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Writ of Certiorari.

WRIT OF CERTIORARI.

NEW JERSEY, ss.

The State of New Jersey to DALLAS FLANNAGAN, Judge of the Court of Common Pleas in and for the County of Essex, and John H. Scott, Clerk of said court, GREETING:

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We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 17th day of June, 1925, by the Honorable Dallas Flannagan, Judge of the said Court of Common Pleas, in and for the said County of Essex, in a certain proceeding brought on behalf of Harriet A. Bissett, petitioner against Lehigh Valley Railroad Company, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, we command you, the said Court of Common Pleas in and for the County of Essex and John H. Scott, Clerk of the said Court, that the said determination and judgment, together with a transcript of the evidence and all proceedings for the making of the same and all things touching and concerning the same, as fully and entirely as before you they remain, or are in your custody and control, you do certify and send together with this Writ, to our Justices of our Supreme Court of Judicature at Trenton,

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Writ of Certiorari.

on the 10th day of August, 1925, that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court at Trenton, this 21st day of July, A. D. 1925.

10

EDWARD J. KELLEHER,
Clerk.

HOBART & MINARD,
Attorneys for Prosecutor.

I allow this writ. Let it be sealed.

Dated July 21, 1925.

WILLIAM S. GUMMERE,
Chief Justice of New Jersey Supreme Court.

20

30

40

Return.

RETURN.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

I, DALLAS FLANNAGAN, Judge of the Court of
Common Pleas, Essex County, New Jersey, do
hereby certify and return to the Supreme Court 10
of Judicature of the State of New Jersey, all
the pleadings and proceedings in the case to-
gether with the judgment record and together
with the entire record of the proceedings had
at the trial and all things touching and concern-
ing the same as by the within Writ to me di-
rected I am commanded.

IN WITNESS WHEREOF, I have here-
unto set my hand and the seal of said
(SEAL) court at Newark, this twentieth day 20
of August, A. D. 1925.

DALLAS FLANNAGAN,
Judge of Common Pleas Court
of Essex County, N. J.

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*Dependent's Claim Petition for Compensation.***Dependents' Claim Petition for Compensation.**

NEW JERSEY DEPARTMENT OF LABOR
 WORKMEN'S COMPENSATION BUREAU
 TRENTON, N. J.

10	HARRIET A. BISSETT,	}	<i>Claim Petition No. 2281. June 28, 1923.</i>
	<i>Petitioner,</i>		
	<i>vs.</i>		
	LEHIGH VALLEY RAILROAD COM- PANY,	}	<i>Respondent.</i>
	<i>Respondent.</i>		

20 Attorney for Petitioner, Silberman & Gross-
man, 776 Broad street, Newark, N. J.

TO THE WORKMEN'S COMPENSATION BUREAU OF
 NEW JERSEY:

The claimant respectfully alleges the follow-
 ing facts:

1. What was the full name of the decedent?
Burt Augustus Bissett.
2. Where did decedent live? 169 Elizabeth
avenue, Newark, N. J.
- 30 3. Sex of decedent? Male.
4. Date of birth of decedent. May 19, 1880.
5. Give below, in reference to each person
claimed to be dependent upon the deceased at
the time of accident or death:

	Age		
Name of Each Dependent	at Last Birthd'y	Date of Birthd'y	Relation to Decedent
Harriet A. Bissett	43	July 28, 1879	Widow
Harriet Bissett, Jr.	10	Feb. 16, 1913	Daughter
10 Ruth Bissett	10	Feb. 16, 1913	Daughter

Dependent's Claim Petition for Compensation.

6. By whom was decedent employed at the time of accident? (Give name and business address) Lehigh Valley Railroad Company, West Oak Island, Freight Yark, Newark, N. J.

7. What was the business of the employer?

8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No. 10

9. Did he receive such notice from the employer? No.

10. Did the employer have knowledge of this accident? Yes.

11. Did you notify the employer of this accident? Yes.

12. If so, on what date?

13. Have you made claim to the employer for compensation? Yes. 20

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Roundhouse foreman.

15. When did the accident happen? January 30, 1923.

16. Where did the accident happen? West Oak Island freight yard, Pioneer street, Newark, N. Y. 30

17. What was the nature of the accident and how did it happen? Packing pistons and repairing air pump on an engine when he slipped on a greasy run board and fell to the ground.

18. Did the deceased work any after the accident? No.

19. If so, give date he was compelled to stop work. January 30, 1923. 40

Dependent's Claim Petition for Compensation.

20. Give date of death. March 5, 1923.
21. Were his wages fixed by piece work? No.
22. If so, what was his average weekly wage?
23. If wages were fixed by the hour, state rate per hour.
- 10 24. Give number of hours in an ordinary working day. Eight hours.
25. Give number of days in an ordinary working week. Seven.
26. State the amount of weekly wages. \$48.
27. How much money have you received from the employer as compensation (not medical aid) since the accident? None.
28. Has the employer promised to pay you any compensation? No.
- 20 29. If so, how much?
30. Was medical aid required? Yes.
31. If so, was this service furnished by the employer? No.
32. What other sum did you expend for medical, surgical or hospital service?
33. Give name and address of physician and hospital. Dr. Fewsmith, c/o St. Michael's Hospital, Newark, N. J. Confined in St. Michael's Hospital.
- 30 34. What other facts are there which you believe important?
35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? No.

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act

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Dependent's Claim Petition for Compensation.

prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper. 10

And your petitioner will ever pray, etc.

HARRIET A. BISSETT,
169 Elizabeth Ave.,
Newark, N. J.

20

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

Harriet A. Bissett, of full age, being duly sworn according to law, on her oath deposes and says: That she is the petitioner named in the foregoing petition; that she has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of her knowledge and belief. 30

HARRIET A. BISSETT,
Petitioner.

40

Dependent's Claim Petition for Compensation.

Subscribed and sworn to before me this 27th
day of June, 1923, at Newark.

WILLIAM J. O'HAGAN,
Attorney at Law of New Jersey.

WORKMEN'S COMPENSATION BUREAU,

10

W. E. Stubbs,
Secretary.

I, W. E. STUBBS, Secretary of the Workmen's
Compensation Bureau, hereby certify the fore-
going to be a true copy of the petition in this
case.

W. E. STUBBS.

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30

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*Respondent's Answer to Claim Petition.***Respondent's Answer to Dependent's Claim
Petition.**

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
TRENTON, N. J.

10

HARRIET A. BISSETT,

*Petitioner,**vs.*

LEHIGH VALLEY RAILROAD COM-
PANY,

Respondent.

*Claim
Petition
No. 2281.*

In answer to Claim Petition filed in this cause: 20

1. What was decedent's name? Burt Augustus Bissett.

2. Where did decedent reside? 169 Elizabeth avenue, Newark, N. J.

5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify. Yes. The respondent has no information upon which to base an acknowledgement that the persons named in the said question were the decedent's dependents. 30

6. Was the decedent in your employ at the time of the alleged accident? Yes.

7. State your business. Common carrier.

8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did you give such notice to him? No. 40

Respondent's Answer to Claim Petition.

10. When did you first have knowledge of this accident? January 30, 1923.

11. Did you receive notice of this accident from the petitioner? No.

12. If so, on what date? —

10 13. Has any claim for compensation been made? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Roundhouse foreman. Maintaining and repairing locomotive.

15. When did the accident happen? January 30, 1923.

16. Where did the accident happen? Oak Island, New Jersey.

20 17. What was the nature of the accident, and how did it happen? Decedent is alleged to have fallen from footboard of engine when he fainted.

18. Did the decedent work any after the accident? No.

19. If so, give date he stopped work. Same date.

20. Give date of death. Alleged to have died March 5, 1923.

30 21. Were his wages fixed by piece-work? No.

22. If, what was his average weekly wage?

23. If wages were fixed by the hour, state rate per hour. Unable to state at present.

24. Give number of hours in an ordinary working day. Unable to state at present.

25. Give number of days in an ordinary working week. Unable to state at present.

40 26. State the amount of weekly wages. Unable to state at present.

Respondent's Answer to Claim Petition.

27. How much have you paid as compensation (not medical aid) since the accident? Nothing.

28. Have you promised to pay compensation? No.

29. If so, how much?

30. Was medical aid required? Yes.

10

31. If so, did you furnish all the medical, surgical or hospital services, or other expense of last sickness? Furnished hospital treatment.

32. Between what dates was service rendered? January 30 and March 5, 1923.

33. Give name and address of physician and hospital rendering service at your direction? St. Michael's Hospital, Newark, N. J.

34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion. Decedent did not meet with an accident, within the meaning of the Workmen's Compensation Law. (2) The decedent's death was not the result of an accident arising out of or occurring in the course of his employment with the despondent. (3) The respondent denies that the Workmen's Compensation Bureau of the New Jersey Department of Labor has jurisdiction of the subject matter or of the parties and will require the petitioner to prove that the decedent was engaged in intrastate commerce at the time of the alleged accident and that the provisions of the New Jersey Workmen's Compensation Act are applicable to this case.

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LEHIGH VALLEY RAILROAD COMPANY,

By P. P. Sennett,

Assistant Claims Attorney,

143 Liberty Street, New York City.

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Respondent's Answer to Claim Petition.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. }*ss.*

10 V. P. SENNETT, of full age, being duly sworn according to law, on his oath deposes and says: That he is the Assistant Claims Attorney of the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to his knowledge and belief.

V. P. SENNETT.

Subscribed and sworn to before me this twenty-third day of July, 1923, at New York, N. Y.

20 EUGENE S. SHREVE,
 Notary Public, New York Co., No. 722.
 N. Y. Co. Register's No. 4843.
 My commission expires March 30, 1924.

NOTARIAL
 SEAL.

30 I, W. E. STUBBS, Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the answer in this cause.

W. E. STUBBS.

Determination of Facts and Order.

Determination of Facts and Order.

Filed October 17, 1924.

WORKMEN'S COMPENSATION BUREAU.

HARRIET A. BISSETT,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY,

Respondent.

10

*Determina-
tion of Facts
and Order.*

A petition having been filed in the above-stated matter for compensation to which the petitioner and her two infant children were entitled by virtue of the provisions of an act of the Legislature of the State of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for injuries received by the employee in the course of the employment, etc." approved April 4, 1911, together with the several amendments and supplements thereto and acts amendatory thereof; and the respondent having duly filed an answer to the within petition and a time and place for the hearing of the petition having been fixed by the Workmen's Compensation Bureau of the Department of Labor in the State of New Jersey, and the same having come on for a hearing before Commissioner Harry Goas, on the said petition and answer, and the Court having considered the evidence and argument of counsel, now determines and finds as follows:

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30

1. That on or about the thirtieth day of January, 1923, the deceased, Burt Bissett, husband

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Determination of Facts and Order.

of the petitioner was in the employ of the respondent as roundhouse foreman, at what is known as West Oak Island yard, in the City of Newark, County of Essex and State of New Jersey.

2. That his wages were \$48.00 per week.

10 3. That on or about the thirtieth day of January, 1923, while engaged in the repair of an engine he fell several feet from the engine to the ground, causing severe injuries from which on March 5, 1923, he died.

4. That the respondent had due notice of the accident.

5. That the employment of Burt Bissett, was pursuant to Chapter 95 of the Laws of 1911, as subsequently amended and supplemented,
20 commonly known as the Workmen's Compensation Act.

6. That by reason of the accident above mentioned the said Burt Bissett, husband of the petitioner, suffered a temporary disability from January 30, 1923, until March 5, 1923, during all of which time he was confined to the hospital and at which place he died on March 5, 1923.

30 7. That at the time of the accident Burt Bissett was engaged in the repair of an engine wholly separated from any cars, which engine was resting upon what is known as a tie-up track, which track is devoted exclusively, or almost so, for use while repairing the rolling stock of the respondent railroad company. That as far as the evidence goes the engine was not interrupted in any interstate haul. That the engine was a yard engine and was never called upon to leave it; that evidence distinctly showing that it was never utilized for the purpose
40

Determination of Facts and Order.

of carrying any cars without the State of New Jersey. The yard in which the engine was operated was not permanently devoted to interstate commerce. That since the accident and before the trial, the engineer in charge of the engine died, and therefore, the extent of the repairs required upon his inspection of the engine, does not appear clearly, suffice to say that although the repairs on this engine had been in progress for about an hour, yet the fact remains and it is uncontradicted that they were not completed within the hour, and that the engine was taken to the general repair shops of the respondent company on the morning following the accident. The engine was destined to do such work as it might be called upon to perform; that the necessary repairs on the engine were of a character requiring considerable time to perform in view of the fact that in order to complete them it was necessary to take it to their general repair shop. That at the time of the accident the engine had simply finished whatever work it had been performing and had not yet begun upon any other, and at the time of the accident it was not engaged in any commerce.

8. That the petitioner has sustained the burden of proving that at the time of the accident the work at which the petitioner's intestate was employed brought such employment within the provisions of the Workmen's Compensation Act of the State of New Jersey.

9. That the accident and resulting death of Burt Bissett arose out of and in the course of his employment with the respondent.

10. That burial expense exceeded the sum of two hundred (\$200) dollars.

Determination of Facts and Order.

10 11. That at the time of the accident and resulting death the petitioner, and twins, Harriet Bissett, Jr., and Ruth Bissett, born February 16, 1913, wife and children respectively of the deceased were members of the deceased's household and were entirely dependent upon the deceased for their support, and that they received such support from the deceased, and as dependents were entitled to 45% of his weekly salary for a period of 300 weeks from the date of his death, which would entitle them to the maximum payment under the Workmen's Compensation Act then prevailing of \$12.00 a week.

20 12. That the services of Kalisch & Kalisch, as counsel for the petitioner, were reasonably worth \$500.00, half of this sum to be paid by the respondent and half by petitioner as and for a counsel fee.

30 It is, therefore, on this 26th day of September, 1924, ORDERED, that judgment final be entered in favor of the petitioner against the respondent for \$984.00, being compensation up to and including September 24, 1924, and that the respondent shall pay or cause to be paid to the petitioner the sum of \$12.00 a week for a further period of 218 weeks; \$100 in addition for funeral expenses and \$250.00 to Kalisch & Kalisch, as part of counsel fee for services rendered at the trial of the issue, and costs to be taxed.

HARRY J. GOAS,
Deputy Commissioner.

I, W. E. STUBBS, Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the Determination of Facts and Order in this cause.

Stephen Gillen, direct.

WORKMEN'S COMPENSATION BUREAU.
DEPT. OF LABOR OF NEW JERSEY,
NEWARK, ESSEX COUNTY DISTRICT.

HARRIET A. BISSETT,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY,

Respondent.

10

Transcript of stenographer's notes of evidence taken in the above entitled matter before the HON. HARRY J. GOAS, Deputy Compensation Commissioner, 9 Franklin street, Newark, New Jersey, on the 13th day of March, A. D. 1924, at ten o'clock A. M.

20

Appearances:

Isidor Kalisch, Esq., (Kalisch & Kalisch, Esqs.), for the petitioner.

V. P. Sennett, Esq., for the respondent.

STEPHEN GILLEN, a witness produced on behalf of the petitioner, sworn.

30

Direct examination by Mr. Kalisch.

Q What is your name? A Stephen Gillen.

Q Were you employed with the Lehigh Valley Railroad on January 30, 1923? A I was.

Q And what was your work there? A Agent.

Q Agent? A Yes.

Q Where? A Oak Island Transfer.

Q Did you know Mr. Bissett? A No.

40

Stephen Gillen, direct.

Q You did not know him? Know anything about this case at all? A What I heard about it.

Q Only what you heard? A Yes.

Q Did you see any part of it? A No.

Q Did you see the man at all? A No.

10 Q You were not called to the roundhouse?

A No.

Q From whom did you hear and get information about it? A Just from our records that we required.

Q What? A Our records that were required.

Q Who made out the records? Who were the individuals? A Well, whatever records you might call on there. We have a lay-out showing the cars handled at night.

20 Q You know nothing else than that? A The cars handled. I know the cars that were handled during the night.

Q Do you know anything about the engine?

A I don't, what engine it was; no.

Mr. Kalisch: That is all.

Mr. Sennett: I will cross examine you after.

30 Mr. Kalisch: If there is any cross examination I think it should be done now, so we have our record clear.

Mr. Sennett: Why don't you go ahead and put on your witnesses, and then I will put on my witnesses and prove interstate commerce for you?

Mr. Kalisch: That is all right. You said cross examination.

40 Mr. Sennett: Yes, sir; you called this man as your witness.

Stephen Gillen, cross.

Mr. Kalisch: I think the proper time to cross examine him is now.

Mr. Sennett: I can defer my cross examination.

The Court: It is unusual to say the least.

Mr. Kalisch: It is certainly unusual to wait until the plaintiff—I do not mean to make out your affirmative case, but I mean as to the subject-matter of my direct examination, it should be disposed of now. 10

Cross examination by Mr. Sennett.

Q Mr. Gillen, you testified you were the agent at Oak Island Transfer. What was Bissett out there? A Supposed to be a round-house foreman, I understand, at the time. 20

Q Was he also located at Oak Island? A Oak Island Transfer.

Q What is the nature of the work performed at Oak Island Transfer?

Mr. Kalisch: I object as not cross examination. I will withdraw the objection. Go ahead.

A Why, we transfer freight; unload and reload cars and distribute freight received from different stations, going to different station. 30

Q Yes. And do you handle any freight there going from one state to another?

Mr. Kalisch: I object on the ground it is not cross examination. Very important at this time.

The Court: It is not strictly cross examination. 40

Stephen Gillen, re-direct.

Mr. Kalisch: Then I object to it.

Mr. Sennett: I will withdraw it.

The Court: You probably have other witnesses.

Mr. Sennett: Yes.

10 Q You did not see Bissett on the night of this accident? A No.

Q Know nothing about the accident personally? A (Witness nods head negatively.)

The Court: No?

A No.

Re-direct examination by Mr. Kalisch.

20 Q Do you know Frank Osborne? A Is that the yardmaster?

Q Yes. A Don't know him personally; no; he is on nights. I am on days.

Q Is he still in the employ of the company? A That I couldn't say. He does not work in connection with me.

30 Q From anything that you have heard—strike it out. How about Walter Reed, do you know him? A I don't know him personally; no.

Q Do you know his position? A No. That is all night operation. I am on days.

Q All night operation? A Yes.

Q You do not know whether he is still connected with company? A I couldn't say.

Mr. Kalisch: That is all.

Mr. Sennett: All right.

John Sankus, direct.

JOHN SANKUS, a witness produced on behalf of the petitioner, sworn.

Direct examination by Mr. Kalisch.

Q Mr. Sankus, did you work for the Lehigh Valley on January 30, 1923? A Yes.

Q And what was your work? A Fireman. 10

Q What? A Fireman.

Q Did you know a man by the name of Bissett? A Yes.

Q Did you see him on that day? A I seen him; yes.

Q Did you see him after he was hurt? A After he was hurt? Yes.

Q Where did you see him? A I seen him on the ground. That's all I saw.

Q And how near his engine? A Well, I just couldn't exactly tell you, but just laying aside. 20

Q He was lying alongside of the engine, is that right? A Yes.

Q And did you see him taken out to the ambulance and sent to the hospital? A No, sir; I didn't see the ambulance; no.

Q Did you hear any one of the men in charge there tell someone to call up for an ambulance? 30

Mr. Sennett: That is objected to.

The Court: Well, he may hear it.

Mr. Kalisch: Did he hear anyone?

Mr. Sennett: Did he hear?

The Court: Yes.

Mr. Kalisch: Yes. Did you?

A I don't remember if I heard of anybody there saying that he called an ambulance or not. But I know he got taken to the hospital. 40

John Sankus, direct.

Q You do. And on what track was this engine that he was working on? A I think the number one.

Q Is that a tie-up track? A No, sir; it is in the yard.

10 Q Is that where they usually repair the locomotives on that track? A They are repaired wherever it is necessary.

Q This is inside of the yard, isn't it? A Yes.

Q Has nothing to do with the main tracks? A No.

Q What was wrong with that engine, if you knew? A The pump wasn't working right.

Q The pump wasn't working right. And was Bissett fixing the pump? A He was ordered to fix it; yes.

20 Q He was ordered to fix the pump. And anything else wrong with it? A No.

Q Was that your engine? A It wasn't mine. I was working on it yet.

Q Well, I don't mean do you own it. That's all right, too. You would like to own it? A Well, if I could own it I would have a good ride every day.

30 Q I mean that was the engine in which you were engaged? A Yes.

Q And the pump was not working right? A No.

Q And did you drive it into the yard to have it repaired? A The engineer did that.

Q You are the fireman, are you? A Fireman.

Q Well, what was that track used for? A Just for the cars.

40 Q To bring engines in for repairs? A Well, when they are needed they bring them in there; if not they put them in the roundhouse.

John Sankus, direct.

Q Is that what you call a tie-up track? A Yes.

Q It is. And you say that Bissett was working on this when he was hurt, when he fell—

A Oh, I didn't see—

Mr. Sennett: I object to that.

10

A I didn't see that.

Q You did not see him fall? A No. I didn't see him fall.

Q Do you know Mr. Osborne? A Well, I don't know him personally.

Q What is his position there if you know?

A Well, I think he is a yardmaster.

Q You think he is a yardmaster. Do you see him around there? A No.

Q Do you know whether he is still the yardmaster? A I couldn't tell you. I don't work on that part now. I work away, far away from it.

20

Q You say you saw Bissett lying on the ground. Was he on his back or on his face? A I couldn't tell you that, because there was a lot of other guys there then.

Q Do you see anybody else in the court room that you saw there that day? A Well, I only see the conductor.

30

Q Any other of the other gentlemen here that are employees of the Lehigh Valley? Do you see anybody else here that you saw there when Bissett was lying on the ground? A Besides the conductor?

Q Yes. Is he here? A Yes.

Q What is his name? A Nolan.

Q Nolan? A Nolan.

Q Nolan. Nobody else, that you saw there that day? A No.

40

John Sankus, cross.

Q That was Bissett's work, wasn't it, engaged on repairs of engines? A He was a roundhouse foreman.

Q That has to do with repairing jobs? A On engines.

10 Q On engines. I see. And that is what you bring engines into the roundhouse for? A Any repairs, why, that is his job.

Q And that is what your engineer brought the engine in on that day for? A Well, we were assigned to that job there. We didn't have to drive around anywhere. We were right there. Right around.

Q I mean you came into that track for repairs? A Yes.

20 Mr. Kalisch: That is all. Thank you.

Cross examination by Mr. Sennett.

Q Do you recall the number of your locomotive that day? A Yes; 3451.

Q That is the regular yard engine at Oak Island. A Yes; regular size engine.

30 Q You say these repairs took place on number one track. That is a regular track in the yard, isn't it? A Yes.

Q It is not laid aside for any special purpose of repairs, is it?

Mr. Kalisch: I object to that.

A No.

Mr. Kalisch: Well, all right.

40 Q What I mean, number one track is used to switching cars in and out of the yard every day? A Yes, sir.

John Sankus, cross.

Q This locomotive was not driven into the roundhouse for repairs? A No; not driven into the roundhouse for repairs.

Q What was the nature of the repairs to be made to that locomotive? A Just for that pump; that's all.

Q Just for the pump? A That's all. 10

Q What did he have to do? A Pack it.

Q To pack it? A Yes.

Q Light job? A Light job.

Q How long would it take? A About fifteen or twenty minutes.

Q So that engine was not taken out of service to have this done? A No; no.

Mr. Kalisch: I object to that as calling for a conclusion of the witness. 20

The Court: That is calling for a conclusion from him.

Mr. Sennett: All right.

Mr. Kalisch: I move that answer be stricken out.

The Court: Strike it out.

Q You say this job on the engine took about fifteen or twenty minutes? 30

Mr. Kalisch: I object.

The Court: He can testify if he knows.

Mr. Kalisch: I object on the ground there is no evidence at this time that the job was finished.

Q (Question repeated by the stenographer.)

A Yes.

John Sankus, cross.

The Court: Was the job finished at the time you saw it last?

A What, the engine?

10 The Court: Yes; this packing of the piston?

A Yes; it was finished by Burt Bissett's assistant, Walter Reed.

Q Your engine was still under steam? A Yes, sir.

Q And you as fireman, and the engineer, were still on board? A Yes.

Q Why was it necessary to pack this pump?

A On account of wouldn't have enough air to move the engine.

20 Q You mean that if your air escaped from the pump you could not get up power to move, or something of that sort? A Yes.

Q Did you have to have the pump packed in order to continue the night's work? A Yes.

Q You did not see Bissett fall off this engine as alleged, did you? A No, sir.

Q You saw him on the ground? A Yes.

30 Q Did he say anything to you? A No; he didn't say nothing then.

Q What was that job? A What was that engine?

Q Yes. A That was Oak Island Transfer job.

Q That was Oak Island Transfer job, worked right there in the yard? A Right there in the yard.

Q What kind of work did you do? A Made out fast freight.

40 Q Hauling cars at the transfer? A Yes.

John Sankus, re-direct.

Q Now, after this alleged accident to Bissett, did you go about your regular work? A Yes.

Q Had to have that pump packed in order to do that, did you? A Yes.

Mr. Sennett: I think that is all.

Re-direct examination by Mr. Kalisch.

10

Q What about the pistons? Were they in proper condition too, that day? A What do you mean, pistons?

Q Well, you know what they are, don't you? A Yes.

Q Well, what I want to know is whether they were in proper condition? A After it was repaired; yes. It was in proper condition.

20

Q They repaired the pistons, too? A What?

Q They repaired the pistons, too? A No. There was nothing wrong with the pistons.

Q It was just the packing? A Yes; it was just the packing. Just the same as if you saw you have a busted water pipe you have to fix it.

Q Yes. You say that you saw how long it took this thing to repair? Is that correct? A I saw? No. I didn't see, but I should say it would take about fifteen or twenty minutes to do that job.

30

Q What were you doing while they were working on the engine? A I was out eating my supper. I wasn't watching them repair it.

Q You were out? A Sure.

Q What was your engineer's name? A My engineer's name was Pat Dunphy.

Q Where was he? He was here in court the last time this case was up? A No; he will never come here no more.

40

John Sankus, re-direct.

Q He died? A Yes.

Q Died since the last time you were in court?

A Yes.

Q How far are the main tracks of the railroad from these roundhouse tracks? A Well, I couldn't tell you that correct. They are, we
10 will say, maybe twenty or twenty-five, maybe more than that feet. They are away about—wait—one, two, about three cars—or three tracks away from it yet.

Q You mean there are three tracks over from where this track is when you reached the line where the main line is? Is that correct? They run the same direction as the track upon which your engine was when it was being fixed? They run parallel? A Oh, they are a way off. Like
20 we will say, about three buildings away yet.

Q About three buildings away? A They are quite a ways, because the roundhouse stands in the centre, here is your yard, and the other side is about three tracks yet where the main line is yet.

Q I see. A We will say here is the roundhouse. Right here is your yard.

Q Yes. A Well, from this, from the right
30 side about three tracks yet there is the main line.

Q You know this neighborhood better than I do. A Yes.

Q You say that engine was on this number one track? A In the yard.

Q In the yard? A In the yard.

Q Now, in order to get out to the main line how far would your engine have to be driven, and where would it have to switch to get onto the main line? A Oh, it would have to go
40

John Sankus, re-direct.

maybe a thousand or two thousand or more than that feet.

Q In order to get on the main line? A Yes.

Q Or in order to drive it? A No.

Q That engine does not work on the main line at all, does it? A No; that engine is only in the yard, never main; Oak Island Transfer, that's all. No main line work at all. 10

Q No main line work at all? A No.

Q I see. What are the other tracks used for in that yard? Number one, two, three and four? A Just put in other cars shifting.

Q Making up cars? A Making up trains.

Q And you ran it onto number one to have these repairs made? A Yes.

Q Is that where you usually brought that engine for repairs? A We put it wherever we got the route. 20

Q That's all. Is Mr. Reed in court? A No; no.

Q Do you see him? A No; he isn't in court.

Q Do you know whether he still works for the company? A I don't think he does. I ain't sure, though. But the last time I saw him he said he was going away. So I don't know is he chucked his job up or not. 30

Q Do you know Mr. Osborne? A I don't know him to talk to.

Q I see. A But I know—

Q Is he in court? A Not that I see.

Q Was he in court the last time this case came up? A I wasn't there.

Q You were not here. That is all. 40

John Sankus, re-cross.

Re-cross examination by Mr. Sennett.

Q You say this engine did no work on the main line? A No.

Q Its work was confined to Oak Island Transfer? A Oak Island Transfer.

10 Q Regularly assigned to that job? A Regular engine assigned to that job.

Q I suppose if you had a packing to be made, such as on this night, you would call out the mechanics and let them do it wherever you stood?

Mr. Kalisch: I object to that on the ground it is not cross examination.

Mr. Sennett: Yes. It is.

20 Mr. Kalisch: And in the second place, it is not a question. It is a statement of fact by the attorney.

Mr. Sennett: You are attempting to confine it to track number one.

The Court: I think that is proper if you ask it in the interrogative form.

30 Q Would repairs such as this be made on any track in the yard at a convenient spot to the roundhouse?

Mr. Kalisch: What is the answer?

A Yes.

Q So far as this number one track that you spoke of, that is not devoted to this repair work entirely? A No.

Q It is a regular running track in the yard?

40 A What is that?

John Sankus, re-cross.

Q It is a regular running track in the yard?

A You use a track in the yard, whatever one you have got clear. Wherever you get the cars out of the way for you, you use it.

Q And on this night you happened to run in on number one and have the pump packed there? A Yes.

10

Q I believe you said this locomotive was regularly assigned to the Oak Island drill route? A Yes.

Q Can you tell me what work that did? A Making up the fast freight.

Q Where was the fast freight going to? A Wherever they were routed. Say they are going to Buffalo, or wherever they are classified to go, that is where they go.

Q Make up any trains there for Wilkes Barre, Pennsylvania? A Yes.

20

Q If the train is made up there for Buffalo? — A Yes.

Q —(continued), does she go over the Lehigh Valley System? A Yes.

Q Does that system traverse the states of New Jersey, Pennsylvania and New York, in order to reach Buffalo? A What is that?

Q Does that system traverse the states of New Jersey, Pennsylvania and New York in order to reach Buffalo? A It goes through Pennsylvania, yes. You have to go by way of Mauch Chunk.

30

Q By way of Mauch Chunk, Pennsylvania? A Yes.

Q Does that crew drill out cars at Oak Island Transfer? A Drill out cars in the yard; yes.

Q At the platforms, at the transfer platforms? A Yes.

40

John Sankus, re-cross.

Q How many cars; as you recall it? How many cars were drilled out on that night at that time?

10 Mr. Kalisch: I object to that as immaterial. The question involved, if there is a defense of interstate commerce, is what the decedent was doing at the time the accident occurred, and not what the railroad was doing in its manifold operations.

Mr. Sennett: I think it is all linked together.

(Discussion of counsel off the record.)

The Court: I think it is part and parcel of the same examination.

Mr. Kalisch: I ask an exception.

20 The Court: Note an exception.

Q (Question repeated by the stenographer.)
Answer that question, how many cars?

The Court: If you can.

A About one hundred or two hundred cars.

Q Did the majority of cars come from the transfer?

30

Mr. Kalisch: I object on the same ground.

The Court: Note an exception.

A All from the transfer.

Q All came from the transfer? A Yes.

Q Your crew switched them from the transfer and made them up into trains? A Yes, sir.

40 Q Did you take, from the transfer, all the cars that were ready to move forward? A

John Sankus, re-direct.

Well, if they were to go out for any train, if they were to go, yes.

Q That is all the loaded cars at the transfer?

A Yes; all the loaded.

Q And were shifted out and put in the trains?

A And put into rotation for the fast freight to be ready.

10

Q What time did this alleged accident occur?

A Well, I think it was around eight-thirty or forty, or something like that.

The Court: In the morning?

A No; at night.

The Court: In the evening?

A At night.

Q What were your regular hours of duty?

20

A Three to eleven.

Q P. M. A P. M.

Q And after you saw Bissett on the ground his assistant completed the packing of the pump?

A He completed the job; yes.

Q That was to enable you to complete your night's work? A Yes.

Q And did you complete your night's work with that engine? A Yes; we completed it.

Q Right up until eleven o'clock? A Yes. 30

Q Kept shifting the cars all night? A Yes.

Mr. Sennett: That is all.

Re-direct examination by Mr. Kalisch.

Q Just one more question: So you say you ran into number one track because that was perfectly free and clear? A Yes.

Mr. Kalisch: That is all.

40

William Nolan, direct.

WILLIAM NOLAN, a witness produced on behalf of the petitioner, sworn.

Direct examination by Mr. Kalisch.

10 Q Mr. Nolan, what capacity were you engaged with the Lehigh Valley on or about the 30th of January, 1923? A Conductor.

Q Conductor and of what? A Lehigh drill engine. Conductor of a transfer yard drill engine.

Q Did you have anything to do with the engine upon which this last gentleman worked?

A I was conducting that engine at that time.

20 Q I see. And were you on it when it was brought into the yard for repairs? A Well, it wasn't brought in; it was in the yard.

Q When it was brought in to track one for repair? A Yes.

Q Were you there when Bissett got up to work on it? A No, I wasn't there when he got up to work on it.

Q Did you see him working on it? A No; I didn't see him working on it.

30 Q Did you know that he was to work on it? A I knew that he was to work on it.

Q And in order to work on it where would he have to get on the engine? A He would have to get up where the pump is.

Q I mean about how high from the ground is that? A Oh, twelve foot, fourteen.

Q About twelve or fourteen feet. Is there ever any grease up there on that platform?

Mr. Sennett: Objected to.

40 Mr. Kalisch: I will get the question—

William Nolan, direct.

Mr. Sennett: Objected to. Let us confine ourselves to this case.

Mr. Kalisch: Strike out that question.

Q In what way may grease get on that platform?

10

Mr. Sennett: That is objected to on the same ground.

A That is something I can't tell you.

The Court: Well, he may ask whether grease was up on the platform.

Mr. Sennett: Yes; if he confines himself to this case. But how should grease get on a platform? It is perfectly obvious.

20

The Court: Yes. You may ask him as to this particular case.

Q Did you see any grease on that platform?

A I don't know; I wasn't up on the platform.

Q Did you see Bissett fall? A No, sir.

Q How long after he had fallen from the platform did you see him? A Well, I should judge three or four minutes.

30

Q And where was he? A On the ground.

Q Did you see them pick him up? A I didn't see him picked up. I seen them take him off the ground and take him in the shanty, in the office.

(Answer repeated by the stenographer.)

Q Did they carry him in? A Yes, sir; they carried him in.

40

William Nolan, cross.

Q Did you see the way he was taken away from the place to the hospital? A No; I didn't see him taken away.

Q Is the piston and the pump connected? Are they one and the same operation? A I don't know.

10 Q You do not know anything about it? A No.

Q You probably know as little about it as I do then? A Yes, sir.

Mr. Kalisch: All right. That is all.

Cross examination by Mr. Sennett.

Q You have no personal knowledge of any accident having happened to Bissett, have you?

20 A I personally?

Q Yes. A No.

Q You did not see him fall? A No.

Q He is alleged to have fallen. How long did you know Bissett? A Well, oh, it is six or seven months, if not more.

Q Did you ever know him to have been effected by fits?

30 Mr. Kalisch: I object.

The Court: Objection sustained. Not proper cross examination.

Q You were conductor of the transfer yard drill crew? A Yes, sir.

Q What engine did you have? A 3051-3451.

Q She was your regular engine? A Yes, sir.

Q This work of packing the pump, was that just a temporary interruption? In your night's work?

40

William Nolan, cross.

Mr. Kalisch: I object to the question on the ground that it does not state—it is not proper cross examination upon any subject matter introduced on direct examination.

The Court: Well, it has been brought out beforehand, in the testimony. Some other witnesses' testimony, I think; I think the preceding witness; the pump was packed and it went back to work, until eleven o'clock. 10

Mr. Kalisch: If that is the purpose of the examination I have no objection to the question.

Q You heard the witness Sankus testify, didn't you? A Yes, sir. 20

Q Can you corroborate what he said as to the assignment of this engine?

Mr. Kalisch: I object to the question on the ground that a witness may not be called upon to either deny or to corroborate any other witness' testimony by merely saying "I say it is true or untrue."

The Court: I think that is well taken. 30

Mr. Sennett: What is the ruling on that?

The Court: Overruled.

Mr. Sennett: You may answer.

The Court: No; you object to it?

Mr. Kalisch: Yes.

The Court: Objection sustained.

Q Oh; were you at this locomotive at the time the repairs were being made? A After he fell I was. 40

William Nolan, cross.

Q Not at the time? A Not at the time; no.

Q Do you know how long it took to repair the pump? A About twenty minutes.

Q It is a light job, is it? A As far as I know.

10 Mr. Kalisch: I object, on the ground this witness says he does not know anything about this kind of work.

The Court: He can testify how long it took, because he was on the ground.

Mr. Kalisch: He is interrogating him about the kind of work it is; whether it is a light job or not. He does not know about that.

20 The Court: He does not know much about the mechanics of the engine evidently.

Q This locomotive was standing on track number one? A Yes, sir.

Q That is a regular yard track? A Regular yard track.

Q Is that track especially devoted to repairs of locomotives? A At no time; small minor repairs.

30 Q Are other tracks in the yard also used for that purpose? A Yes, sir.

Q Did you continue your regular work that night after Bissett's assistant had fixed the pump? A Oh, yes.

Q What did your work consist of?

40 Mr. Kalisch: I object as immaterial what the work of this man was or what the work of the engine was after the accident, on the ground that is not basis by which the liability of the company may be determined.

William Nolan, cross.

Mr. Sennett: That is a very important test. It shows the assignment of the locomotive.

Mr. Kalisch: According to the last case I can find in the United States Supreme Court you seem to be misinformed as to the rule.

10

Mr. Sennett: It is an instrument of interstate commerce, in *Paterson v. D., L. & W.*

Mr. Kalisch: That is overruled.

The Court: It is admitted tentatively subject to being changed later, if necessary.

Mr. Kalisch: I ask an exception.

The Court: Note an exception.

Q (Question repeated by stenographer.) A 20
Classifying cars.

Q Make up any trains there? A Yes, sir.

Q Was your regular job that of taking care of the cars at the transfer? A Yes, sir.

Q Did you haul away all the cars that were loaded there? A Drilled them out and classified them. Pulled them off the tracks.

Q You drilled out all the cars at the transfer? A Yes, sir.

30

Q This happened about eight forty, I think the witness testified; is that right? A About eight forty.

Q What time did they stop loading cars at the transfer? A About six, five forty-five, six o'clock.

Q And what time does the crew go on duty?
A Three P. M.

Q Three P. M.? How long do you work? A
Until eleven.

40

William Nolan, re-direct.

Q And are you continuously engaged from whatever time they stopped loading at the transfer until eleven o'clock in drilling out all the cars? A Yes, sir.

Q And you make those cars up in trains? A In trains.

10 Q Is that why you had to have the pump packed that night? A Yes; had to have it packed.

Q You could not do your work unless you had it packed? A No.

Q And after you had your pump packed you continued to do this work up until your quitting time? A Yes.

Q Your work was confined to that yard? A To the transfer.

20 Q You did not work out on the main line? A No.

Q Were you the only crew in the yard at the time? A Only crew, yes; only crew there.

Q The only crew assigned to that? A Yes.

Re-direct examination by Mr. Kalisch.

Q There were no other cars on track one? A Not at the time.

30 Q Nor engines? Are all the cars in there freight cars that you drill? A All freight cars.

Q All freight. Don't some of them have a destination in the State? A Well, the destination may be anywhere, wherever they are destined to.

Q In other words, some of them, most of that shipment, or most of the cars are sent out of the State, but it is interstate and intrastate, isn't that so? A Some are in and some out of the State.

William Nolan, re-cross.

Mr. Kalisch: That is all.

Re-cross examination by Mr. Sennett.

Q What trains do you make up there every night?

Mr. Kalisch: I object; what he does now is immaterial. 10

The Court: Sustained.

Mr. Sennett: Yes. At that time. That is what I mean.

Q During the month of January, 1923, and particularly on this night, what train was made up by your crew every night?

Mr. Kalisch: I object to what was being done every night. 20

Mr. Sennett: At that time specified.

The Court: At that time.

A J-D 1.

Q Where does J-D 1 go? A Buffalo or Manchester J-D 1.

Q In New York State? A Yes.

Q In running to Manchester, through what States would it traverse, or did it traverse on the Lehigh Valley? A Through Pennsylvania, and beyond that I don't know much about up the line. 30

Q What are the other trains? A J-B 2; J-M 1; first J-P 3; second J-P 3 and Hotfoot.

Q What was the last? A Hotfoot.

Q Hotfoot? What kind of a train is that? A It is a Jersey City train; New York-Hartford. 40

William Nolan, re-cross.

Q New York-Hartford. Did you take all the New York-Hartford cars in that? A All that was to come out. All that was to go.

Q You mean by that all the cars loaded at the transfer that you put in the Hotfoot? A In the Hotfoot.

10 Q And they would go on to Jersey City and New York and Hartford? A Jersey City.

Q What points on New York and Hartford, do you know? A Different points.

Q Would that go to the piers in New York City? A Pier 5, pier 8, pier 44, pier 66.

Q They are all in New York City, are they? A New York.

Q And these other trains you mentioned, did you say J-P 1? A J-P 1.

20 Q That is the Manchester, New York, train? A Yes.

Q What other trains did you mention? A J-S 1.

Q Where does that go? A To Wilkes-Barre, Hagerstown.

Q All in the State of Pennsylvania? A Pennsylvania.

Q You said J-M 1? A J-M 1.

30 Q Where does that go to? A Buffalo.

Q Any other train that you recall? A First J-P 3 and second J-P 3.

Q Where do they go? A Bethlehem, Easton. That is the first J-P 3.

Q Both points in the State of Pennsylvania? A Pennsylvania.

Q Do both those trains go to those? A First goes to South Plainfield.

40 Q That is in the State of New Jersey? A State of New Jersey.

William Nolan, re-cross.

Q And the second J-P? A The second goes to Plainfield.

Mr. Kalisch: I object to all this. I have not objected. On the ground we are besides the question involved in the case, namely, what was the decedent doing at the time of the accident? Was he engaged in interstate commerce or intrastate commerce or in any commerce? What these people did with this engine is immaterial. Now, I have been patient about it. I do not want to object to it again, but I certainly from now on shall object, because it is immaterial and we are wasting time. 10

Mr. Sennett: I do not think you appreciate the point. We are trying an interstate commerce case. 20

Mr. Kalisch: Yes, but perhaps the United States Supreme Court in the Schang (?) case did not understand your reasons either. I am as stupid as the Court was in that decision.

The Court: I think for the time being I will allow it to be in; that is on the theory is was just simply an interruption for the time being. 30

Mr. Sennett: That is all it was. Put a little packing around a pump.

The Court: There has got to be some continuity somewhere. What was the continuity between what was done before and what was done after? Of course, we cannot have any testimony about what was done a half day before or a half day after.

(Further discussion of counsel off the record.) 40

William Nolan, re-direct.

Q This work at the transfer that you speak of, were all the cars loaded to full capacity at the transfer? A Before they go out.

Q Before they go out. Well, are some cars only partially loaded? A Well, I don't know really. I couldn't answer that, what is inside of
10 them.

Q Are the cars—strike that out please. Are you furnished with a list of the cars that are ready to be pulled? A Yes; I have a drill order.

Q A drill order. Do you recall about how many cars were pulled out that night?

Mr. Kalisch: I object on the ground that
20 goes beyond the scope of my direct examination. I carried this witness up to the time this man was hurt. I asked him no questions about what occurred afterwards.

Mr. Sennett: I am willing to have him put this in on direct.

Mr. Kalisch: So I may cross examine him?

Mr. Sennett: Yes. If that is all right. It is six of one and half dozen of the other.
30 That's all.

Re-direct examination by Mr. Kalisch.

Q You said some of those cars were to be sent to Jersey City and others were to be sent to points in New York State? A Yes.

Q I see. And that work, in other words, consisted of some shipments out of the State—I mean some trains being sent out of the State
40 and some trains in the State, both? A Both.

William Nolan, re-direct.

Mr. Kalisch: I see, that is all. Is there any question about the death of this man?

Mr. Sennett: Yes; there is.

Mr. Kalisch: I offer the death certificate.

Mr. Sennett: That is objected to on the ground that the defendant has not the right to cross examine the maker of this instrument and also on the ground that, while it is certified, it is not authenticated. 10

Mr. Kalisch: I make the offer. It is the death certificate issued by the proper officer of the City of Newark in connection with the death of the petitioner's intestate in this case.

The Court: There is no opportunity to cross examine. 20

Mr. Kalisch: Of course there is not, but the statute makes it evidence. It is not a certificate from another state. This a certificate from the City of Newark in the State of New Jersey.

The Court: Is there a statute to that effect?

Mr. Kalisch: Any public record is evidence, because there is always the presumption of correctness of keeping of the record. 30

The Court: Evidence of the contents, what he died from.

Mr. Kalisch: I understand the rule to be that a death certificate is evidence in an issue in tort or quasi-tort.

The Court: It is evidence, if it comes from the Bureau of Vital Statistics, Trenton. 40

Harriet Bissett, direct.

Mr. Sennett: We will not object to its evidence as evidence of the fact that the man died on or about March 5, 1923.

10 Mr. Kalisch: I make the offer of the death certificate, and I would like to have a ruling as to whether the Court accept the death certificate or not, so I may get it properly on record one way or the other.

The Court: I will rule it may be admitted as a certificate of that fact the man has died on such and such a day.

Mr. Kalisch: In other words you limit the effect of the certificate?

The Court: Yes.

Mr. Kalisch: Then I wish to take an exception.

20 The Court: Note an exception.

Mr. Kalisch: —to the limitation by the Court of the effect of this certificate. I wish also then to ask the Court to permit this matter to go over, after we have finished this case, so we may produce the county physician who signed the death certificate. So long as we are obliged to prove it, why, we will prove it.

30

HARRIET BISSETT, the petitioner, sworn.

Direct examination by Mr. Kalisch.

Q Mrs. Bissett, you are the wife of Burt Bissett? A I am.

40 Q And at the time your husband died—or rather, strike it out. At the time your husband was working for the Lehigh Valley on or about

Harriet Bissett, direct.

January 30, 1923, your household consisted of your husband and yourself and how many children? A My two children.

Q Your two children. How old is the older child? A They are both the same age; they are twins.

Q Twins. And their birthdays on February 16th? A Right; yes, sir. 10

Q They were born on February 16, 1913? A 1913.

Q Did your husband support you and the children? A Always.

Mr. Kalisch: I find nothing in the answer to deny the amount of weekly wages, so I suppose, under the rule prevailing in New Jersey, the wages are admitted. 20

Mr. Sennett: We have approximately forty (\$40.00) dollars.

Mr. Kalisch: Forty-eight (\$48.00) dollars.

Mr. Sennett: I have not checked it up.

Mr. Kalisch: We have his paybook which shows it to be about forty-eight (\$48.00) dollars.

Q Now, when did you see your husband after he was hurt? A I saw him about two o'clock on the thirty-first of January. 30

Q Where? A At the St. Michael's Hospital.

Q Anybody there? You went alone? A Just myself and a friend of mine.

Q I see. How long did he stay there? A He was there from January 30th until March 5th, twenty minutes of eight March 5th, he died

Mr. Kalisch: He died. That is all. 40

Thomas Masterson, direct.

Cross examination by Mr. Sennett.

Q I do not suppose you have been married since last March, have you? A No.

Q You have not been married? A No.

Q And you and your two children were always dependent upon Mr. Bissett for support?

10 A Always; yes.

Q You lived with him right along? A Always; yes, sir.

Mr. Sennett: That is all.

Mr. Kalisch: That is all.

THOMAS MASTERSON, a witness on behalf of
20 the petitioner, sworn.

Direct examination by Mr. Kalisch.

Q Mr. Masterson, did you see Mr. Bissett on January 30, 1923, at the roundhouse? A No, sir.

Q You did not see him at all? A No, sir.

Q Do you know anything about this at all?

30 A All I know is I made the lay-out of the cars that day.

Mr. Kalisch: Oh, that is all. That is all.

Mr. Sennett: That is all.

William Hager, direct.

WILLIAM HAGER, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Kalisch.

Q Were you an employee of the Lehigh Valley on January 30, 1923? A Yes, sir.

10

Q And did you know Mr. Bissett? A No, sir.

Q Did you see him that night? A No, sir.

Q You did not see the accident? A No, sir.

Q Nor did not see the man after the accident?

A No, sir.

Mr. Kalisch: That is all.

Mr. Sennett: That is all.

Mr. Kalisch: Any other employees of the Lehigh Valley in court? The petitioner will have to rest at this time, and I want leave to subpoena—that is, time first to produce Dr. Minahan to prove the death; secondly I am informed that there are other witnesses that are not here today that know a great deal more about this accident. I want to have time to subpoena them. I did not know Mr. Dunphy is dead, who probably knew more about it than anybody. And I ask the matter go over, as far as the petitioner's case is concerned, to give me that opportunity.

20

30

Mr. Sennett: This is the second time we have been here and all our witnesses have been here. I think there was plenty of opportunity—

Mr. Kalisch: You knew Mr. Dunphy was dead and I didn't know it.

40

William Nolan, direct.

Mr. Sennett: I did not know it until two or three days ago, when I went to call him.

Mr. Kalisch: I did not know.

The Court: He is the engineer?

10 Mr. Kalisch: Yes, sir. And Mr. Reed whom we naturally supposed would be here today is not here.

Mr. Sennett: Mr. Reed is not in our employ.

Mr. Kalisch: And Mr. Osborne is not here.

The Court: Do you want to go on with your witnesses?

20 Mr. Sennett: I would like to go on with my witnesses.

Mr. Kalisch: I have no objection to that.

The Court: No objection to that?

Mr. Kalisch: No, absolutely not. I could not object to that.

RESPONDENT'S CASE.

30 WILLIAM NOLAN, recalled on behalf of the respondent.

Direct examination by Mr. Sennett.

Q I believe that you testified you were the yard conductor in charge of the Oak Island drill crew on the night of January 30, 1923, is that right? A Yes.

40 Q What engine did you have that night?
A 3451.

William Nolan, direct.

Q And who was your engineer? A Pat Dunphy.

Q The witness Sankus was your fireman?

A Sankus the fireman.

Q What was the hours of duty of that crew?

A From 3:00 P. M. to 11:00 P. M.

Q What is Oak Island Transfer? A A transfer yard to classify freight for different points. 10

Q Do you mean by that that freight is transferred? A From one car to another.

Q From one care to another? Do they have platforms or any such things as that to transfer this freight? A Platforms; yes, sir.

Q Do you know about how many cars were in Oak Island Transfer on the night of January 30, 1923? A About one hundred and seventy or eighty cars. 20

Q Now, as I recall your testimony, you said that your crew was assigned to take care of those cars that were loaded? A Take care of the cars loaded.

Q Would your crew drill out the loaded cars? A Surely.

Q Take them away from these platforms?

A Take them away from the platforms. 30

The Court: From the platforms?

Q From the platforms. What would you do with the loaded cars after taking them away?

A Put them in the station order on the train they were to go out in.

Q Station order. Would you have to make up fast freight with those cars? A That is what they consist of; fast freight cars.

Q I do not suppose all cars were loaded each day at this platform? A Not all of them. 40

William Nolan, direct.

Q What would you do with the partially loaded cars? A Put them back; throw them back.

Q Put them back. In order to get some to load would you have to take out partially loaded cars? A Yes, sir.

10 Q And then when you have disposed of the loading, throw the partially loaded cars back? A Throw the partially loaded cars back.

Q And so you practically handled all of the cars at the station? A All the cars we needed.

Q That was your regular assignment? A That was our regular assignment.

Q And this engine Bissett was supposed to work on was assigned to that work? A Yes, sir.

20 Q You did not work on the main line? A No.

Q Your work was confined simply to that yard? A To that yard.

Q What, if anything, happened to that engine that night that necessitated work on it by Bissett? A Dunphy told me that the packing had blown out and he had to have it fixed.

Q Dunphy was your engineer? A He was the engineer.

30 Q Did you tell him to go ahead and have it fixed? A I said we will take it down to one—to number one track and go over and notify Bissett, the roundhouse foreman, and he said I will go over.

Q You were not there when this accident is supposed to have happened? A No.

Q How long did it take to make that repair? A Well, it was fifteen or twenty minutes, they claim on that repair. (Answer repeated by the

40 stenographer.)

William Nolan, direct.

Mr. Kalisch: I move that answer be stricken out.

The Court: Yes, yes, that should be stricken out.

Q Do you remember yourself at that time how long your engine was on number one track that night being taken care of by Bissett and his helper? A Bissett and his helper? 10

Q How long was it on that track? A Well, at the time he started, why, he fell, I don't think he was there over ten minutes.

Q Bissett had been working on it about ten minutes? A They were up on the engine. I don't know if they were working, but they were up there where the pump was.

Q And after the accident is supposed to have happened were the repairs completed by somebody else? A Yes, sir. 20

Q And the engine went on about its work? A Yes, sir.

Q For the rest of your trick? What time was this said to have happened. What time did this happen? A About eight-forty.

Q About eight-forty? A Eight thirty-five or forty. 30

Q Your engine was not taken into a round-house to make this repair? A No, sir.

Q Stayed right out in the yard? A Yes, sir.

Q It was not withdrawn from service? A No, sir.

Mr. Kalisch: I object to that as calling for a conclusion.

Mr. Sennett: I do not think. 40

William Nolan, direct.

Mr. Kalisch: He can tell what facts are so.

The Court: I think that calls for a conclusion.

Q Your engine had up steam? A Yes.

10 Q And the crew upon it? A And the crew upon it.

Q Now, on the night what time did they stop loading at the transfer, if you recall?

Mr. Kalisch: I object to that on the ground it is immaterial, incompetent and irrelevant.

Mr. Sennett: I do not think there is anything immaterial about it at all.

20 The Court: You may answer that. I see no harm in answering it.

A About six o'clock.

Q That is the usual hour? A About the usual hour.

Mr. Kalisch: I object to that as being incompetent, irrelevant and immaterial.

The Court: Note an exception.

30 Mr. Kalisch: What the usual hour is.

The Court: Usual hours you quit work?

A No; usual hour we start to pull house, the platform.

The Court: I think it may be admitted; note an exception.

40 Q They do not work at the transfer loading these cars at night, do they?

William Nolan, direct.

Mr. Kalisch: I object to that as leading.

Mr. Sennett: Let me put that this way:

Q Do they work at the transfer at night loading cars? A No, sir.

Q Just as soon as they quit loading on this particular night did you and your crew start to pull the tracks? 10

Mr. Kalisch: I object to that as leading.

The Court: Can't you ask it in some other way, Mr. Sennett? It is leading.

Q After six o'clock on the night of January 30, 1923, what work did you do? A Our regular work. Starting on the house. Starting on the platform. The "house" we call it. 20

Q What was the answer? A (Answer repeated by the stenographer.)

Q Just what do you mean by start on the house? A That is to pull your fast freight out.

Q Pull your loaded cars out? A Pull your loaded cars out.

Q And were you doing this work when it became necessary to repair the pump? A Yes, sir. 30

Q Did you continue to do that work after the repairs were made? A We went right back to where we left.

Q What trains did you make up that night? A J-P 3, first and second, J-P 1, J-M 1.

Mr. Kalisch: I object. This is just cumbering up the record.

Mr. Sennett: This was under your objection. 40

William Nolan, cross.

Mr. Kalisch: No it is not. It is in the record without objection that he made up these trains.

Mr. Sennett: If you will state that on the record.

10 Mr. Kalisch: I will state now that what was testified to about making up those trains was without objection.

Q Were you making up those trains throughout the entire night? A Yes, sir.

Cross examination by Mr. Kalisch.

Q You say that the engine had steam up and the crew were on it? A The crew was on it, yes.

20 Q Well, if the crew was on it, how is it you say you did not see the accident? A I didn't see the accident? I was on the opposite side.

Q Did not you say you were off the engine when the accident happened? A Well, off the engine on the ground, yes.

Q And how long was it—what called your attention to the accident? A Why, the fire-boy hollered.

30 Q What did he holler? A That someone fell.

Q Someone fell and you ran around and you saw Bissett on the ground? A On the ground.

Q Bissett's work was nothing more than a mechanic on this engine, was it not? A On this engine.

Q For repairs? A For repairs.

40 Q Any other repairs in and around the roundhouse itself, that he had to do? A I don't know.

William Hager, direct.

Q What did you say, when Dunphy told you—I think something had blown out, what did you call it? A Packing.

Q Packing had blown out. Why did you say we will take it down to number one track?

A Because it is the most appropriate place for it.

Q I see. A Being that the conductor had trouble taking it in where it is— 10

Q I understood you to say on direct examination they used number one for minor repairs.

A In general, yes.

Q Was Bisset conscious or unconscious when you got there, do you recollect? A He was unconscious, at the time, when I got there.

Mr. Kalisch: I think that is all.

20

WILLIAM HAGER, recalled on behalf of the respondent.

Direct examination by Mr. Sennett.

Q You are employed by the Lehigh Valley?

A Yes, sir.

Q In what capacity? A Seal clerk. 30

Q At what point? A Oak Island Transfer.

Q Were you so employed on January 30, 1923? A Yes, sir.

Q What are your duties as seal clerk? A I take the record of the seals in the incoming cars, and apply seals to the outgoing cars.

Q Do you seal all cars coming into and out of Oak Island Transfer? A Yes, sir.

Q Did you seal the cars that were loaded at Oak Island Transfer on January 30th? A Yes, 40
sir.

William Hager, direct.

Q What time did you stop loading on that date? A About six o'clock.

Q About six. Have you a book record as to what cars were sealed there that day? A Yes, sir.

10 Q Will you produce that? (Witness leaves stand and gets a book with a cover spotted like leopard skin.)

Q How many cars did you have all told?

Mr. Kalisch: Do you keep this record? I would like to cross examine him on that.

Mr. Sennett: I will ask him.

Special cross examination by Mr. Kalisch.

20 Q Do you keep this record yourself? A Well, it is kept in the office.

Q By whom? A Where they keep all the records.

Q Did you make up the record yourself? A Yes, sir.

Q This book. A Yes, sir.

Q It is written in your handwriting? A Yes, sir.

30 Q All this memorandum in here is in your handwriting? A Yes, sir.

Direct examination (continued) by Mr. Sennett.

Q Did you actually put the seals on the cars? A Yes, sir.

Q And you took the initials and numbers off the cars? A Yes, sir.

40 Q How many cars did you have at the transfer that day? A Well, there was fifty-one—
fifty-nine regular cars.

William Hager, direct.

Q Fifty-nine regular cars? A Yes, sir; and there was twelve extra cars.

Q Twelve extra cars. What do you mean by regular cars? A Regular cars there are on five, six, seven and eight track. And the extra cars—they make extra cars when the regular cars are loaded; and the extra cars are on nine and ten track. 10

Q How do they work this transfer proposition out? I mean how do you designate a car into which freight is to be loaded? A By flag number.

Q By flag? A Yes, sir.

Q Do you have seal lay-out or something of that sort every day by which the men know where to take freight? A Yes, sir; there is a lay-out made out every day. 20

Q There is a lay-out made out every day? A Yes, sir.

Q Who makes that lay-out? A Well, at that time, Thomas Masterson.

Q Masterson? A Yes, sir.

Q Would he specify the flag number on his lay-out? A Well, I go out and get the numbers and the flags of the cars.

Q Yes. A See the cars are all placed.

Q Yes. And then what happens? A In the office we make out the lay-out. 30

Q You and Masterson made out the lay-out? A We get the numbers of the cars and the flag numbers, and he makes out the lay-out numbers.

Q From your record? A Yes, sir.

Q And that is a true record of all the numbers in there on that day? A Yes, sir.

Q Do you want the record?

The Court: I do not think it is necessary. 40

Thomas Masterson, direct.

Q Do you know to what points these cars were going?

Mr. Kalisch: Of your own knowledge?

A No, I couldn't just do that.

Q This Masterson is the one made out these
10 lay-outs? A Yes, sir.

Mr. Sennett: Cross examine.

Mr. Kalisch: No questions.

Cross examination by Mr. Kalisch.

Q Where is this Oak Island yard? A Oh, it is in Newark.

Q Where? A Down near the meadows.

Q Is that on Poineer street? A No, down
20 toward Port Newark.

Q Near Port Newark. A Yes.

Q It is in Newark? A Yes, sir; it is in Newark.

THOMAS MASTERSON, recalled on behalf of the respondent.

30 *Direct examination by Mr. Sennett.*

Q Mr. Masterson, by whom are you employed? A Hays Hunt Corporation, Elizabeth.

Q How long have you been there? A About a year and two months.

Q Were you employed by the Lehigh Valley at any time? A Yes, sir; I was employed by the Lehigh Valley for three years. January up to about February first or second. That I am
40 not sure.

Thomas Masterson, direct.

Q 1923? A Yes, sir.

Q And after that you went to the Hays Hunt Corporation. What was your work—or rather where were you employed with the Lehigh Valley? A I was employed as a clerk.

Q At what point? A Billing and exception clerk, Oak Island Transfer.

10

Q Billing and exception clerk? A Yes, sir.

Q At Oak Island Transfer? A Yes, sir.

Q Was it one of your duties to make up the lay-out sheets of the cars every day? A Yes, sir.

Q And how did you make that sheet up? A Why, car numbers and flag numbers were taken from the seal book.

Q Is that the seal book prepared by the last witness? A Yes, sir.

Q And did you assign these cars to a flag, or something of that sort? A Yes, sir, there is a regular lay-out of the destination, destination for each day.

20

Q These cars were loaded by flag, as I recall it? A Yes, sir.

Q That is the car opposite a certain flag would mean a certain destination, is that it? A Yes, sir.

Q And you made up the layout every day, did you? A Every day I was on duty, unless otherwise ordered.

30

Q Were you on duty January 30, 1923? A Yes, sir.

Q I show you a daily lay-out sheet for January 30, 1923, Oak Island Transfer; did you make up that lay-out?

Mr. Kalisch: Is that in his handwriting?

A No, sir.

40

Thomas Masterson, cross.

Mr. Kalisch: It is not?

Q How did you make that out?

Mr. Kalisch: I object to it.

Mr. Sennett: Let me bring it out.

10 Mr. Kalisch: All right. Go ahead.

A Why, any day I was on duty I always made this lay-out and put my initials at the top. And this here lay-out—

Q Is that done on the typewriter? A Done on the typewriter.

Q Those are your initials at the top? A Yes, sir.

Q Will you tell us what cars you had on that day, the destinations?

20

Mr. Kalisch: I object. It is not a complete system. That is not a complete system that is being described at this time.

Mr. Sennett: Why not? Here is the man made up the lay-out, and laid them out every day.

Mr. Kalisch: I would like to examine him first.

30

Special cross examination by Mr. Kalisch.

Q Where are your original notes on it? What becomes of those? A Why, these are the original.

Q These are the original, on the typewriter? A Yes.

Q How did you dictate them? From what did you dictate to the stenographer? A Why, I typewrote these myself.

40

Thomas Masterson, cross.

Q Did you do this yourself? A Yes, sir.

Q On this sheet? A Those are my initials on there.

Q Did you do it? A It was my duty to do it every day.

Q Did you do that? A It was my duty to do it every day. 10

Q Did you do that? A Why, I wouldn't swear that I done it. Anybody can put initials on.

Q And you do not identify those as your own written initials? A TOM. That's my initials.

Q TOM, that's your initials. But in other words you will not say those were written by you? A On that day I must have made it up. I was on duty.

Q Did you write those initials? A I 20 couldn't swear I typewrited anything.

Mr. Kalisch: Well, I object to the use of it. Not properly identified at this time.

Mr. Sennett: I think it is properly identified.

The Court: He may be unduly cautious.

Mr. Sennett: He does it every day. And his initials are on it. And there are no erasures. 30

(Further discussion of counsel off the record.)

By the Court.

Q When you are on duty you alone do that?
A Yes, sir.

Q And you say when you are on duty. What days are there when you are not on duty? A Why, we generally have a day off, a half a day 40

Thomas Masterson, cross.

off, every other week. We may be out on account of sickness.

Q But all the time you are working down there you are given that particular kind of work?

A Yes, sir.

10 The Court: I think he may testify to that.

Mr. Kalisch: One more question.

By Mr. Kalisch.

Q Is your memory distinct that you worked on January 30th? A Yes, sir.

Q Were you working on January 29th? A I couldn't just say whether I was working that day.

20 Q How is it you can remember you were working January 30th, if you cannot remember you were working the day before? A Why, according to the records.

Q I am not interested in the records. You said a moment ago you were working on January 30th but you do not know whether you were working the day before. Now, are you sure you were working any one day that may be asked you?

30 A Not exactly sure. Because I didn't keep any memorandums.

Q Who told you you were working January 30th? A Called up the office and see if I was really on record.

Q You called them up and they told you you were working on January 30th, and when you got here in Court they gave you this piece of paper with your initials on it, didn't they? A Yes, sir.

40 Q And you are going on the stand now swearing that you know personally that you were

Thomas Masterson, direct.

working, and that those were the papers you made up. Do you mean to do that? A I am not really certain I made these out. I told the Court anything that is typewritten I wouldn't swear to.

By Mr. Sennett.

10

Q You quit down at the Valley around the first of February, didn't you? A Around February 1st.

Q Had you been working every working day for say a couple of weeks previous to the time you quit? A I don't know about that. Just a year ago.

Q Let me ask you another thing. Those initials, "T. C. M." on the top of that lay-out are your initials, are they? A Yes, sir.

20

Q Anybody else make up this lay-out, do they put your initials on it or their own?

Mr. Kalisch: I object to what anybody else does.

Q Are you familiar with the custom there?
A Why, I don't know what you mean.

30

Q Is the custom of the person who does make out a report to put his initials on?

Mr. Kalisch: I object to the custom. The question is: Is that his report made by him? I object to what the custom is.

Mr. Sennett: I am trying to authenticate.

The Court: He may ask that question, whether it is a custom, does anybody else use his initials.

40

Thomas Masterson, direct.

A Why, I never heard of anybody else using another one's initials while they are making up a report down there. And anybody that made that report up I don't think they would put my initials on there.

10 Q In other words you have to take the responsibility for this report? A Yes, sir.

Q And if anybody else made the report he would have to take the responsibility for it? A Yes, sir.

Mr. Sennett: I think it is pretty conclusive evidence. This thing is done in daily routine. Men cannot sign everything.

20 Mr. Kalisch: He said he does not know whether he worked. He never saw the papers since; and they gave him this paper this morning expecting him to swear to something happened a year ago.

The Court: Isn't there any record as to the time record of the various clerks?

Mr. Sennett: Yes.

(Discussion of counsel off the record.)

30 The Court: I am pretty well convinced he made it out, if he was there that day, because that is his exclusive work, as I understand he testified.

Q Did you call the Oak Island timekeeper to find out whether you were on duty that day? A Yes, sir.

Q Is she a friend of yours? A Why, I know her personally.

Q You know her personally? A Yes, sir.

40 Q And you made an independent inquiry as to whether or not you were on duty that day? A Yes, sir.

Thomas Masterson, direct.

Q And you found out from her that you were?

Mr. Kalisch: I object.

A She told me.

Mr. Kalisch: I object to what she told
him. 10

The Court: Yes. That should be stricken
out.

Q Did you ascertain whether or not you were
on duty that day?

Mr. Kalisch: I object.

A She told me.

The Court: That will be an answer to
the question. 20

Mr. Kalisch: Yes.

The Court: I think if you can prove by
the time records or by some oral testi-
mony that he was actually there in the line
of his duty on that particular day, I think
it is admissible. Otherwise there is just a
little doubt about it. I think you might
safely leave that go until the next day. 30

Mr. Sennett: Possibly the agent can tes-
tify to that. Do you want to cross examine
him?

Mr. Kalisch: No.

Mr. Sennett: That is all.

Stephen Gillen, direct.

STEPHEN GILLEN, recalled on behalf of the respondent.

Direct examination by Mr. Sennett.

10 Q Mr. Gillen, you are employed by the Lehigh Valley Railroad? A Yes, sir.

Q In what capacity? A Agent.

Q At what point? A Oak Island Transfer.

Q Were you so employed January 30, 1923? A Yes, sir.

Q What is the nature of the work done at Oak Island Transfer? A We unload and reload cars in order to classify the freight to get it in proper destination. We get the freight from the cars and we have to classify it.

20 Q From what point to what point does this freight arrive, and is to be sent? A Well, we get freight from different parts of the country going to different parts.

Q Do you handle Canadian freight there? A United States and Canada.

Q Do you handle state as well as interstate freight? A Both.

30 Q Do you know the percentage of interstate freight handled there a month? A No; I couldn't say. We never made a record of that.

Q Now, are a certain number of cars—were a certain number of cars, at the time this accident is supposed to have happened, loaded each day? A Yes, sir.

Q And do you designate, in loading these cars, various consignments of freight by flag or anything of that sort? A By flag number.

Q Did you have a regular daily layout? A Yes, sir.

40 Q What was the layout on this day? A Layout—

Stephen Gillen, direct.

Mr. Kalisch: I object. Does this man make it?

A Layout is made under my supervision.

Q What does the layout consist of? A The layout consists of loaded outbound by flag number, and is made up of the seal record book by the waybill and exception clerk at that time. 10

Q Do you know whether or not Masterson was on duty on January 30, 1923? A He was on duty then.

Q And he made up the daily layout report then? A He did.

Q And shortly after that Mr. Masterson left the employment, did he? A Yes.

Q Now, these flags, will you give me the points that they indicate? A On the layout we show that. 20

Q Could you refresh your recollection as to the layout at that time by seeing this report?

A That is the regular layout at that time.

Q Did you supervise that layout? A Yes.

Q Did you tell Masterson—

Mr. Kalisch: I object to this as leading; suggests what he told Masterson. 30

Q Masterson was one of your clerks? A He was.

Q And you had full charge of the loading and transferring? A At Oak Island.

Q By whom was the layout system devised? A We have a special spot each day.

Q You have a special spot for each car every day? A We have a special spot for each car every day. We don't change the layout every day. It is not changed from day to day. 40

Stephen Gillen, direct.

Q By a spot do you mean a destination? A
A destination and flagging.

Q What were those layouts as you recall
them, the flags? A Well, you take there, we
have a regular spot for our New York pier cars,
and a regular spot for cars going in and out of
10 the state.

Q Could you refresh your recollection from
this layout as to what your spots were and
destination at that time? A Why, yes.

Mr. Kalisch: I object to his using that
on the ground it is not one made by him.

A Made under my supervision.

Mr. Kalisch: Your attorney will handle
my objection.
20

Mr. Sennett: That is already testified to
and he has devised the scheme for the lay-
out. And he can use it to refresh his recol-
lection.

Probably you can testify without it.

Mr. Kalisch: That is all right.

The Court: Did you have occasion, in the
course of your work there as agent, to refer
to this layout?
30

A From day to day we do in tracing shipments.
In order to find in just what car particular
freight was loaded into and where it was allotted
to.

The Court: I think he can explain this
from personal knowledge.

Mr. Kalisch: He said after the shipment
he has occasion to refer to it. That is his
answer. "After." Not before.
40

Stephen Gillen, direct.

A We have occasion to use it when the cars are going out in order to put these car numbers on the original waybills.

Mr. Kalisch: I object.

The Court: Do you see every layout? In other words does every layout come under your personal supervision; that is, I mean to say, did you see it with your own eyes? 10

A Why; yes.

The Court: Every layout is made under you?

A Every layout during the day, I see it.

The Court: You see it on the same day it is made out? 20

A Yes, sir.

The Court: If that is the case, I think the testimony of the preceding witness who actually made out these layouts, although he is not quite sure he made out the particular layout on the particular day; that is only a matter of his being there on that particular date; I do not see why Mr. Gillen cannot testify to something under his own observation, something so very intimate. All right. 30

Mr. Kalisch: I ask an exception.

The Court: Note an exception.

Q What was your layout? A Why, our layout was we will say Flag No. 1 was a car laid out for Pier 8, New York. 40

Stephen Gillen, direct.

Q New York City? A New York City. And that was on track eight. On track number seven we had a car laid out for 124th street, which was the car in back. And on track number six we had a car laid out for Elizabethport Transfer, State of New Jersey, Central Railroad delivery. All freight for the Central Railroad route by Oak Island Junction was loaded into that Elizabethport car. The freight for number eight was loaded into the number eight car until such time as it was loaded, and no more freight would go into the car.

Q Number eight is the New York car? A Yes, sir.

Q Let us have your other flags? A Why, we have a car here, we will say, on this here flag forty-five, going to Reading Transfer. All freight for the P. & R. Railroad, via East Penn Junction, was laid to this flag.

Q East Penn Junction? A East Penn Junction.

Q On this report are indicated flags, and various numbers under here. Opposite flag number one is pier eight, North River. A Yes, sir.

Q Was a pier eight car placed opposite flag number one each day at that time? A Until such time—on this particular day there was.

Q Your number two flag. A There was a car placed there empty for loading to 124th street.

Q You mean placed empty for loading; you mean placed that morning for loading? A Yes, sir; yes, sir.

Q Is there anything on this report indicates to you that this car was loaded and went out that night? A Those cars with the lines not drawn through are the cars went out that night.

Stephen Gillen, direct.

The cars with the lines drawn through didn't go out, but they had to be moved from the platforms in order to get at the other cars.

Q So the cars were partially loaded would have to be drilled out by this crew, of which Nolan was conductor? A Yes; in order to get at the other cars.

Q And placed back at other spots? A Yes, sir. 10

Q You must have had some empty cars to put in there, after these cars were drawn out? A Empty cars would be put in at the spot where the loaded ones were taken out for movement. Loaded cars were put in their place.

Q Would the yard crew take care of them, too? A Yes, sir.

Q On Flag No. 5 that day, what car was that? Flag No. 5? A Pier 34, North River, New York. 20

Q Flag No. 6? A East 149th street, New York.

Q That is New York also? A Yes, sir.

Q And No. 7? A That was lined up for Greenville, Jersey City. And it wasn't completed loading, and it had to come back again to be loaded up.

Q Go right on. A Pier 66, New York. Flag No. 9, that flag went out. 30

Mr. Kalisch: This is all over my objection.

The Court: Yes, I do not know whether it is necessary to go into that any more, all individual cars.

Mr. Sennett: Yes.

Q How many cars went out that day? Loaded cars? A Twenty-three loaded cars. 40

Stephen Gillen, cross.

Q Twenty-three loaded cars and the rest of the cars? A Were sent back to complete loading.

Q Were sent back to complete loading. How many cars were sent back? A Forty-eight cars.

10 Q Among your loaded cars, went out that day, were what? Give us some points. A Loaded cars went out that day car for Pier 8, North River, New York. Car for East 124th street, New York. Car for East 149th street, New York. One car for Pier 5, Wallabout, Brooklyn. Car for Jay Street Terminal, Brooklyn. One car for Bush Docks, Brooklyn; one car for Grand street, Jersey City; one car for Reading Transfer, Pa., and one car for Perth Amboy, New Jersey. Car for Metuchen, New
20 Jersey. Another car for Pier 34, North River, New York. Another one for Pier 66, North River, New York. Another one for East 124th street, New York. One for East 149th street, New York. One for Rochester, New York. One for Wilkes-Barre, Pennsylvania; two for Irvington, New Jersey; one for Newark, New Jersey; one for Pier 8, New York. One for Keasbey, New Jersey. One for Lenox, New Jersey. One for the Long Island Railway, Long Island City.

30 Q The rest were all partial loads, had to come back? A Yes.

Mr. Sennett: Any cross examination?

Cross examination by Mr. Kalisch.

40 Q Do you know why this last part has been taken off or been torn off? A That was torn off going through and checking up records at various times than the time it was made up.

Stephen Gillen, cross.

Q Do you know what was in there, do you know? A This here looks like it might be an Allentown car.

Q Why? A On account of the N at the bottom.

Q Is that the only place you shipped to that ends with N? A We ship to Pittstown 10
(?) Pa.

Q Don't you ship to Trenton, New Jersey? A No; it goes to the P. R. R. in that Metuchen car.

Q You mean to say you do not ship anything to Trenton? A We don't allot it direct to Trenton.

Q Does anything go out, routed from the Oak Island Transfer, that is going to have its destination in Trenton? A Why, of course, 20
there is shipments coming through which is shipped to Trenton. If it is routed through the P. & R. it would go to Wayne Junction Transfer. If it is due via P. R. R., at Metuchen, it would go to the Metuchen car P. R. R.

Q That is only a guess? A Yes; that is only a guess. It has been torn off going through, but it is not meant for Trenton. We don't make a straight Trenton car.

Q What time does this have reference to? 30
January 30th here, the hours? A That is made in the morning, covering cars loaded there in the day.

Q This has to do with the work that has to be done from the morning until six o'clock in the evening? A Until six o'clock in the evening on this—

Q On that day? A —(continuing) day, and then the cars are taken out after six o'clock loading. 40

Stephen Gillen, re-direct.

Q Then the cars are taken off? A Then the cars are taken away, to be classified according to station orders, to be put in the trains.

10 Q You have nothing to do with that order? Merely—do you have anything to do with the station orders? A The setting of interstate trains? No. That is done by the conductor of the engine itself.

Q Of the engine itself? A Yes, sir.

Q How many engines are there? A We have one engine at night doing that.

Q Always the same engine? A I couldn't say whether it was always the same engine all the time. If the engine was in good condition they might assign that engine to the job.

20 Q And if it is not they repair it and put it back on the job? A Well, they repair and put another engine on the job.

Mr. Kalisch: That is all.

Re-direct examination by Mr. Sennett.

30 Q Mr. Kalisch has referred to two cars at the bottom of the page where there was a tear in the page? A That wasn't done intentionally. That was done going through the records.

Q These cars were not loaded that night, were they? A No; they didn't move.

Q What time did you finish loading that night? A Well, about six o'clock I should judge.

Mr. Sennett: I think that is all.

Mr. Kalisch: That is all.

40 Mr. Sennett: Mr. Masterson.

Thomas Masterson, direct.

Mr. Kalisch: Do you want to prove the record? Prove that?

Mr. Sennett: Yes. Will you admit it?

Mr. Kalisch: Yes.

THOMAS MASTERSON, recalled, on behalf
of the respondent.

10

Direct examination by Mr. Sennett.

Mr. Sennett: That is the daily layout card?

Mr. Kalisch: All right. Have you a copy?

Mr. Sennett: Yes. I think I have in my files.

20

Mr. Kalisch: I am willing to have you offer the copy as though you have the original, as long as you say it is an exact copy.

Mr. Sennett: No. I thought I had. It is not the same thing.

Q Mr. Masterson, I show you the daily layout card for January 30, 1923, and bearing your initials, made out at Oak Island Transfer. Will you give us the destinations of the cars that were worked on and loaded that day at Oak Island?

30

Mr. Kalisch: Perhaps if you can tell me the purpose of this examination I may stipulate it.

Mr. Sennett: It is to show that the cars which were handled by this drill crew that night consisted of the cars were loaded at

40

Thomas Masterson, direct.

the transfer that day and the cars that were partly loaded; they shifted them all night long.

Mr. Kalisch: In other words the cars in that yard consisted of shipments of interstate and intrastate?

10 Mr. Sennett: These shipments here.

Mr. Kalisch: I am willing to stipulate that the cars there in the yard were for both intrastate and interstate commerce.

Mr. Sennett: Very well.

Mr. Kalisch: That is the purpose. That point does not make much difference. Is there anything else you wanted from this witness?

20 Mr. Sennett: There is this point, too; that these cars which were loaded at the transfer, (probably not clear to you) but this crew handled merely the cars at the transfer which were loaded that night or partially loaded, and not indiscriminately, in the yard. And that this is the work Mr. Nolan's crew had to do that night, with the engine on which Bissett is said to have been working when he met with his injury.

30 Mr. Kalisch: I am willing to stipulate that that engine had to do with shipments both interstate and intrastate, both before and after, but as to after, I do not care to stipulate as to the after part, but it is my contention it is immaterial. I am willing to stipulate the fact but I maintain of course, it is immaterial what they did after.

40 Mr. Sennett: Our position is directly opposite. And we will contend it is very important.

Thomas Masterson, direct.

Mr. Kalisch: I will stipulate the fact they handled intrastate and interstate cars.

Mr. Sennett: That is perfectly obvious.

Mr. Kalisch: Certainly it is.

(Discussion of counsel off the record.)

Q Let us have the loaded cars, or rather the cars— 10

Mr. Kalisch: I withdraw all the stipulations I made then, if you are going to go into it.

The Court: Make it as brief as possible.

Mr. Kalisch: And I object to it. My stipulation is made or I insist this record be introduced in evidence. 20

Mr. Sennett: Well, we will introduce it in evidence.

Mr. Kalisch: Then I object to his testifying to it.

The Court: What?

Mr. Kalisch: I object to the witness reading from it. It is evidence and speaks for itself.

The Court: I think if it is in evidence it speaks for itself. 30

Mr. Sennett: I want the witness to explain the record. On the top of this record.

The Court: He may explain it.

Q Shown is a daily layout card, there is a point or column, headed with the words, "When Carded." What does that mean? A That is the destination where the car is going. First car. 40

Thomas Masterson, direct.

Q And this record also shows the flag number? A That is the number of the car. Flag number of the car.

Q And you have there your initials of the car? A Initials of the car and number.

Q And your destination? A Car number.

10 Q There are a number of cars which have check marks near the flag numbers. What do those check marks mean? A That is the check-up against the ticket for the cars. That is done in the yard office, I believe. But it may be done—

Q Does that indicate the car went out? A Yes, it indicates the car went out.

Q There are other cars where you have a pencil line drawn in through here. What does that indicate? A That shows they stayed in that night.

20 Q They were only partially loaded? A They were only partially loaded; were not loaded enough to send out.

Mr. Sennett: I want it marked for identification.

Mr. Kalisch: I object to them being marked for identification.

30 Mr. Sennett: That is in evidence.

Mr. Kalisch: I object to them being marked as an exhibit.

(Two yellow sheets of paper marked Exhibit R. 1.)

John Sankus, direct.

JOHN SANKUS, recalled on behalf of the respondent.

Direct examination by Mr. Sennett.

Q You testified previously you did not see this accident? A No; I didn't see the accident; no. 10

Q Did you see Bissett at any time around that locomotive before the alleged accident was said to have occurred? A Before the accident?

Q Yes. A No.

Q Do you know why you went to the repair house or repair shanty for him, or with your engine? A Oh, we stopped there and Pat Dunphy just went and told him we wanted to get the pump fixed. 20

Q Yes. A Well, he said, "Run it on number one and I will be right over." And that's all I know about it.

Q And the next you saw of Bissett was on the ground? A Yes, sir.

Q Was it necessary to have your pump fixed in order to carry out the rest of your duties that night? A Yes, sir. 30

Q Did you continue to work at the transfer all night? A What is that?

Q Did you continue to work at the transfer all night? A Yes, sir.

Q Doing the same work you had done before this happened? A Yes.

Q That was the regular assignment for your crew? A Yes, sir.

Q And you were the only crew in that yard? A Yes, sir; we were the only one. 40

John Sankus, cross.

Q When you took cars from the transfer did you make them up into trains? A Made them up in trains; yes. For whatever trains they were to be made for. That is in the fast freight. Where they were routed.

10 Mr. Sennett: All right.

Cross examination by Mr. Kalisch.

Q Couldn't you run that engine without having it repaired? A No.

Q You could not? A No, sir.

Q And what time did they run into the first track, number one? A About eight-forty.

Q What? A About eight-forty.

20 Q Where did you go then? A I went and ate.

Q Yes. Is it far away or nearby? A No; no. It is nearby.

Q How long were you away? A Oh, I don't know how long I way away. I came back.

Q Well, about how long? A Well, I say it might be fifteen or twenty minutes I was away.

30 Q And when you got back you found Bissett on the ground—alongside the engine as you have testified before? A Yes.

Q Had they started to work directly that you went out for your supper or whatever it was? A Yes; they started to work all right.

Q And you were away you say fifteen minutes, you think? A Yes.

Q And how long after you got back did they finish the job? A How long?

Q Yes. A After the accident happened?

40 Q No. After you got back how long was it before they finished the engine? A I told you,

John Sankus, cross.

after the accident happened, I don't know how long it took them then.

Q No. I say after you got back. You went out to eat, didn't you? A Sure.

Q When you came back how long did you stay there before the engine was ready for you to take it out? A I don't know. The accident happened at that time; when I came there, to work and eat, the accident happened, and after that I don't know how long it took them then. 10

Q How long was it before you went out with the engine? What time did you go out with the engine after this in the evening? A That I don't know.

Q How long a time do you think it was before you started on the engine? A I don't know; I couldn't tell you. 20

Q About how long? A I would say maybe an hour or maybe less or more; I couldn't tell you.

Q I see. A That there I couldn't tell you.

Q And did you say that he was working on it about ten minutes before it happened? A About ten or fifteen minutes; yes. That is I should judge it that. I won't say that it is about ten or fifteen minutes they were there. And after— 30

Q Did you see him start to go up and do the work? A No; I didn't see him start to go up and do the work, only when I got off I seen that they were working on the pump.

Q They were working on the pump? A Yes.

Q Where is that? A On the left-hand side.

Q How high up? A How high up?

Q Yes. A About ten or twelve feet, with the running board there. 40

John Sankus, re-direct.

Q When you left to eat they were up there working? A Yes; I left them there working; yes.

Q When you came back about fifteen minutes later you found Mr. Bissett alongside of the engine on the ground, as you have told us? A I told you that.

Q And you say that before the engine was ready for you to take it out was an hour or a little more? A Well, it might be until he got him in there, and then his assistant, we got organized there to do the work; that other part I couldn't tell you.

Q You do not know exactly what they found wrong with the engine, do you? A Pump; that is all.

Q That is all Dunphy spoke about? A That is all; that is all that was wrong about it.

Q Do you understand the mechanism of an engine? A Sure; I am working it long enough.

Mr. Kalisch: All right, I want to find out. That's all.

Re-direct examination by Mr. Sennett.

Q I understand, from your previous testimony, it takes about fifteen or twenty minutes to do a job like that?

Mr. Kalisch: I object to that.

Mr. Sennett: That is what he testified to.

Mr. Kalisch: I do not care what he testified. It is an important fact.

Q How long does it take to do a job—

Mr. Kalisch: I object.

John Sankus, re-direct.

Mr. Sennett: It is a well-known fact among railroaders—

Mr. Kalisch: I do not care whether it is a well-known fact among railroaders. We are in a court now.

Mr. Sennett: Here is a man, an expert on this. 10

Mr. Kalisch: He does not repair them.

A No; we ain't supposed to repair them. That is what they have got the foreman. But in case of emergency we got to do it.

Mr. Kalisch: I object to the question.

The Court: I think there is plenty of testimony in on that. A lot of testimony it took fifteen or twenty minutes. 20

Q Was this a light job?

Mr. Kalisch: I object to that.

A Sure, it is a light job.

The Court: How can he answer that? You do not do any repairing? 30

A No; not where there is a man for that purpose; where we are assigned into a yard, no. We are not supposed to do that. But if we happened to go out on the main line, then it is up to us to make the repairs the best we can.

The Court: You do, and have made repairs of that nature? Could you go up and make that repair then? A That engine?

The Court: Yes. 40

John Sankus, re-direct.

A I wouldn't say I could really do it, but we have to make the best of it to get in with it.

The Court: If he could not do the job himself, how can he testify as to whether it was a light job or heavy job?

10. A Why, sure—

Q Have you seen this work done before? A Sure.

Q How long have you been a fireman for the railroad? A 1920. Over four years now. It will be four years.

Q What kind of work is this they did at the pump; what was that job? A All they need to do is there is like in the center of the pistons, down here, we will say, right here, take this here, 20 here is the piston, we will say, right here. Down at the bottom here is compressor. Up above that is the steam cylinder. Well, now, underneath where the compressor is, right around there, we will call it, a unit.

The Court: Unit?

A Unit.

30 The Court: Unit?

A It is called a bushing.

The Court: Unit?

A Yes; it is like a steam pipe, this unit. Inside that bushing is a packing. If this wears out, the pressure on that piston going down will force that air right out, and it won't hold, and your 40 brakes will go on the engine, and that has to be

John Sankus, re-direct.

fixed. And it only takes simply take that out and put that packing in there; tighten it up. That is all there was to it.

Q You were held up longer on this case than usual because of the alleged accident?

Mr. Kalisch: I object to that. That is 10
leading.

Q Were you, on this occasion, held up with that engine longer than usual because of this fall that Bissett is supposed to have had? A On account of that accident, sure. It took longer because he didn't finish it until they got the other man in and he seen it; until he got out there, it took a little more time; sure.

Q Did you have to take care of Bissett and send him to the hospital? A I didn't have to take care of him. 20

Q I mean did the crew? A No; neither did the crew. There was men around there. I don't know anything of that, because I just heard it. When I got there he was alongside of the engine.

Q And is that what held you up that night?

Mr. Kalisch: I object to that on the ground he said he wasn't there. That calls 30
for a conclusion of the witness.

The Court: He did say it took longer.

Q How long did you have to wait around in order to get Bissett off to the hospital? After he was hurt? A That there I couldn't tell you.

Q Approximately? A That part I didn't time. I couldn't say.

Q Would you say it was more than a half an hour? 40

John Sankus, re-direct.

Mr. Kalisch: I object to this. It is improper, with his own witness, to suggest the answer. It is leading.

The Court: He does not seem to have much idea as to the extent of time involved.

10 Q You say you have seen pumps packed on previous occasions. How long did it take to pack those?

Mr. Kalisch: I object.

Q As a general rule.

Mr. Kalisch: I object.

A I told you fifteen or twenty minutes.

20

Mr. Sennett: He has had experience.

Mr. Kalisch: I object to the question.

The Court: I think there is enough testimony in, it took fifteen to twenty minutes to pack the pump.

Mr. Sennett: All right.

The Court: We can be governed by that testimony.

30

Mr. Sennett: That is all.

The Court: Two or three witnesses have testified to that.

Mr. Sennett: Anything further?

Mr. Kalisch: No.

The Court: To conclude when?

Mr. Kalisch: I could conclude now if Mr. Sennett withdraws his objections on the question of death. There seems to be no question about it. Their own witnesses have

40

John Sankus, re-direct.

testified they heard him yell and there he was on the ground. His wife testified he died. There is no question about the death. The only question involved in the case, it seems to me, is the question of interstate commerce.

(Discussion of counsel off the record.) 10

Mr. Sennett: Let us have Miningham's affidavit on that point. I do not want to admit the death.

Mr. Kalisch: This is Miningham's writing down at the bottom.

Mr. Sennett: This is the city clerk.

Mr. Kalisch: Of course. This is a copy of the death certificate issued by the city clerk.

The Court: Outside of that is the case closed? 20

Mr. Kalisch: I will close my case if the objection is withdrawn to this.

Mr. Sennett: I should not like to do that.

The Court: What about an affidavit you spoke about?

Mr. Sennett: You can put an affidavit in.

Mr. Kalisch: I won't close my case unless I can close it the way I want to. 30

The Court: You can take the affidavit.

Mr. Kalisch: No. I ask leave to continue it to produce the other witnesses.

The Court: How long?

Mr. Kalisch: Two weeks.

(The case was thereupon adjourned two weeks.)

Walter Reed, direct.

I hereby certify that the foregoing is a true and accurate transcript of the stenographic notes as taken by me at the time, place and date hereinbefore mentioned.

(Signed) EDWIN J. O'BRIEN,
Court Reporter.

10

I hereby certify that the foregoing is a true and accurate transcript of the stenographic notes as taken before me at the time, place and date hereinbefore mentioned.

(Signed) HARRY J. GOAS,
Deputy Compensation Commissioner.

20

Transcript of stenographer's notes of testimony taken in the above-entitled matter before Hon. Harry J. Goas, Deputy Compensation Commissioner, at the Department of Labor Building, 9-15 Franklin street, Newark, New Jersey, on the 25th day of April, A. D. 1924, at 10:30 A. M.

Appearances:

30

Isidor Kalisch, Esq. (Kalisch & Kalisch, Esqs.) for the petitioner.

Mr. Sennett for the respondent.

WALTER REED, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Kalisch.

Q Mr. Reed, did you work for the Lehigh Valley Railroad Company on or about January 30, 1923? A Yes, sir.

40

Walter Reed, direct.

Q What was your work? A Machinist's helper.

Q Machinist's helper? A That was it.

Q At Oak Island? A At Oak Island.

Q I see. Was there a man working also on the same sort of work by the name of Bissett?

A Yes, sir. 10

Q What was his first name? A Bert is the name I knew him by.

Q Bert Bissett? A Bert Bissett.

Q On the 30th day of January, did you see him working on an engine? A Yes, sir; I was working with him.

Q You were working with him on the engine? A Yes, sir.

Q What was wrong with the engine? A Well, the pump packing was blown out. We were working packing the pump. 20

Q Do you know how long Mr. Bissett worked before he was hurt, on that engine, on this work that was necessary? A Well, it must have been twenty or thirty minutes, as far as I know. I can't just remember now.

Q Yes. Then did anything happen to him? Did he keep on working or was he hurt? A Well, after he was working twenty or thirty minutes he fell off the locomotive; that's all I know. 30

Q He fell off the locomotive. What part of it? A The steam chest.

Q Up on the steam chest. About how high from the ground is that? A I don't even know the height.

Q Can you point to something in the room to indicate about the distance from the ground to the platform? A I guess about as high as this piece of tin across that calendar. 40

Walter Reed, cross.

Q When you stood next to it would it be above your head? A No.

Q How high would it come here, about, up to your shoulders? A About the shoulders; about five feet.

10 Q About five feet. He fell to the ground, you say. Was he taken away afterwards to the hospital, do you know? A Yes; he was.

Q After he had worked twenty or thirty minutes repairing this engine, and after he had been hurt, did they continue on the repairs? A Well, I done the best I could with it. I fixed it so they could go ahead with it for the night.

Q For the night? A Yes; I put the gland back on it; the pump gland.

20 Q The pump gland, you mean. What is that pump gland? A That is a nut like, sets over the packing box. You screw that nut after you put the packing in the pump; then screw that back again. They call it a gland; it is a nut like.

Q Was the work finished when you let the engine go out that night? A No, sir.

Q What did they do with the engine after that, the next day? A The next day they were up to take the engine to Jersey City for repairs.

30 Q To fix that part which had been left unfinished? A Yes.

Cross examination by Mr. Sennett.

Q The locomotive remained there in the yard that night? A Yes, sir.

Q What caused Bissett to fall off this locomotive, do you know?

40 Mr. Kalisch: I object to that as calling for a conclusion.

Walter Reed, cross.

A I couldn't really say.

Mr. Kalisch: He has answered. I withdraw the objection.

Q Describe more in detail this falling from the locomotive. Describe what you were doing. 10

A What I was doing?

Q What you and Bissett were doing? A We were packing the pump.

Q Yes. Then what happened? A Why, Bissett fell off.

Q Fell off? In what manner did he fall off? Did he slip? A No; he didn't slip; just fell off.

Q Do you know whether he fainted?

Mr. Kalisch: I object to that. 20

A I don't know whether he fainted or not; I don't know.

Mr. Kalisch: Withdraw the objection.

Q Was the locomotive moving? A The locomotive was standing still there.

Q Nobody pushed him? A No.

Q Did he collapse? A He just fell down; just went down; fell off the engine. 30

Q You mean he collapsed and fell off the engine? A Just fell down.

Q You saw no accident? A No.

Mr. Kalisch: I object to that as calling for a conclusion.

Q Did you see any accident?

Mr. Kalisch: I object to that. 40

Walter Reed, re-direct.

A All I saw him fall.

Mr. Kalisch: All right; the answer is in.

Q Just saw him collapse and fall? A That's all.

10 Q Did you ever know him to be subject to fainting spells or fits? A No, sir.

Q After this occurrence you tightened up the gland and let the locomotive go out? A Yes.

Q It was still under steam? A Yes, sir.

Q The engineer and fireman still with the engine? A Yes, sir.

Re-direct examination by Mr. Kalisch.

20 Q How long did you work on it that night after Bissett fell down, before you finished up? Before you did the work that you described? I mean how much longer after Bissett worked twenty or thirty minutes, did it take you before you could get the engine off the track back into the work? A Between the excitement and all it took me another half an hour, anyway.

30 Mr. Kalisch: That's all. I again make the offer of the certificate of death under the seal of the clerk, city clerk of the City of Newark, in connection with the death of Bert Bissett.

40 Mr. Sennett: The objection which was made at the last hearing is renewed at this time to the offer. I will admit the certificate to show the man died on a certain date, but it has a lot of secondary matter in there, a lot of conclusions I cannot consent to.

Mrs. Harriet Bissett, direct.

The Court: I really think the certificate is admissible to indicate the death, but whether it is admissible to indicate the cause of the death is a very debatable matter.

Mr. Kalisch: It doesn't make much difference, because the evidence is clear; all of the evidence is he fell from this engine, was taken unconscious to the hospital and died a few days later. 10

The Court: I don't think it makes any difference, then.

MRS. HARRIET BISSETT, the petitioner,
recalled as a witness by the respondent.

Direct examination by Mr. Sennett. 20

Q Do you know Dr. W. D. Minningham? A I didn't know him until I went to see him a few nights ago.

Q Did he treat your husband in St. Michael's Hospital? A I guess he only signed the death certificate, as far as I know.

Q Of your own personal knowledge, he didn't see your husband before his death? 30

Mr. Kalisch: I object to that unless the witness knows.

A I can't tell you; I don't know.

Mr. Sennett: That's all.

Mr. Kalisch: That's all.

The Court: (Referring to death certificate.) I will admit this to prove the death. 40

Certificates of Stenographer and Commissioner.

Mr. Kalisch: I want to take an exception to the limitation of the offer of this certificate.

The Court: That concludes the case?

Mr. Kalisch: That concludes the case.

10 (Case closed.)
(Decision reserved.)

I hereby certify that the foregoing is a true and accurate transcript of the above-entitled matter, as taken stenographically by me at the time, place and date hereinbefore set forth.

(Signed) WILLIAM C. O'BRIEN,
Court Reporter.

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I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter, as taken before me, at the time, place and date hereinbefore set forth.

(Signed) HARRY J. GOAS,
Deputy Commissioner,
Workmen's Compensation Bureau.

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Exhibit P. 1.

EXHIBIT P. 1.

CITY OF NEWARK

Essex County, State of New Jersey

(Seal)

UNITED STATES OF AMERICA

10

I, W. J. EGAN, City Clerk of the City of Newark, Essex County, State of New Jersey, do hereby certify that the following is a true and correct transcript from the Record of Deaths in my office.

1 Place of Death City Newark N J No St Michaels Hospital St

2 Full Name Bert A Bissett

(a) Residence No. 13 Stanton St

Length of Residence in city or town where death occurred yrs. mos. ds. How long in U. S., if of foreign birth? yrs. mos. ds.

20

Personal and Statistical Particulars

3 Sex Male

4 Color or race White

5 Single, Married, Widowed or Divorced Married

5a If married, widowed or divorced Husband of (or) Wife of Harriet A Bissett

30

6 Date of Birth May 19-1880

7 Age Years 42 Months 9 Days 16 If less than 1 day, . . . hrs. or . . . min.

8 Occupation of Deceased

(a) Trade, profession or particular kind of work Engineer

(b) General nature of industry, business, or establishment in which employed or employer . . .

(c) Name of employer

9 Birthplace Freehold N J

40

Exhibit P. 1.

Parents

- 10 Name of Father Frederick Bissett
- 11 Birthplace of Father N J
- 12 Maiden Name of Mother Harriett W Browne
- 13 Birthplace of Mother N J
- 10 14 Informant Wife
(Address)
- 15 Filed 3/6/, 1923 W J Egan Registrar.

Medical Certificate of Death

- 16 Date of Death March 5 1923
- 17 I Hereby Certify That I saw the deceased from.....19....., to, 1923 that I last saw h.....alive on....., 1923
- 20 and that death occurred on the date stated above at 8 P M.
The Cause of Death* was as follows:
Fall from Locomotive Accident
.....
.....(duration)yrs.....mos.....ds.
Contributory Occupational L V R R
(Secondary)
.....(duration)yrs.....mos. 34 ds.
- 30 18 Where was disease contracted if not at place of death? L & R R
Did an operation precede death? No Date of..
Was there an autopsy? No
What test confirmed diagnosis History & Exam
Signed W D Minningham, M. D.
(Address) Dep Co Phy
- 19 Place of Burial, Cremation or Removal
Freehold N J
Date of Burial 3/8/1923

Exhibit R. H. 1.

20 Undertaker Smith & Smith
Address C

WITNESS WHEREOF, I have hereunto
(SEAL) set my hand and affixed the seal of
said city this 4th day of August A. D.
1925.

W J EGAN 10
City Clerk.

I, W. E. Stubbs, Deputy Commissioner and
Secretary of the Workman's Compensation
Bureau, hereby certify the foregoing to be a
true copy of Exhibit (P. 1) 673 in this cause.

EXHIBIT R. H. 1.

LEHIGH VALLEY RAILROAD COMPANY. 20

DAILY LAYOUT CARD
T C M

May 22 1925

27 OAK ISLAND TFR	Station	Jan 30 1923	
Where	Car	Car	
Carded	Flag	Initials	Number
Pier 8 NR	1	DLW	39698
E 124 TH ST	2	NH	81861
E Port Ter	3	SAL	23187
Pier 34 NR	5	LI	3823
E 149 TH ST	6	CMSTP	54514
Greenville	7	L&N	103089
Pier 66 NR	9	CRIP	38887
Pier 44 ER	10	NKP	20348
Natl Docks 11	11	NH	79715
Wallabout	13	P&R	3658

30

40

Exhibit R. H. 1.

	Where Carded	Flag	Car Initials	Car Number
	Jay St TML	14	LV	77000
	GG DUFF			
	Pier E SPUR	15	ERIE	80005
	Long Island	17	LV	81542
10	B E D TML	18	B/4	43162
	Landsdown			
	& Way	19	B&O	192259
	Cedar Hill	21	ERIE	110221
	Bush Docks	22	GT	24955
	Manville	23	SOU	37073
	Bridgeport	25	ERIE	86987
	Bayonne	26	LV	83320
	Bound Brook			
	& Lincoln	27	CN	46928
20	Grand St.	29	MC	50522
	Granton Ter	30	NYC	S-182715
	Way &			
	New Market	31	DLW	33053
	Irvington	33	LV	82100
	Pier (& 97 ER	34	PMCKY	81284
	Stanton & Way	35	NYC	199754
	Newark	37	LV	74951
	Wallabout	38	LV	71598
	St. Geo Tfr	39	NYC	S-160946
30	Dirt Car	40	LV	72968
		41	LV	75523
		42	CNJ	30529
	Aldene	43	WAB	80450
	Comm Acety			
	Bound Brook	44	NH	73307
	Reading Tfr	45	MEC	8579
	Manchester	46	RI	37176
	Roselle Park			
	& Via	47	PL	536178
40	Courtland	48	LV	83583

Exhibit R. H. 1.

Where Carded	Flag	Car Initials	Car Number	
Bethlehem	49	NH	91992	
Manchester	50	LV	85969	
Hillside & Way	51	ACL	37409	
Easton	52	GT	34458	10
Manchester	54	LV	86018	
Wilson Ave	55	CBQ	114329	
P Burg Tfr	57	LV	72415	
Buffalo	58	B&O	171684	
Mt Carmel & Via	59	P&R	2908	
P Burg PRR	61	LV	82907	
Hazleton	62	NH	94138	
W Barre D&H	63	B&O	172285	
Wayne Jct	65	LV	78201	20
W Barre	66	NH	75772	
Pittston	67	ERIE	106154	
Pn Amboy	69	NH	80153	
Rochester	70	LV	73279	
Ironton RR	71	ERIE	111515	
Metuchen PRR	73	PRR	39618	
Sayre	74	BAR	7543	
So Lfield	75	PRR	12739	
Pier 34 NR	103	LV	87397	
Pier 66 NR	104	LV	78089	30
E 124TH St	116	LV	81875	
E 149TH St 11	118	NY C	216499	
Rochester	102	LV	79013	
W Barre	105	LV	84089	
Irvington	204	NYC	257067	
Irvington	136	LV	81408	
Newark	137	LV	77705	
E 149TH St	127	LV	87065	
Pier 8 NR	135	LV	87109	
Keasbey NJ	132	P&R	12172	40
Lenox NJ	233	UP	125993	

Notice of Appeal.

I, W. E. Stubbs, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, hereby certify the forgoing to be a true copy of EXHIBIT RH-1 in this cause.

10

NOTICE OF APPEAL.

Filed October 7, 1924.

ESSEX COUNTY COURT OF
COMMON PLEAS.

 HARRIET A. BISSETT,

Petitioner,
*On Petition
for Com-
pensation.*

20

*vs.**C. P. 2281.*

LEHIGH VALLEY RAILROAD Co.,

Respondent.
*Notice of
Appeal.*

To Secretary of the Workmen's Compensation Bureau, Clerk of the Court of Common Pleas of the County of Essex, Messrs. Kalisch and Kalisch, attorneys for petitioner, or to whom it may concern:

30

Please take notice that the respondent hereby appeals to the Court of Common Pleas in and for the County of Essex from a determination of the Workmen's Compensation Bureau in the above-entitled matter dated the 26th day of September, 1924, in which judgment was entered on said date in favor of the petitioner and against the respondent as follows: That the respondent pay petitioner the sum of \$984.00, being compensation up to and including September

40

Notice of Appeal.

24th, 1924, and that the respondent shall pay to the petitioner the sum of \$12.00 a week for a further period of two hundred and eighteen weeks; \$100.00 in addition for funeral expenses and \$250.00 to Kalisch & Kalisch as part of counsel fee for services rendered at the trial of the above issue and costs to be taxed.

10

Respectfully,

COLLINS & CORBIN,
Attorneys for Respondent-Appellant.

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30

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Order Fixing Time and Place for Hearing Appeal.

**ORDER FIXING TIME AND PLACE FOR
HEARING OF APPEAL.**

Filed November 5, 1924.

ESSEX COUNTY COURT OF
COMMON PLEAS.

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HARRIET A. BISSETT, <i>Petitioner-Appellee,</i> <i>vs.</i> LEHIGH VALLEY RAILROAD COM- PANY, <i>Respondent-Appellant.</i>	}	<i>On Appeal.</i> <i>Order Fixing</i> <i>Time and</i> <i>Place for</i> <i>Hearing of</i> <i>Appeal.</i>
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It appearing that the above-entitled matter was tried before Deputy Commissioner Harry J. Goas, of the Workmen's Compensation Bureau, and determination of facts and rule for judgment entered against the respondent and in favor of the petitioner;

30

And it further appearing that certified transcript of record and transcript of testimony was filed with the Clerk of Essex County on October 29, 1924; it is, therefore, on the 3rd day of November, 1924,

ORDERED, and I do fix the 9th day of December, 1924, as the time for the hearing of the appeal in this matter, at the Court House, in Newark, New Jersey.

DALLAS FLANNAGAN,
 Judge of Essex County Court
 of Common Pleas.

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*Opinion.***OPINION.**

Filed May 11, 1925.

ESSEX COUNTY COURT OF COMMON
PLEAS.

HARRIET A. BISSETT,

*Petitioner,**vs.*LEHIGH VALLEY RAILROAD Co.,
Respondent.

10

Opinion.

For the appellant appear Messrs. Collins & Corbin.

For the petitioner appear Messrs. Kalisch & Kalisch. 20

FLANNAGAN, J.

The petitioner's deceased husband was a roundhouse or repair-shop foreman, employed by the respondent, Lehigh Valley Railroad Company, in repairing engines in its repair-shop located in the Oak Island yard of the respondent in the City of Newark, New Jersey.

While engaged in the performance of his duty, repairing a pump on a drilling or yard engine of respondent, deceased fell from the steam chest to the ground and was killed. 30

It is contended by the respondent that at the time of the occurrence, the deceased was engaged in interstate commerce, and that the state courts are without jurisdiction.

The Workmen's Compensation Bureau has found against the respondent, and respondent has brought the case here on appeal. 40

Opinion.

The duty to which the locomotive was assigned, upon which petitioner's deceased was working, confined it to the limits of the yard in the City of Newark. It was used only to shift cars from place to place in the yard. Some of the cars which it engaged in shifting were loaded with freight for points in other states; some were loaded with freight for local points in this State; some were partly loaded and some empty. The locomotive was used to assemble the cars in proper positions for loading, for unloading and to be hauled by some other locomotive to ultimate destination in this or some other state.

On the night when deceased was killed, the pump on the yard engine ceased to operate properly, and the engineer and fireman went to the repair-shop and advised the deceased. The deceased told the engineer to place his engine on track No. 1, and that he would make the repair, track No. 1 being a track used for minor repairs in general, as well as for usual yard purposes.

The engineer complied with these instructions and the engine being wholly separated from any cars the deceased commenced making the necessary repairs, but while doing so after working about twenty or thirty minutes, he fell, and was killed, as already stated. The repairs were proceeded with, after the deceased had fallen, by a machinist's helper who was working with deceased. He did sufficient to enable the engine, after about thirty minutes' work to proceed and continue with the work which had been interrupted by the failure of the pump to properly operate. The next day the engine was taken to Jersey City and the repairs completed there.

Opinion.

The deceased's duties were at all times performed within the limits of the City of Newark. The duty to which the engine was assigned confined it within the limits of that city. But it is contended that as the engine shifted at times cars loaded with freight consigned to points without the State, as well as cars loaded with freight consigned to points within the State, that the deceased was engaged in interstate commerce. 10

The fatal difficulty with this argument, in the opinion of this Court, is that the engine was at the time of the accident entirely separated from any cars, and was not engaged in any commerce, but had been withdrawn therefrom for repair.

Jason v. Pa. R. R. Co., 3 N. J. Ad. R. 199. 20
Price v. Central R. R. of N. J., 123 A. 756.
Herzog v. Hines, 95 N. J. L. 98.

The judgment of the Workmen's Compensation Bureau will therefore, be affirmed.

Dated May 7, 1925.

DALLAS FLANNAGAN,
 Judge.

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40

Statement of Facts and Determination.

**STATEMENT OF FACTS AND
DETERMINATION.**

Filed June 17, 1925.

ESSEX COUNTY COURT OF COMMON
PLEAS.

10

HARRIET A. BISSETT,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD Co.,

Respondent.

*Statement of
Facts and
Determina-
tion.*

20 A petition having been filed in the above-
stated matter for compensation by virtue of
the provisions of an act of the Legislature of
the State of New Jersey entitled "An Act pre-
scribing the liability of an employer to make
compensation for injuries received by the em-
ployee in the course of the employment, etc." approved April 4, 1911, together with the several amendments and supplements thereto and acts amendatory thereof, and the respondent having duly filed an answer to the said petition and a time and place for the hearing of the pe-
30 tion having been fixed by the Workmen's Com-
pensation Bureau of the Department of Labor in the State of New Jersey, and the same hav-
ing come on for a hearing before Commissioner Harry J. Goas on the said petition and answer, admissions in open court and testimony taken before the said Commissioner, and the said Com-
missioner having filed a determination of facts and order providing for compensation as fol-
40 lows:

Statement of Facts and Determination.

“That judgment final be entered in favor of the petitioner and against the respondent for nine hundred and eighty-four (\$984) dollars, being compensation up to and including September 24, 1924, and that the respondent shall pay or cause to be paid to the petitioner the sum of twelve (\$12.00) dollars a week for the further period of 218 weeks; one hundred (\$100) dollars in addition for funeral expenses and two hundred and fifty (\$250) dollars to Kalisch & Kalisch, as part of counsel fee for services rendered at the trial of the issue, and costs to be taxed,” and the respondent having given notice of appeal, and having perfected such appeal pursuant to the statute in such case made and provided, and this Court having set a time and place for the hearing of said appeal, the said appeal having come on for a hearing in the presence of Kalisch & Kalisch, attorneys for the petitioner, and Collins & Corbin, attorneys for the respondent, and the Court having considered the testimony taken before the Deputy Commissioner, and the argument of counsel, I do now find and determine from the evidence as follows:

1. That on or about the thirtieth day of January, 1923, the deceased, Burt Bissett, husband of the petitioner, was in the employ of the respondent as roundhouse foreman, at what is known as West Oak Island Yard, in the City of Newark, County of Essex and State of New Jersey.

2. That his wages were \$48.00 per week.

3. That on or about the thirtieth day of January, 1923, while engaged in the repair of an engine he fell several feet from the engine to

Statement of Facts and Determination.

the ground, causing injuries from which on March 5, 1923, he died.

4. That the respondent had due notice and knowledge of the accident and injury.

10 5. That the employment of Burt Bissett, was pursuant to Chapter 95 of the Laws of 1911, as subsequently amended and supplemented, commonly known as the Workmen's Compensation Act.

6. That by reason of the accident above mentioned the said Burt Bissett, husband of the petitioner, suffered a temporary disability from January 30, 1923, during all of which time he was confined to the hospital and at which place he died on March 5, 1923.

20 7. That at the time of the accident Burt Bissett was engaged in the repair of an engine wholly separated from any cars, not engaged in any commerce but withdrawn therefrom for repairs. That the engine was not interrupted in any interstate haul.

30 The duty to which the locomotive was assigned, upon which petitioner's deceased was working, confined it to the limits of the yard in the City of Newark. It was used only to shift cars from place to place in the yard. Some of the cars which it engaged in shifting were loaded with freight for points in other states; some were loaded with freight to local points in this State; some were partly loaded, and some were empty. The locomotive was used to assemble the cars in proper positions for loading, for unloading, and to be hauled by some other locomotive to ultimate destination in this or some other state.

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Statement of Facts and Determination.

8. That the petitioner has sustained the burden of proving that at the time of the accident the work at which the petitioner's intestate was employed brought such employment within the provisions of the Workmen's Compensation Act of the State of New Jersey.

9. That the accident and resulting death of Burt Bissett arose out of and in the course of his employment with the respondent. 10

10. That burial expense exceeded the sum of two hundred (\$200) dollars.

11. That at the time of the accident and resulting death the petitioner, and twins, Harriet Bissett, Jr., and Ruth Bissett, born February 16, 1913, wife and children respectively of the deceased, were members of the deceased's household and were entirely dependent upon the deceased for their support, and that they received such support from the deceased, and as dependents were entitled to 45% of his weekly salary for a period of 300 weeks from the date of his death, which would entitle them to the maximum payment under the Workmen's Compensation Act then prevailing of \$12.00 a week. 20

12. That an allowance of three hundred (\$300) dollars, will be made to Kalisch & Kalisch, for legal services rendered at the trial of this action, as and for a counsel fee in addition to the amount awarded as counsel fee by the Deputy Commissioner, which said counsel fee shall be paid by the respondent, and shall be taxed as part of the costs; also costs to be taxed against the respondent. 30

It is, therefore, on this 17th day of June, 1925,
ORDERED, that judgment final be entered in favor 40

Statement of Facts and Determination.

of the petitioner and against respondent for thirteen hundred and ninety-two (\$1,392) dollars, being accrued payments to May 25, 1925, plus one hundred (\$100) dollars funeral expenses, and respondent shall pay or cause to be paid to the petitioner the sum of \$12 a week for the remaining 184 weeks.

DALLAS FLANNAGAN,
Judge.

A true copy.

JOHN H. SCOTT,
Clerk.

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Judgment.

JUDGMENT.

ESSEX COUNTY COMMON PLEAS COURT.

<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p style="text-align: center;">36778</p> <p>HARRIET A. BISSETT, <i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>LEHIGH VALLEY RAILROAD Co., <i>Respondent.</i></p> </div> <div style="width: 35%; font-size: 3em; line-height: 1; padding-left: 10px;">}</div> </div>	<p><i>On Appeal from Work- men's Com- pensation.</i></p> <p style="text-align: right;">10</p> <p><i>By the Court.</i></p>
--	---

Judgment entered June 17, 1925.

Damage	\$1,392.00	
Costs	2.18	
		20
Total	\$1,394.18	

Kalisch & Kalisch, attorneys of petitioner. Judgment on Appeal from Workmen's Compensation Bureau by order of the Court was rendered on the seventeenth day of June, A. D. nineteen hundred and twenty-five, in favor of the petitioner Harriet A. Bissett and against the respondent Lehigh Valley Railroad Co. for the sum of thirteen hundred and ninety-two dollars (\$1,392.00), being accrued payments to May 25, 1925, plus one hundred dollars (\$100.00) funeral expenses and respondent shall pay or cause to be paid to the petitioner the sum of \$12.00 a week for the remaining 184 weeks. 30

An allowance of three hundred dollars (\$300) will be made to Kalisch & Kalisch for legal services rendered at the trial of this action and for counsel fee by the Deputy Commissioner which 40

Judgment.

said counsel fee shall be paid by the respondent and shall be taxed as part of the costs.

Judgment entered and signed June 17, 1925.

DALLAS FLANNAGAN,
Judge.

10 Book R-2 Common Pleas Judgments page 12.

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Consent and Rule for Substitution.

CONSENT AND RULE FOR SUBSTITUTION.

Filed June 6, 1925.

ESSEX COUNTY COURT OF COMMON
PLEAS.

HARRIET A. BISSETT, <i>Petitioner-Appellee,</i> vs. LEHIGH VALLEY RAILROAD COM- PANY, <i>Respondent-Appellant.</i>	}	On Petition for Compen- sation. Consent and Rule for Substitution.	10
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Upon the consent hereinafter noted of Messrs. Collins & Corbin, attorneys of record of the respondent-appellant, 20

ORDERED, that Messrs. Hobart & Minard be and they hereby are substituted as attorneys of record in the place and stead of said Messrs. Collins & Corbin as attorneys for said respondent-appellant.

Rule entered this 6th day of June, 1925,

On motion of

HOBART & MINARD,
Attorneys for Respondent-Appellant. 30

Consent is hereby given to the making and entering of the above rule.

COLLINS & CORBIN,
Attorneys for Respondent-Appellant.

*Reasons.***REASONS.**

Filed.

NEW JERSEY SUPREME COURT.

10

 HARRIET A. BISSETT,
Defendant-in-Certiorari,
vs.
 LEHIGH VALLEY RAILROAD COM-
 PANY,
Prosecutor-in-Certiorari.

 On
Certiorari.
Reasons.

20

The prosecutor files the following reasons upon which it will rely for the reversal of the determination of the Essex County Court of Common Pleas brought up for review by the Writ of Certiorari herein:

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1. Because the determination of the said Court confirming the determination of the Workmen's Compensation Bureau, was erroneous in that it was not justified by the evidence.

2. Because the said Court should have reversed the determination of the Workmen's Compensation Bureau for the reason that the determination of the said bureau, was not justified by the evidence.

3. Because the finding of said Court that Burt Bissett at the time of the accident of January 30, 1923, was working upon an engine not engaged in any commerce, but withdrawn therefrom for repairs, was not justified by the evidence.

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Reasons.

4. Because said Court should have found that Burt Bissett at the time of the accident of January 30, 1923, was working upon an engine engaged at that time in interstate commerce.

5. Because the finding of said Court that the defendant-in-certiorari sustained the burden of proving that at the time of the accident of January 30, 1923, Burt Bissett was engaged in intrastate commerce, was not justified by the evidence. 10

6. Because the Court should have found that the defendant-in-certiorari did not sustain the burden of proving that Burt Bissett at the time of the accident of January 30, 1923, was engaged in intrastate commerce. 20

7. Because the finding of said Court that Burt Bissett's death resulted from the accident of January 30, 1923, was not justified by the evidence. 20

8. Because said Court should have found that Burt Bissett's death did not result from the accident of January 30, 1923.

9. Because the finding of said Court that the accident, which it was alleged, resulted in the death of Burt Bissett, arose out of his employment, was not justified by the evidence. 30

10. Because said Court should have found that the accident, which it was alleged resulted in the death of Burt Bissett, did not arise out of his employment.

11. Because the finding of said Court that the accident, which it was alleged resulted in the death of Burt Bissett, arose in the 40

Reasons.

course of his employment, was not justified by the evidence.

12. Because said Court should have found that the accident, which it was alleged resulted in the death of Burt Bissett, did not rise up in the course of his employment.

10 Dated: August 11, 1925.

HOBART & MINARD,
Attorneys for Prosecutor-in-Certiorari.

Service of a copy of the written Reasons is hereby acknowledged this 25th day of August, 1925.

KALISCH & KALISCH,
Attorneys of Defendant-in-Certiorari.

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*Stipulation.***STIPULATION.**

NEW JERSEY SUPREME COURT.

HARRIET A. BISSETT, <i>Defendant-in-Certiorari,</i> <i>vs.</i> LEHIGH VALLEY RAILROAD Co., <i>Prosecutor-in-Certiorari.</i>	}	<i>On</i> <i>Certiorari.</i> <i>Stipulation.</i>	 10
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It is hereby agreed and stipulated by and between the attorneys of the respective parties hereto that the return day of the Writ of Certiorari herein be extended from August 10, 1925, to August 28, 1925.

20

KALISCH & KALISCH,
Attorneys for Defendant-in-Certiorari.

HOBART & MINARD,
Attorneys for Prosecutor-in-Certiorari.

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THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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On	}	James M. ...
		...
Contract	}	...
...		...

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...

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MARSHALL & HALL

Attorneys for Plaintiff

ROBERT S. ...

Attorney for Defendant

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed March 2, 1926.

No. 250, October Term, 1925.

NEW JERSEY SUPREME COURT.

10

HARRIET A. BISSETT,
Petitioner-Defendant,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY,
Respondent-Prosecutor.

Submitted October 15, 1925. Decided January 15, 1926. 20

B. was an employee of a Railroad Company. His work was the repairing of engines and cars in the yard of the Company. An engine used only for the shifting of cars from one place to another within the yard, while being so used, developed pump trouble. It was detached from all cars and taken to a track for repairs. B. while working upon the engine fell to the ground and sustained injuries resulting in death. After the accident to B. the temporary repairs were finished by B's helper and the engine was placed in service: Held, 30

(1) That a finding of fact in an application by B's widow for compensation that B. was not at the time of the accident engaged in interstate commerce had from the facts stated evidence to support it:

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Opinion of Supreme Court.

(2) That where a Trial Court's finding as to a fact is supported by evidence it will not be disturbed:

(3) That the Trial Court was justified in finding from the evidence that the fall sustained by B. was an accident.

10 On writ of certiorari to the Essex County Court of Common Pleas.

Before Justices Trenchard, Katzenbach and Lloyd.

For the respondent-prosecutor: Hobart & Minard, Esqs. George S. Hobart, Esq. of Counsel.

For the petitioner-defendant, Kalisch & Kalisch, Esqs. Isidor Kalisch, Esq.

20 The opinion of the Court was delivered by Katzenbach, J.

This case is before this Court upon a writ of certiorari directed to the Court of Common Pleas in and for the County of Essex. The writ brings up the record in a workmen's compensation case. On January 30, 1923, Burt A. Bissett was an employee of the Lehigh Valley Railroad Company. He was foreman at a round house in the Oak Island Yard of the Lehigh Valley Railroad Company near Newark, New Jersey. 30 His work was the repairing of engines and cars. In the yard there was an engine used for making up trains. The engine did not leave the yard. It was used only for shifting cars from one place to another in the yard. On January 30, 1923, this engine, while being used, developed pump trouble. It required repairs. The engineer and firemen so informed Bissett. He told them to place the engine upon Track No. 1, which was a track used for placing engines or cars in need of repairs. This track was also used 40

Opinion of Supreme Court.

for the usual yard purposes. The engine was placed on this track. Bissett climbed up on the engine for the purpose of making repairs to the pump. While thus engaged he fell from it a distance of twelve or fourteen feet and received injuries from which he died on March 5, 1923. A helper who had been working with Bissett finished the repairs, after the accident. The engine was then again placed in service upon the work which was interrupted by a pump trouble. The repairs made by Bissett's helper were temporary. The engine was on the day following taken to Jersey City for permanent repairs.

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Bissett's widow filed a petition with the Workmen's Compensation Bureau for compensation. A hearing was had before Deputy Commissioner Goas. He held that Mrs. Bissett had sustained the burden of proving that at the time of the accident Bissett was employed within the provisions of the Workmen's Compensation Act; that the accident to Bissett and his resulting death arose out of and in the course of his employment; and that the petitioner was entitled to compensation. An appeal was then taken to the Essex County Court of Common Pleas. Upon the testimony taken before the Deputy Commissioner the Court of Common Pleas affirmed the award of compensation. The Lehigh Valley Railroad Company then made application for a writ of certiorari to bring the case to this Court for review. The writ was allowed.

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The prosecutor advances two grounds for reversing the judgment of the Essex County Court of Common Pleas. The first is that Bissett at the time of the accident was engaged in inter-

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Opinion of Supreme Court.

state commerce, and was not, for that reason, within the provisions of the Workmen's Compensation Act, and that the petitioner (Mrs. Bissett) did not sustain the burden of proof cast upon her of showing that her husband was within the provisions of said act at the time he received his fatal injury.

10 The second ground advanced by the prosecutor is that the finding that Bissett's death was the result of an accident was not justified by the evidence. The second ground we think not difficult of disposition. The evidence is that Bissett after working some twenty or thirty minutes on the engine fell, became unconscious and was taken to the hospital. The workmen who testified to his fall could not tell what was the cause of the fall. The prosecutor argues from this
20 that it must have occurred through illness or faintness. There is no testimony that Bissett was ill or subject to fainting spells. We think from the testimony as to the fall and the absence of any testimony tending to show that Bissett had any tendency to fall through faintness, that the Court was justified in drawing the inference from the facts heretofore recited that the fall sustained by Bissett was an accident.
30

The question as to whether or not Bissett at the time of the accident was engaged in interstate commerce and hence not within the provisions of the Workmen's Compensation Act presents a difficult question for decision. The answer seems to us to depend upon whether or not the engine upon which Bissett was working at the time of the accident was then in use in interstate commerce or had been withdrawn from service. If it had been withdrawn from service
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Opinion of Supreme Court.

then this case falls within the doctrine of several cases recently decided in the courts of this State. The leading case in this State on this subject is *Herzog vs. Hines, Director General, etc.*, 95 N. J. L. 98. In this case Herzog was employed in the New Durham yards of the West Shore Railroad Company as a car repairer. The yard was used for the making up of freight trains, both interstate and intra-state, for the storage of cars, and for the repair thereof. Herzog was repairing a freight car. He was called from his work to look at another car which had just been repaired. Upon his return to the car upon which he was working he attempted to crawl under one of several cars which were coupled. At that moment the cars were moved. Herzog was injured. He instituted a suit to recover damages for his injuries under the Federal Employers' Liability Act. It was necessary in that action for Herzog to show that he was engaged at the time of the accident in interstate commerce. The Trial Court held he had in this respect failed in his proof. A non-suit was entered. This judgment of non-suit was affirmed by the Court of Errors and Appeals. The ground of the decision was that while the repair work was being done to an instrument of commerce, yet at the time of the accident the car was entirely out of commission. The opinion in the Herzog case cites a case decided in the U. S. Supreme Court (*Minneapolis & C. Railroad Co. v. Winters*, 242 U. S. 353). The facts in that case are quite similar to the facts in the present case. In the *Winters* case the plaintiff received his injury while repairing a locomotive engine. The engine had been used in interstate commerce before the accident hap-

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10 pened, and was so used afterward. There was nothing, however, to show that it was permanently devoted to such commerce. It was held that the facts did not present a case within the Federal Act. The Court said, "Is it not like the matter of repairs upon a road permanently
10 devoted to commerce among the States. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in any interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the
20 moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

The Herzog case was followed in the Court of Errors and Appeals by the case of *Price v. Central Railroad of New Jersey*, 99 N. J. L. 425. In this case an employee of the Central Railroad Company was killed. He met his death
30 while engaged in repairing a car. The car upon which he was working was not engaged in any specific line of transportation but was used in both interstate and intra-state commerce, as occasion might require. It was held in this case that the employee at the time of the accident was not engaged in interstate commerce.

This case was followed in the same court by the case of *Jayson v. Pennsylvania Railroad Company*, 127 Atl. Rep. 169. In this case Jayson had his left hand injured while driving
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a spike upon a car at the shops of the Pennsylvania Railroad Company at Kearny, New Jersey. The car had been withdrawn from use in order that the repairs thereto might be made. The injured man presented a petition for compensation to the Workmen's Compensation Bureau. Upon the facts presented, as stated, it was held that he was engaged in intra-state commerce at the time of the accident. This decision was affirmed by the Court of Errors and Appeals. In the Federal Courts are similar decisions. 10

In the present case the Essex County Court of Common Pleas found as a fact "That at the time of the accident Burt Bissett was engaged in the repair of an engine wholly separated from any cars, not engaged in any commerce but withdrawn therefrom for repairs. That the engine was not interrupted in any interstate haul." In other words he was not engaged in interstate commerce at the time of the accident. 20

We think there is evidence in the case which supports this finding. When the pump trouble developed and the engine could not be used without repairs, it was detached from all cars and was taken to Track No. 1. It certainly was not then engaged in interstate commerce. It was idle and disabled. It has been withdrawn from the use to which it had been put. It had to be repaired before it could be again used. It was so repaired. During the making of these repairs Bissett was injured. 30

It is settled that where a trial court's findings of fact are supported by evidence they will not be disturbed. *Kauffield v. G. F. Pfund & Sons*, 97 N. J. L. 335.

The judgment here under review will therefore be affirmed. 40

Order of Affirmance.

ORDER OF AFFIRMANCE.

Filed March 11, 1926.

This matter having been argued at the October term of this Court, Collins & Corbin, appearing for the prosecutor, and Kalisch & Kalisch, *contra*, and the Court having considered the argument of counsel, it is, therefore, on this eighth day of March, 1926,

ORDERED that the judgment in the above-entitled cause be and the same is hereby affirmed with costs.

For the Court by

THOMAS W. TRENCHARD,
J. S. C.

Rule entered this eleventh day of March, 1926.
On motion of

KALISCH & KALISCH,
Attorneys of Petitioner.

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Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed March 23, 1926.

NEW JERSEY SUPREME COURT.

HARRIET A. BISSETT, <i>Petitioner-Defendant,</i> <i>vs.</i> LEHIGH VALLEY RAILROAD COM- PANY, <i>Respondent-Prosecutor.</i>	}	<i>Notice and Grounds of Appeal.</i>	10
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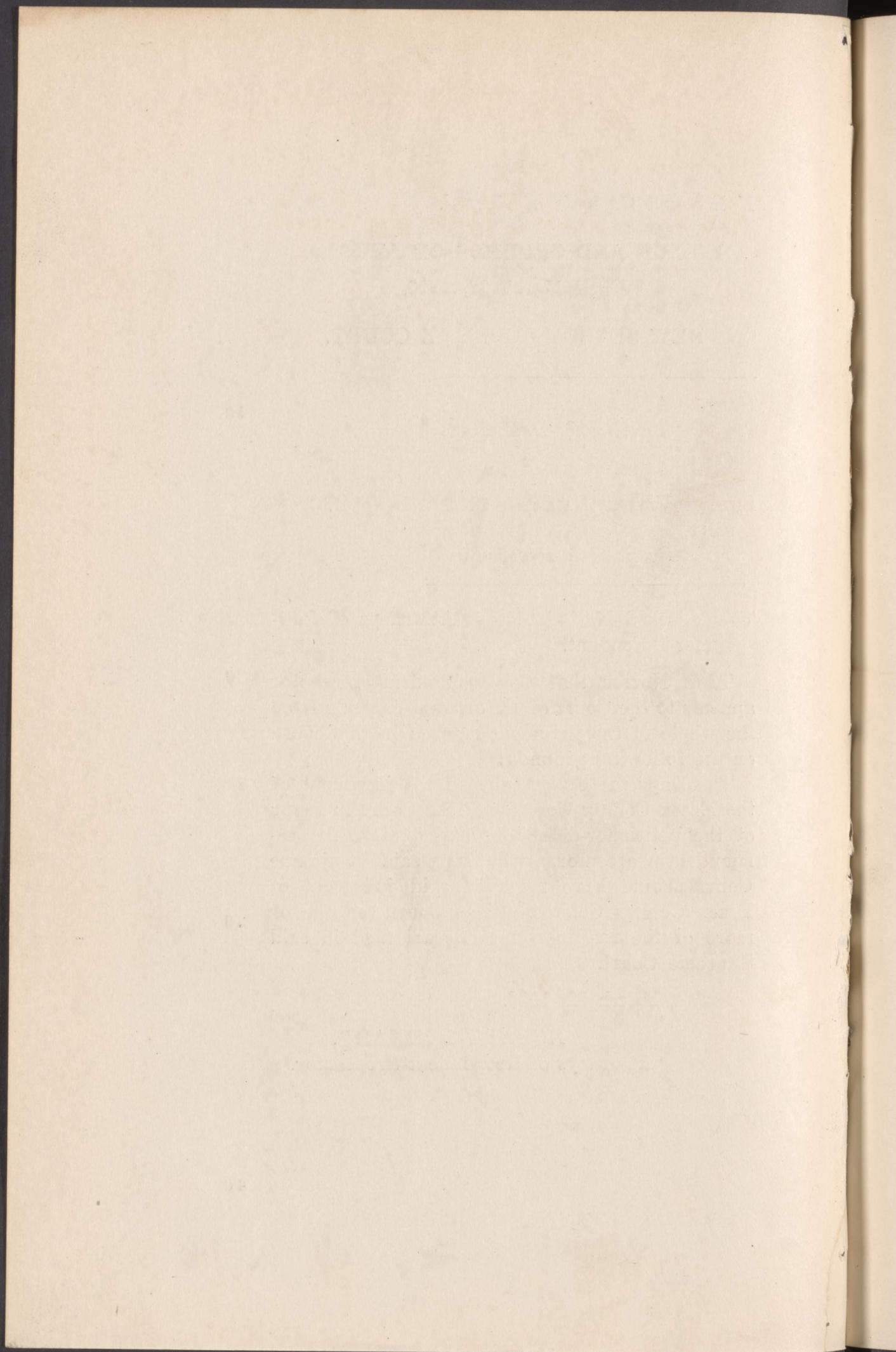
To Kalisch & Kalisch, Esqs., Attorneys of Petitioner-Defendant.

TAKE NOTICE that the respondent-prosecutor 20
appeals to the Court of Errors and Appeals from
the whole of the judgment entered in this cause
on the following grounds:

The Supreme Court affirmed the judgment of
the Essex County Common Pleas Court in favor
of the petitioner-defendant and against the re-
spondent-prosecutor, whereas said Supreme
Court should have reversed said judgment of
Essex County Common Pleas Court for one or 30
more of the reasons on certiorari filed in said
Supreme Court.

Dated, March 22, 1926.

HOBART & MINARD,
Attorneys of Respondent-Prosecutor.



79 MAY.T.1926

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HARRIET A. BISSETT, <i>Respondent,</i>	} <i>On Appeal from Supreme Court.</i>
<i>vs.</i>	
LEHIGH VALLEY RAILROAD COM- PANY, <i>Appellant.</i>	

BRIEF OF HOBART & MINARD IN FAVOR OF APPELLANT.

(1)

Statement of the Case.

This appeal brings up for review a judgment of the New Jersey Supreme Court, affirming a judgment of the Essex Common Pleas which in turn affirmed an award of the Workmen's Compensation Bureau in favor of the respondent, Harriet A. Bissett, on a petition filed by her with said Bureau as the widow of one, Burt Bissett, who had been in the employ of the appellant as a round-house foreman at its Oak Island yard near the city of Newark.

On the date of the alleged accident on January 30, 1923, the decedent was called upon to make certain small repairs to a pump on engine No. 3451. This was a drill engine regularly assigned to the Oak Island Transfer yard. At that point less than carload shipments from all over the country are classified and unloaded and shipments consigned to the same destination are reloaded into the same cars. The work of engine No. 3451 consisted exclusively in shifting the loaded cars from the transfer platform and mak-

ing them up into trains. The majority of the trains made up by this engine on the night in question were destined to points outside of the State of New Jersey. While the engine was engaged in thus making up these trains, pump trouble developed which required immediate repair so that the engine could continue its work. The engine was accordingly moved to what is known as track No. one. This is an ordinary yard track and was not used as a repair track any more than any of the other yard tracks. The time ordinarily consumed in making the repair to the pump, as was required in this case, is about twenty minutes. Bissett and his helper were standing on the firebox of the engine in the act of fixing the pump when Bissett was seen to suddenly collapse and fall to the ground, a distance of about five feet. He was removed later to St. Michael's Hospital, Newark, where he remained until March 5, 1924, on which day he died.

In the petition filed by the respondent with the Compensation Bureau she asked for compensation on the ground that the compensation statute was applicable and that his death resulted from the fall.

The appellant filed an answer in which the following defenses were set up:

1. The Compensation Bureau did not have jurisdiction of the subject matter or of the parties and required the petitioner to prove that the decedent was engaged in intrastate commerce at the time of the alleged accident and that the New Jersey Compensation Act applied.

2. Decedent's death was not the result of an accident arising out of or in the course of his employment.

3. Decedent did not meet with an accident within the meaning of the Compensation Act.

The Compensation Bureau made an award in favor of the respondent. From this award an appeal was taken to the Essex Common Pleas, which affirmed the award. Thereupon the appellant procured a writ of certiorari. The New Jersey Supreme Court, on January 15, 1926, filed an opinion affirming the judgment below. See State of Case, pages 121-7.

The opinion is reported in IV N. J. Adv. Reps. of March 13, 1926, at page 519; also in 132 Atl. page 32.

After the entry of judgment in the Supreme Court an appeal was taken to this Court.

(2)

GROUND OF APPEAL.

The Supreme Court affirmed the judgment of the Essex County Common Pleas court in favor of the respondent and against the appellant, whereas said Supreme Court should have reversed said judgment of Essex County Common Pleas court for one or more of the reasons on certiorari filed in said Supreme Court.

The Reasons are as follows:

1. Because the determination of the said Court of Common Pleas confirming the determination of the Workmen's Compensation Bureau, was erroneous in that it was not justified by the evidence.

2. Because the said Court should have reversed the determination of the said Bureau for the reason that its determination was not justified by the evidence.

3. Because the finding of said Court that Burt Bissett at the time of the accident of

January 30, 1923, was working upon an engine not engaged in any commerce, but withdrawn therefrom for repairs, was not justified by the evidence.

4. Because said Court should have found that Burt Bissett at the time of the accident of January 30, 1923, was working upon an engine engaged at that time in interstate commerce.

5. Because the finding of said Court that the defendant-in-certiorari (respondent) sustained the burden of proving that at the time of the accident of January 30, 1923, Burt Bissett was engaged in intrastate commerce, was not justified by the evidence.

6. Because said Court should have found that the defendant-in-certiorari (respondent) did not sustain the burden of proving that Burt Bissett at the time of the accident of January 30, 1923, was engaged in intrastate commerce.

7. Because the finding of said Court that Burt Bissett's death resulted from the accident of January 30, 1923, was not justified by the evidence.

8. Because said Court should have found that Burt Bissett's death did not result from the accident, of January 30, 1923.

9. Because the finding of said Court that the accident, which it was alleged, resulted in the death of Burt Bissett, arose out of his employment, was not justified by the evidence.

10. Because said Court should have found that the accident, which it was alleged resulted in the death of Burt Bissett, did not arise out of his employment.

11. Because the finding of said Court that the accident, which it was alleged resulted in the death of Burt Bissett, arose in the course of his employment, was not justified by the evidence.

12. Because said Court should have found that the accident, which it was alleged resulted in the death of Burt Bissett, did not arise in the course of his employment.

(3)

BRIEF OF THE ARGUMENT.**I.**

The respondent did not sustain the burden of proving that at the time of the accident the decedent was engaged in intrastate commerce. On the contrary, the evidence shows that the decedent and the appellant were engaged in interstate commerce. The Compensation Bureau of the State of New Jersey therefore had no jurisdiction of the case.

This Court has settled that in a proceeding to recover compensation under the state law the burden is on the petitioner to prove a case within the law.

Lincks v. Erie Railroad, 91 N. J. L. 166;
Carberry v. Delaware, etc. R. Co., 93 N. J. L. 414.

An engine which is engaged indiscriminately in both inter and intrastate commerce is an instrumentality of interstate commerce.

North Carolina R. Co. v. Zachary, 232 U. S. 248; 58 L. Ed. 591;

New York, etc. R. Co. v. Carr, 238 U. S. 260; 59 L. Ed. 1298;

Louisville & N. R. Co. v. Parker, 242 U. S. 13; 61 L. Ed. 119;

New York Central R. Co. v. Winfield, 244 U. S. 147; 61 L. Ed. 1045;

Mathison v. Payne, 98 N. J. L. 87 (affirmed 99 N. J. L. 285).

So far as relates to the question of interstate commerce, the facts are undisputed. The evidence shows that the crew of engine No. 3451 began the work of shifting the cars from the transfer platform, the making up of trains with loaded cars and the replacing of unloaded cars at the platform, a little after 6 o'clock P. M.; this was the "regular work" of this engine and of its crew and they had started this work at the usual time on the night of January 30, 1923, and were engaged in such work up to within a few minutes before the time of the injury to the decedent (p. 26, ll. 30 to 40; p. 30, ll. 1 to 30; p. 32, ll. 35 to 40; p. 39, ll. 20 to 30).

After the crew had been working for about two hours and a half trouble developed in the pump of the engine; the engine remained under steam with the engineer and fireman on board (p. 26, ll. 1 to 15). The repairs required were the packing of the piston of the pump. It was a "light job" which required about 15 or 20 minutes (p. 25, ll. 1 to 20).

When the pump trouble developed the engineer moved the engine to a track known as No. 1. This was in the same yard where the engine did its regular work; it was moved to this track in order to be at a convenient location with reference to the round-house (p. 28, l. 35; p. 30, l. 30). This track is one of the regular running tracks and is not devoted to repair work (p. 30, l. 35; p. 31, l. 10).

Repairs of this kind are made at wherever it is necessary within the yard limits (p. 22, ll. 5 to 15; p. 30, ll. 30 to 35; p. 31, ll. 1 to 10).

The decedent was a round-house foreman and was ordered to fix the engine pump (p. 22, ll. 18 to 20; p. 24, ll. 1 to 5).

While decedent was engaged in making these repairs he fell off the engine for some unknown reason (p. 26, ll. 20 to 30). The accident happened about 8:30 in the evening and after Bissett had been carried away his assistant, one Reed, finished the job and the crew resumed their regular night's work up to the end of their trick at 11 o'clock at night (p. 33, ll. 10 to 30; p. 53, ll. 10 to 30; p. 92, ll. 1 to 20).

Among the cars made up into trains on the night of the accident by the crew in charge of this engine were cars that were moved in trains known as J-D 1, which went to Buffalo and Manchester through the states of Pennsylvania and New York; J-S 1 for Wilkes-Barre and Hackettstown, Pa.; J-M 1 for Buffalo, N. Y.; first J-P 3 for Bethlehem and Easton, Pa.; second J-P for Plainfield, N. J.; the New York & Hartford train whose cars are transferred via piers 5, 8, 44 and 66 in New York City (pp. 41, 42). Other cars that were shifted by the engine on that night were destined for 124th street, New York City; Elizabethport Transfer, N. J.; Reading Transfer via Eastern Pennsylvania Junction; Pier 34 North River, N. Y., East 149th street, New York City; Greenville, Jersey City; Pier 66, New York City (pp. 72, 73). In all 48 cars were moved which went to various points in the states of New York, New Jersey and Pennsylvania (p. 74, ll. 1 to 30).

The shipments that were handled at the yard come from various points in the United States and Canada (p. 68, ll. 10 to 30). The daily layout card (Exhibit R. H. 1) for January 30, 1923, shows that about 75% of the cars that were shifted were consigned to points outside the State of New Jersey.

The evidence shows without dispute that on the night of the injury to the decedent the engine was doing its regular work, that is, it was used exclusively for a certain task to which it had been specifically assigned, to wit, the shifting of cars at the Oak Island Transfer. The laborers who unloaded and reloaded cars at the transfer station finished their work at 6 P. M. and it was then the duty of the crew of engine 3451 to take out the cars that had been loaded, arrange them for their trains and then put empty cars at the platform in preparation for the next day's work.

At about 8:30 P. M. on the night of January 30, 1923, this work was temporarily interrupted for the purpose of making the "light" repairs to the engine, and after Bissett's assistant had completed these repairs to the extent that it was possible for the engine to resume its regular work, it in fact did so and finished same at 11 P. M. The engine was not removed to the round-house or to any repair track; the repairs were made while the engine was standing on track No. one, which is in the yard and devoted to repairs; and after the temporary interruption of a few minutes for the purpose of packing the engine pump the engine resumed and in fact completed the very job to which it had been specifically assigned.

If decedent at the time of the accident came within the provisions of the Federal Employers' Liability Act of April 22, 1908, the New Jersey Workmen's Compensation Act is not applicable, and the Bureau did not have jurisdiction. Second Employers' Liability cases, *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327; *New York Central R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045.

The Federal Act provides:

“That every common carrier by railroad, while engaging 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, or, in case of the death of such employee, to his or her personal representative * * *.”

That an instrumentality engaged indiscriminately in inter and intrastate movement is an instrumentality of interstate commerce and that one engaged in performing a service in connection with said instrumentality is engaged in interstate commerce is settled. The test applied is: Was the employee, at the time of the injury, engaged in interstate employment or in an act of his employment so closely related to or connected with or incidental to interstate commerce as to be a part of it?

In *Pederson v. D., L. & W. R. R.*, 229 U. S. 146, 57 L. Ed. 1125, it was held that the repair of a bridge in use as an instrumentality of interstate commerce was so closely related to such commerce as to be in practice and in legal contemplation a part of it. We quote (italics ours):

“Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. *Tracks and bridges* are as indispensable to interstate commerce by railroad as are *engines and cars*, and sound economic reasons unite with settled rules of law in demanding *that all of these instrumentalities be kept in repair*. The security, expedition, and efficiency of the commerce depend in large measure upon this being done. Indeed,

the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment used in interstate commerce. But independently of the statute, we are of the opinion that *the work of keeping such instrumentalities in a proper state of repair while thus used* is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (citing cases.) Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, *but only with the work of maintaining them in proper condition after they have become such instrumentalities, and during their use as such.*"

If the engineer or some other member of the crew of this engine had been injured on the night of January 30, 1923, in the course of his employment, there would be no question about the application of the federal statute. *New York Central R. Co. v. Winfield, supra.* Is the legal situation changed by reason of the fact that there was a brief temporary interruption in the interstate work of this engine for the purpose of making light repairs, and that the injury happened to the employe engaged in making such repairs? The answer to this question depends upon whether at the time of the accident

the engine was then in use in interstate commerce or had been withdrawn therefrom. The New Jersey Supreme Court concluded that the finding of the Essex Common Pleas that the engine was not engaged in any commerce was justified and that, therefore, the decedent was not engaged in interstate commerce at the time of the accident (p. 127, ll. 15 to 25). On this point the opinion says:

“We think there is evidence in the case which supports this finding. When the pump trouble developed and the engine could not be used without repairs, it was detached from all cars and was taken to Track No. 1. It certainly was not then engaged in interstate commerce. It was idle and disabled. It has been withdrawn from the use to which it had been put. It had to be repaired before it could be again used. It was so repaired. During the making of these repairs Bissett was injured.” (Page 127, ll. 25-35.)

The Court further held that where the findings of fact of the trial court are supported by evidence, they will not be disturbed, citing *Kaufeld v. G. F. Pfund & Sons*, 97 N. J. L. 335.

Granting that a finding of fact will not be reviewed when supported by evidence, the questions still remain whether the finding of the trial court in the present case *was a finding of fact, and likewise, whether such finding was supported by the evidence.*

When there is no dispute as to the facts or as to the inferences to be deduced therefrom, then the conclusion of the trial court is not a finding of fact, but is a finding of law. Here we have evidence which is without dispute so far as relates to the work of this engine, both before and after the accident; also so far as

relates to its regular assignment; also so far as relates to the nature of the repairs that were required; also so far as relates to the work which the employe was doing at the time of his injury. In other words, all of the facts upon which the question of interstate commerce *vel non* depend are without dispute.

The conclusion by the Essex Common Pleas, or by the referee or by the Supreme Court, that the engine had been "withdrawn" from commerce and was not engaged in any commerce at the time of the accident, is not a finding of fact, but is a conclusion of law from undisputed facts.

The legal question on this phase of the case resolves itself into this: At the time of the accident was the engine then in use as an instrumentality of interstate commerce, or had it been withdrawn from all commerce?

In view of the decisions of the United States Supreme Court, we respectfully submit that the answer to this question is free from doubt. There are several cases in that Court in which this point has been considered. In *Minneapolis, etc. R. R. Co. v. Winters*, 242 U. S. 353; 61 L. Ed. 358, plaintiff brought suit under the federal statute to recover for personal injuries while making repairs upon an engine. The opinion of that Court does not state the nature of the repairs, but the opinion of the state court of Minnesota shows that the work in which the plaintiff was engaged at the time of the accident was the placing of new tires on the driving wheels. For that purpose he was engaged in raising the front end of the engine and removing the timber upon which it had rested, so that the engine might be lowered to its proper place on the trucks.

While plaintiff was in the act of changing the position of one of the jacks, pursuant to the direction of the foreman, the front end of the engine dropped and crushed the plaintiff's hand. See 126 Minn. 260; 148 N. W. 106.

The facts as to the use of the engine are stated in the opinion of the United States Supreme Court as follows:

“This engine ‘had been used in the hauling of freight trains over the defendant’s line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff’s injury.’ The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21 after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for.”

The engine in the present case was assigned exclusively to the work at Oak Island Transfer and was, therefore, regularly engaged in both inter and intrastate commerce.

In the Winters case the Court further said (italics ours):

“It (the engine) was not interrupted in an interstate haul *to be repaired* and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen.* At the moment it was not engaged in either. Its character as an instrument of

commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events.”

Applying these principles to the present case, engine 3451 had *not* finished its interstate work at the time of the accident and it was expected to resume such work, and in fact did so after the repairs were completed. Its “next work” did not depend upon “remote probabilities or upon accidental later events,” but, on the contrary, its next work was intended to be and in fact was of an interstate character—exactly as it had been prior to the temporary interruption of such work for the purpose of light repairs.

The New Jersey Supreme Court in the opinion in the present case relies upon the decision of this Court in *Herzog v. Hines*, 95 N. J. L. 98 (decided November 15, 1920), which in turn relies upon the Winters case (*inter alia*).

In the *Herzog* case an employe brought suit under the federal statute, for injuries received while he was engaged in repairing a freight car which had been placed upon a deadhead track which, with another track, was used for the storage of freight cars which required repairs. These cars when in service were used indiscriminately in interstate and intrastate commerce. While working on the car he was called away by his superior to look at a car on another track, and then started to return to the car on track 27, upon which he had been working; and on his way he was injured by the movement of a car under which he was crawling for the purpose of reaching the car on track 27. Judgment of non-suit in an action brought under the Federal Act was affirmed on the ground that at the time of the accident “the car was entirely

out of commission, and was not being used for any purpose whatever" (95 L., p. 99).

The opinion in the Herzog case does not give the details as to the nature of the repairs to the car but an examination of the record of that case shows that the repairs thereto were "quite extensive," consisting of putting in new draft timbers; the car had been placed on the "dead-head track" for repairs on June 17, the accident occurred on June 20, and the repairs were completed and the car returned to service on June 28. (See State of Case, p. 15, ll. 15 to 20, and p. 37, ll. 20 to 40).

This is very different from the present case where the repairs would require only 15 or 20 minutes and the engine was not removed to a storage track or to a repair track, and the engineer and the fireman remained on board and steam was kept up so that the moment the repairs were finished the engine could at once resume its interrupted interstate work—which, in fact, it did so.

The New Jersey Supreme Court in its opinion in the instant case also cites the decisions of this court in *Price v. Central Railroad of New Jersey*, 99 N. J. L. 425, and *Jayson v. Pennsylvania Railroad*, 127 Atl. 169 (pp. 126, 7).

In the Price case the decedent was employed as a car inspector and repairer in Jersey City and was killed between 3 and 4 o'clock in the afternoon, while repairing one of the defendant's cars. The car upon which he was working was used in both intra and interstate commerce, as occasion might require. Its most recent run was on the morning of the accident, from Cranford to Jersey City, at which time it carried interstate passenger traffic. The opinion does not

state the nature of the repairs nor how long a time would be required to make same, but it is clear that there was no evidence to show in what class of commerce the car would be engaged after the repairs had been completed; and it is equally clear that at the time the repairs were being made it had been completely withdrawn from commerce.

In the Jayson case the opinion of this Court states that the accident occurred at the car shops of the company at Kearny where the employe was repairing the "platform" of a car. The employe was attempting to fix it, using certain spikes to fasten the boards and while so doing one of the spikes flew back and struck him in the eye (pp. 44, 45). The State of Case does not show when the car in question was taken to the shop or how long it remained there, nor whether it was customarily used in inter or intrastate commerce, or in both; but it does show that the car was empty and had been removed to a shop which was used exclusively for repair purposes. The repairs were of a substantial nature, to wit, the restoration of the back of the car that had been "pushed in" (p. 44, ll. 30 to 40).

A recent case in the U. S. Supreme Court (cited in our brief in the New Jersey Supreme Court but not mentioned in the opinion), is *Industrial Accident Commission v. Davis*, 259 U. S. 182, 66 L. Ed. 888 (decided May 29, 1922). There it was held that an employe was entitled to an award under the state law for injuries received while working in the general repair shops of a railroad company upon an engine that had been employed in interstate commerce, and was destined to be so employed again. The question was whether redress for the injury must be sought through the Workmen's Compensation

Act of California, or under the provisions of the Federal Act. The Court stated:

“The facts are not in dispute. It was stipulated that while Burton (the employe) was drilling and tapping the boiler of the engine, a piece of steel lodged in his left eye; that this was in the course of his employment and caused thereby, and occurred while he was performing service growing out of and incidental to the same.”

The engine had been sent to the repair shops for general overhauling and was partly stripped and dismantled. The accident occurred *two months* after the engine had been placed in the shop. The Court said (*italics ours*):

“We refrain from a review of our cases. They pronounce a test and illustrate it. We are called upon to apply it to the present controversy. The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; but so are all attached to the railroad company—official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically part of it, in order to displace state jurisdiction and make applicable the Federal act. And there is a difference in the instrumentalities. In some, the tracks, bridges and roadbed and equipment in actual use, may be said to have

definite character, and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character, according to circumstances; and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. *There may be only a placement upon a sidetrack or in a round house—the interruption of actual use, and the return to it, being of varying lengths of time; or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations—the relations of a workshop—its employments and employees having cause in the movements that constitute commerce, but not being immediate to it.*

“And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial, and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. *‘It was not interrupted in an interstate haul to be repaired and go on.’*”

The application of the above principles to the present case is apparent. The U. S. Supreme Court held that one of the circumstances to be considered is “the time taken for repairs—the duration of the withdrawal from use.”

And again the court pointed out, “it is this separation that gives character to the employment.”

The distinction is obvious between a case where an engine is removed to a repair shop for general repairs and remains there for two

months, and a case like the present where the engine is not removed to the shop and where the repairs require only a few minutes and where in fact the engine immediately resumes its interstate work after the repairs are made.

Another recent case in the U. S. Supreme Court (decided January 4, 1926, a few days before the opinion in the instant case was filed on January 15, 1926), further illustrates the point that a brief interruption in the use of rolling stock which is engaged in interstate commerce does not operate as a withdrawal of same from commerce. In *Minneapolis, etc. Ry. Co. v. Goneau*, U. S. Adv. Ops. of Feb. 1, 1926, p. 146; 70 L. Ed. — the plaintiff was employed as a brakeman on a freight train and recovered a judgment for personal injuries in an action based upon the Federal Act of April 22, 1908, and upon the Safety Appliance Act. The latter act affords certain protection to railroad employees while rolling stock is being "used." The train upon which plaintiff was employed broke in two by reason of a defect in the coupler. Plaintiff made an emergency repair which enabled the coupler to interlock and the two parts of the train were coupled together and the train resumed its journey. After proceeding a few feet it again broke and the plaintiff while again attempting to make emergency repairs lost his balance and fell backwards, sustaining the injuries for which suit was brought. The defendant claimed that at the time of the accident the defective car, being motionless, was not then in use and that the plaintiff was not engaged in a coupling operation but was doing repair work. Judgment for plaintiff was affirmed, the court saying:

"It is clear that the use of the defective car had not ended at the time of the accident,

although it was then motionless. A defective car is still in use when it has been moved with the train from the main line to its siding, to be cut out and left so that the other cars may proceed on their journey * * * and so it is while still in a section of the train on the main line to be coupled up and proceed on its journey as a part of the train."

In the course of the opinion the court also held that the plaintiff was not engaged in doing repair work although he had stated that he could not couple the train unless he "fixed" the coupler. But whether he be considered as a brakeman or as a repairman at the time of the accident the fact remains that under this decision a freight car is still in use, so far as relates to the application of the Safety Appliance Act, even though the train of which it forms a part, is motionless and the accident happens while a brakeman is in the act of making repairs to the car so that the train may proceed; in other words, the car in question in that suit was held to be still engaged in interstate commerce although at the moment of the accident it was standing still and could not be moved until light repairs had been made to it.

There are several other decisions of the U. S. Supreme Court which indicate that in the view of that court a brief temporary interruption of interstate service does not operate to withdraw the instrumentality from interstate commerce.

In *Johnson v. Southern Pacific Co.*, 196 U. S. 1; 49 L. Ed. 363; one of the questions was whether a dining car was in use as an instrumentality of interstate commerce during the period of a few hours when it had not actually entered upon its interstate trip, but was being held to await the arrival of an interstate train by which

it was to be picked up. The claim of the company was that the car was not "used in moving interstate traffic" within the meaning of the Safety Appliance Act until the car was actually engaged in an interstate movement or was being put into a train for such use. The Court held that the Safety Appliance Act applied, saying:

"Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

In *Delk v. St. Louis, etc. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, a car containing an interstate shipment was taken out from the train for the purpose of repairing a defect in the coupler. The car had been taken out at 7:30 A. M. on October 3d and remained out of the train until 10 or 11 o'clock on October 4, when the accident occurred. The majority of the Circuit Court of Appeals, for the 6th Circuit, held that the car was engaged in interstate commerce, saying, "the plaintiff-in-error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not reached its destination, and it was not then ready for the delivery to the consignee, wherewith the commerce would have ended. Its stoppage in the yard was incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and the car was being hauled upon the track when the accident occurred." See 158 Fed. 931. The U. S. Supreme Court said:

"We concur with the majority of the court below that the car in question was being used in interstate traffic when the plaintiff was injured."

In *Walsh v. New York, etc. R. Co.*, 223 U. S. 1; 56 L. Ed. 327 (one of the series of cases involving the constitutionality of the Second Federal Employers' Liability Act), the Court held that the act applied to the case of an employe who was injured while replacing a draw-bar on one of the cars which was then in use in interstate commerce, the accident being caused by the pushing of other cars against the one on which the employe was working. Of course it may be said as to this case that the fundamental question was the constitutionality of the federal statute, and apparently the point was not raised as to whether or not the car on which the employed was working had been withdrawn from interstate commerce while he was making repairs thereto.

In *Great Northern R. Co. v. Otos*, 239 U. S. 349; 60 L. Ed. 322, action was brought under the federal statute and under the Safety Appliance Act. Plaintiff was a switch foreman and was engaged in breaking up an interstate train. One of the cars therein had certain defects; it was marked for repairs and was to be switched to a repair track before proceeding. In the switching operation the plaintiff attempted to uncouple the car and was injured. The defendant claimed that the car had been "withdrawn" from interstate commerce. The Court overruled this contention and sustained a judgment for the plaintiff on the ground that the car had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination, citing *Delk v. St. Louis, etc. R. Co.*, 220 U. S. 580; 55 L. Ed. 590.

In *Chicago, etc. R. Co. v. Wright*, 239 U. S. 548; 60 L. Ed. 431, the employe was injured in a collision while taking a road engine from a point in one state to a repair shop in another state.

The Court held that the federal act applied, saying: "That the engine was not in commercial use, but merely on the way to a repair shop, is immaterial."

There are several decisions of the federal courts, other than those of the U. S. Supreme Court which illustrate the principle laid down by that court in *Industrial v. Davis*, *supra*, that so far as relates to equipment which is withdrawn for the purpose of repairs the application of the Federal Act depends upon circumstances and that among the circumstances "is the time taken for repairs—the duration of the withdrawal from use."

In *Northern Pacific R. Co. v. Maerkl*, 198 Fed. 1 (C. C. A. 9th Cir.), it was held that an employe was engaged in interstate commerce while making repairs to a freight car used indiscriminately in both classes of commerce, both before and after the repairs were made. The work was being done in a repair shop located on the main line of the company. The repairs consisted of the replacement of the center sills, ceiling and other parts of the car. It does not appear how long was required to make the repairs, but the accident happened on the second day that the employe, with others, was so engaged.

In *Baltimore & O. R. Co. v. Darr*, 204 Fed. 751 (C. C. A. 4th Cir.), an engine which was used by the company to haul interstate trains reached the end of its run and had been placed on a fire track to wait for the return trip, which was a few hours later; plaintiff was injured while making repairs to the engine while it stood on this track; the repairs consisted of replacing a bolt which had been lost from a brake shoe. Held, that the Federal Act applied. The decision was put on the authority of *Johnson v. Southern*

Pacific R. Co., *supra*, and also on the authority of *St. Louis, etc. R. Co. v. Delk*, 158 Fed. 931 (afterwards affirmed by the U. S. Supreme Court in 220 U. S. 580; 55 L. Ed. 590, *supra*).

In *Law v. Illinois Central R. Co.*, 208 Fed. 869 (C. C. A. 6th Cir.), a boiler maker was injured while assisting in the repair of an engine which was regularly in use in interstate commerce; the engine had been placed in the shop for repairs and had been there for 21 days; two days after the accident it was returned to its interstate service. Held, that the employe was engaged in interstate commerce.

In *Chicago, etc. R. Co. v. Kindlesparker*, 234 Fed. (C. C. A. 6th Cir.), plaintiff was injured while repairing an engine which was engaged in both inter and intrastate commerce when in service. The engine had been placed in the shops for general repairs on April 15. The accident happened July 3rd. The repairs were completed July 4 and it was restored to service three days later. Judgment for plaintiff was affirmed, but this was reversed by the U. S. Supreme Court on the authority of the *Winters* case, *supra*. See 245 U. S. 658; 62 L. Ed. 925. It will be observed that in this case there was an interruption of the interstate character of the employment of the engine by its long withdrawal from service for a period of over two months for the purpose of general repairs.

In *Chicago, etc. A. R. Co. v. Allen*, 249 Fed. 280 (C. C. A. 7th Cir.), plaintiff was injured while repairing an engine which was used indiscriminately in interstate and intrastate commerce both before and after the engine had been taken out of service for the purpose of repairs. On the authority of the *Winters* case, *supra*, held that the act did not apply, it appearing that the

engine had been out of service for over two months prior to the accident, and that the repairs consisted of a general overhauling of the engine.

In *Atlantic Coast Line R. Co. v. Woods*, 252 Fed. 428 (C. C. A. 4th Cir.), plaintiff was operating a machine in a railroad shop used to cut threads or bolts. At the time of the accident he was threading a bolt which was to be placed on a particular engine which was regularly engaged in interstate commerce. On the day of the accident this engine had been taken out of its usual interstate trip in order that the bolt might be repaired. The engine had been placed in the shop prior to the accident and after the accident it went out the same day on its regular run. After referring to the *Winters* and other cases, the Court said:

“It (the case at bar) is easily distinguished from the *Winters* case because the character of the work in which the engine in this instance was employed did not depend ‘upon remote possibilities or upon accidental later events.’ ”

Judgment for plaintiff was reversed, as the action had not been brought within the time limit fixed by the Federal Act.

In *Central R. Co. of N. J. v. Sharkey*, 259 Fed. 144 (C. C. A. 2nd Cir.), plaintiff was engaged in repairing a car for which there was a “rush” order from Bayonne, N. J., to Philadelphia, Pa. The repairs consisted in bolting a coupler. Action was brought under the federal statute and judgment for plaintiff was sustained.

In *Scoggins v. Union Pac. R. Co.*, 292 Fed. 162 (D. C. Minnesota), held that a car repairer was not engaged in interstate commerce when it appeared that the car on which he was working at the time of the accident had been out of service

and in the shop from April 27 to June 10 (date of accident), and that the withdrawal from use was for the purpose of general repairs and rebuilding.

The Court said that the question as to whether an employe is engaged in interstate commerce resolves itself into a "question of degrees" and that where equipment used in interstate commerce is withdrawn for repairs, the employes engaged in making the repairs may or may not be engaged in interstate commerce according to circumstances, and that among these circumstances "is the time taken for repairs—the duration of the withdrawal from use."

In *Baltimore & O. R. Co. v. Kast*, 299 Fed. 419 (C. C. A., 6th Cir), judgment for plaintiff was affirmed in an action brought under the Federal Act to recover damages by an employe whose work was that of a machinist's helper at the defendant's round-house and repair shops. The accident happened while they were working on an engine which had finished an interstate trip and was taken to the round-house for "light running repairs." The engine was assigned to another interstate trip about ten hours later. This was its usual service both before and after the accident. Plaintiff had gone after material to be used in making the repairs on this engine and while walking through the yard the supper gong sounded and he went to get his lunch basket and while so doing, stepped upon a wrench and was injured. The trial judge charged the jury, as a matter of law, that at the time of the accident the plaintiff was engaged in interstate commerce, holding

1. That the mere fact that the plaintiff was on his way to lunch did not change the nature of his employment; and

2. That the repair work was part of interstate commerce.

In sustaining the judgment for plaintiff the appellate court, after citing the U. S. Supreme Court decisions in the Winters, Kindlesparker and Industrial Accident cases, *supra*, adopted the views of the trial judge on this phase of the case, as follows:

“In the instant case, the engine was placed in a roundhouse, and not sent to repair or construction shops. The engine was not really withdrawn from interstate commerce in order to make the repairs in question. It had merely completed its usual interstate trip and was making its usual lay-over before beginning its next trip, which it was then known would be in interstate commerce. During this usual lay-over, the employes were engaged in making the usual running repairs, such as can be made upon a side track, or in a roundhouse, and such as are usually made during a lay-over. The work in question was the legal equivalent of inspecting, oiling, firing, and preparing an engine, and getting it ready for an intended interstate trip, as in the Zachary case, or the replacement of a broken draw-bar, so that the car could resume its interstate journey, as in the Walsh case. While these running repairs were being made, there was not merely an expectation that the engine might thereafter start on an interstate trip, but the work was being done to enable the engine to start upon an interstate trip, and is therefore within the test stated by Mr. Justice Holmes in the Parker case. In my opinion, plaintiff and defendant were engaged in interstate commerce.”

This case is almost identical with the one now under consideration except that there the engine was out of service for about ten hours and it does not appear how long was ordinarily required for the light repairs; whereas, in the in-

stant case, the engine was out of service less than an hour and the repairs would ordinarily take only 15 or 20 minutes.

In *Connolly v. Chicago, etc. R. Co.*, 3 Fed. (2d) 818 (D. C. Washington), held on the authority of *Industrial Commission v. Davis, supra*, that an employe was not engaged in interstate commerce while repairing a locomotive which had been sent to the repair shops for the purpose of general overhauling and which had been in the shops for five months before the accident happened.

In *Davis v. Baltimore & O. R. Co.*, 10 Fed. (2d) 140 (C. C. A., 6th Cir.), action was brought for injuries sustained while plaintiff was replacing a broken coupler on a car which stood in the defendant's yard. Prior to the removal of the car to the yard for repairs it had been used in intrastate commerce; at the time the repairs were being made to the car it was not "under orders of consignment"; its next movement was from the yard (located in West Virginia) to a point in Maryland, where it was to be used in either interstate or intrastate commerce, as business might require. On the authority of the *Winters* and *Industrial Commission* cases, held that the Federal Act did not apply. The court, after reciting the facts, said:

"This presents a wholly different situation from a case in which a car is permanently assigned or specially devoted to interstate commerce, and is taken out of a train for trifling repairs, with the intention or purpose of continuing it in interstate commerce as soon as the repairs are completed."

* * * * *

"This car was not interrupted in an interstate haul to be repaired and continue its journey, nor was it actually employed in interstate commerce when taken out of service

at Ancelle and sent to the Keyser shop track for repair. For this reason we do not think the extent of the needed repairs or the length of time it was withdrawn from intrastate service, in which it was being used immediately prior to such withdrawal, helpful, much less controlling, in determining whether this car was or was not actually or constructively engaged in interstate commerce at the time plaintiff was injured."

There are also several cases in the state courts which illustrate the point that if a car or an engine is engaged generally in interstate commerce one of the circumstances upon which the question of whether it is withdrawn from commerce depends, is the nature of the repairs and the time required for making same. The following is a summary of these cases:

In *Loveless v. Louisville & N. R. Co.*, 75 So. 7 (Ala.), an employe was injured while repairing a car in the defendant's shop. The accident happened July 10. Up to July 2 the car was engaged in interstate commerce. After that date it was not used in any kind of commerce and on July 9 was put in the shop for repairs; after the repairs were made it was used in intrastate shipments. Held, that the federal act did not apply, citing the *Winters* case, *supra*.

In *Louisville & N. R. Co. v. Petris*, 206 Ala. 96, 89 So. 201, an action was brought for injuries to an employe while repairing a car which had been dropped from an interstate train for repairs during the night; the repairs were undertaken the next day. Held, that the car was not withdrawn from interstate commerce. The court says it is the relation of the work to interstate commerce at the time in question that characterizes it as an instrumentality in such commerce. The car being at the time empty,

the court further says that if an empty car is in the course of uninterrupted movement across state lines for future assignment or use in interstate or intrastate commerce, it is, at the time of such movement, so related to interstate commerce as to be an instrumentality of such commerce. During the course of such interstate movement it is an instrumentality in interstate commerce until its progress to destination has been so interrupted or deflected as to effect a withdrawal from such movement, and hence denude it of the character with which its interstate movement invested it.

In *Southern Pacific Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916 E., 916, the Industrial Commission of the state took jurisdiction of a claim for the death of an employe who was engaged in repairing a switch engine in the round-house. The engine in question and other similar switch engines were used in the railroad yard for handling both inter and intrastate commerce. About 70 per cent. of the work of these engines was interstate. The engine upon which the employe was working had been withdrawn from service on January thirteenth, the accident happened three days thereafter, and the engine returned to service on January 19. The Commission held that the employe was not engaged in interstate commerce. The Supreme Court of California reversed the decision on the ground that the conclusion of the Commission as to the nature of the employment was a conclusion of law (the facts being without dispute), and that on such facts the employe was engaged in interstate commerce and that, therefore, the federal statute applied to the exclusion of the State Compensation Law.

The opinion in this case is particularly helpful as it has a careful review of the federal decisions.

The U. S. Supreme Court denied a writ of certiorari to review this decision; and while this denial does not operate to establish any legal principle so far as the U. S. Supreme Court is concerned, it is of interest to observe that the denial was several months after the decision of the same court in the Winters case. That case was decided January 8, 1917. Writ denied May 21, 1917. (See 244 U. S. 653, 61 L. Ed. 1373.)

The Pillsbury case was decided in 1915; the Winters case in 1917. In October, 1920, another case arose in California which is reported under the name of *Hines v. Industrial Accident Commission*, 192 Pacific 859, 14 A. L. R. 720. In that case the employe was a machinist's helper and was making repairs upon a switch engine which had been temporarily withdrawn from service. The engine was not used exclusively in interstate traffic. The report does not show for how long the engine had been withdrawn from service. The prevailing opinion, however, states that the engine "had been withdrawn from all traffic." The repairs consisted in the adjustment of the engine brakes. An award of the Commission was sustained. Petition for certiorari was denied by the U. S. Supreme Court January 17, 1921 (254 U. S. 655, 65 L. Ed. 459).

In *Wallace v. N. Y., etc. R. Co.*, 121 Atl. 878 (Connecticut), there is an interesting discussion of the Davis case, *supra*, with reference to the application thereof to a railroad employe who is engaged in repair work. After commenting

on this and other cases the Connecticut court says:

“One of the factors to be considered in each case is the length of time that the repair work or maintenance takes. If it withdraws the instrumentality in use in commerce from such use for an unreasonable time, the instrumentality can no longer be held to be engaged in interstate commerce. What is an unreasonable time we can only determine upon a weighing of all the facts of a case. The test of whether a condition is reasonable or unreasonable is not infrequent in the law; it is never a definite standard, but it is the best courts have found. * * * It sufficiently appears that *Industrial Commission v. Davis* was reversed because the period of repair was an unreasonable time constituting a withdrawal of the engine from interstate commerce.”

The *Wallace* case held that the plaintiff was not engaged in repair work, but upon new construction, and that even if it had been repair work the crane upon which he was employed had been out of service so long that it could not be said to be a “temporary withdrawal,” and that, therefore, the plaintiff was not engaged in interstate commerce at the time of the accident. The crane had been removed from service on December 10 and the accident happened the following January 11 and it was returned to service January 17.

In *Sheehan v. Wabash Ry. Co.*, 214 Ill. App. 347, decedent was killed on the morning of July 9 while repairing a pipe of an engine while same was standing on a side track in the railroad yard. The engine had been placed on the side track the night before the accident for the purpose of having certain repairs made to it. The engine was regularly engaged in interstate commerce

both before and after the accident. The railroad claimed that it had not been actually assigned for an interstate run until two hours after the accident had happened. There was evidence to show that early in the morning of the accident and before it happened the engine in question was "marked up" on the bulletin board for the information of the repairmen indicating it was to make an interstate trip from the yard at Decatur, Ill., to St. Louis, Missouri. Held, that the federal act applied. Verdict for plaintiff affirmed.

In *Bishop v. Chicago, etc. R. Co.*, 217 Ill. App. 96. Held, that the Federal Act did not apply to the case of an employe who was killed while making repairs to a car when there was no evidence to show that while the car was being repaired it was designed or intended to be next used in interstate commerce. "On the contrary the evidence tends to show that it might have been used in either interstate or intrastate commerce."

In *Defenbaugh v. Union Pacific R. Co.*, 102 Kansas 569; 171 Pac. 647, plaintiff was engaged in making repairs to the roof of a freight car, which was standing on a track used exclusively for repair work. The car was empty. Its last trip was interstate. It had been placed on the repair track three days before the accident and the repairs were completed and the car was restored to service three days after the accident. It did not appear whether the car was used exclusively for interstate commerce, nor did it appear what its first service was after the completion of the repairs. On the authority of the *Winters* case, held that the federal act did not apply.

In *Illinois Central R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 119; 47 L. R. A. (N. S.) 31, it was conceded that the federal act applied to the case of an employe who was repairing a defective brake on a car which was standing on a side-track in the yard; the car was being put in order for use in interstate transportation and had been used and was to be used in carrying on interstate commerce.

In *Sterner v. Michigan Central R. Co.*, 204 N. W. 102; 231 Mich. 382, plaintiff was employed as a pipe fitter whose duty it was to repair pipes on locomotives, which were used in interstate commerce and was injured while on his way home to get something to eat. After a careful review of the various cases, including *Winters and Industrial Commission v. Davis*, *supra*, held that the federal act applied, the court saying:

“Locomotives are a part and an indispensable part in the movement of interstate commerce. They are an instrumentality and an important instrumentality in such movement; as important as the bridges and roadbed. Not only does every consideration of public safety demand that they be kept in repair, but the express mandate of Congress so requires. * * * These repairs may be so extensive as to temporarily take them out of service in such commerce, and they may be so minor as to require but a few hours of attention. Plaintiff was employed in such repair work, both large and small. Upon this record we hold he was engaged in the work of interstate commerce, and the remedy afforded by the Federal act was exclusive. It was unimportant that he was temporarily leaving defendant's grounds to get something to eat.”

In *New Orleans & N. R. Co. v. Beard*, 90 So. 727 (Miss.), held, on the authority of the *Winters* case, that the federal act did not apply to

the case of an injury to an employe who was repairing an engine which was regularly used in hauling interstate trains but at the time of the accident had been placed in the shops for a general overhauling and had been undergoing repairs for "several weeks" prior to the accident.

In *Parsons v. Delaware & H. R. Co.*, 153 N. Y. S. 178; 167 A. D. 536, held, that the Federal Act did not apply to the case of an employe who was repairing a foreign car which had passed through the state loaded and had gone back empty and had come into the possession of the defendant empty in the course of an interstate trip, and after the repairs, was sent to a point in the state to be loaded for an interstate trip. The car was in the repair shop for a period of thirty days.

In *Okrzesz v. Lehigh Valley R. R.*, 155 N. Y. S. 919, 170 A. D. 15, held that the Federal Act did not apply to an injury to a car repairer who was working on a car which had been used indiscriminately in both classes of commerce, but at the time of the injury had been taken out of service and was standing in a shop for repairs.

In *Kinsella v. New York Central R. Co.*, 175 N. Y. S. 363, 186 A. D. 856, an employe was injured while cleaning an empty freight car which was standing on a track in the yard. The car had recently made an interstate trip and after it had been unloaded was billed as an empty for another interstate trip; at the time of the accident it was standing on the track awaiting delivery to a connecting carrier. Held, that the federal act applied.

In *Conklin v. New York Central R. Co.*, 202 N. Y. S. 75; 206 A. D. 524, plaintiff was replac-

ing worn tires on a locomotive in the roundhouse. The last work done by the engine was in interstate traffic, but that work had been completed. At other times it was engaged in intrastate commerce. It was not destined especially for any particular kind of traffic. The Court held:

“It (the engine) was withdrawn from service, placed in the roundhouse repair shop, and remained there 5 days. The necessity for repairs did not arise from a cause which interrupted a run.”

Held, that the federal act did not apply.

In *King v. Norfolk & S. R. Co.*, 176 N. C. 301, 97 S. E. 29, plaintiff was injured while engaged in repairing the draw-head of a caboose in the defendant's yard; it had been customarily used and was to be used with trains hauling interstate freight. Held, that the Federal Act applied.

The U. S. Supreme Court denied certiorari. See *Norfolk & Southern R. Co. v. King*, 249 U. S. 599; 63 L. Ed. 795.

In *Chicago, etc. R. Co. v. Cronin*, 176 Pac. 919 (Ok.), held, that federal act did not apply to the case of an employe who was injured while jacking up a “broken down” or “dead” engine which had been placed in the roundhouse for repairs; the engine being used, when in service, to pull an interstate train.

In *Koons v. Philadelphia & R. Ry. Co.*, 114 Atl. 262 (Pa.), suit was brought against the defendant for common law liability. Judgment was entered for defendant and on the appeal of the plaintiff the question involved was whether the federal statute applied. The facts are stated as follows in the opinion:

“Decedent worked for the company as a laborer at its car shops at Rutherford, Dau-

phin County, Pa. While engaged in unloading a portion of a wrecked car, Mississippi Central No. 519, from a gondola, a hook attached to the hoisting device slipped, allowing the load to fall, causing the death of Koons. The official records of the company show this car was returning to its home route empty and was moving from Elizabethport, N. J., to Gettysburg, Pa., for delivery to the Western Maryland Railway. By continuous movement it reached Gettysburg April 18th. The next morning, during the shifting of cars, it was broken into two pieces. It was then loaded on a car and moved to the Rutherford shops the same day. On April 22d, while the car was being unloaded at the shop for repairs, Koons was killed. The new parts of the car consisted of girders and flooring, and when repaired, May 7th, it was taken to Gettysburg by the Western Maryland Railroad for home delivery."

Concluding that the federal act applied the Court said:

"Assuming the above-mentioned standard to be the correct one, does the fact that, while the instrumentality is thus engaged, it is disabled and temporarily taken away to a shop for repairs, alter its interstate character, the injury occurring on the instrumentality during its temporary absence? The answer to this question relates back to the first: What was it engaged in at the time it was disabled? If at that time it was in an interstate movement, its disablement does not suspend nor destroy that interstate character. The employment follows the kind of instrumentality through the delay in the repair shop until it returns to the transportation indicated; such being the fact in this case. This seems to be the doctrine in *Great Northern Ry. v. Otos*, 239 U. S. 349, 351, 36 Sup. Ct. 124, 60 L. Ed. 322; *Minneapolis, etc. R. R. Co. v. Winters*, *supra*; *Johnson v. S. P. R. Co.*, 196 U. S. 1, 5, 25 Sup. Ct. 158, 49 L. Ed. 363. If

temporary absence, by reason of disability, is sufficient to take it out of interstate movement, how long must the absence be to relieve it of such character? The true test in all such cases seems to be: Was its withdrawal temporary or permanent? We need not here determine what might control if the instrumentality was diverted to intrastate service after it left the repair shop."

In *Lorick v. Seaboard Air Line Ry.*, 102 S. C. 86, S. E. 675, held that the federal act applied to the case of a car repairer who was injured in the railroad yard while making repairs to the coupling of a car which, at the time of the accident, was in the course of interstate transit but had stopped temporarily for repairs before being delivered to a connecting carrier.

In *Cook v. Southern Ry. Co.*, 109 S. C. 377, 96 S. E. 148, the complaint alleged that the car upon which the decedent was working at the time of the accident was used by the defendant in interstate and intrastate commerce and was brought to the defendant's shop for repairs "a short time prior to said injuries," with a view to its being returned and continued in use by the defendant in such interstate and intrastate commerce; the complaint also alleged that the work of the decedent was at the top of the car and that while he was attempting to climb there by means of a ladder it slipped and he fell to the floor of the shop. The exact nature of the repairs is not stated, nor does it appear how long the car had been in the shop before the accident. Held, that these allegations were sufficient to show, as against a petition for removal to the federal court, that the employe was engaged in interstate commerce and therefore was within the federal act.

In *Missouri, etc. R. Co. v. Donahy*, 165 S. W. 529 (Texas), held that the federal act applied to the case of a car repairer who was injured while repairing a box car which had been and was to be used indiscriminately in inter and intrastate commerce. It is not stated how long the car had been out of service, the court saying:

“The car had been idle in the shop sometime before plaintiff was hurt, and during the time it was in the shop it was not used for either interstate or intrastate shipments, as it was there for repairs; but the character of its use should have been determined from the time before it was placed in the shop and its use after it was repaired.”

In *Payne v. Wynne*, 233 S. W. 609 (Texas), a railroad employe was killed while engaged in making repairs to an engine which was regularly used in hauling interstate and intrastate freight. The engine had been placed in the roundhouse on April 23, after it had finished its trip for that day and remained there until April 26 when the repairs were completed and the next day resumed its work. The accident happened on April 24. The repairs were described as “light or running repairs” of the tender. This had been cut loose from the engine. Plaintiff’s intestate was killed by the collapse of a jack which had been used to raise the front end of the tender. Held not engaged in interstate commerce.

In *Kuchenmaister v. Los Angeles, etc. R. Co.*, 172 Pac. 725 (Utah), held, that the federal act applied to the case of an accident to an employe who was injured while repairing a passenger engine which, before and after the accident, was used in interstate commerce; at the time of the accident the engine was in the roundhouse where it had been placed “a day

or so" before the accident to be "overhauled." The court distinguished the Winters case on the ground that under the facts of that case the engine on one day might have been engaged in interstate commerce while on the following day it might have been used in intrastate commerce and that the plaintiff therein had therefore failed to discharge the burden of proof that the engine in question at the time of the injury was engaged in interstate commerce, whereas in the Kuchenmaister case the undisputed evidence was that the engine both before and after the accident was exclusively used in interstate commerce and was being repaired so that it might be continued to be so used.

In *Utah Rapid Transit Co. v. Industrial Commission*, 204 Pac. 87 (Utah), held that the federal act did not apply to the case of an employe who was injured while repairing a car which, prior to the repairs, was engaged in both classes of commerce and after the repairs was used in intrastate commerce. The car had been taken out of the service on the morning of the day the repairs were made, and was to be returned to service when the repairs had been completed. How long the repairs occupied is not stated. The nature of the repairs is not stated except that it is said the employe "was engaged in repairing the roof."

In *Denver & R. Co. v. Industrial Commission*, 206 Pac. 1103 (Utah), held that the federal act did not apply to the case of an employe who was repairing a chisel which was used for making bolts which were to be used on an engine which was used, both before and after the accident, in intrastate traffic, the engine having been taken out of service for repair and remaining out of service for six days.

In *Larkin v. Industrial Commission*, 208 Pacific 500 (Utah), an employe was killed on May 4, while making repairs to an engine, which was used exclusively in interstate service. It had been taken out of service on April 27 and put in the repair shop and remained there until May 13. The repairs consisted of a testing of the main wheel, the reboring of the main driving boxes and some minor repairs. The court held that the employe was not engaged in interstate commerce.

In *Chesapeake & O. Ry. Co. v. Mizelle*, 118 S. E. 241 (Va.), plaintiff was injured while working on an engine which had been withdrawn from service for repairs which occupied about two months. Held, that he was not engaged in interstate commerce.

In *Lynch v. Central Vermont Ry. Co.*, 89 Vt. 363; 95 Atl. 683, held that the federal statute applied to the case of a road master who was assisting in making repairs to the brake beam of a caboose which had fallen down while the train, of which it was a part, was moving in interstate commerce.

In *Lauer v. Northern P. Ry. Co.*, 83 Wash. 465; 145 Pac. 607, it was conceded that the federal act applied to the case of a car repairer who was boring holes through brake shafts which were to be placed on cars used in interstate commerce.

In *Smigiel v. Great Northern Ry. Co.*, 165 Wis. 57; 160 N. W. 1057, plaintiff was engaged in repairing iron ore cars which were used solely in interstate commerce. At the time of the accident he was pressing back a steel sheet which formed the side and bottom of one of the cars.

How long the cars had been out of service is not stated. Held, that the federal act applied.

While it may not be possible to reconcile all of the various decisions, there are certain principles which may be said to be well established, to wit:

1. A temporary interruption in the movement of a car or an engine for the purpose of light repairs while the car or engine is in the course of interstate transportation does not remove it from commerce, and the Federal Act applies.

2. If the car or engine is removed to the shop or the roundhouse for the purpose of general repairs, the Federal Act does not apply even though the engine or car was used indiscriminately in both classes of commerce, provided its use after the repairs are made has not been definitely designated.

3. *Per contra*, in the event of such removal for such purposes, if the rolling stock has been definitely assigned to interstate commerce, then some of the cases hold that the Federal Act applies and others that it does not apply—the conclusion in each case being dependent upon the nature of the repairs and the duration of the withdrawal of the rolling stock from service.

In the present case the following facts appear without dispute:

1. Before the accident the engine was used indiscriminately in both classes of commerce.

2. The repairs were of a light nature and required only 15 or 20 minutes to complete.

3. The engine was not removed to the roundhouse but was placed on a track convenient to the roundhouse, which track was merely one of several yard tracks.

4. While the repairs were being made steam was kept up on the engine and some of the crew remained on board.

5. At the time the repairs were being made the engine was definitely assigned to continue the same kind of work which it had been doing prior to the accident.

6. After the repairs were made the engine in fact continued to do the same kind of work, to wit, the shifting of cars containing both classes of commerce.

Under these facts, we submit that the New Jersey Supreme Court was in error in holding that the engine had been "withdrawn" from commerce. If the conclusion of the court is correct under the circumstances of this case, then it follows that *any* interruption of an interstate use of rolling stock for the purpose of repairs operates to remove same from interstate commerce—no matter how trifling the repairs may be and no matter for how short a time the rolling stock may be out of use. True, as stated by the court, the engine "had to be repaired before it could be again used." But the same might be said of many of the cases above cited where the conclusion nevertheless was that the engine had not been removed from commerce and that the Federal Act continued to apply.

We therefore submit that the brief withdrawal of the engine from its regular interstate service did not deprive it of its interstate character, and that, therefore, the State Compensation Bureau had no jurisdiction.

II.

At the time of the accident the evidence shows that the decedent was preparing the engine for interstate service.

This engine was regularly assigned to the work of shifting cars containing both inter and intrastate commerce. At the time of the accident

it had already been designated for such service and, in fact, it performed such service as soon as the repairs had been completed. When the accident happened the work of the engine had not been finished; the crew, by which it was operated, was waiting to complete its trick and two of them, the engineer and the fireman, remained on the engine while the repairs were being made. The evidence shows without dispute that the repairs were for the purpose of putting the engine in proper condition to resume its regular work of interstate commerce. The preparation of an instrumentality of interstate commerce for use therein is itself a part of such commerce.

In *Kinzell v. Chicago, etc. R. Co.*, 250 U. S. 130; 63 L. Ed. 893, the court said:

“It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act.”
(Citing cases.)

Recent illustrations of the application of this principle are:

Erie R. R. v. Collins, 253 U. S. 77; 64 L. Ed. 790; and

Erie R. R. v. Szary, 253 U. S. 86; 64 L. Ed. 794.

In the *Collins* case the Federal Act was held to apply to a case where the employee was injured while operating a signal tower and pumping station—the tower being used for the operation of trains and the tank being used to supply locomotives with water which was pumped from a well into the tank by a gasoline engine.

In the Szary case the employe was charged with the duty of preparing sand in the sand-house of a railroad yard for use in engines engaged in interstate commerce. A necessary part of the work was the drying of the sand in stoves which it was the duty of the employee to attend. He was injured while on his way to get a drink of water after carrying ashes from one of the stoves to the ashpit. Held, that the Federal Act applied.

In *Hines v. Logan*, 269 Fed. 105 (C. C. A. 5th Cir.), the work of the employe was the inspection and repair of cars in a railroad yard containing cars that were used in both intra and interstate commerce. While he was passing through an open space between two cars he was killed by being caught between them on account of the impact from a third car which was being switched on the second track. Verdict for plaintiff was sustained on the ground that "he was inspecting, and wherever necessary, repairing cars which were being made ready for departure to several states."

In *Glidewell v. C. B. & Q. R. R. Co.*, 236 S. W. 677 (Mo.), Glidewell was employed as a blacksmith and was injured while carrying a drawbar to be placed in an engine undergoing repairs. Evidence showed the engine was regularly used in a run between Milan, Mo., and Quincy, Ill. In appealing from judgment for plaintiff, defendant contended there was no proof how long the engine had been out of service; whether it returned to service or whether it was used in interstate commerce after its return; and further that it was not shown the drawbar actually was put in the engine; and further that the engine was being repaired in a shop and not on a track waiting to go out on an interstate run. The

Court upheld judgment for plaintiff saying:
(Italics ours.)

“We think there is no question but that plaintiff was engaged in the furtherance of interstate commerce in repairing part of this engine. He was making this instrumentality of interstate commerce fit for the uses intended; that is, commerce between the states of Missouri and Illinois * * * We fail to see what difference it would make whether the work was being done in a blacksmith shop or while the engine was standing upon the track waiting to make an interstate run. It would make no difference where the work was being performed. *The place of the doing of the work was certainly not the test, but the character of the work being done; whether the work was being done in direct furtherance of interstate commerce or work so closely connected with interstate traffic as necessarily to become a part thereof; this is the test to be applied.*”

In *Mathison v. Payne*, 98 N. J. L. 87, (affirmed 99 N. J. L. 285), plaintiff was in the employ of the railroad company at its roundhouse, about a quarter of a mile from Oak Island Junction. His duties were to keep the fires up and water in the boilers of the engines which were run into the roundhouse and to give them general care. The engines were used in interstate and intrastate commerce. He was injured while riding to work on an engine of his employers. Discussing the question whether the decedent was engaged in interstate commerce, the New Jersey Supreme Court said:

“Lastly it is argued that the judgment should be reversed because there is no proof that the plaintiff at the time he was injured was engaged in interstate commerce. The proof tended to show that the plaintiff was employed at the roundhouse to take care of all engines without regard to their use, and,

therefore, we think that he was employed both in interstate and intrastate commerce and that when he went to his work and was returning from it he was engaged in both kinds of commerce.”

We therefore submit that regardless of whether at the time of the accident the engine had been withdrawn from all service, it at least was being *prepared* for service in interstate commerce to which it had been definitely devoted, and that, therefore, the Federal Act applied to the exclusion of the state law.

III.

The evidence does not show that the decedent fell from the engine because of an accident.

The record shows that while Bissett was working on the engine on January 30, 1924, he suddenly fell from the steam chest to the ground, a distance of about 5 feet. The engine was standing still at the time. No explanation is given of the cause of the fall. The only eye-witness, one Reed, said:

“Q What caused Bissett to fall off this locomotive, do you know?

A I couldn't really say.

Q What were you and Bissett doing?

A We were packing the pump.

Q Then what happened?

A Why Bissett fell off.

Q In what manner did he fall off? Did he slip?

A No, he didn't slip, just fell off.

Q Do you know whether he fainted?

A I don't know whether he fainted or not; I don't know.

Q Was the locomotive moving?

A The locomotive was standing still there.

Q Nobody pushed him?

A No.

Q Did he collapse?

A He just fell down; just went down; fell off the engine.

Q You mean he collapsed and fell off the engine?

A Just fell down.

Q Did you see any accident?

A All I saw him fall.

Q Just saw him collapse and fall?

A That's all.

Q Did you ever know him to be subject to fainting spells or fits?

A No, sir. (p. 92, l. 30 to p. 94, l. 10.)''

We submit there was nothing in this evidence to show that Bissett's fall was the result of an accident.

The Supreme Court held that in the absence of testimony tending to show that Bissett had any tendency to fall through faintness, the court was justified in drawing the inference that the fall was an accident.

We respectfully submit that this conclusion changes the burden of proof. The mere fact that Bissett fell from the engine comes very far from proving that he fell because of an accident—especially when the only eyewitness says specifically that he "*did not slip*" but "*just fell off.*"

We have here a case of a fall—not a slip—while the engine was standing still, unexplained and unaccounted for. True, there is no testimony that Bissett was ill or subject to fainting spells; but the burden was not upon the company to explain the fall. On the contrary, the burden was on the respondent, as the petitioner before the Compensation Bureau, to prove all the essential facts to bring the case under the provisions of the New Jersey Statute and one

of the facts necessary to be proven is the fact of an accident.

IV.

The evidence does not show that the death of the decedent was the result of the alleged accident.

Granting for the moment that there was evidence to justify the conclusion that Bissett fell from the engine by reason of an accident, the question still remains whether his death resulted therefrom. Here again the case is barren of proof. The record shows that after the accident on the night of January 30, 1924, Bissett was removed to St. Michael's Hospital in Newark where he died on March 5, 1924 (p. 47, ll. 30 to 40). An effort was made to show that his death resulted from the accident, but there is a complete failure of proof on this point. No physician was called and the only attempt made to show the casual relation between the alleged accident and the death of Bissett was the introduction of the death certificate signed by Dr. Minningham. This was admitted in evidence for the purpose of proving the fact that Bissett had died *but for no other purpose* (p. 94, l. 30 to p. 96, l. 10). All the certificate states on this point is "the cause of death was as follows:

Fall from Locomotive.
Accident."

The certificate further shows that there was no autopsy (p. 98, l. 35) and Dr. Minningham was not called as a witness. There is nothing in the certificate to show that the doctor ever saw Bissett until after the accident or until after he died; on the contrary, paragraph 17 of the certificate, in which are found certain

parts to be filled in with the dates when the certifying physician saw decedent, are entirely blank (p. 98, ll. 15 to 20).

It is obvious that the doctor did not see Bissett until after he had died as Mrs. Bissett testified that he died at twenty minutes of eight on March 5 (p. 47, ll. 35 to 40) and the doctor certified that his death occurred at 8 P. M. (p. 98, l. 20).

This point is included in the reasons and was discussed in the brief of the appellant in the Supreme Court, but is not mentioned in the opinion of that court.

In order to entitle the respondent to the benefit of the Compensation Act, there must be evidence to show not only that there was an accident, but also that the death resulted from the accident. Without such evidence, we submit that the respondent is not entitled to an award under the Compensation Act.

V.

The judgment of the Supreme Court should be reversed with instructions to reverse the judgment of the Essex Common Pleas and to direct that court to set aside the award in favor of the respondent and to dismiss the petition.

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New Jersey Court of Errors and Appeals

<p>HARRIETT A. BISSETT, <i>Petitioner,</i> <i>Defendant-in-Certiorari,</i> <i>Respondent</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>LEHIGH VALLEY RAILROAD CO., <i>Respondent,</i> <i>Prosecutor-in-Certiorari.</i> <i>Appellant</i></p>	}	<p><i>On</i> <i>Certiorari.</i></p>
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BRIEF OF DEFENDANT IN CERTIORARI. *Respondent*

Facts.

This was an action for Compensation, under Workmen's Compensation Act.

There is no dispute between the parties that "Oak Island" is a railroad yard of the prosecutor near Newark, New Jersey, in which switch engines were operated for the purpose of making up freight trains, which trains after being made up were designed for either inter- or intrastate use. On the date of the accident, January 30, 1924, the petitioner's intestate was a round house foreman in charge of repairing engines and cars. That this engine upon which petitioner's intestate was injured at no time in its work was driven out of the yard; some of the freight cars in the yard on the night in question were loaded with merchandise destined for points out of the State, and some for points within the State and some had no merchandise at all.

It will be observed that all the testimony in the case was elicited from employees of the railroad company with the exception of witness Reade, who at the time of the accident was an

employee of the company and assistant to the deceased. In view of this fact, it will be observed and the evidence will clearly corroborate the statement that the Petitioner had great difficulty in establishing her case. However, there are facts present and not contradicted, which will tend to support the theory upon which the Petitioner below rested her case.

The engineer, Dunphy, on the engine on which the petitioner's intestate suffered his injury and died as a result thereof, died before the trial of this case (p. 27, bottom of page, top of p. 28). Therefore, many facts which formerly might have been obtained for consideration at the trial were not obtainable, and all the testimony is from the mouths of present employees of the railroad company.

The engine developed pump trouble during its work and it was of such character that the engine could not operate without its repair; this is conceded in the first point of the Prosecutor's brief. While making the repairs, which repairs were assigned to the petitioner's intestate, he fell from the engine to the ground, became unconscious, was taken to the hospital and there after a few days died on March 5, 1923, at St. Michael's Hospital.

POINT I.

At the time of the accident petitioner's intestate was NOT engaged in interstate commerce.

Before going into the evidence particularly, we wish to suggest that the evidence fails to disclose that any of the freight cars which were drilled *before* the accident came from without the State of New Jersey. There was evidence that some of the cars which were being loaded

would, after they left the round house yards, be taken out of the State and some would stay in the State. The evidence also fails to disclose that the engine just previous to being taken to the tie-up track for repairs had been working in making an interstate haul, and there is nothing to show exactly what this engine was to do, even if the repairs could be completed in time for it to resume operations.

That the yards in which this engine was exclusively used were at least one thousand or two thousand feet from the main line (p. 28, bottom; p. 29, top). The engine's work was exclusively in these yards (p. 29, ll. 9 to 12; p. 52, ll. 20 to 23). That track No. 1 upon which the engine was brought for repairs was what was termed the tie-up track (p. 23, top of page), and the petitioner's intestate's work had to do with any repairing jobs on engines in the round house (p. 24, top of page), and that the engine was a regular yard engine assigned to work in the yards (p. 24, l. 11 and l. 23).

It is true that there is some contradiction between the railroad witnesses, whom the Petitioner was obliged to call owing to the fact that no other persons were at or near the scene of the accident, but the conclusions reached from their testimony were questions of fact for the Trial Court to decide, and the determination of these facts by the Trial Court, appearing on pages 108 to 112 inclusive, warrants our statement that the Court found that the engine was brought upon a tie-up track for repairs and that track No. 1 was used exclusively for that purpose. The Prosecutor attempted on its case to show that the engine was ready for use in making up freight and its service was not discontinued, and therefore attempted to show by wit-

nesses that certain of the crew were on the engine.

An examination of the testimony, however, will disclose that the crew were *not* on the engine. Witness Sankus, the fireman, was out eating his supper (p. 27, l. 32). Witness Nolan, conductor of the drill engine, was not there (p. 34, l. 22; p. 37, bottom), so it cannot be said that the crew were ready to take out that engine, nor did they have any idea that it could again work until repairs were completed, which this Court will observe were finally completed according to the testimony of witness Reade, the next day when the engine was taken to Jersey City for that purpose (p. 92, l. 26).

A capable claim department, after a serious accident where perchance a substantial sum of money must be paid by the railroad company, if the claim comes under the Compensation Act, may, of course, send the engine back for duty during the rest of the night even though the repairs are not completed, in order that the company may resist a claim that the accident came within the Compensation Act, and while there is no evidence that the claim department knew of the accident, still anyone having had any dealing with railroad companies knows their efficiency, and the fact that the claim department gets immediate notice of any untoward event that occurs. We are warranted in making this statement in view of the uncontradicted testimony of witness Reade, at page 92, that the work was not finished when the engine went out for the balance of the night, and that it was taken to Jersey City for repairs to be completed. In other words, the company caused a hiatus in the repairs, so as to avoid the conclusion that the engine had been withdrawn from service.

There is no attempt on the part of the railroad company to explain why another man did not come to the yards to complete what they call a minor repair, nor do they explain, and it is, of course, all within their knowledge, how long it took their employees at Jersey City to complete the necessary repair. The fact is that it must have been necessary to take it to their main repair plant, else why did the engine go there. The veracity of the employees was for the Court, and in view of their contradictory statements as to their whereabouts at the time of accident justified the Court in refusing to accept their testimony in toto.

It may be that the petitioner's intestate had been capable enough to make all the repairs necessary and his mouth has been closed by death, as well as the mouth of the engineer.

The Determination of Facts (p. 110) discloses that the Trial Court found that the engine was wholly separated from any cars, was not engaged in any commerce, but was withdrawn for repairs, and that the engine was not interrupted in any interstate haul; that the locomotive was only used to assemble the cars in proper condition for loading and unloading, and such cars were *to be hauled by some other locomotive to their destination either in or out of the State.*

There are numerous cases which support the Petitioner's theory and the finding of the Trial Court, later than such cases as *Pederson v. D., L. & W.*, 229 U. S., page 146, which case is cited by the Prosecutor, and these later decisions of the U. S. Supreme Court somewhat change the rule laid down in that case.

"A conductor of a switching crew engaged in shifting in the shop yards, cars which had come into the state in interstate com-

merce, and were destined to be returned to other states, some cars for repairs and others to be unloaded, was *not* engaged in interstate commerce." *Schauffele v. Dir. Gen.* (1921, 276 Fed. 115).

The Court said the evidence is that the movement of the cars was merely local and for purposes not connected with interstate commerce; the purpose was for repairs. This conclusion is identical with the issue at bar.

In *Industrial Acc. Comm. v. Davis* (1922), 259 U. S. 182, the United States Supreme Court held that the fact that an engine had been employed in interstate commerce and was intended for such use again did not bring its repairs within the Federal Act. And further on the Court continued that the employee at the time of the injury must be engaged in interstate transportation, or in work so closely related to it as to be practically a part of it, in order to give Federal jurisdiction, and though the car was brought in for repairs from an interstate trip and is assigned to an interstate trip when the repairs are completed, does not make the one engaged in the repair subject to the Federal law.

In *Bishop v. Chicago* (1920, 216 Ill. App. 96), the Court said that the car was not engaged in any commerce at the time it was being repaired, and without proof expressed or implied that it was being repaired for the specific purpose of next being used in interstate commerce, the Federal Act did not apply. To the same effect is *Payne v. Wynne* (1921), 233 S. W. 609.

It should be observed here that there is nothing to disclose that this engine was being prepared for an interstate job at the time of the repairs. The Prosecutor seems to argue that repairs on an engine or car upon interstate

tracks and during an interstate haul still retain Federal control, and with this argument we are in accord. It is to be remembered, however, that this situation is not present in this case, for this engine had never made an interstate haul, and its work was purely local and in the yards of the company at Newark. It does not even appear that the engine was hauling interstate freight at the time the necessity for repairs became apparent.

A very similar case to the one at bar is *Hines, Dir. Gen., etc., v. Ind. Acc. Com.*, 192 Pac. Rep. 859, there the finding of fact on which the Compensation award was based was to the effect that at the time of the injury and death the employee was making repairs upon a switch engine which had been *temporarily withdrawn* from service; that when in service the engine was used in both inter- and intrastate traffic. Here it will be remembered that this engine *never* left the yards. This finding of fact concluded by holding that the deceased was within the jurisdiction of the State Compensation Act, and not the Federal law. The body of the opinion goes on to quote, *Shanks v. D., L. & W. R. R. Co.*, 239 U. S. 556.

This case refers to *Erie v. Welsh*, 242 U. S. 303, where the yard conductor just previous to his accident had been engaged in handling a freight car into position where it could be included in an interstate train, and he had been injured while returning to the yard master's office for orders, and these orders required him to proceed immediately to make up an interstate train. The Court refused to subscribe to the conclusion that his act, at the moment of his injury, partook of the nature of the work that but for the accidental interruption he would be

called upon to perform; the Court thereupon held that the Federal Act did not apply.

The Hines opinion further refers to *Minn. R. R. Co. v. Winters*, 242 U. S. 353, there the plaintiff was making repairs upon an engine, and this engine had been used in both interstate and intrastate commerce, and was so used after the accident. The Court held that that was not sufficient to bring it within the Federal Act. The reasoning seems to be that there is a difference between repairs *upon a road permanently devoted to interstate commerce* and where an engine is not permanently devoted to any kind of traffic, or where it appeared that the engine was merely destined to do such work as became necessary from time to time. At the time of the repairs *this engine was not engaged in either*. Its character (so continues the opinion) as an instrument of commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events.

The Hines opinion further refers to the case of *B. & O. R. R. Co. v. Branson*, 242 U. S. 623, where Branson had been injured by inhaling the spray from a paint gun, which he used while painting engines and cars. The State Courts held that the Federal Act applied, but the U. S. Supreme Court *held to the contrary*. An attempt was made to certiorari to the U. S. Supreme Court the Hines decision of January 17, 1921, *which application was denied, thereby making effective the decision of the State Court that compensation was payable*, 264 U. S. 655. The refusal to grant the writ is in consonance with the New Jersey cases hereinafter referred to.

One operating an engine which, after starting interstate cars, has been stopped on a side track

to let a train pass, is not engaged in interstate commerce. *Patterson v. Director General* (1921), 105 S. E. 746.

Our State Supreme Court and Court of Appeals have, however, passed upon the subject which we are now discussing, and follow the important cases hereinbefore cited by us.

In the case of *Herzog v. Hines, Director General of Railroads*, 112 Atl., page 315, Chief Justice Gummere there cites with approval other decisions of the United States Supreme Court, and continues:

“The engine had been used in interstate commerce before the accident happened and was so used afterwards. There was nothing, however, to show that it was permanently devoted to such commerce.”

The New Jersey Court of Errors and Appeals cites with approval: *Baltimore & Ohio R. R. Co. v. Bronson*, 242 U. S. 623, and *Chicago, etc., R. R. Co. v. Kindelsparker*, 246 U. S. 657, where the Court applied the test that where a plaintiff was injured while repairing an engine which, when in use, was devoted indiscriminately to the movement of interstate and intrastate traffic, he was not engaged at the time of the accident in interstate commerce, within the meaning of the Federal law.

And finally our Court of Errors says, referring to the cases which we have just cited:

“The cases cited, as we read them, establish the principle that an employee of a common carrier who is injured while at work in repairing rolling stock of the carrier, and which is out of use for the purpose of having the repairs made, is not injured, while engaged in interstate commerce, etc.”

Our case is not one where the engineer of a locomotive, while on his journey, is obliged to get off his locomotive and make a temporary adjustment, but is a case where the duties of the workman injured *consisted of repairing locomotives*, and, therefore, directly that the locomotive is taken away from its work and put on a tie-up track, it is immaterial what the nature of the repairs are, if the locomotive is removed from its work, and it is also immaterial to what purposes the locomotive is destined after the repairs, for at the time that the locomotive is removed from its regular work and put upon this repair track for repairs it is, in the language of the cases referred to, not in any commerce, and, therefore, an accident occurring at the time brings the injured within the provisions of the New Jersey Workmen's Compensation Act.

The Herzog case is followed by *Price v. Central R. R. Co. of N. J.*, opinion by Minturn, J., 123 Atl. Rep., page 756, and *Lawrie v. Atl. City R. R. Co.*, New Jersey Adv. Rep., Vol. 3, No. 10, March 7, 1925, and *Jayson v. Penn. R. R. Co.*, New Jersey Adv. Rep., Vol. 3, No. 5, January 25, 1925.

Our State Courts have concluded that an employee of the railroad company engaged in the repairing of an engine in the yards (and in our case the engine was actually put on a repair track), is within the protection of the Workmen's Compensation Act.

The evidence of Mr. Reade discloses that the repairs to the engine were not completely finished even by himself and after the injury to the deceased, but that the next day the engine was taken to Jersey City to complete the repairs. Certainly, the railroad company should not have

it within its power by placing an engine, after an accident has occurred, in either interstate or intrastate commerce, and thus by its own act establish the nature of the right of the one injured.

The seventh paragraph of the Determination of Facts and Order established beyond any question that that engine was removed from all commerce and for repairs, and the railroad company by discontinuing the repairs which had started could not change the status of Bissett at the time of his accident. In other words, Reade's testimony about the completion of the repairs at the repair shop in Jersey City was uncontradicted, and, therefore, it was reasonable for the Court to conclude that the repairs would have taken longer than the non-expert witnesses of the railroad company testified, for otherwise, why was it necessary to take it to the repair shop in Jersey City? Bissett's status, therefore, was the same twenty minutes after he started the repair work as it would have been five days later, if the repairs had taken that long. Once having found the repairs were necessary, the length of time that the deceased had been working on such repairs would be of no consequence.

The Court will note that the cases referred to by us are subsequent to the decisions referred to by the Prosecutor, and establish the last word by our superior courts, both local and Federal.

We have established the accident as coming within the Workmen's Compensation Act, as an examination of the cases cited by us will indicate. We do not have to establish that there is no dispute as to the facts. It cannot be reasonably disputed that the Trial Court had abundant proof to bring case within the Compensation Act, and,

therefore, we have satisfied the burden laid upon us in the opinion of *Links v. Erie R. R. Co.*, 91 N. J. L., page 166. See also *Chicago, etc., v. Cronin*, 176 Pac. Rep. 919.

POINT II.

The Petitioner sustained the burden of proving Petitioner's intestate was not engaged in interstate commerce.

The same citations of authority are referred to here as in Point I, already argued.

POINT III.

There was evidence that decedent's death was the result of the accident of January 30, 1924.

The testimony of the employees of the company clearly lead to the conclusion we agree for. Witness Sunkus, fireman of the engine, is that he worked for the company January 30, 1923.

“Q Did you know a man by the name of Bissett? A Yes.

Q Did you see him on that day? A I seen him; yes.

Q Did you see him after he was hurt? A After he was hurt? Yes.

Q Where did you see him? A I seen him on the ground. That's all I saw.

Q And how near his engine? A Well, I just couldn't exactly tell you, but just laying aside.

Q He was lying alongside of the engine, is that right? A Yes.

Q And did you see him taken out to the ambulance and sent to the hospital? A No, sir, I didn't see the ambulance; no” (p. 21, ll. 12 to 28).

Conductor Nolan said as follows:

“Q And in order to work on it where would he have to get on the engine? A He would have to get up where the pump is.

Q I mean about how high from the ground is that? A Oh, twelve foot, fourteen” (p. 34, ll. 31 to 35).

And on page 35, lines 31 to 40.

“Q And where was he? A On the ground.

Q Did you see them pick him up? A I didn't see him picked up. I seen them take him off the ground and take him in the shanty in the office.

Q Did they carry him in? A Yes, sir; they carried him in.”

And on page 36, top of page, to line 3.

“Q Did you see the way he was taken away from the place to the hospital? A No; I didn't see him taken away.”

And on page 53, ll. 13 to 19.

“Q How long was it on that track? A Well, at the time he started, why he fell, I don't think he was there over ten minutes.

Q Bissett had been working on it about ten minutes? A They were up on the engine. I don't know if they were working, but they were up there where the pump was.”

And page 56, ll. 27 to 38.

“Q And how long was it—what called your attention to the accident? A Why, the fire-boy hollered.

Q What did he holler? A That someone fell.

Q Someone fell and you ran around and you saw Bissett on the ground? A On the ground.

Q Bissett's work was nothing more than a mechanic on this engine, was it not? A On this engine.

Q For repairs? A For repairs.”

And page 57, ll. 17 to 20.

“Q Was Bissett conscious or unconscious when you got there, do you recollect? A He was unconscious at the time, when I got there.”

These excerpts show that Bissett fell twelve or fourteen feet and became unconscious and was taken to a hospital, and if more than this were needed we find it in the testimony of Walter Reade. This witness said that Bissett was working twenty or thirty minutes before accident (p. 91, ll. 22 to 27); that Bissett then fell off steam chest of engine (p. 91, ll. 32 and 33) and was taken to hospital (p. 92, ll. 9 to 11); that Bissett was *not* subject to fainting fits (p. 94, ll. 10-11).

Prosecutor argues, because witness Reade could not tell what made Bissett lose his footing, that Bissett must have fainted, but the record does not support this conclusion, and counsel tries to put in the mouth of the witness that Bissett collapsed and fell, but the fact remains that the burden of showing that a fit caused the accident was upon the company. It was not incumbent upon the Petitioner to show exactly what caused Bissett to fall, negligence or contributory negligence are not elements to be considered. It was a pure accident as far as the record discloses for which the “Compensation Act” allows compensation.

Mrs. Bissett shows that she saw her husband at 2:00 A. M. of January 31st, a few hours after accident (p. 47, ll. 30 to 33), and that her husband remained at St. Michael’s Hospital until 7:40 P. M., March 5, 1923 (p. 47, ll. 37 to 40). In other words, Bissett lingered a little over a month before he died, during which time Prosecutor could have had as many medical examinations as they wanted; the fact is that they

furnished the hospital treatment, according to their answer.

Exhibit P. 1 (p. 97) is "Death Certificate," issued and certified by City Clerk of Newark, N. J., and is *prima facie* evidence of its contents. Prosecutor denied this at the trial and still does. But there is no substance in such denial in view of section 28 and 29 of "Evidence Act" (Vol II, Comp. Stat., p. 2229); see also *Vanderbilt v. Mitchell*, 72 Eq. 910.

It is to be noted that no prior sickness had disabled Bissett from his work and that immediately after the accident he was unable to work again and died about a month later. The sequence of events is undenied and the conclusion is certain; even if no one had seen Bissett fall the result would be the same. The mere finding of this man, unconscious alongside of his engine, would have been sufficient to establish an accident arising out of and in the course of his employment (*De Fazio's Estate v. Goldschmitt's Detinning Co.*, 88 Atl. Rep., p. 705.)

It is to be noted that the company, pursuant to the Compensation Act, furnished the treatment at St. Michael's Hospital (pars. 31, 32 and 33 of answer, p. 11).

It is only when uncertain possibilities which may explain the death, appear in the evidence, that it is necessary to produce a doctor. Bissett could not legally have been buried without a doctor's certificate. Even if the accident had been only a contributing cause to the injury and death, liability is established (*Newcomb v. Albertson*, 89 Atl. Rep. 928; see also *Muzik v. Erie R. R. Co.*, 88 Atl. Rep. 248).

Whether the Deputy Commissioner accepted the "Death Certificate" pursuant to the "Evidence

Act'' or not is beside the question, because if this Act and the other Evidence will and do support his conclusions, these conclusions will not now be disturbed.

We, therefore, respectfully submit that judgment be in all things affirmed.

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Defendant-in-Certiorari.

ISIDOR KALISCH,

On the Brief.

Respondent

