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NEW JERSEY COURT OF ERRORS AND APPEALS

**JOSEPHINE NOON, as Administratrix of George
Noon, Deceased,** Plaintiff-Appellant,
vs.
**THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD CO.,** Defendant-Appellee.

Action at Law.

APPEAL FROM SUPREME COURT.

STATE OF CASE.

Notice of appeal and grounds therefor.

Filed August 13, 1929.

NEW JERSEY SUPREME COURT.

OCEAN COUNTY.

10

JOSEPHINE NOON, Administratrix
of George Noon, Deceased,
Plaintiff-Appellant,

vs.

20 THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY, a
corporation,
Defendant-Appellee.

Action at Law
Notice of Ap-
peal and
Grounds.

To FREDERIC B. SCOTT,
Attorney for Defendant-Appellee.

Sir:

30 PLEASE TAKE NOTICE that the plaintiff in the above
entitled cause appeals to the Court of Errors and
Appeals in the last resort in all causes in New Jer-
sey, from the whole of the judgment entered in this
cause on the following grounds:

1. Because the Supreme Court erred in giving
judgment to the defendant instead of the plaintiff,
in that:

(a) The trial court erred in sustaining, as a
matter of law, the motion of the defendant for an
instructed verdict and in giving such instruction.

40

Notice of Appeal.

(b) The trial court erred in refusing to receive in evidence a part of defendant's Rule 530, applying to engineers and reading viz:

"Trains must proceed with caution through yards and station limits."

10

(c) The trial court erred in refusing to admit in evidence a part of defendant's Rule 563, applying to engineers and reading viz:

"They must run with due caution at all points when there is reason to apprehend danger."

(d) The trial court erred in refusing to receive in evidence that part of defendant's Rule 30, applying to engineers and reading viz:

"The engine bell must be rung when passing a train standing on an adjacent track."

20

(e) The trial court erred in refusing to receive in evidence that part of Rule 117 applying to engineers and reading viz:

"When practicable to avoid it, a train must not be allowed to stand on a curve between stations."

30

(f) The trial court erred in refusing to receive in evidence Rule 118 applying to engineers and reading viz:

"In case of doubt or uncertainty, the safe course must be taken."

(g) The trial court erred in disregarding the negligent failure of the engineer of the drill train to watch for and obey Noon's stop signal.

40

Notice of Appeal.

(h) The trial court erred in disregarding the negligent failure of the engineer of the express train to give a timely warning of his approach and under the circumstances to put his train under control.

10 (i) The trial court erred in disregarding the negligent failure of the defendant to adopt and enforce a reasonable rule for the protection of its trainmen, when working near their train in switching territory, on a curve and hidden from the sight of the engineer of a passing train on an adjacent track.

20 (j) The trial court erred in disregarding the judicial admissions of the defendant, made in its answers to statutory interrogatories and in failing to give them such force and effect.

(k) The trial court erred in disregarding the provisions of the Federal Employers Liability Act and the construction placed thereon by the Federal Court and in applying rules of law in conflict therewith.

30 (l) The trial court erred in adopting and following the decision of this court on the former appeal as the law of the case.

Respectfully yours,

DAVID A. VEEDER,

JAS. B. SHEEAN,

Attorneys for Plaintiff-Appellant.

Dated July 11, 1929.

Summons.

Served April 5, 1926.

THE STATE OF NEW JERSEY,

to

DELAWARE, LACKAWANNA AND WESTERN 10
RAILROAD COMPANY, A Corporation:

(SEAL) You are summoned to answer the annexed
complaint of Josephine Noon, Administra-
trix, Ad Prosequendum, of George Noon,
deceased, in an action at Law in the Supreme Court.
And take notice, that unless you file your answer to
said complaint, with the Clerk of the Supreme Court,
at Trenton, within Twenty Days, after service upon
you of this writ and the annexed complaint, Plain- 20
tiff may proceed in the suit, and judgment may be
entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of
the Supreme Court, at Trenton, this nineteenth day
of March, nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

DAVID A. VEEDER, 30
Attorney.

Amended Complaint.

Filed April 14, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

10

JOSEPHINE NOON, administratrix
of George Noon, deceased,
Plaintiff,

vs.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
a corporation,
Defendant.

Action at Law

20

Plaintiff, Josephine Noon, as administratrix of George Noon, deceased, residing in the Town of Toms River, County of Ocean and State of New Jersey, says that:

30

1. Said defendant now is and on and prior to April 27th, 1925, was a duly organized, incorporated and existing corporation, under and by virtue of the laws of the State of Pennsylvania, and as a common carrier of State and inter-State traffic, operated a line of railroad extending from Hoboken, New Jersey, to Scranton, Pennsylvania, passing through the Cities of Passaic, Clifton and Patterson, New Jersey.

2. That on April 27th, 1925, one George Noon, deceased, was employed by the defendant as a switchman and was one of a crew consisting of two

40

Amended Complaint.

enginemen, operating a switch or drill engine and of one foreman, controlling, directing and responsible for the acts, conduct and safety of his crew, and of two switchmen and a flagman, whose duties, among other things, were to couple and uncouple cars and engines, signal movements of the engine, throw switches, open gates, flag approaching trains, keep a lookout for trains approaching on main line tracks and to warn one another of the approach of such trains. 10

3. That at or about six o'clock P. M. on April 27th, 1925, while the defendant and said Noon were switching cars into and out of the industry plant of the Athenia Steel Mills Company, located at the City of Clifton, New Jersey, and while the switch engine and cars then and there owned and operated by the defendant were on the eastbound main track, it became the duty of said Noon to signal the movement of said engine and cars, and to do so he was required to stand between the east and westbound main tracks, and while thus engrossed with his work was struck and instantly killed by defendant's passenger engine on train Number 367, running on the westbound track, at a very high rate of speed. 20 30

4. That when said Noon was struck by said engine, he was then and there an employee of said defendant, and then and there was engaged in carrying on interstate commerce between the State of New Jersey and other states and territories and that said defendant at that time and place in moving said engine and cars into and out of said industry plant, was carrying on interstate commerce between 40

Amended Complaint.

the State of New Jersey and other states and territories.

10 5. That the death of George Noon, deceased, was directly and proximately caused by the negligent acts and omissions of said defendant, its officers, agents and servants and resulted in injury, loss and damage to his surviving widow and children, and that the negligent acts and omissions of the said defendant, its officers, agents and servants, as aforesaid, were as follows, to wit:

20 6. That the defendant with full knowledge of the conditions, negligently failed to provide and maintain for said Noon, a reasonably safe place to work, in that at the time and place said Noon was killed, there existed very long sharp curves in said main line tracks, obstructing the view of trains approaching from the east and rendering it difficult for employees at work on or near said tracks to see approaching trains; that then and there the clearance between said main line tracks was unnecessarily and unusually short and did not exceed three feet in width, thereby creating unnecessary hazards to employees working between said track and that then and there said main line tracks were improperly ballasted, and in condition to trip and endanger employees working on them, and that by reason of those conditions, said Noon's place of work was rendered unreasonably dangerous and unsafe and the defendant failed and neglected to perform its duty of providing a reasonably safe place for Noon to work.

40 7. That at the time and place said Noon was killed, there existed east and west bound main line

Amended Complaint.

tracks and industry tracks, connecting therewith and leading to adjacent industries, located north and south of said main line tracks; that said main line tracks were used to their capacity in the movement of traffic east and west, very many trains passing over them each day and said industry tracks were frequently used by defendant's employees in switching cars off and onto said main line tracks. All of said tracks at said place were crossed and used each day on and long prior to April 27th, 1925, by defendant's employees and other persons, including the employees of the numerous industries located in the vicinity thereof. That notwithstanding the defendant's knowledge of these facts, said defendant negligently failed to adopt any rules or regulations, requiring its enginemen on approaching trains, to give warning of their approach or to put their trains under control or to keep a special lookout for persons and employees, crossing or working on or near said tracks and said defendant then and there also negligently failed to provide any appliance to warn the public or its employees of the approach of its trains.

8. That said defendant negligently failed to warn said Noon of the approach of the train which killed him, and negligently failed to establish any rules, regulations or methods of work for his protection at the time and place where he was killed.

9. That said defendant negligently failed to supply or employ a sufficient number of switchmen in said Noon's crew to protect him from the danger of passing trains.

Amended Complaint.

10 10. That said defendant employed and negligently continued in its service: a foreman of said crew who was incompetent and not capable of adopting methods of work to insure protection to the members of said crew from the dangers of passing trains and that said defendant knew of the incompetency of said foreman, long prior to April 27, 1927, or in the exercise of ordinary care, should have known that he was not qualified or competent to direct the work at the time and place where Noon was killed.

11. That at the time and place Noon was killed, he did not know or appreciate the dangers of his work and that said defendant, well knowing that fact, negligently failed to notify him of said dangers.

20 12. That on and prior to April 27th, 1925, it was the custom and practice of Noon's train and engine crews, when they were working in the yards or on or near the main line tracks to observe the whereabouts of one another, to keep a lookout for passing trains and to warn one another of the approach of such trains which custom was well known to the defendant and was relied on by Noon when he was killed. That at the time and place Noon was killed
30 the other members of said crews negligently failed to observe Noon's position of peril and negligently failed to keep a lookout for approaching trains and negligently failed to warn him of the train which killed him, well knowing that such train was long past due.

40 13. That the foreman of Noon's switching crew negligently failed to keep a lookout for the approaching train which killed Noon, although he well knew that the train was past due at the time Noon was

Amended Complaint.

killed. That said foreman negligently failed to observe Noon's movements or position when working near said westbound track and negligently failed to warn him of the approaching train.

14. That said foreman negligently failed to adopt a method of work that would have kept one of his men watching for approaching trains to warn the other men thereof, who were required by their work to go near said main track. 10

15. That said foreman negligently required the work which was being done at the time of the accident, to be done at a time and place which rendered that work specially hazardous, all of which he well knew.

16. That the rules of said defendant, in effect when Noon was killed, required enginemen on delayed regular trains to keep a sharp lookout for trackmen, sounding the whistle at short intervals where the view is obstructed and to proceed with caution through yards and station limits, and said rules also required enginemen to exercise the utmost care to avoid injury to laborers of the defendant by the movement of trains and engines; and to sound the whistle and ring the bell when approaching where men are at work; and that the engine bell must be rung when passing a train standing on an adjacent track and that under conditions not provided by the rules said enginemen must take every precaution for protection. That the enginemen of train Number 367 which killed Noon, in approaching the place where Noon was killed negligently disregarded each and all of the aforesaid rules, and then and there behind its schedule ran 20 30 40

Amended Complaint.

10 said train at a very high rate of speed and negligently failed to keep a lookout for employees who were working on or near the tracks where Noon was killed, or to give any warning of the approach of said train and negligently failed to have their train under control or to stop it in time to avoid killing Noon.

20 17. That by reason of the negligence of said defendants as aforesaid and the death of said Noon, deceased, the plaintiff was required to and did, expend more than five hundred (\$500.00) dollars in burial and funeral costs and expenses and that the plaintiff herein is the surviving widow of George Noon, deceased, and that Lydia Noon, seven years of age, and Alice Noon, five years of age, are the surviving daughters of said decedent and that she and they have suffered and sustained great pecuniary damage, injury and loss including the care, training and advice of said decedent in the amount of fifty thousand (\$50,000.00) dollars, by reason of the premises and the negligence of said defendant.

30 18. That on March 30, 1927, Josephine Noon, the plaintiff herein, was duly appointed and qualified to act as administratrix of the estate of said George Noon, deceased, and then became the personal representative of George Noon, deceased, and that on said day letters of administration were duly granted to said plaintiff by the Surrogate of the County of Morris, State of New Jersey, to prosecute this cause of action.

40 19. That the cause of action alleged herein is based up the provisions of the "Employer's Liability Act" of the United States, set forth at length

Amended Complaint.

in Sections 8657-8665 inclusive, of the Compiled Statutes of the United States of 1918, and that this action was begun within two years after the death of said decedent.

WHEREFORE by reason of these premises, the plaintiff asks judgment against said defendant in the sum of Fifty thousand (\$50,000.00) dollars, and her costs of suit. 10

DAVID A. VEEDER,
Attorney of Plaintiff.

20

30

40

Answer to Amended Complaint.

Filed April 28, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

10

JOSEPHINE NOON, administratrix
of George Noon, deceased,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Defendant.

20

} Action at Law

The Delaware, Lackawanna and Western Railroad Company, answering the allegations contained in the plaintiff's amended complaint, says:

I. It admits the allegations contained in the first paragraph.

30 II. It denies the allegations contained in the second and third paragraphs.

III. It admits the allegations contained in the fourth paragraph as to said parties' engagement in interstate commerce.

IV. It denies the allegations contained in the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth paragraphs.

40

Answer to Amended Complaint.

V. It has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the eighteenth and nineteenth paragraphs.

AND FOR A SECOND, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it, for that the said plaintiff's decedent, George Noon, was guilty of negligence resulting in his death, at the time and place mentioned in the sole and proximate cause of the plaintiff's decedent's death. 10

AND FOR A THIRD, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it for that the said plaintiff's decedent assumed the very risk of the accident and injury complained of by the plaintiff in her complaint, and which resulted in the death of the plaintiff's decedent. 20

AND FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it for that the plaintiff's decedent was guilty of contributory negligence.

WHEREFORE, this defendant prays that the above entitled action may be dismissed as against it. 30

FREDERIC B. SCOTT,
Attorney of Defendant.

Reply.

Filed April 29, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

10

JOSEPHINE NOON, administratrix
of George Noon, deceased,
Plaintiff,

vs.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY, a
corporation,

20

Defendant.

Action at Law

The plaintiff, Josephine Noon, as administratrix of the Estate of George Noon, deceased, for her reply to the defendant's second, third and fourth separate and distinct defenses of its answer denies each and every allegation contained in all and each of said separate defenses, severally and jointly, denying each and all of said allegations.

30

Therefore, she prays for judgment as in her amended complaint.

DAVID A. VEEDER,
Attorney for Plaintiff.

40

Notice of Appeal.

Entered April 27, 1928.

NEW JERSEY SUPREME COURT.

JOSEPHINE NOON, Administratrix of George Noon, Deceased, Plaintiff-Respondent, <i>vs.</i> THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-Appellant.	}	Action at Law Notice of Appeal.	10
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To: DAVID A. VEEDER, *Attorney of Plaintiff-Respondent.*

Sir:

YOU WILL PLEASE TO TAKE NOTICE THAT The Delaware, Lackawanna and Western Railroad Company hereby appeals from the judgment of the Supreme Court, confirmed on the 2nd day of April, 1928, on the discharge of the Rule to Show cause allowed by said Court,—to the New Jersey Court of Errors and Appeals, and that it will within the time prescribed by law and the practice in such cases made and provided, file its reasons or ground for appeal.

Dated April 17, 1928.

Yours truly,

Frederick B. Scott,
Attorney for Defendant-Appellant.

Order on Reversal of Judgment.

Entered March 1, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 October Term, 1928.

JOSEPHINE NOON, Administratrix
of George Noon, Deceased,
Plaintiff-Respondent,*vs.*THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Defendant-Appellant.} On Appeal
from Su-
preme Court.
Order on Re-
versal of
Judgment.20 This cause having been argued at the October,
1928, Term of this Court by Frederic B. Scott, of
counsel for the defendant-appellant, and James B.
Sheean of counsel for the plaintiff-respondent, and
the Court having inspected the record and judg-
ment below and considered the causes assigned for
error;30 It is thereupon ordered that the judgment of the
said Supreme Court be in all things reversed, set
aside and for nothing holden, and that the record
and proceedings be remitted to the said Supreme
Court to be proceeded with the accordance with this
judgment, and the opinion of this Court, and the
practice of the said Supreme Court.

On motion of

FREDERIC B. SCOTT
Atty. of Defendant-Appellant.

Postea.

Entered May 17, 1929.

NEW JERSEY SUPREME COURT.

OCEAN COUNTY.

10

JOSEPHINE NOON, Administratrix
of George Noon, Deceased,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY, a
corporation,
Defendant.

Action at Law
Postea

This case was tried before Judge Rulif V. Lawrence with a jury, at the Ocean Circuit, on May 3rd and 4th, 1929. The jury, at the direction of the Court rendered a general verdict against the plaintiff and in favor of the defendant.

20

RULIF V. LAWRENCE

Judge.

30

40

Order for Judgment.

Entered May 17, 1929.

NEW JERSEY SUPREME COURT.

10 THE DELAWARE, LACKAWANNA AND }
WESTERN RAILROAD COMPANY, a }
corporation, Defendant, }
vs. } Action at Law
JOSEPHINE NOON, Administratrix }
of George Noon, Deceased, }
Plaintiff. }

20 It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff without costs. Entered May 17, 1929.

On motion of

FREDERIC B. SCOTT, Attorney.

30

40

Judgment for Defendant.

Entered May 17, 1929.

NEW JERSEY SUPREME COURT.

JOSEPHINE NOON, Administratrix of George Noon, Deceased, Plaintiff, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, Defendant.	}	Action at Law on Postea Judgment for Defendant. Frederic B. Scott, Attor- ney.	10
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Judgment entered this seventeenth day of May, A. D. nineteen hundred and twenty-nine in favor of Defendant and against the plaintiff without costs. 20

WM. S. GUMMERE,
 C. J.

30

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Case.

Trial at Toms River, N. J., May 3 and 4, 1929.

JOHN C. FELLOWS, sworn for plaintiff.

10 *Direct examination by Mr. Sheean:*

Q. Mr. Fellows, where do you reside? A. Beachwood.

Q. What is your present occupation? A. Civil engineer and land surveyor.

Q. How long have you been practicing that profession? A. About seventeen years.

20 Q. Have you had any experience in surveying railroad lines or right of way or adjacent properties? A. Yes.

Q. To what extent has that experience gone? A. About six years.

Q. And for what companies did you, in past, do that line of work? A. The Lehigh Valley and the D. L. & W.

30 Q. Were you in April, 1927, requested to go to the Clifton station to make a survey of certain property? A. Yes, sir.

Q. You were there on that day? A. About the middle of April, 1927.

Q. What did you do? A. Well, I made a survey about 1,500 feet either side of this switch that leads into Athenia Steel Mill, I believe they call it.

John C. Fellows, for Plaintiff, Direct.

Q. Did you make a print or drawing showing the results of your survey? A. Yes, sir.

Q. Calling your attention to Exhibit A, marked for identification, state what that is. A. It is a map showing tracks and right of way from Clifton Station to the other side of the Athenia Steel Mill of the D. L. & W. Railroad. 10

Q. State whether or not it shows what is called the switch into the eastbound main line track. A. Yes, sir, it does.

Q. Are those tracks, and distances, in accord with the facts as they existed? A. At that time, yes.

Q. What curvature did you find of the tracks there, west of the station?

Mr. Scott: I object. 20

The Court: On his assurance that he will show the same physical conditions existing at the time, I will allow the witness to testify.

Cross examination by Mr. Scott:

Q. Mr. Fellows, this survey was made on April 18, 1927? A. Yes, about that time.

Q. When did this accident happen, if you know personally? A. I couldn't say. 30

Q. You don't know? A. No.

Q. That was the first time you were in that vicinity for how many years? A. About six months.

Q. And prior to that six months, had you ever been in that vicinity? A. Quite a few times.

Q. I don't mean just passing over in a train, I mean on the ground in the same locality. A. Probably about a year after that accident. 40

John C. Fellows, for Plaintiff, Cross.

Q. Was it a year after or two years, or when?

A. Well, I was around there till about 1926 to 1927 at different times.

Q. And what was your purpose at that time, being there? A. Well, I just passed by, that was

10 all.

Q. Over on a train? A. No, driving in a car.

Q. In an auto? A. Yes, sir.

Q. That was not on the roadbed, was it? A. No.

Q. That was in about 1926? A. Yes, sir.

Q. And then six months prior to the time you made that map or got the data, were you driving by again? A. Yes, sir.

20 Q. And that was not on the railroad company's right of way? A. No, sir.

Q. Can you tell us any time then when you were on the same part of the company's right of way prior to April 18, 1927? A. No, I can't.

Q. It is a fact you were never there, is it not? A. Not on this particular spot.

30 Q. And the fact is you don't know what the conditions were as they existed there in April, 1925? A. No, sir.

Q. Don't know whether they are the same or whether they were changed? A. I couldn't say.

Q. Don't know whether the curvature of the tracks was the same or different? A. No, sir.

40 Q. And you don't know whether this switch that Mr. Sheean talks about was located at the same place in 1925, April, as it was when you made a survey and a location of it in 1927? A. No, I do not.

John C. Fellows, for Plaintiff, Re-direct.

Mr. Scott: I press my objection.

The Court: Your objection is overruled, on the assurance of counsel that the physical condition actually existing at the time of the accident will be proven. This is merely a preliminary, showing the actual condition. You may have an exception. 10

By Mr. Sheean:

Q. What curvature did you find in the tracks there, west of the station? A. Why, about one degree and fifteen minutes.

Q. What curve have you reference to, having in mind the location of the main line switch? A. The one that leads into the Athenia Steel Mill. 20

Q. That is where this curve is that you speak of? A. Yes, sir.

Q. What did you find there with reference to the approach on the south side, from the Athenia Mills, to the railroad tracks?

Mr. Scott: I object.

Mr. Sheean: We will show that the conditions he observed then, are the same as they were in 1925. 30

The Court: On that assurance the objection is overruled. You may have an exception.

A. There was a switch leading into the steel mill.

Q. From what track? A. It would be from the eastbound track.

Q. Describe the tracks that are in the industry there. A. There is a path which leads over the 40

John C. Fellows, for Plaintiff, Re-direct.

switch, from an office to the other side of the track; a guard rail or a fence along there, right of way fence.

Q. On which side? A. I guess it would be called the south side.

10 Q. Does your drawing show where that right of way fence stops on the south side? A. Yes, I believe it does.

Q. How large a space is there between the end of that fence and the building of the steel company?

Mr. Scott: I object.

The Court: Objection overruled.

Defendant excepts.

20 A. About the width of a gate, ordinary gate.

Q. Tell us what were the conditions there at that time as to gates, cars and tracks leading into the steel industry.

Mr. Scott: I object.

The Court: Objection overruled, on the assumption that the testimony will be connected properly.

30 A. There are wire gates that may be opened or closed to let trains in and out, and trains were let in and out.

Q. That is, in and out of the plant, steel mill? From the railroad to the plant? A. Yes, sir.

Q. Can you locate on that map, a point 175 feet east of the main line switch target that you show thereon? A. Yes, sir; there is a point here marked with a cross, and that is about it.

40

John C. Fellows, for Plaintiff, Re-direct.

Q. That indicates what? A. That indicates about 175 feet from the switch, where it is at the present time.

Q. In what direction from the switch is this point you have located? A. To the east.

Mr. Sheehan: Subject to conditions, I offer 10
blueprint, marked Exhibit A, in evidence as illustrating the conditions, involved in this litigation.

Mr. Scott: I object for the same reason.

The Court: I will allow it to be marked merely for identification at the present time. You must produce adequate testimony or evidence that the conditions were the same at the moment of the accident as they appear upon 20
the map.

Q. Calling your attention to Exhibit B, marked for identification, do you recognize it as representing any condition that you saw or are familiar with?

A. Yes, sir.

Q. What does it represent? A. Well, it is the crossing that I was talking about, a path across the tracks, the approach to it. 30

Q. Were you present when that picture was taken? A. No, not right at the time, I was not.

Q. Is that a correct reproduction of the conditions as they existed there on the day you saw them? A. It looks just like it.

Q. Calling your attention to Exhibit E for identification, do you recognize what that is a reproduction of? A. A curve from the railroad station, looking west. 40

John C. Fellows, for Plaintiff, Re-direct.

Q. Did you see those tracks and that station and those conditions? A. Yes, just about the time this picture was taken.

Q. Is that a correct reproduction of those conditions as you saw them? A. It looks just like it.

10 Q. This picture shows the two main line tracks, west of the station, do they? A. Yes, sir.

Q. Looking in the direction of the Athenia Mills? A. Yes, sir.

Q. Calling your attention to Exhibit C for identification, state whether you recognize the condition, portrayed therein. A. It looks just like the switch at that point.

20 Q. What does the picture purport to reproduce? A. A view looking to the east.

Q. Of what? A. From the switch that leads into the Athenia Steel Mill.

Q. Calling your attention to Exhibit D for identification, do you recognize that as anything you have seen before? A. Yes, sir.

Q. What do you recognize? A. That is a view of the switch that leads into the steel mill.

30 Q. Which direction are you looking? A. Looking west.

Q. State whether or not the conditions in this picture are as you saw them. A. Yes, sir, they are.

Q. You saw them in 1927? A. Yes, sir, about the time those were taken.

Interrogatories and Answers.

Mr. Sheean: Plaintiff will now read in evidence the statutory interrogatories propounded to the defendant and answered under oath by its claim agent.

1. Under the laws of what state were you organized as a corporation, and of what state are you a citizen? The Delaware, Lackawanna & Western Railroad Company, answering so many of the interrogatories propounded to it by the plaintiff as it is advised it is under an obligation to answer, answers the same as follows: A. Under the laws of the State of Pennsylvania, of which State the defendant is a citizen. 10

2. Under, and by what name were you incorporated? A. The Delaware, Lackawanna and Western Railroad Company. 20

3. Did you on or about April 27th, 1925, have in your service a man named George Noon, and if so where did you employ him, and in what different capacities did he serve you? A. George Noon was employed by the defendant on or about April 27th, 1925, and had been so employed here for some time past, being gateman at defendant's Hoboken Passenger Terminal in July, 1916, clerk in its stationery department September, 1916, trainman in April, 1927, until he resigned in October, 1918, to resume service as trainman in January, 1920, in which service he continued until fatally injured. 30

6. What kind of work and in what capacity did Noon serve you on or about April 27th, 1925? A. As a trainman in the freight service.

9. What work was Noon and his train crew doing on the afternoon of April 27th, 1925? A. Switching 40

Interrogatories and Answers.

cars in and out of various industrial sidings between Passaic and Paterson, N. J.

10 10. What work was Noon and his train crew doing just prior to and at the time he was killed? A. Switching cars in and out of the Athenia Steel Mills Company's plant.

11. What are the names and addresses of the men working in Noon's engine and switching crews at the time he was killed? A. Defendant is advised it is not obliged to answer.

20 12. Have any of the members of Noon's switching and engine crews executed and delivered to you written statements of the circumstances or causes of Noon's death? If so, please attach hereto as a part of your answer true copies of said statements. A. Defendant is advised it is not obliged to answer.

13. What are the names and addresses of the engineer and fireman who were operating the engine hauling train No. 367, which killed Noon? A. Defendant is advised it is not obliged to answer.

30 14. Has either the engineer or fireman of train No. 367 delivered to you written or telegraphic statements of the circumstances under which Noon was killed? If so, please attach hereto as a part of your answer true copies of said statements. A. Defendant is advised it is not obliged to answer.

17. How far from the place of the accident was Noon's body thrown or carried? A. Noon's body was found nearby to the point or place of contact.

40 21. For what distance could the men on the engine of train No. 367 have first seen Noon if they had been looking out for him? A. 500 feet.

Interrogatories and Answers.

23. Was train No. 367 running on its scheduled time when it killed Noon? A. No.

24. If train No. 367 was not on time, or on its schedule at the time and place it hit Noon, how many minutes late was it? A. Three minutes.

25. How many trains passed east and west at the place where Noon was killed, between one o'clock, P. M., and six o'clock P. M. of April 27th, 1925? A. Fifteen trains moving west and sixteen trains moving east. 10

28. Have you a map, print or drawing or engineer's notes showing the length and degrees of curvature of the main line tracks for 600 feet on either side of the switch points of the switch admitting engines into the works of the Athenia Steel Mills Co., as they were located on April 27, 1925? If so, please attach a true copy thereof to your answer. A. Yes. 20

29. Have you a map, print or drawing or engineer's drawing showing the length and degrees of curvature of the four main line tracks, for 600 feet on either side of said switch as they now exist? If so, please attach to your answer a true copy thereof. A. Yes. 30

30. What was the distance in feet and inches between the near or inside rails of the east and west bound main tracks at the place and time Noon was killed? A. 8 feet, 6 inches.

31. What changes have you made since April 27, 1925, in the location, curvature, ballasting and grade of the road bed and tracks extending 600 feet east and west of the switch at or near which Noon was 40

Interrogatories and Answers.

killed? A. No changes have been made in the location, ballasting, curvature or grade, but an additional track has been installed on the west side of the original tracks.

10 32. What changes have you made since April 27th, 1925, in the location, curvature, ballasting and grade of the industrial track leading from said switch into the plant of the Athenia Steel Mills Co.?

A. The switch referred to has been moved and replaced 175 feet west of its former position. The switch in question formerly led off the main eastbound track. In its new position it leads off the eastbound freight track. The curvature, ballasting and grade are practically the same as before said
20 changes were made.

33. Since April 27, 1925, how far have you widened and extended the embankment extending east and west of the switch at or near which Noon was killed? A. The embankment on the south side at the point of the accident has been widened about fifteen feet for some distance east on the south side of the main track. The embankment east of the point of the accident has not been widened. The
30 reason for widening said embankment was due to the installation of an additional main track.

34. What rules or regulations had you in effect on April 27, 1925, for the guidance of your engineers and the protection of your other employees, when your trains are rounding curves or approaching places where your employees may be working on or near your tracks? Please attach a copy of such rule. A. Rule 526. "They must stop and inquire
40 respecting any signal not understood, and on de-

Interrogatories and Answers.

layed regular trains and extra trains must keep a sharp lookout for trackmen and hand cars, sounding the whistle signal at short intervals where the view is obscured."

35. What rules or regulations had you in effect on April 27, 1925, and what precautions had you taken, to protect your employees when working on or near your tracks extending 2,000 feet east and west of the switch at or near which Noon was killed? 10
 A. Rule R. "Employees must not place themselves in positions where the movement of a car, engine or train would injure them. In the performance of their duties in connection therewith, they must know that they are fully protected as prescribed in the rules. Employees must stand outside and clear of all main tracks while trains are passing. They must not rely upon others to notify them of the approach of a train. Employees who are careless of the safety of themselves or others will not be retained in the service." 20

36. Where was Noon located when he was killed?
 A. Between the east and westbound tracks.

37. Was Noon standing or walking when killed?
 A. Noon was seen moving away from the track at the time he received his injuries. 30

38. Was Noon east or west of the switch points of the switch which serves the industry track extending into the plant of the Athenia Steel Mills Co., when he was killed? A. He was about opposite the switch point of the switch which served the industrial track.

39. How far distant was Noon from the switch points of said industrial switch when he was killed? 40

Interrogatories and Answers.

A. The location given in the preceding interrogatory is as close as the defendant can answer the 39th interrogatory.

10 40. Was Noon struck between the east and west-bound main tracks or was he between the rails of the westbound track when he was killed? A. Noon was struck while jumping away from the westbound main track.

41. What direction was Noon facing when he was killed? A. South according to railroad direction.

20 42. If Noon was standing when struck, how long had he been standing at the place where he was killed? A. See answer to the 40th interrogatory.

43. What was Noon about to do or in the act of doing when he was killed? A. Just prior to the accident Noon opened a switch and shortly prior to meeting his death called his conductor's attention to the position of the gates of the Athenia Steel Company plant.

30 45. Were the switch engine or cars coupled thereto making any noises at the time Noon was killed? A. No.

46. How many switchmen were working in Noon's crew at the time he was killed? A. The crew with which Noon was working at the time he was injured consisted of the conductor, two trainmen and flagmen, including Noon.

40 47. What were the other switchmen in Noon's crew doing and where were they at the time Noon was killed? A. Noon's foreman or conductor was in the second car from the west end of the train

Interrogatories and Answers.

giving signals to the engineer which were relayed to him by one of his trainmen.

48. Where was Noon's foreman and what was he doing at the time Noon was killed? A. In second car from west end of train giving signals to engineer relayed to him by one of the trainmen. 10

49. What is the name and address of Noon's foreman? A. Defendant is advised that it is not obliged to answer.

50. Were the gates across the tracks extending into the plant of the Athenia Steel Company opened or closed at the time Noon was killed? A. Open.

51. Was it Noon's duty to open or close the gates extending across the industry tracks? A. No. 20

52. What service had Noon done, just prior to his death? A. Opened switch leading from east-bound main track.

53. Did either of the enginemen or the switch engine or any of the switchmen or foremen of Noon's crew see train No. 367 approaching the switch at or near which Noon was killed? A. Yes.

53a. If so, who saw said train and how far east of the switch at or near which Noon was killed was the approaching train first seen? A. Conductor—25 feet. 30

53b. Did any one of Noon's engine or switching crews know that train No. 367 was due to pass west at the time it did pass? A. Yes.

54. Did either of the enginemen, switchmen or foremen of Noon's crew keep a lookout for approaching trains at the time Noon was killed? A. No. 40

Michael J. McGowan, for Plaintiff, Direct.

55. What precautions, warnings, or instructions did Noon's foreman take or give to insure Noon's safety? A. None.

10 56. At the time and place Noon was killed, were you and he then engaged in carrying on interstate commerce as a common carrier of goods and passengers? A. Yes.

57. At the time and place Noon was killed, was he an employee of yours, then and there engaged in carrying on interstate traffic or commerce? A. Yes.

20 58. Were the industry tracks extending into the plant of the Athenia Steel Mills Co. used and operated by you in carrying on your interstate commerce as a common carrier? A. Yes.

MICHAEL J. MCGOWAN, sworn for plaintiff.

Direct examination by Mr. Sheean:

Q. Mr. McGowan, where is your residence? A. 319 West 105th Street, New York City.

Q. What is your present occupation? A. Chief train dispatcher.

30 Q. What company are you chief train dispatcher for? A. D. L. & W.

Q. How long have you occupied that position? A. Since 1911.

Q. Prior to that time what position did you occupy? A. Trick dispatcher.

Q. How many years were you engaged at that? A. Well, 1901, started with the company in 1901.

40 Q. Have you ever been engaged with any other railroad? A. Yes, sir, New York Central.

Michael J. McGowan, for Plaintiff, Direct.

Q. In what capacity did you serve that railroad?

A. Telegraph operator and train dispatcher.

Q. Have you ever been a locomotive engineer?

A. No, sir.

Q. As chief train dispatcher, what are your duties, with reference to the movement of trains?

10

A. Well, to see that the car orders are filled and the cars are moved, move the empties and loads over the road, and keep the trains moving; if a train breaks down or anything, get them around on the other track.

Q. What are your duties with reference to reporting movements of regular and extra trains?

A. We keep the regular train sheet in the office, the other trick dispatchers keep the regular train sheets.

20

Q. What, if anything, do you do with reference to supervising the engineers on the railroad? A. Well, no more than give them their instructions, that is, train orders, like meet orders. The trick dispatcher does that, but not oversee them.

Q. What, if anything, do you have to do with passing on their qualifications to act as engineers?

A. Nothing, sir; that is done by the trainmasters.

30

Q. What, if anything, do you do with reference to examining engineers and conductors as to their qualifications? A. That is all done by the trainmasters.

Q. Did you keep a record of the movement of this train 367 on April 27, 1925? A. Yes, sir, I have got it right here with me.

Q. Have you also a record of the trains that moved between Passaic and Paterson on the afternoon of April 27, 1925? A. Yes, sir.

40

Michael J. McGowan, for Plaintiff, Direct.

Q. Give us the running time of train 367 from Passaic to Paterson. A. Passed Passaic tower at 4:50 and passed Paterson Junction at 5:00 o'clock.

Q. What is your notation at Clifton Station? A. "No. 367 struck and instantly killed trainman George Noon on the Passaic drill." That is the number of the train he was working on, Extra 581.

Q. What time is shown? A. It is marked there "Athenia, 4:52 P. M."

Q. Mr. McGowan, what is the distance from Passaic to Paterson? A. Well, Paterson station, about I would say, about four miles.

Q. How far is it from Passaic to Passaic tower? A. It is not over a quarter of a mile, I don't think.

Q. How far is it from the Passaic tower to the Paterson Junction tower? A. Well, I would say about three and a half miles.

Q. How far is it from the Paterson Junction tower over to the City of Paterson? A. Well, it is a good mile and a quarter, I think.

Q. Approximately? A. Yes, sir.

Q. What is the distance from the Passaic tower to this switch where Noon was killed? A. Well, at a rough estimate, (now—I wouldn't say without looking at the timetable)—it is a mile and three-quarters.

Q. You gave it a mile and a half before, didn't you? A. Well, a mile and a half, yes.

By the Court:

Q. A mile and a half to a mile and three-quarters?

A. I would say it is about that.

Michael J. McGowan, for Plaintiff, Direct.

By Mr. Sheean:

Q. What time did train 481, known as the Passaic drill, leave Paterson on the afternoon of April 27, 1925? A. 4:40 P. M.

Q. What time did it arrive at Clifton yards? A. Well, we don't have any record of that particular spot, but the next record we have is when it got down to Passaic tower. 10

Q. What time did they get into Passaic? A. 6:25.

Q. Did that train move under timetable rules? A. No, sir, it is an extra train.

Q. Did it move under special orders? A. No, sir, they had their regular lineup of work when they started out in the morning, to do switching of trains from Passaic to Paterson. 20

Q. What is the length of average box cars? A. Oh, they run all the way from forty to fifty feet.

Q. How do they run in width, the box cars? A. Oh, seven and a half to eight feet in width.

Q. Aren't there some ten and a half? A. There may be some big automobile cars but I wouldn't be positive about that now without looking it up.

Q. Who has the record of the cars that were in this movement at the time Noon was killed? 30

Mr. Scott: I object as indefinite.

By the Court:

Q. Do you know who has the record? A. Well, the conductor, I suppose, has the record.

Q. The conductor? A. Must have the record in his book. 40

Michael J. McGowan, for Plaintiff, Direct.

By Mr. Sheean:

Q. Was train 367 a regular passenger train? A. Yes.

Q. And what was the consist of that train? A. Mine cars and engine.

10 Q. What was the length of that train? A. I should say about 630 or 640 feet.

Q. Including the engine? A. Well, that would be about 700 feet.

Q. Do you know who the engineer of that train was that day? A. Yes, sir.

Q. How long have you known him? A. Fifteen or twenty years.

20 Q. How long has he been on that run? A. That was his regular assigned run.

Q. About how long? A. Well, I couldn't say that right offhanded; two or three years.

Q. Are the fireman and engineer separated on that engine? A. Sure.

Q. Which side of the engine does the engineer occupy. A. He is on the right-hand side.

30 Q. On which side is the fireman? A. Left side.

Q. Do you know where the yard limit signs are on the east side of Paterson? A. I don't know as I do. I couldn't tell you exactly.

Q. Do you know where they are with reference to the east side of Paterson Junction? A. I don't know just where they are stationed, to tell the truth.

40 Q. Do you know where they are with reference to the east side of Clifton Station? A. There is no yard limit at Clifton.

Michael J. McGowan, for Plaintiff, Direct.

Q. You don't know about that? A. Well, I know the same as any other station, they don't have a limit.

Q. Are there any yard limits on the west of the Passaic Junction? A. Well, it is all switching territory through there.

10

Q. It is all what? A. There is industrial tracks through there right along, but there are no yard limit boards.

Q. None whatever? A. It isn't any supposed to be, you know. It isn't supposed to be a regular yard.

Q. But it is all used for industrial service, is it? A. Well, there is places along there, different, scattered along there.

20

Q. Did train 481 have authority to use the main tracks from you? A. Why, when they start out in the morning, they get a clearance and they go about their work. If we want to run a train over any territory they are in, we have to locate them first, get in touch with the conductor of that train. They have the authority to go ahead and do their work.

30

Q. There are no restrictions then on that train? A. No, just go ahead and do their work, keep out of the way of regular trains.

Q. Are you familiar with the duties of locomotive engineers? A. I think I am.

Q. Have you observed their conduct, methods and manners, on your line of railroad? A. Yes.

Q. Have you done that on other lines of railroad? A. Oh, I don't know. I won't say that I have.

40

Michael J. McGowan, for Plaintiff, Direct.

Q. Do you know what the custom and practice is of your engineers with reference to signalling the approach of an engine under varying conditions?

A. Well, they have always got their eye—supposed to be watching.

10 Q. You have had enough experience, haven't you, to know what they do in the customary and usual way? A. They are supposed to keep a sharp look-out of signals.

Q. What precautions, Mr. McGowan, are usually taken by reasonably prudent and careful engineers when operating such a train, that is, a delayed regular train, at a speed of about forty-five miles an hour, with the view ahead partially obscured?

20 Mr. Scott: Objected to as containing an unwarranted assumption of fact; second, that there is nothing to show that the witness is qualified to answer; third, that it calls for a conclusion.

By the Court:

30 Q. Mr. McGowan, do you feel that you are competent to answer that question as to what a reasonably prudent engineer would do where his view ahead was obstructed in the manner indicated, namely, by a standing freight train or engine on a siding?

40 A. Well, I am sure that we have got an order in the book of rules that the bell will ring and how long he would ring the bell. He was one of the best men on the road. Of course, ring the bell as you pass a train on a siding or an engine switching along the main track, the engine bell should ring.

Michael J. McGowan, for Plaintiff, Cross.

Q. If he saw a person on the track? A. Any engineer would blow the whistle.

Q. Of course he would have to see him sufficiently far away to give him a view? A. Yes, sir.

Mr. Sheean: The question is, what precautions, if any, are usually taken by reasonably prudent and careful engineers of the Lackawanna Company when operating a train, a delayed regular train running behind time, forty-five miles an hour, and the view is obscured of the track ahead. 10

Mr. Scott: I object and I would like to ask Mr. McGowan a preliminary question.

By Mr. Scott: 20

Q. Mr. McGowan, you are chief dispatcher?
A. Yes.

Q. Your duties are at the Hoboken Terminal?
A. Yes, sir.

Q. And you are confined there from the time you go on duty until you leave, as I understand? A. Yes, sir.

Q. From where your office is and where your duties are, you are not engaged in traveling for the road at any time? A. No. 30

Q. So from the time you get down in the morning or at night, whatever it is, you stay in your suite of offices where your assistant dispatchers are? A. Yes.

By the Court:

Q. And as I understand, you have always been a dispatcher of some character, either an assistant 40

Michael J. McGowan, for Plaintiff, Cross.

dispatcher or as you are now, chief dispatcher, is that right? A. Yes, I was outside for a year, though, with the trainmaster.

By Mr. Scott:

Q. What time? A. Away back in 1908.

10 Q. And since that time your duties have confined you to your office in the Terminal? A. Yes, sir.

By the Court:

Q. What were your duties as outside man that you spoke of, trainmaster? A. Well, at that time I was located along the route, different stations.

Q. Well, did it require you to have some knowledge of the duties of engineers? A. Yes, sir.

20 Q. And you acquired it in that way, did you? A. Yes, sir.

Q. While you were outside man? A. Yes, sir.

By Mr. Scott:

Q. And when you were an outside man you were not working for the Lackawanna Railroad? A. Yes, sir, I was.

30 The Court: I will allow you to answer that question.

By Mr. Sheehan:

Q. You remember the question? A. Yes.

Q. Just tell us what precautions a reasonably careful man would take? A. Well, they all have their head out, watching for signals.

40 Q. What other precautions? A. The rules call for passing a train or station, the bell must ring of a passenger train.

Andrew Johnson, for Plaintiff, Direct.

Q. That rule involves delayed passenger trains?

A. Well, there is no exception, really, delayed or on time.

By the Court:

Q. Whether delayed or on time the duty is the same? A. They are going right along as fast as they can all the time.

10

By Mr. Sheean:

Q. No different if behind time? A. Well, I don't know as there is, any more than on time.

By the Court:

Q. Do you know what a station whistle is, Mr. McGowan? A. One long sound approaching a station.

20

Q. What is a public crossing whistle? A. Two long and two short, repeated after.

Q. Two long and two short? A. Yes, sir.

By Mr. Sheean:

Q. What whistle is given for men or objects on the track, on or near? A. Well, if they see anybody on the track they will blow a continual blast of the whistle.

30

Q. Describe what is known as an emergency whistle. A. Well, several short blasts, repeated right one after the other.

ANDREW JOHNSON, sworn for plaintiff.

Direct examination by Mr. Sheean:

Q. Where do you live, Mr. Johnson? A. 110 Clifton boulevard, Clifton, New Jersey.

40

Q. How long have you lived there? A. From 1922.

Andrew Johnson, for Plaintiff, Direct.

Q. What position do you occupy with the Lackawanna Railroad? A. Section foreman.

Q. How long have you occupied that position?

A. Since the beginning of 1910 I have been section foreman.

10 Q. How long have you been in charge of the section running in and about Clifton, New Jersey? A. Beginning with 1922.

Q. Do you remember the occasion of this accident to Mr. Noon April 27, 1925? A. Well, only I remember that night.

Q. You know there was such an accident? A. Yes, I remember it.

20 Q. What time in the day did that occur, about? A. Somewhere before 6:00.

Q. Where were you at that time? A. Home, just got home.

Q. How far is your home from the place where this accident occurred? A. It is not far. It is a block from home to the second corner.

30 Q. Would you say it was two blocks? A. Well, it is about two blocks. There is no blocks through there. There is a kind of hill goes up from the track.

Q. Four or five hundred feet away, is it? A. About four or five hundred feet.

Q. What first attracted your attention that night? A. Well, I was busy that night putting on screens.

40 Q. What attracted your attention? A. Well, she asked me, she says, "Andrew, what is that train blowing so hard up there?" and I happened to look up there and I seen the train was about coming to a stop, I seen people getting off.

Andrew Johnson, for Plaintiff, Direct.

Q. Did you hear a whistle? A. I certainly did.

Q. What kind of a whistle was it? A. A long, straight whistle, one straight whistle.

Q. How long did it blow? A. Blowing a long whistle.

Q. That is the first time you heard the whistle? 10
A. Yes, sir.

Q. You didn't hear any other whistle, only one whistle? A. One long whistle. He was blowing all the while until he stopped.

Q. What did you do then? A. Well, I went up there to see what happened, because I have to make a report to the railroad if any accident happens on the section. 20

Q. You went down to the place of the accident?
A. Yes, sir.

Q. And did you see a man there, dead? A. Yes, sir.

Q. Who did you understand that was, George Noon? A. Well, I asked the people around who was killed and they told me one of the crew.

Q. Where was Noon's body lying at the time you got there with reference to the switch? A. Between the eastbound and westbound tracks. 30

Q. Near the switch? A. I don't just remember how far the switch was, just where it was.

Q. Was it the track that the coal pocket connects with? A. At that time it was the westbound track.

By the Court:

Q. How many tracks were there at the time of this accident? A. Two. 40

Andrew Johnson, for Plaintiff, Direct.

Q. Only two? A. Only two.

Q. Westbound and eastbound? A. Yes.

Q. Then the siding that went into the steel mill?

A. Yes, sir.

10 Q. Was there any siding or storage track on the other side? A. Well, coal pocket.

Q. Coal pocket? A. Yes, sir.

Q. Was there a track running in the coal pocket?

A. On the opposite side.

By Mr. Sheean:

Q. Are you sure there wasn't a third track there?

A. Partly laid.

20 Q. Well, it was how long? A. Between switches and the approaches.

Q. How long was it? A. I don't remember it was a great distance. Some places it was a shorter distance, other places it was a bigger distance.

Q. About how long was this third track, half a mile? A. I don't remember just how long it was.

30 Q. What did they use that track for? A. They didn't use it. It was a dead track at that time. Nobody was using it.

Q. Into what track did this coal side track connect? A. It had been cut from the westbound track switch leading into the coal pocket.

Q. Then it crossed over this third track? A. No, it couldn't cross over the third, because it was laid above from the switch.

40 Q. Do you recognize Exhibit C, a picture taken in 1927? A. I recognize it.

Guy L. Wallgren, for Plaintiff, Direct.

Q. What appears in the distance? A. Well, from here appears a long distance both ways.

Q. Is Clifton Station shown? A. Yes.

Q. Tell us whether that correctly represents the conditions as they existed there in 1925. A. This shows like a sharp curve. Now there is no such sharp curve like that showing over here. 10

Q. How much of a curve is there? A. Over there is a three-inch elevation.

By the Court:

Q. There is no such sharp curve, the way it shows on this picture? You mean that it is a very sharp curve, but it is a very light curve? A. It is an easy curve. It takes a long sweep, that curve. 20

Q. A long sweep? A. From that place you can see a long distance both ways.

Q. Does it show conditions as they existed in 1927? A. 1927 there was only two tracks, and there is four tracks over there now.

GUY L. WALLGREN, sworn for plaintiff.

Direct examination by Mr. Sheean:

Q. Where do you reside? A. Wallington, New Jersey. 30

Q. How long have you resided there? A. A little over seven years.

Q. What concern are you employed by? A. Athenia Steel Company.

Q. Where is its headquarters? A. New York City.

Q. Where is its plant? A. Clifton. 40

Guy L. Wallgren, for Plaintiff, Direct.

Q. How long have you worked for the Athenia Steel Company? A. Twenty years.

Q. Where has its plant been during all that time? A. Same place as it is now.

10 Q. Are you familiar with the conditions generally around the plant and across the track? A. To a certain extent, yes, sir.

By the Court:

Q. How did the employees get out of the yard of the steel company? A. Through a gate alongside of the office.

Q. Just describe it. A. Why it is a swinging gate.

20 Q. And did this siding, the railroad siding, go under or through this gate? A. No, not through this gate. There is another gate.

Q. Where is that gate? A. It is alongside of the office, on the opposite side of the office.

Q. And those gates, of course, when closed, were over the rails of this siding? A. The railroad gates, yes, sir.

By Mr. Sheean:

30 Q. Calling your attention to photograph identified as Exhibit B, do you recognize the conditions portrayed therein? A. Yes, sir.

By the Court:

Q. Does that correctly reproduce the conditions as they existed at or about the time of the accident, Mr. Wallgren? A. So far as I can remember, yes, sir.

40

Guy L. Wallgren, for Plaintiff, Direct.

Q. You recall this accident, do you? You have heard of it? A. I have heard of it, yes.

Q. It appears to have happened on April 27, 1925. Do you recall the circumstance? A. Yes, sir.

Q. And do those photographs indicate the conditions existing at the time of this accident? A. As far as I can remember, yes, sir. 10

By Mr. Sheean:

Q. Calling your attention to Exhibit D for identification, which purports to be a view looking west from a point forty paces east of the steel company's switch, tell us whether or not you recognize the situation. A. Yes, as much as I can remember of it.

Q. Does it correctly portray the conditions as they existed at the time of the accident? A. As far as I can remember, yes, sir. 20

By the Court:

Q. This does show the siding into the steel plant? A. Yes, sir.

Q. And it shows the two main tracks? A. Yes, sir.

Q. But there are other tracks shown which were not there at the time of the accident; in other words, there are four tracks shown here. A. Altogether, yes, sir. 30

Q. You haven't been out to see those tracks since they have been laid? A. I haven't no, sir. I have seen the tracks from the mill yards and the mill road, that is all.

Q. Do those photographs correctly show the two tracks plus the steel company's siding, as they existed at the time of the accident? A. To the best of my knowledge, they do, yes, sir. 40

Guy L. Wallgren, for Plaintiff, Cross.

By Mr. Scott:

Q. And the best of your knowledge is what you told the Court before, you have never been up on the tracks? A. I have never been up on the tracks since.

10 By the Court:

Q. You don't know whether they have been changed or altered or not? A. Well, not by being up on the railroad property, no, sir.

By Mr. Sheean:

Q. You have frequently gone by this place, haven't you, on the side of the right of way? A. Oh, yes.

20 Q. Did the steel company observe the daylight saving law? A. Yes, sir.

Mr. Scott: I move to strike out all the testimony of Mr. Wallgren with respect to any crossing over the tracks and the identification of the pictures or exhibits.

30 The Court: I will strike out his testimony with respect to the crossing over the track on the ground that it is immaterial. I will not strike the testimony as to the photographs so far as it has a tendency to indicate the presence of the tracks plus the siding into the steel company's yard at the time of the accident. You may have an exception.

ANDREW JOHNSON, recalled for plaintiff.

Direct examination by Mr. Sheean:

40 Q. Mr. Johnson, calling your attention to Exhibit E for identification, which purports to be a view

Andrew Johnson, for Plaintiff, Direct.

from the station platform at Clifton, looking west towards the Athenia Steel.— A. Yes.

Q. Look at that and tell us whether those conditions are the same as they were in 1925. A. Well, there was no changes made except after a while there was laid those two tracks, one on the eastbound side and one on the westbound side; and when you looked from Clifton Station up towards the Athenia Steel or quite away past the Athenia Steel gives you a clear view. There is no obstruction whatever. 10

By the Court:

Q. What distance is that, about? A. Well, that would make—well, quite over half a mile.

Q. Half a mile from Clifton Station? A. Half a mile from Clifton Station, looking west. 20

By Mr. Sheean:

Q. Half a mile goes how far? A. Well, as far as you could see it.

Q. Runs up towards Paterson? A. Yes, sir.

By the Court:

Q. Does that photograph otherwise show the conditions as they were at the time of the accident, in other words, with the exception of the two tracks? A. It seems so funny on those photographs. When you look over there it looks so sharp a curve over here. 30

Q. All right. Then don't you identify it. We won't admit that photograph in the circumstances. Is it a sharp curve? A. Yes, it shows a sharp curve.

Q. No, but actually is it a sharp curve? A. No, sir. 40

Andrew Johnson, for Plaintiff, Direct.

10 The Court: I am going to allow that photograph to go in with this qualification: that there are two tracks there, one east and one west, which were not there at the time of the accident. It does disclose the east and westbound tracks, so-called, as they existed at the time of the accident; it shows the curve, which the witness says is rather sharper in the photograph than he thinks it is actually on the ground. Now with those qualifications the photograph will go in for what it is worth. I think it may be considered by the jury. It may be marked and you may have an exception.

20 By Mr. Sheean:

Q. Calling your attention to this Exhibit C for identification, it purports to be a view looking east from a point forty paces west of the steel company's switch, looking east. A. Looking east, towards New York or towards Hoboken?

Q. Towards Clifton Station. A. Well, you can see quite a long distance.

3) Q. Tell us whether or not that is a substantial reproduction of the tracks and grounds and conditions as they existed there in April, 1925, excepting such changes as you may indicate. A. Of course, those changes didn't make any difference to the view whatever. Now there is the switch. Now I would have to look at it—I can stand by the switch and I can just see the picture of that; I can see both ways from that switch.

Andrew Johnson, Examined by the Court.

By the Court:

Q. Does that photograph show now the conditions as they were in 1925? A. No, sir, this was taken later, because it has four tracks here.

Q. Well, does it show the other tracks, the tracks that were there in 1925? A. Your Honor, this was taken after a while and not at that time, when the accident happened. 10

Q. No, I know; but otherwise does it show the conditions? A. Well, it was two tracks, of course. I don't know, it is different now. It has four tracks. There was only two.

Q. Does it show the westbound and eastbound tracks here? A. Well, this would be the eastbound tracks here and this would be the westbound here. 20

Q. That is looking towards the Clifton Station; Mr. Johnson? A. Yes, looking down towards Clifton Station.

Q. The first track down on the right is what one? A. This is track 4, we call, and it is a late track.

Q. What is it used for? A. At the present time it is used for passenger and everything, whatever comes. 30

Q. Are the eastbound and westbound tracks as they existed in 1925 shown in that picture? A. Yes, this one here and this one here.

By Mr. Sheean:

Q. Now we have the two tracks identified. The switch was there at the time of the accident? A. No, this one. 40

Andrew Johnson, for Plaintiff, Direct.

Q. The switch was there, this eastbound main track? A. Yes.

Q. Well, with the changes that you have pointed out, does the picture give a reproduction of the tracks as they existed in 1925? A. The only difference, I say, is the four tracks.

By the Court:

Q. Instead of two? A. Instead of two.

Q. That is the only difference? A. That is the only difference.

Q. And the switch is 175 feet nearer than it was before? A. Further on in that track.

Q. Otherwise it is the same? A. It is no different whatever. It is the same view both ways; nothing at all over it, no obstruction whatever.

By Mr. Sheean:

Q. Calling your attention to Exhibit D, which purports to be a view looking west from a point forty paces east of the steel company's switch, do you recognize the location? A. That is the signal by the Athenia Steel up there.

Q. It is in the picture, isn't it? A. Yes.

Q. Do you recognize that location? A. Yes, I do.

Q. Does that substantially represent the conditions as they existed in April, 1925, with such exceptions as you will now name? A. It shows the same way except at that time there was only two tracks and now it has four.

Q. Otherwise it is just the same? A. Just the same.

Mr. Sheean: Plaintiff offers in evidence Exhibits B, C, D and E.

Andrew Johnson, for Plaintiff, Direct.

Mr. Scott: I object generally to the introduction of all the photographs as not representing the conditions existing at the time of the accident, even though the witness has testified in a qualified sense with respect to the conditions. I further object to Exhibit B for identification, inasmuch as your Honor has already ruled on that photograph. That is the photograph with respect to the approach from the steel works, the steps up, and that has nothing to do with any view. Your Honor has already passed on that.

10

The Court: Yes. I will allow the others to go in as full exhibits, and Exhibit B I will not allow.

20

Objections overruled; exceptions by defendant.

By Mr. Sheean:

Q. Are you familiar with the gates that the steel mill had for the side tracks? A. You mean the gate that goes into the Athenia steel yard?

Q. Yes; are there gates there as a matter of fact? A. The gate is there and every factory has a gate, every factory that I know of.

30

By the Court:

Q. Well, has this one? A. Has a gate going into the property. One side is the railroad lock and the other side is the private people lock.

By Mr. Sheean:

Q. The railroad has a lock on this gate? A. The private people has a lock on the inside, so either side can open the gate.

40

Benjamin G. Hicks, for Plaintiff, Direct.

Q. Those gates are over those tracks that run into the mill, they cross the tracks? A. Yes, they cross the tracks over the railroad.

BENJAMIN G. HICKS, JR., sworn for plaintiff.

10 *Direct examination by Mr. Sheean:*

Q. Mr. Hicks, where do you live? A. 522 Warren street, Newark.

Q. What is your present occupation? A. Trainman on the D. L. & W. Railroad.

Q. What was it in April, 1925? A. Trainman on the D. L. & W. Railroad.

20 Q. Are you one of the crew that was with Noon at the time he was killed? A. I was.

Q. What time did you leave Paterson? A. I don't recall what time it was.

Q. What sort of a train did you have? A. Why, a caboose, a tank and two box cars.

Q. Where did you make your first stop after leaving Paterson? A. Athenia Steel.

30 Q. What was done there? A. Why, we stopped to set two box cars off on the main track.

Q. In doing that, what was necessary to do? A. Stop and blow the flag out.

Q. What do you mean by blowing the flag out? A. Tell the flagman to protect the rear of the train.

Q. How about uncoupling and coupling cars? A. After we stopped.

Q. Did you bleed them of air? A. Yes, sir.

40 Q. What did you do with respect to bleeding the air and putting on the brakes of these two cars you left on the main line? A. We cut the cars off.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. Did you do those two acts? A. Yes, sir.

Q. Then what did the engine and the caboose do?

A. Why, they pulled down over the switch.

Q. Where were you when they pulled down over the switch? A. On the caboose step.

Q. Where was the caboose, ahead of or behind the engine? A. Ahead of the engine. 10

Q. Which way was the engine headed? A. West.

Q. And you were on the caboose? A. Yes.

Q. How far west did you go in that movement?

A. Just over the switch.

Q. That is the switch that we are discussing in this lawsuit? A. Yes.

Q. The main line switch? A. Yes, sir. 20

Q. When you say just over, what do you mean, twenty feet? A. No, sir, just to clear the switch points.

Q. Who threw that switch for the next move?

A. I don't recall who threw it.

Q. Where was Noon at that time? A. I don't recall where Noon was.

Q. Where was Seaman at that time? A. Out with the flag. 30

Q. Where was Ahrens? A. Throwing the switch on the inside.

Q. Inside of what? A. Inside switch leading to the coal track.

Q. How many switches were there on the inside?

A. I believe there were two besides the main line switch. 40

Benjamin G. Hicks, for Plaintiff, Direct.

By the Court:

Q. Where were they? A. One leading to the storage track and the other leading to the coal track, to the commercial track.

10 By Mr. Sheean:

Q. Which of those switches did you say Ahrens was at? A. The one leading to the coal track.

Q. What was done then with the train and the caboose? A. We shoved in with the caboose and our tank to spot the oil car.

Q. What track did you spot the tank car on? A. On the coal track.

20 Q. How far did the caboose and the engine move in on these side tracks? A. I don't just recall how far it would be; just to clear the gate with the tank car.

Q. Tell us whether that was a kick or a switch movement. A. We shoved in.

Q. You didn't kick it in? A. No, sir.

By the Court:

30 Q. What do you mean by kicking in? A. Why, giving the car a kick and let the man ride it.

Q. Without the engine motive power? A. Yes.

Q. In other words, it goes on its own momentum; you gave it a kick? A. Yes.

Q. But the man is on to regulate the brake? A. Yes, sir.

40 Q. After placing that coal car, what movement did the caboose and engine make? A. We pulled it over the first switch to shove in on the commercial track.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. Where was Noon at that time? A. I believe he was on the caboose with me.

Q. Who threw that switch? A. I don't just recall which one threw it.

Q. What movement was then made by the engine and the caboose? A. We went in and picked up a gondola. 10

Q. On what track? A. The commercial track.

Q. Coupled? A. Coupled to it, yes.

Q. Then what was done? A. We backed up to the main track switch.

Q. How many switches did you have to throw in order to get out? A. None, only just the main track was thrown. 20

Q. What protection, if any, had been given to that open main line switch while you were working? A. We had a flagman out on the eastbound track.

Q. What on the westbound? A. Nothing on the westbound. Didn't need anything on the westbound.

By the Court:

Q. Why? A. Because we were not working on the westbound line. 30

Q. You were working on the eastbound? A. Yes, sir.

By Mr. Sheean:

Q. Coming out of the commercial track with the caboose and gondola, how far east did you go in that movement? A. Over the switch point.

Q. Which switch do you refer to? A. Main track switch. 40

Benjamin G. Hicks, for Plaintiff, Direct.

Q. How far over the point did you go? A. Just to clear the point.

Q. Then what movement did you make? A. Shoved west.

Q. Where was Noon then? A. By the switch.

10

Q. The main line switch? A. Yes, sir.

Q. You mean the switch target or the switch point? A. Switch point, I believe.

Q. Where were you? A. On the gondola.

Q. Was that on the head car? A. The gondola was headed out.

Q. Where was Ahrens? A. By the switch leading to the commercial track, I believe.

20

Q. That would be what direction from the main switch? A. It would be west.

Q. How far? A. I can't say.

Q. How far did this engine, caboose and car move? A. Up to the two cars standing on the main track.

Q. How far were they from the switch? A. I couldn't judge.

Q. Half a mile? A. Oh, no.

30

Q. A quarter of a mile? A. I can't say. I can't tell how far it was.

Q. How far was Seaman from the main track? A. He was on the main track a mile out with the flag, a mile or half a mile.

Q. Before you started that movement, how long did this engine and cars stay west of that switch?

A. Just long enough to throw a switch over.

40

Q. Who threw the switch? A. I believe it was Noon.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. What were you doing, standing on the gondola? A. Waiting for the switch to be thrown.

Q. How long did he stand west of the switch? A. Long enough to throw the switch over.

Q. How long would that be? A. About two or three seconds. 10

Q. In throwing the switch what does the man have to do? A. Step on the lever and pull the handle around.

Q. Is that all? A. Yes, sir.

Q. Sure about that? A. Yes, sir.

Q. When you went down to the two cars on the main track, who coupled onto those cars? A. I did.

Q. Who released the air on those cars? A. I believe the conductor while he was standing there by the switch. 20

Q. And who released the brakes? A. The conductor released it with the bleed cock.

Q. Who gave the signal to move east? A. I did.

Q. And how far east did you go? A. Just over the switch point.

Q. And how far would that be, in your judgment? A. Just to clear the switch points so you could throw the switch over. 30

Q. From where the cars were picked up and moved in, how far was it? Ten cars? A. I don't know that it was that far.

Q. How far? A. I can't say. I don't know how far it would be.

Q. When you got over, how far were you east of the switch points? A. Just cleared the switch points. 40

Benjamin G. Hicks, for Plaintiff, Direct.

Q. How many feet would that be? A. Six or seven inches.

Q. Where were you then? A. On the box car.

By the Court:

10 Q. Where? A. The west box car.

By Mr. Sheean:

Q. On the west box car? A. Yes.

Q. On it or in it? A. On it.

Q. On the top? A. No, sir; on the step.

By the Court:

Q. On the side? A. Yes, sir.

20 By Mr. Sheean:

Q. On which side? A. The engineer's side.

By the Court:

Q. Would that be on the main track side? A. Yes, sir; between the east and westbound line, it would.

By Mr. Sheean:

30 Q. What was done after you took your position there? A. Watched Noon step across the track after throwing the switch.

Q. Did you see him? A. Yes, sir.

Q. Well, you didn't see him throw the switch, did you? A. Yes, sir.

Q. I thought you said you were on the right-hand side of that car. A. I could see.

Q. You were on the end of the car? A. Yes, sir.

40 Q. Not on the side? A. On the side. You can see from the side. The side is on the end of it, the ladder is.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. Then what did he do? A. Stepped over on the engineer's side.

Q. What did your train do? A. Stood there.

By the Court:

Q. Was it stopped? A. Yes, sir.

10

Q. Standing? A. Yes, sir.

Q. Not moving? A. No, sir.

By Mr. Sheean:

Q. How long was it standing there? A. Till George Noon gave the go-ahead signal.

Q. How long was that? A. I should imagine about a minute from the time he threw the switch and got over.

20

Q. Then what happened? A. George got on the step with me.

Q. And then what did he do? A. We started to shove in.

Q. To the steel plant? A. Yes, sir.

Q. Then what? A. George got off the step.

Q. Where was he when he got off? A. On the same step with me.

30

Q. And about how far from this main track switch? A. Oh, we hadn't gone a car length, I don't believe.

Q. Then was your train moving? A. Yes, sir.

Q. What did Noon do then? A. Got off to give a stop signal.

Q. Where did he go? A. The last I saw of him he went by my step between the two tracks.

40

Benjamin G. Hicks, for Plaintiff, Direct.

Q. Two main tracks? A. Yes, sir.

Q. To give a stop signal? A. Yes, sir.

Q. To whom was he to give the stop signal? A.
The engineer.

10 Q. Do you know whether or not he gave it? A.
Yes, sir.

Q. Did they stop? A. Yes, sir.

By the Court:

Q. Did he have to go where he did to give that
signal? A. Had to step out. The first car was just
starting in the switch in the plant; kind of a small
curve.

20 Q. Small curve? A. Yes, from the main track
to the siding.

Q. Where did he have to go to give that signal?
A. He could have stood right between the east and
westbound main to give it.

Q. Where he did stand? A. Yes, that is the last
I saw of him.

Q. Is that where he stood? A. That is as far as
I know.

30 Q. The last you saw him? A. Yes, sir.

Q. Did you see him give the signal? A. Yes, sir.

Q. How did he do it? (Witness illustrates by
waving.)

Q. Waving the arm? A. Yes, sir.

By Mr. Sheean:

Q. Why did he want to stop? A. The watchman
of the Athenia Steel was closing the gates.

40

Benjamin G. Hicks, for Plaintiff, Direct.

Q. The gates had been left open by the crew, had they? A. Yes, sir.

Q. Whose duty was it to close those gates? A. Athenia Steel people.

Q. Don't the switchmen carry keys to those locks?
A. To open them. 10

Q. Now you have given us the last time you saw Noon. How long was it before your train stopped?

A. I wouldn't just state the time, because I don't know how long it took them.

By the Court:

Q. You say you saw Noon step out? A. Yes, sir.

Q. Between the east and westbound tracks? A. Yes, sir. 20

Q. Was he actually between those tracks? A. As far as I can remember.

By Mr. Sheean:

Q. Where were you at the time the express train went by? A. Standing on the side of the box car.

Q. Why didn't you see the rest of it? A. Because he was past me.

Q. Who, Noon? A. George Noon. 30

Q. He was east of you, was he? A. Yes, sir.

Q. You had passed west of him? A. Yes, sir.

Q. Where did that car stop that you were on? A. I don't just remember where it stopped.

Q. You were shoving in? A. Yes, sir.

Q. This was the last movement, was it not? A. Three cars.

Q. In that was the engine, caboose and three cars? 40

A. Engine, caboose and three cars.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. Did you see this happen? A. Yes, sir.

Q. Now, you spoke of Noon stepping out a little. That was on a curve, wasn't it? A. No, he was shoving into the plant.

10 Q. Wasn't the course a curve? A. No, sir; there is no curve there.

Q. Can you see the engineer from where you are standing holding onto the side of the car? A. No, sir.

Q. You have to get off to get a vision, don't you? A. Yes, sir.

Q. That is what Noon did? A. Yes, sir.

By the Court:

20 Q. How far did he have to go to get a vision? A. Just to step across from the eastbound in the middle of the east and westbound.

Q. Where he did go? A. Yes, sir.

Q. You say it was necessary for him to go there? A. Yes, sir.

Q. In order to see the engineer to give a signal? A. Yes, sir.

30 By Mr. Sheean:

Q. Did you know the train came along and hit Noon? A. No, sir; I didn't know it.

Q. When did you learn that fact? A. From the flagman.

Q. Where were you at that time? A. On the car.

40 Q. How far were you then from the switch when this accident occurred? A. I don't just remember how far it was.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. If Noon was actually at the switch, how far west of the switch were you? A. I don't remember how far it was.

Q. Have you no idea? A. No, sir.

Q. Were you still on the side of the car? A. Yes, sir. 10

Q. You stayed there, did you, until Seaman came in? A. No, I stayed there till our train stopped.

Q. Who was it that told you that Noon had been killed? A. Seaman, the flagman.

Q. Out half a mile or two miles? A. He had walked in since then, when we pulled off the main track.

Q. Did you go where the body was after the accident? A. Yes, sir. 20

Q. Where did the body lie with reference to the switch? A. I don't just recall where it laid. I know it was past the switch.

Q. You mean east or west of the switch? A. West of the switch.

Q. How far? A. I can't say.

Q. Did you hear the emergency whistle of that express train? A. I heard one long blast. 30

Q. And how soon after that was it that the express train passed? A. It was stopping then.

By the Court:

Q. By the way, that train came from what direction? A. Came west.

Q. Westbound track? A. Yes, sir.

Q. The last you saw of Noon he was standing between the east and westbound tracks? A. Yes, sir. 40

Benjamin G. Hicks, Examined by the Court.

Q. And your cars were being shunted into the steel yard in a westerly direction? A. Yes, sir.

Q. So that the last you saw of Noon, he was standing with his back to the direction in which the express train came?

10 A. Standing with his face that way. He had stepped off and faced the engineer to give the stop signal.

Q. Facing the direction from which the train came? A. Yes, sir.

Q. Is that the way he should have been standing? A. He had to do it in order to see the engineer.

20 Q. What direction were your cars moving? A. We were being shoved west into the Athenia Steel.

Q. The engine was on the rear? A. Yes, sir.

Q. He had to turn west to see the engineer? A. Yes, sir.

Q. He was facing in the direction from which that express train came? A. Yes, sir.

Q. You didn't see him struck? A. No, sir.

30 Q. Why didn't you? A. Because I had turned around to watch the gates.

Q. At the steel yard? A. Yes, sir.

Q. Did you give the time that elapsed between the time when you last saw Noon and the time that you heard this long whistle? A. No, sir; I don't remember how long it was.

Q. Have no impression at all? A. Well, I can't say that I have. I don't know just how long it was.

40 Q. Well, was it a matter of seconds? A. It couldn't have been a minute, I don't believe.

Benjamin G. Hicks, for Plaintiff, Direct.

Q. It was less than sixty seconds, anyway? A. Yes, sir.

By Mr. Sheean:

Q. How far west of the switch was your engine, when Noon was killed? A. I don't know. I was on the end of the box car. 10

Q. Well, didn't you go back to where the body was? A. Yes, I went back after the accident.

Q. Then where was the engine with reference to his body? A. I believe it just cleared the frog of the switch.

Q. The engine? A. Yes, sir.

Q. Is that your recollection? A. That is the best of my recollection. 20

Q. What is the grade from that switch down to the frog? A. I don't know. I believe it is upgrade, if I am not mistaken.

Q. What is the grade from that switch down into the yard of the Athenia mill? A. I don't know. I am not familiar with the grades.

Q. When you saw Noon give this signal to the engineer, how far were you west of him? A. Just as he stepped off the car to go out. 30

Q. And how far were you west of the switch then? A. I don't recall.

Q. How many cars were east of you? A. Two cars, caboose and engine.

Q. How far was the switch from the point where Noon was when he gave the signal to the engineer? A. I don't remember. 40

Benjamin G. Hicks, for Plaintiff, Cross.

Q. Was Noon's body near the place where he had given the signal? A. I don't remember. I believe he walked off towards the engine, as far as I know, the last I saw of him.

10 *Cross examination by Mr. Scott:*

Q. This train of which Noon was a member of the crew was known as the Passaic drill? A. Yes, sir.

Q. And that drill drills from Paterson down to where every day? A. Between Secaucus and Paterson.

Q. Between Secaucus and Paterson? A. Yes, sir.

20 Q. Did you come in from Secaucus? A. Come in from Secaucus.

Q. And worked your way out? A. Yes, sir, towards Paterson.

Q. Delivering and taking cars in and out at the industrial sidings? A. Yes, sir.

Q. Then you finally got out at Paterson? A. Yes, sir.

30 Q. Then in the afternoon you came out from Paterson? A. Yes, sir; east.

Q. Came down the eastbound main track? A. Yes, sir.

Q. And was that the regular afternoon movement you made every day? A. Yes, sir.

Q. And Noon was a member of that crew and had been for some time? A. As far as I remember, yes, sir.

40

Benjamin G. Hicks, for Plaintiff, Cross.

Q. And his job was what on that drill crew? A. Head man, I believe.

Q. And you were what? A. The middle man.

Q. And Seaman? A. Flagman.

Q. This express train was known as train 367? A. Yes, sir. 10

Q. And that passed you every day when you were working there in the afternoons? A. Yes, sir.

Q. Toward evening? A. If we were there at the steel company at the time.

Q. If you were around there? A. Yes, sir.

Q. But you and the members of your crew know that that train went by there about that time every night? A. Yes, sir. 20

Q. And the last signal that you saw Noon give was a stop signal to his engineer? A. Yes, sir.

Q. At that time he was standing in a place of safety? A. Yes, sir.

Q. Between the tracks? A. Yes, sir.

By the Court:

Q. Which tracks? A. East and westbound main.

Q. He was in a position of safety then? A. Yes, sir. 30

Q. And the express would not have hit him? A. No, sir; he could clear them. Where he stopped and got off he could clear the westbound main.

By Mr. Scott:

Q. As I understand it, the reason that Noon got off the box car was that you hollered to him, "The old man is closing the gates?" A. Yes, sir. 40

Benjamin G. Hicks, for Plaintiff, Re-direct.

Q. Noon got off to give the stop signal? A. Yes, sir.

Q. And you saw him give that stop signal? A. Yes, sir.

10 Q. That is the signal that you have told the Court is the last signal that you saw Noon give? A. Yes, sir.

Q. As a result of that signal as far as you know, your train, string of cars, came to a stop? A. Yes, sir.

Re-direct examination by Mr. Sheean:

20 Q. Was it standing still when Noon was struck?
A. I don't know. I don't know what time Noon was struck.

Q. How many days do you say Noon was in your crew in 1925? A. About four days; three or four days, if I am not mistaken.

Q. That is the only time you and he were ever in the same crew, is it? A. No, sir; he was on there before.

30 Q. How long before? A. I don't remember how long it was.

Q. How many days was he on there before? A. I don't know. He was on there on and off.

Q. You didn't keep any record of how many days? A. No, sir.

Q. Do you know how often he went into the Athenia Mill tracks? A. No, sir; I don't.

40 Q. Did you always go in there? A. When we had cars to put in there.

Benjamin G. Hicks, for Plaintiff, Re-direct.

Q. Only when you had cars? A. Yes, or cars to take out.

Q. Did you make up your trains on the eastbound track? A. Not on the eastbound track.

Q. Did you make them up anywhere down in that neighborhood? A. Only our empties, taking them in with us. 10

Q. Did you make up a train to do that? A. Not on the eastbound track.

Q. Where would you make them? A. At Passaic, on the siding.

Q. Where did you gather your empties? A. In different plants, out of the different plants.

Q. What use did you make of the main tracks there for making up trains? A. Didn't use the main track for making up trains. 20

Q. What use of the track did you make by standing your trains on it? A. We have at certain times, to use the main track to set out and pick up empties from certain plants.

Q. Does that apply to all the tracks there at Clifton? A. Some times on both sides, we have to use the main track. 30

Q. Have you ever done any switching on the other side of this track where the coal yards are? A. Yes, sir.

Q. Can you tell us what track the coal companies' switch cuts into? A. It was at the time then a dead track.

Q. How is it now? A. It is known as track 3, westbound main. 40

Benjamin G. Hicks, for Plaintiff, Re-direct.

Q. What is this distance between tracks, the eastbound and the west? A. I don't know. I don't have anything to do with that.

Q. You don't know how wide the cars are? A. No, sir.

10 Q. And do you know whether you were at the peak of the curve or on the end of the curve at the time this accident occurred? A. I don't just recall where the car was at the time.

Q. Were you rounding the curve? A. There wasn't a curve there; it was more of a straight shove in, excepting the switch point.

20 Q. How do you know that Noon had a clearance there? A. Why, if you stand sideways the two main tracks can pass you there.

Q. If you stand sideways? A. Yes, sir.

Q. That would give you a clearance of what, a foot and a half? A. I don't know. I can't tell you how far it will give you standing there.

Q. No, but you say if a man would stand sideways the train could go by without catching him. A. From what I have seen.

30 Q. And is that all the clearance there is there, just enough for a man to stand sideways for the two trains? A. As far as I know.

Re-cross examination by Mr. Scott:

Q. Just one question, Mr. Hicks. You were going in this industrial track at the time Noon jumped off? A. Yes, sir.

40 Q. You were partly on the main track and partly in the industrial track? A. Yes, sir.

Thomas F. Graves, for Plaintiff, Direct.

Q. You don't know how much of your train was on the industrial track? A. No, sir; I don't. I don't remember just how it was.

Q. But you know you had started in on it? A. Yes, sir.

Q. You said that rather than it being a curve it was a sort of a straight shove in? A. Yes, sir. 10

THOMAS F. GRAVES, SWORN for plaintiff.

Direct examination by Mr. Sheean:

Q. Where do you live? A. 82 Susset avenue, East Orange.

Q. What is your business at present? A. Engineer on the Lackawanna road. 20

Q. How long have you been an engineer? A. About thirty or thirty-one years.

Q. Have you worked for any other railroad than the Lackawanna? A. Yes, sir.

Q. What other railroad? A. New Jersey Central Railroad here.

Q. How long did you work for them? A. Three years and a half. 30

Q. And did you work for any other road? A. No, sir.

Q. You were the engineer on this train that Noon was working on? A. Yes, sir.

Q. Where did you take the train on that day? A. At Secaucus.

Q. Did you go to Paterson? A. Yes, sir. 40

Thomas F. Graves, for Plaintiff, Direct.

Q. How many cars did you have when you left Paterson? A. I had four. I had a caboose, an oil tank and two box cars.

10 Q. What position did your engine have with reference to the other cars? A. Well, when I left Paterson, the engine was running, backwards. I had four cars west of the engine; but when I come down to the steel plant, the conductor cut off two cars on the main.

Q. What was the conductor's name? A. Johnnie Ahrens.

Q. How long did it take him to cut off those box cars? A. Not very long.

20 Q. What did he do to the cars, if anything? A. He just cut the cars off and gave me a back-up signal.

Q. What direction did you take then? A. After he give me the back-up signal I moved east.

Q. How far east did you go? A. Just far enough to clear the switch.

Q. What switch was that? A. Why, it went in on the steel works company's place there.

30 Q. How many feet did you go east of the switch? A. Just far enough to clear, so he could throw it over.

Q. That would be clear for two cars? A. Yes, two cars and the engine.

Q. Then what was done? A. Why, we shoved that oil tank on the coal tracks and placed it just inside the gate.

40 Q. Who opened the gate? A. I don't know who opened the gate.

Thomas F. Graves, for Plaintiff, Direct.

Q. Who rode the car in? A. Nobody. We shoved the car in.

Q. Was that on the coal tracks? A. Yes, sir.

Q. Where was your engine at the time you left the car? A. Outside the gate.

Q. How far outside the gates? A. Not very far, because the caboose and the engine, when we placed that oil tank inside the gate, it was just inside, just clearing. 10

Q. Well, how far was your engine away from the switch at the time you let go of this first car that you put on the coal tracks? A. That commercial switch was right behind me.

Q. How far was the main line switch from there? A. I don't know. I never measured it there. 20

Q. How far did you come out then with your caboose and engine? A. Just far enough to clear the commercial switch.

Q. And how near to the main line switch were you in doing that? A. Well, the main line switch was quite a distance back yet.

Q. What was the next movement? A. We shoved in on the commercial track to pick up a gondola there. 30

Q. Then how did you move? A. Then we backed out on the main switch.

Q. Did you back over the commercial switch? A. Yes, we backed over that and out on the main.

Q. Did they throw the commercial switch? A. No, sir, not then.

Q. When did they throw that? A. We didn't throw it again. 40

Thomas F. Graves, for Plaintiff, Direct.

Q. This places you out on the main line, doesn't it? A. Yes, we backed out on the main line.

Q. And what was done to the main line switch?

A. Why, threw it over and shoved west to pick up the two box cars.

10 Q. How far over that switch did you go that time?

A. Why, not very far that time.

Q. When you say not very far, do you mean a car length, or two car lengths? A. Well, not very far, because them cars just laid to clear that switch. We went into do that work in the yard there.

Q. But your "very far or not very far" is rather indefinite. It means a very short distance, does it?

20 A. Well, when they cut off that way, they just get clear of the switch, so we won't have to go very far ahead.

Q. Who threw the switch there at that time?

A. Noon.

Q. And where was Hicks at that time? A. I don't know just where he was then.

Q. Where was Ahrens? A. He was on the gondola.

30 Q. You are moving west with the engine and gondola and the caboose? A. Yes, sir.

Q. How far did you move west? A. Not very far, because them cars just laid to clear the switch there.

Q. Would you say ten feet or a thousand feet?

A. Well, I don't know, because I didn't measure it. They didn't lay there very far. I didn't notice just how far they did lay, because we don't go very far when we have to pick up cars that way.

40

Thomas F. Graves, for Plaintiff, Direct.

Q. How far west of the switch did those two cars stand on the main track? A. I didn't notice. They just cleared the switch there.

Q. Those two cars just cleared the switch? A. Yes, so we could go in on that plant and do the work there.

10

Q. To clear the switch, would be how many cars away from the switch target? A. I didn't measure it. They just laid there to clear that switch, so we could get in and do our work, and I didn't notice.

Q. Can't you give us some idea what distance is necessary to clear a switch? A. No, sir, I don't because I don't know how far the open switch clears the track there. It just cleared that adjoining track there.

20

Q. Do you think it is one car or two cars lengths? A. Well, I don't know.

Q. Have you any idea how long those cars are? A. No, sir, because some of them cars is longer than others.

Q. No idea how wide? A. No, sir, I don't because I wasn't interested in it.

Q. Well, you went down and coupled onto these two cars on the track? A. Yes, we backed down.

30

Q. How long did it take you to couple on? A. Not very long, because the knuckles is open; when they come back they couple that way.

Q. Who let off the brake? A. Noon.

Q. Then you moved down, did you? A. No, sir, we was moving west again when he let me in off the main.

40

Thomas F. Graves, for Plaintiff, Direct.

Q. Then you picked up those two cars in a west-
erly movement? A. Yes, sir.

Q. Then you moved which way, east? A. Yes,
sir.

10 Q. How far did you move east? A. Just far
enough so we could clear that switch, so we could
come back on the commercial track.

Q. Where was Noon when you were coming back
to that switch? A. Noon threw the switch over.

Q. Where was Noon when you were moving those
four cars east? A. Noon was right on the switch.

20 Q. When you moved after picking up the two
cars on the eastbound main track, you then moved
east over this switch? A. Yes.

Q. Where was Noon when you were making that
movement? A. Standing at the switch.

Q. He didn't come down there? A. No, sir.

Q. And pick up those cars? A. No, sir, not then.

Q. What was he doing at the switch? A. He was
waiting till I backed down over it so he could throw
it over, so that I could go on the commercial track.

30 Q. Which side of the track was he on? A. He was
on the left-hand side.

Q. Your left or his left? A. On the left of me—
because I was running backwards. That made me
face out on the side.

Q. Who threw that switch? A. Noon.

Q. Did you see him throw it? A. No, sir, but he
was on the switch and I suppose he threw it.

40 Q. When did you next see Noon? A. When he
stepped over on my side and give me the go ahead
signal.

Thomas F. Graves, for Plaintiff, Direct.

Q. Where was he standing then? A. Between us and the westbound tracks.

Q. Right in the corner? A. No, sir; just so to clear the cars.

Q. To clear which cars? A. The two box cars.

Q. Your cars? A. Yes, sir.

10

Q. How far was he then from the rail? A. He just stood there so he could get in the cars.

Q. Then what happened? A. He got on the step of the car and after he got on the step of the car he gave me a go ahead signal, that is after he got on the cars.

Q. Then what did you do? A. I was shoving ahead and that was the last time I noticed Noon; when he give me the last signal he was on the step of the box car and he gave me the signal to go ahead.

20

Q. You heard Hick's testimony? A. I didn't notice Hicks. I took Noon's signals. And after he throws his switch he steps over on the engineer's side to give me a go ahead signal, and after he got on the step of the box car he gave me the go ahead signal.

Q. You didn't see Noon give you a signal to stop, did you? A. No, sir; I didn't.

30

Q. Who did you give a signal to stop? A. Paddy Seaman, the flagman.

Q. Where did you stop? A. Just as soon as I possibly could.

Q. I know, but where was your engine when you stopped? Where was your tender standing when you stopped? A. In on the commercial track, head in on the commercial track.

40

Thomas F. Graves, for Plaintiff, Direct.

Q. You passed over the switch on the main line?

A. No, we was going on the commercial track there, shoving them cars on the commercial track.

Q. How far did you continue moving after you heard a train coming, heard the whistle of this train?

10 A. I was moving in the same direction, west.

Q. How long did you continue moving? A. Until I noticed it for about three or four seconds.

Q. You continued moving your train in on that side track or commercial track? A. Yes, sir.

Q. And then the flagman is the one that stopped you? A. Yes, the flagman.

Q. You heard the whistle on the express train?

20 A. He was coming behind me.

Q. How far was it away from you when it blew that whistle? A. I didn't notice.

Q. Where were you on the main line at that time?

A. I was going in on the commercial track.

Q. But how far were you east of the switch at that time? A. I wasn't around the switch. I was west of the switch just then.

30 Q. Noon had just let you in over the switch, hadn't he? A. Yes, but we had got in so I was just over the switch there.

Q. How long did it take you to start and move your four cars over that switch? A. Not very long.

Q. How long? A. About a second or two, just long enough to reverse the engine.

Q. At the time this express train passed, you were facing toward the west, were you? A. Yes, sir.

40 Q. And you didn't see Noon give you a stop signal? A. No, sir, I dind't.

Thomas F. Graves, Examined by the Court.

By the Court:

Q. You say you didn't see Noon give any signal?

A. No, sir, not after he got on the box car, to give me the two go ahead signals.

Q. That was the last time? A. That was the last time I noticed Noon. 10

Q. If he had given any signal after that, would you have seen it? A. Probably I would if I hadn't been looking at Paddy Seaman. Paddy Seaman was giving me what railroad men know as the washout signal. He was almost down on his knees, swinging this red flag right across the track as hard as he could.

Q. When did he give that signal? A. When the accident happened. 20

Q. How soon did the accident happen after you saw Noon giving that signal? A. Well, I didn't notice just how quick it was.

Q. Where were your cars and engine when the accident happened? A. The cars and engine was going in on the commercial track.

Q. On the commercial track? A. Leaving the main track to go in on the commercial track. 30

Q. That was after they had all been picked up? A. Yes, sir.

Q. The two cars that were left on the main track, you picked those up? A. Yes, sir.

Q. And you were pushing them in on the commercial track? A. Yes, sir.

Q. When the accident happened? A. Yes, sir.

Thomas F. Graves, for Plaintiff, Direct.

By Mr. Sheean:

Q. How soon after you started to move west, was it that the accident happened? A. I don't know. I didn't notice.

10 Q. You don't know when the accident did happen, do you? A. No, sir. The first thing I knowed about the accident was after I got stopped I noticed Benny Hicks running east of my engine.

Q. He was running east of your engine, and all that time you were moving forward? A. Kept moving west, yes, sir.

20 Q. How fast were you moving? A. Not very fast, taking that switch. We don't work very fast on them switches. Probably I was going about three or four miles.

Q. How did you make in three or four seconds, that movement, that movement if you can't go at any speed at other places? A. Why, from the time you start it wouldn't take long for three or four seconds to go by.

Q. Mr. Graves, have you ever operated passenger engines? A. Yes, sir.

30 Q. Do you know what is the usual and customary practice of engineers on the Lackawanna Railroad, in operating their engines and giving signals under varying conditions? A. Yes, sir.

40 Q. What precautions, if any, are usually and customarily taken by reasonably prudent and careful engineers of the Lackawanna company when operating a delayed regular train at about forty-five miles an hour and when about to pass a freight train standing or working on a curve of a nearby track, which in part obstructs the view of the engineer; what precautions would a reasonably prudent engi-

Thomas F. Graves, for Plaintiff, Direct.

neer take? A. When an engineer sees anybody working along the track, they blow one whistle, that is, to draw attention of people working along the track. In case it is going past a station or any passenger standing near the edge of the platform, he blows one whistle to draw attention that there is a train approaching him. 10

Q. Gives a timely warning, does he, of his approach? A. Yes.

Q. Is there a usual and customary way of running an engine on the Lackawanna road? A. That is the signal we use for men or anything that wants any road signal at all. It just draws attention of people that a train is approaching, that is all.

Q. What precautions, if any, are usually and customarily taken by reasonably prudent and careful engineers when operating a delayed regular train, at about forty-five miles an hour, when about to pass a freight train which is switching cars. And members of the train crew are working on or about it? A. One whistle. 20

Q. Whereabouts would that whistle be blown? A. Just as soon as the engineer sees the men working, wherever the engineer sees a car working or such men, he blows a whistle to draw their attention right away. 30

By the Court:

Q. Suppose he didn't see any men but he saw the freight train on the siding? A. Just as soon as he sees the freight train and sees any men working around there he starts to blow.

Q. Suppose all he saw was a freight train, nor any men around it; would he blow any whistle at all? A. I don't know as he would. 40

Thomas F. Graves, for Plaintiff, Direct.

Q. He blows a whistle because he sees the men around it; is that right? A. No, sir, when he blows the whistle he sees his men and he blows.

By the Court:

10 Q. Was your train or engine and cars, in motion when the express came by? A. Yes, sir, I was moving in west.

Q. In west? A. Yes, when that train got inside of me.

Q. You were moving in on the commercial track? A. Yes, sir.

Q. How far east of the switch were you at that time? A. I was inside of the switch, just inside.

20 Q. Just inside? A. Yes, sir, going in on the commercial track.

Q. Can you give us any idea how far east of the switch you were, inside the switch? A. I was in the west of the switch then.

By Mr. Sheean:

30 Q. Just prior to that, however, you had been standing out on the main line track, hadn't you, with these four cars, before you went over the switch? A. Yes, had to stop there.

Q. Yes, but when you were there you were on the main line, weren't you? A. Yes, sir.

Q. And on the adjacent track? A. On the east-bound track.

40 Q. Where was the express train at the time you were standing on that eastbound track? A. I don't know, I didn't notice. She was going towards Pater-son. I don't know where she was, because I didn't notice.

Robert M. White, for Plaintiff, Direct.

Q. Could you have seen the express train if you had looked to the east? A. Yes, sir.

Q. When you were standing on that eastbound track? A. I was looking ahead for a signal from the crew.

Q. No, you could have seen the express train coming? A. Yes, if I wasn't looking back, watching my brakeman, I could see it, but I had to watch my brakeman on a job like that. 10

ROBERT M. WHITE, sworn for plaintiff.

Direct examination by Mr. Sheean:

Q. Where do you reside, Mr. White? A. Mountain Lakes. 20

Q. And what is your official position with the defendant? A. Superintendent of the M. & E. division of the D. L. & W.

Q. How long have you been in service? A. I have been with the M. & E. division for nineteen years.

Q. How long have you been connected with the operating department? A. About nineteen years.

Q. As superintendent, is it part of your work to supervise the engineers? A. As far as their action on the road is concerned, yes. 30

Q. Are you familiar with the different emergencies with which they meet and the necessities of taking certain precautions under certain conditions? A. I think I am.

Q. What precautions, if any, are usually taken by reasonably prudent and careful engineers when operating a regular delayed passenger train at a high speed, and approaching another train working or 40

Robert M. White, for Plaintiff, Direct.

switching or operating on an adjacent track? A. Well, I would have to amplify my answer a little bit on that, Mr. Sheean. On the M. & E. division we operate a great many trains, and the question of a delayed train means nothing so far as any action that the engineer would take. The train being three minutes late or four minutes late would actually mean nothing so far as any action he would take on account of notifying anybody. On that division we run a great many trains, a great many extra trains, a great many freight trains that run at high speed, they are not scheduled; so that the delayed train proposition would have absolutely no bearing in this case or in any other case of an accident of that sort.

20 Q. Why is that fact emphasized in your rules about delayed trains? A. Well, it is due to this: that on some portions of our road and portions of other roads where there are very few trains in a day and brakemen and others would know that a train was due, say at noon, that didn't get along till three or 4:00 o'clock in the afternoon on account of being delayed a couple of hours, then it would be important.

30 Q. What bearing has the fact that a train is working and standing on a curve which obstructs in part the view beyond a certain portion of the train? A. That would have no bearing at all unless the engine-men should observe that some man of the other train crew was not looking or was not in a position where he would observe him coming; then he would naturally warn him of his approach.

40

Robert M. White, for Plaintiff, Direct.

By the Court:

Q. That would be the rule in any case, wouldn't it? A. Yes, sir, absolutely.

Q. Any individual appearing on or adjacent to the tracks? A. Yes, that is the general rule, that if there is anybody on the tracks who was not in position to take care of themselves, the engineer, if he sees them, naturally would give a warning whistle or ring a bell; he would usually reach for the whistle because that would be the quickest thing; and then he would have to use the judgment as to whether or not to make an emergency stop.

10

By Mr. Sheean:

Q. Where do your rules emphasize the danger of an obstructed view of an engineer? A. Well, that has no connection with your delayed train and no connection with the warning of a brakeman. And the brakemen naturally are working, their attention is on their work more than it would be watching for trains; and that rule is largely for the protection of brakemen or bridgemen.

20

Q. As a matter of fact, a brakeman is exposed more than a trackman? A. I wouldn't say so.

30

Q. A trainman's work takes him on both sides of a train at any time and away from the train, does it not? A. Why, yes, under certain conditions.

Q. A trackman on the other hand, is stationary; and is working in the same place about all the time? A. He may be working in the same vicinity but must be crossing over tracks in his work, and in his handling materials and so on.

Q. What precautions, if any, are usually and customarily taken by reasonably careful engineers,

40

Robert M. White, for Plaintiff, Direct.

10 when operating a delayed regular train at about forty-five miles an hour, and when about to pass a freight train standing or working or switching on the curve of an adjacent track, which in part obstructs the view of the track that the engineer is running on?

By the Court:

20 Q. In that situation, what would a reasonably prudent engineer do? A. He might sound the whistle. There is no rule would tell him to do so. If a train on an adjoining track were standing still, the rules would provide for his ringing the bell, due to the fact that with a train standing still, it was probably in trouble; there might be somebody between cars, coupling up cars or making couplings or something of that sort, who would possibly step back out.

By Mr. Sheean:

30 Q. The question is not what it is as a general proposition, but what is usually and customarily done by reasonably prudent and careful engineers in the service under the conditions we have assumed? A. Some of them, possibly, would give one blast of the whistle.

Q. That is timely warning? A. As a warning. Some of them would not.

Q. You don't regard the emergency whistle as a timely warning, do you? A. Well, any whistle would be a warning.

Q. The whistle that you refer to, is what kind of a whistle? A. Well, any sound of the whistle.

40 Q. Timely whistle? A. One sound of the whistle is a warning. Anybody can hear one sound.

Robert M. White, for Plaintiff, Direct.

Q. Where ought that whistle to be given? A. Oh, where it would give a man a reasonable chance to step off the tracks.

Q. Isn't a great deal of latitude allowed to engineers in regard to the use of their whistle and you, as general superintendent, have to rely upon their prudence and their care as to when and where and under what conditions the whistle shall be sounded as a warning? A. No, I don't think so, because the rules provide against the unnecessary use of the whistle. 10

Q. But what does this rule mean when it says, "When in doubt, take the safe course?" A. Well, it means just that, if you know what a safe course is.

Q. Do you let the engineer guess? A. We have to let them use their judgment. 20

Q. I call your attention here to an exhibit marked F for identification and ask you to state what that is. A. That is a copy of the rules of the operating department of the D. L. & W. Railroad Company, dated December 15, 1918.

Q. Were these rules in effect on the day of this accident, April 27, 1925? A. Yes, sir, except as they may have been modified by bulletins or timetable instructions. 30

Q. Is there a rule covering the case of a delayed train, running at a high speed, and approaching a train, switching or standing on an adjacent track on a curve? A. No, sir, not so far as any warning to be given to a car on an adjacent track.

Q. And your judgment is that such a rule is unnecessary; is that right? A. Yes, that is my judgment. 40

Robert M. White, for Plaintiff, Direct.

10 Q. You leave it open to the engineer to do what he thinks is right under each condition? A. This won't answer your question. The train crew, so far as their work is concerned, are governed by certain rules whereby they have placed themselves in a position where they may be injured by the movements of their own trains when the other members of the crew have duties to perform in connection with protecting them. But there is no rule that I know of where a trainman can expect protection against any other train or the movement of any other train.

By the Court:

20 Q. Coming from a member of his own crew? A. Yes, sir. He is supposed to take care of himself so far as protecting himself as against the movement of another train.

Q. On another track? A. Yes, sir.

By Mr. Sheean:

30 Q. The use of the whistle, I assume, is in the discretion to a large extent, of your engineers? A. It is. It is the custom, and in case of a fog or snow-storm, anything of that sort, and if a man knows that a crew is working in a certain locality or men are working in a certain locality, it is customary to give some sort of signal to notify them of the approach of a train.

40 Q. What do you mean by station limits? A. Station limits would be inside of the station switches. In case of a station where there were one or two tracks back of the station, back of the freight-house, and so on, which is just right within the limits where they would be doing station switching.

Robert M. White, for Plaintiff, Direct.

By the Court:

Q. Well, let's put it concretely. Wasn't it where this accident happened within station limits? A. No, sir.

Q. Do you know where the accident happened? A. Yes, sir. 10

Q. And how far was that from Clifton Station? A. Oh, it must be three-quarters of a mile.

Q. Now your statement of station limits involves the switches about the station or the station yard? A. Yes, sir.

Q. Storage tracks? A. Yes, sir, freight tracks at that freight station.

Q. Was the point where this accident happened within the yard limits? A. No, sir; it is not. 20

Q. I mean physically speaking now. A. No, sir; it is out on the main line, outside of all yard limits.

Q. Whether it be station or yard limits? A. Yes, sir.

Q. A quarter of a mile, did you say? A. I think it is closer to three-quarters of a mile from Clifton Station to Athenia Steel.

Q. Was that the nearest station, Clifton? A. Yes, sir. 30

By Mr. Sheean:

Q. Would your opinion as to that be changed materially if you knew that this accident occurred only fifteen hundred feet from the station? A. No, sir, wouldn't change it at all.

Henry O. Smith, for Plaintiff, Direct.

Q. If this accident had occurred within sixty feet of the station, would it still have been inside the station limits? A. Well, you might call sixty feet from the station inside the station limits.

10 Q. Have you a rule that fixes it? A. Sixty feet would be beside the station platform.

Q. Have you any rule fixing those limits? A. No, sir, we don't use that rule at all.

Q. Well, it is in your book? A. That is because the book is based on the rules of the American Railway Association.

Q. You are a part of it? A. Yes, sir.

20 Q. So it is your rule? A. There are lots of things in there.

Q. Let me ask you if this is not a rule which you can approve: "Station limits are so much of the main line and ground outside the switches as are in use for reaching side tracks, within the switches." A. Well, that is all right.

Q. Is that a good rule? A. That doesn't conflict with my understanding at all; yes.

30 Q. That is all right, is it? A. Yes.

HENRY O. SMITH, sworn for plaintiff.

Direct examination by Mr. Sheean:

Q. Where do you reside? A. Ship Bottom, Beach Arlington, New Jersey.

Q. What business have you been engaged in in your life? A. Retired engineer.

40 Q. Locomotive engineer? A. Locomotive engineer.

Henry O. Smith, for Plaintiff, Direct.

Q. What railroad companies have you worked for?

A. Pennsylvania Railroad.

Q. How many years? A. Fifty-one years and eight months.

Q. Tell us what experience you acquired during that time. A. I worked all service, all class of service; about thirty-five years as fast passenger. 10

Q. What have been some of your runs? A. C. & O. out of Jersey City was the last of the through lines I ran, Jersey City to Washington.

Q. Are you familiar with the custom and the practice of locomotive engineers in using their whistle on varying occasions when they are on the road operating a train? A. I should be. 20

Q. You mean yes by that?

The Court: That carries weight by implication.

Q. Now what precautions, if any, are usually and customarily taken by reasonably prudent and careful engineers when operating a delayed regular train at about forty-five miles per hour and when about to pass a freight train standing or switching and working on a curve in an adjacent track where the view of the engineer is partially obstructed? A. I would always sound a whistle. 30

Mr. Scott: I object on the ground, sir, that the witness has not shown a similarity of operating conditions, with respect to the location where this accident happened, the first reason; and second, that the question contains an unwarranted assumption of fact with respect to the conditions under which this accident is alleged to have happened. 40

Henry O. Smith, for Plaintiff, Direct.

The Court: I think I will allow an answer to that question. You may have an exception.

10 Q. What is the custom and practice of prudent engineers under those conditions. A. Well, in my own case, when about to pass a train on an adjacent track, either working or standing, I use a whistle before I get to them.

The Court: Well, he can't do that.

Q. What do the other prudent and careful engineers do? Do they do the same thing? A. I judge so. I don't consider myself an exception.

Mr. Scott: Objected to.

The Court: Well, that is hardly responsive.

20 By Mr. Sheean:

Q. What I want is the custom and practice of reasonably prudent engineers. A. They usually do just as I do, use the whistle before they reach that train in time to let them know that you are there and coming.

Q. What kind of a whistle would be sounded? A. I usually use the crossing signal.

30 Q. And what is that? Describe it. A. Two long and two short.

Q. How far away from the train that is standing on the adjacent track? A. That would depend on how far away I seen them. If I seen the rear end, I would blow just as soon as I seen them.

40 Q. Explain why you would blow the whistle under those conditions. A. Well, I would rather be safe than sorry. That is about all I know to answer this question.

Henry O. Smith, for Plaintiff, Cross.

Q. Well, have you reason to anticipate anything?

A. No.

Q. When you are approaching a train like that?

A. No, I wouldn't have reason to anticipate anything.

Q. Not even a man getting in front? A. I would 10
take the safe course, I consider.

Q. Do you understand what I mean by anticipate?

A. I certainly do.

Q. Now why do you give this signal? A. Well, 20
those men are working there. There is a possibility
of a man stepping out from between cars anywhere,
possibly a man sponging a box might straighten
up and my bumper would hit him. If he knows I
am coming by the whistle, he won't do it.

Q. The same thing is true if he turns to signal
an engineer on a curve, isn't it? A. On a curve
or on a freight I would use it.

Cross examination by Mr. Scott:

Q. I take it, Mr. Smith, that you were what they
call an extraordinarily prudent man? A. No, I don't
think so. I don't want to claim so anyhow. 30

Q. But you say your basis of signaling was safe
rather than sorry; as I take it, that was it? A. That
was my idea of it.

Q. That was your idea of railroading from an
engineering standpoint; and if you saw a train stand-
ing upon an adjacent track you would blow? A. Not
on an adjacent track, a train that is liable to be
working. 40

Henry O. Smith, for Plaintiff, Cross.

Q. Well, if you just saw a train on an adjacent track that was standing still, would you blow? A. Well, no, that is something you are looking for.

Q. But I mean would you blow if you saw a train on an adjacent track standing still? A. If it was
10 a place where they were liable to be working, any part of the crew, I would.

Q. Whether you saw the crew or not? A. Well, I wouldn't see the crew.

Q. Sometimes if you didn't see any member? A. If I didn't see any members of the crew.

Q. You would blow on general principles? A. On
20 general principles I would blow, have done it right along.

Q. When did you quit the Pennsylvania service?
A. February, 1923.

Q. And you were an engineer for a long number of years, as I take it, continuously going back and forth over the road? A. Yes.

Q. And then, as I take it also, when you got off your engine you tried to get home and have a little home life? Your entire time that you were working
30 for the Pennsylvania Railroad was devoted to running your engine? A. Well, I would have been pensioned in two years whether I had been defective or not; but my defective hearing helped me out at the age of sixty-five.

Q. You mistake me. I am not talking about a defective hearing. I say the time that you were working as an engineer for the Pennsylvania, you spent all your time running your engines back and
40 forth over your roads? A. Yes, sir.

Henry O. Smith, for Plaintiff, Cross.

Q. And then when you got through with that, then you got home as quick as you could; I mean to get as much home life as possible; do you get me?

A. I got you.

Q. And in what way did you learn the methods that the other Pennsylvania Railroad engineers would follow, like you told us you did? A. It is very evident you have never been around the loafing room. 10

Q. At a meeting of the stovepipe committee? A. All hands and the stovepipe committee.

Q. And you acquired your knowledge as to what the other Pennsylvania Railroad men do at those stovepipe committee meetings? A. No, I followed the lead of the man I had fired for. Now in reality I am an old P. W. B. man, if you know what that is; the old Philadelphia, Wilmington and Baltimore; and they had that habit right along. 20

Q. So you took your method of signaling from your preceptor, as it was? A. I carried that with me all right along.

Q. And you adopted his method of signaling? A. It was never adversely criticized. 30

Q. No, I am not criticising you. I say you adopted his methods. So when you tell us that this reasonably prudent engineer would do a certain thing, it is based upon the fact that you do it plus the fact that a fellow that you liked— A. No.

Q. Well, you did like him? A. Well, I certainly did.

Q. A man that you liked and regarded and was brought up with, that he did it too. I say you base 40

Henry O. Smith, for Plaintiff, Cross.

your judgment on those two things, because he did it and because you did it and because nobody criticised you? A. And because during my term of service I never injured an employee or a passenger. I must have had a whole lot of luck or it was a good method.

10 Q. Well, I will say fifty-fifty. But that is the basis of the rule of prudence that you have been telling the jury and the Court you think should be exercised? A. Well, I don't want to be an expert. I don't want to be criticised myself as an expert, nor I don't want to disagree with anyone else in regard to their methods.

20 Q. But that is the method that you thought? A. I am telling you what I did myself. I am absolutely disinterested, absolutely.

Q. Well, I am only coming up close to you because you are a little deaf; that is all; it is not antagonistic. A. Oh, no, no. I don't think that.

30 Mr. Scott: I move to strike the testimony of this witness from the record, because the basis of his testimony, in answer to his question as to what reasonably prudent engineers do, is based upon the facts elicited in cross examination; and while what Mr. Smith might do and what his preceptor on the engine might have done and told him is not the basis of what reasonably careful, prudent engineers would do.

By Mr. Scott:

40 Q. The custom that you are going to tell Mr. Sheean about, I take it from what I asked you be-

Henry O. Smith, for Plaintiff, Cross.

fore, was based upon only your experience and the experience of the man who taught you to run an engine when you fired for him, and these little social conversations that all good railroad men have in between runs at what they call the stovepipe committee meetings, and sometimes the Y. M. C. A.?
 A. Well, it is hard to be on two engines at once. I can tell you what happens on my own. 10

Q. But not what the other men do? A. But I can't tell you what happens with the other fellow.

By Mr. Sheehan:

Q. Do you understand the question that has been asked you as to what you know about other engineers? A. As far as I can say, the other engineers have orders to take every precaution when passing trains along the road, and as I understand, my precautions are what the rest of them took. Now I don't say they do take it and can't say that; but I should judge that they would. 20

Q. Have you ever ridden on an engine with another engineer? A. I certainly have.

Q. Have you observed the way they run engines?
 A. I have acted as assistant road foreman and rode with all of them; and there will be four out of five that will use that signal, unless it is a passenger train carrying signals; then they have regular signals to blow at each end of the train. 30

Q. How many years have you been riding on different engines with different engineers? A. Well, for years.

Q. I mean for a number of how many years? A. For a number of about eight or nine years steady at that time. 40

Henry O. Smith, for Plaintiff, Cross.

10 Q. In riding on the engines with different engineers, didn't you have a chance to observe what kind of precautions they took under varying conditions? A. Well, with the road foreman of engines, some people will do something that they won't do when he ain't there.

Q. That is not my question. You saw what went on, didn't you? A. I have and I have seen them blow their whistles for passing trains.

Q. Your information about engineers is based in part upon that experience, isn't it, your riding on other engines; is that right? A. That is right.

20 Q. What precautions, if any, are usually and customarily taken by reasonably prudent and careful engineers when operating a delayed regular train at about forty-five miles per hour, and when about to pass a freight station standing or working and switching on a curve of an adjacent track, with the view of the approaching engineer partially obstructed?

By the Court:

30 Q. Now basing your answer on what you observed by riding on an engine with other engineers. A. Well, the majority of our people would use their whistle the same as I have, the majority of our people.

Q. You mean the engineers on the Pennsylvania Railroad? A. On our division.

Q. You have been on more than one division, haven't you? A. On the New York, Maryland & Potomac.

40

Charles T. Kyle, for Plaintiff, Direct.

Q. You are speaking for all those divisions? A. I am speaking for all those divisions.

CHARLES T. KYLE, sworn for plaintiff.

Direct examination by Mr. Sheean:

Q. What position do you hold with the Lackawanna Company? A. District claim agent, state of New Jersey. 10

Q. Were you subpoenaed in this case to appear and produce certain papers? A. I was.

Q. Were you able to produce the papers showing the length, height and width of the cars involved in this transaction? A. No.

Q. Why not? A. As far as I know, there were no measurements taken. 20

Q. You couldn't measure the cars? A. No.

Q. You didn't measure the cars? A. No, not as far as I know.

Q. What does your claim file show, that you have got? A. I have no claim file on it.

Q. None in the case? A. No.

Q. There isn't any claim file in this case? A. If there are, they are not in the hands of the legal department. 30

Q. You had them at one time? A. I did not.

Q. How are we going to get the width of those cars? A. I don't know.

Q. Did you make any effort to get any? A. None at all.

Q. Our subpoena *duces tecum* calls for the dimensions of those cars? A. No. 40

Mrs. Josephine Noon Wilbur, for Plaintiff, Direct.

Cross examination by Mr. Scott:

Q. So far as you know, you say no measurements were taken of the cars? A. No, I didn't request any measurements taken.

10 Q. You never requested any measurements to be taken of the cars? A. No.

Q. And if, in the investigation of the case, you didn't order the measurements to be taken, in a case of this character, they were not taken, so far as you know? A. No, sir.

MRS. JOSEPHINE NOON WILBUR, sworn for plaintiff.

20 *Direct examination by Mr. Veeder:*

Q. What is your name and where do you live? A. Josephine Noon Wilbur.

Q. Where do you live? A. Toms River, New Jersey.

Q. You are the widow of George Noon? A. Yes, sir.

30 Q. And where did you live on April 27, 1925? A. Lincoln Park, New Jersey.

Q. How long had you lived there? A. Four years.

Q. What then was your husband's occupation and by whom was he employed? A. Occupation was trainman and flagman and also baggageman. He was employed by the Lackawanna Railroad.

40 Q. How long had he worked for the Delaware, Lackawanna & Western Railroad? A. About seven years.

Mrs. Josephine Noon Wilbur, for Plaintiff, Direct.

Q. What kind of work had he been doing during that time? A. He first was employed as clerk in the stationery department, and from there he went to the Terminal of the Lackawanna as gateman, and from there he advanced himself to trainman.

Q. State whether or not your husband was working for promotion. A. My husband was working for promotion. That is the reason he went on freights, for it is necessary, I think, to serve in the freight service for a certain length of time before he can become a freight conductor; and then he was working very hard to become a passenger conductor. 10

Q. What happened on April 27, 1925? A. He was killed.

Q. Do you know how he was killed, where he was at the time of his death? A. Well, as near as I know, he was killed at Clifton, New Jersey, while employed by the Lackawanna Railroad. 20

Q. How many children did you then have? A. Two children: Alice, aged four, and Lydia, aged six.

Q. Were those their ages at that time? A. At the time of his death.

Q. At that time, how old was your husband? A. Twenty-nine years old. 30

Q. And how old were you? A. Twenty-nine.

Q. What were your husband's monthly contributions to you and your children at the time of your husband's death? A. At the time of his death, they averaged from \$60 to \$65 every two weeks, averaging about \$120 monthly. 40

Mrs. Josephine Noon Wilbur, for Plaintiff, Direct.

Q. How high were his contributions sometimes?

A. Well, it varies on the railroad. Sometimes in the freight service they receive different runs, as they call it, they receive different money. I really don't know.

10 Q. Do you know how long he had been on the Passaic drill at the time of his death? A. No, I don't. He worked on the Passaic drill several times, I know that, and I really can't tell you just how long he was on the Passaic drill.

Q. Well, how long is your observation at the time of his death that he then had been there? A. I know that he was there very near a week.

Q. Very nearly a week? A. Yes.

20 Q. Was he to get more compensation on the Passaic drill than he had been previously getting? A. Yes, he was.

Q. Had he had a pay day since he had gone on the Passaic drill? A. No, he hadn't.

Q. Now during how long a time had he been making this contribution of \$60 to \$65 every two weeks?

A. Well, I know they get an increase, as near as I can figure it, about three years.

30 Q. About three years? A. Yes.

By the Court:

Q. What was his general physical condition? A. His physical condition was good. He never was sick.

Q. Normal? A. He was normal.

Q. Normal, in good health? A. In good health.

Q. Had no sickness? A. No, no sickness.

40 Q. No organic trouble of any kind? A. No, nothing. The only doctor that ever attended him was

Mrs. Josephine Noon Wilbur, for Plaintiff, Direct.

the railroad doctor for examination when they put him on the railroad.

By Mr. Veeder:

Q. What were your husband's habits? A. His habits were good. He was sober and industrious and very good to the children and myself. 10

Q. What about his education? A. He had twelve years of schooling and he also earned a scholarship in school and he also wrote articles for publication for which he was paid.

Q. How about his personal and political interests? A. Well, he was just starting out. He was interested in politics. He belonged to a political club, of course a small country town, and he was also to be nominated for the office of councilman. 20

Q. Councilman for what town? A. Lincoln Park, New Jersey.

Q. State what his fondness was for and his interest in his family? A. Well, he was very fond of the children. He taught them. There was one little girl at school, he helped her with her lessons when he was home; but in the railroad you don't have very much time home. And he also took them to Sunday school when he was off, which was very seldom that they are off on Sunday in the railroad. 30

Q. What were your husband's church activities, especially in regard to the children? A. Well, as I said before, he worked mostly on Sunday on the railroad; but when he was off on Sunday, he took the children to Sunday school and he was road president of the Sunday school. 40

Mrs. Josephine Noon Wilbur, for Plaintiff, Direct.

Q. After your husband's death, how long did you live at Lincoln Park? A. I lived at Lincoln Park about a month and a half, six weeks.

Q. Where did you and the children then move? A. I came to Toms River, to my father.

10 Q. How long did you live at your father's at Toms River? A. Two and a half years.

Q. What effort did you make to earn a living for yourself and children? A. I went to work at the Marion Inn at Toms River, as waitress, and from there I went to the school cafeteria.

Q. What has been the condition of your health? A. Very poor. I have been in the hospital twice and underwent a serious operation. I am just out a couple of months now; underwent a very serious one.

20 Q. Are you the administratrix of the estate of George Noon, deceased? A. Yes, I am.

Q. Do you recall when the change to daylight savings time took effect? A. On Sunday April 26, 1925.

Q. When was your husband killed? A. April 27, 1925.

By Mr. Scott:

30 Q. Do I understand that your name is not Mrs. Noon at the present time? A. My name is Josephine Noon Wilbur.

Q. You have married since you came to Toms River? A. Yes, a year and a half ago.

Q. Were you appointed administratrix of your husband's estate? A. Yes.

40

John C. Fellows, for Plaintiff, Direct.

JOHN C. FELLOWS, recalled for plaintiff.

Direct examination by Mr. Sheean:

Q. Mr. Fellows, have you drawn a diagram for the purpose of illustrating the character and extent of this curve which was involved in this accident? A. Yes, sir. 10

Q. And that curve is at or near the point of the switch which is in question? A. Yes, sir.

By the Court:

Q. Is that based upon the figures and the survey that you made of this property in question? A. Yes, sir.

Q. What curve is shown there? A. One degree, fifteen minute curve. 20

Q. How far from the switch? A. It extends about 170 feet east and 500 or 600 feet the other way.

Q. West? A. Yes.

Q. 500 or 600 feet west? A. Yes, sir. Well, I haven't shown that much on this drawing. This is just a large scale drawing in the vicinity of the switch.

By Mr. Sheean: 30

Q. What is the length of the chord there to the segment? A. Well, I have shown a 400 foot chord.

Q. What is the length of the offset from the point of the curve to the chord itself, showing the depth of the curve? A. 4.4 feet on 400.

Q. Have you drawn any figures to show what interference, if any, a train of cars on one track might

Introduction of Rules.

have with the view to the east? A. Well, I have just shown a red line to indicate.

10 Q. Did you make a test yourself? A. Yes. From the center of the westbound track opposite the switch to the east, with three forty-foot box cars on the other track just east of the switch.

Q. What view did you get to the east? A. From the center of the track it would be about 500 feet. By Mr. Scott:

Q. You say from the switch east, you had a view of 500 feet? A. Yes.

Q. That was as far as you could see? A. Yes. By Mr. Sheean:

20 Q. Beyond that distance the view would be obstructed? A. Yes.

Plaintiff now offers in evidence certain rules of the defendant identified by its general superintendent as in effect on April 27, 1925, viz:

30 "Rule 30. The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, when running through tunnels and yards, along the streets of towns and cities, and when passing a train standing on an adjacent track."

Objected to by the defendant as incompetent, irrelevant and immaterial and as having no application to the issues.

Objection sustained, plaintiff excepts.

Plaintiff offers in evidence Rule 117, reading viz:

40 "When practicable to avoid it, a train must not be allowed to stand on a curve between stations any longer than actually necessary at any point."

Introduction of Rules.

Objected to by the defendant as incompetent, irrelevant and immaterial and as having no application to the issues.

Objection sustained, plaintiff excepts.

Plaintiff offers in evidence Rule 118, reading viz: 10

“In case of doubt or uncertainty, the safe course must be taken.”

Objected to as immaterial, irrelevant and incompetent.

Objection sustained, plaintiff excepts.

Plaintiff offers in evidence part of Rule 530, reading viz:

“Trains must proceed with caution through yards and station limits, particularly at night.” 20

Objected to by defendant as immaterial, irrelevant and incompetent.

Objection sustained. Plaintiff excepts.

Plaintiff offers a definition contained in said Book of Rules, viz:

“Siding. A track or auxiliary of the main track for meeting or passing of trains.”

30

Received without objection.

Plaintiff offers in evidence Rule 553 reading viz:

“They (meaning the engineers) must maintain as far as practicable, regular and uniform speed, avoiding excessive speed on descending grades and run with due caution when the track is under repair and at all points where there is reason to apprehend danger.”

Objected to by defendant as incompetent, immaterial and irrelevant.

40

Objection sustained. Plaintiff excepts.

Introduction of Exhibits.

Plaintiff offers in evidence map of *locus in quo*. Marked Exhibit A showing conditions for 1,500 feet east and west of said locus on April 27, 1925 except as to changes made thereafter as shown by defendant's answers to Interrogatories 31 and 32 and other testimony.

Defendant objects to the offer as incompetent, irrelevant and immaterial and for the reasons that the map does not show the conditions as they existed on April 27, 1925, and embraces territory outside that covered by defendant's answers.

“By the Court: The objection will be overruled. The map will be admitted and marked, with the qualifications that there have been changes indicated in the testimony, namely, with reference to the laying of additional tracks and such other variations as the evidence has developed. With that qualification, of course, it would be understood that the map will be received therewith.”

Defendant given an exception.

Plaintiff offers in evidence Exhibits C, D and E photographs showing conditions of the locus in quo on April 27, 1925, except for the changes thereafter made by the defendant.

(Received without objection.)

Plaintiff offers in evidence Exhibit G, a map drawn to scale and furnished by defendant in response to Interrogatory 28. (Received without objection.)

Plaintiff and defendant rest.

Motion for Directed Verdict.

Defendant asks that a verdict be instructed in favor of the defendant against the plaintiff for the following reasons:

1. That there has been no negligence shown on behalf of the defendant company.

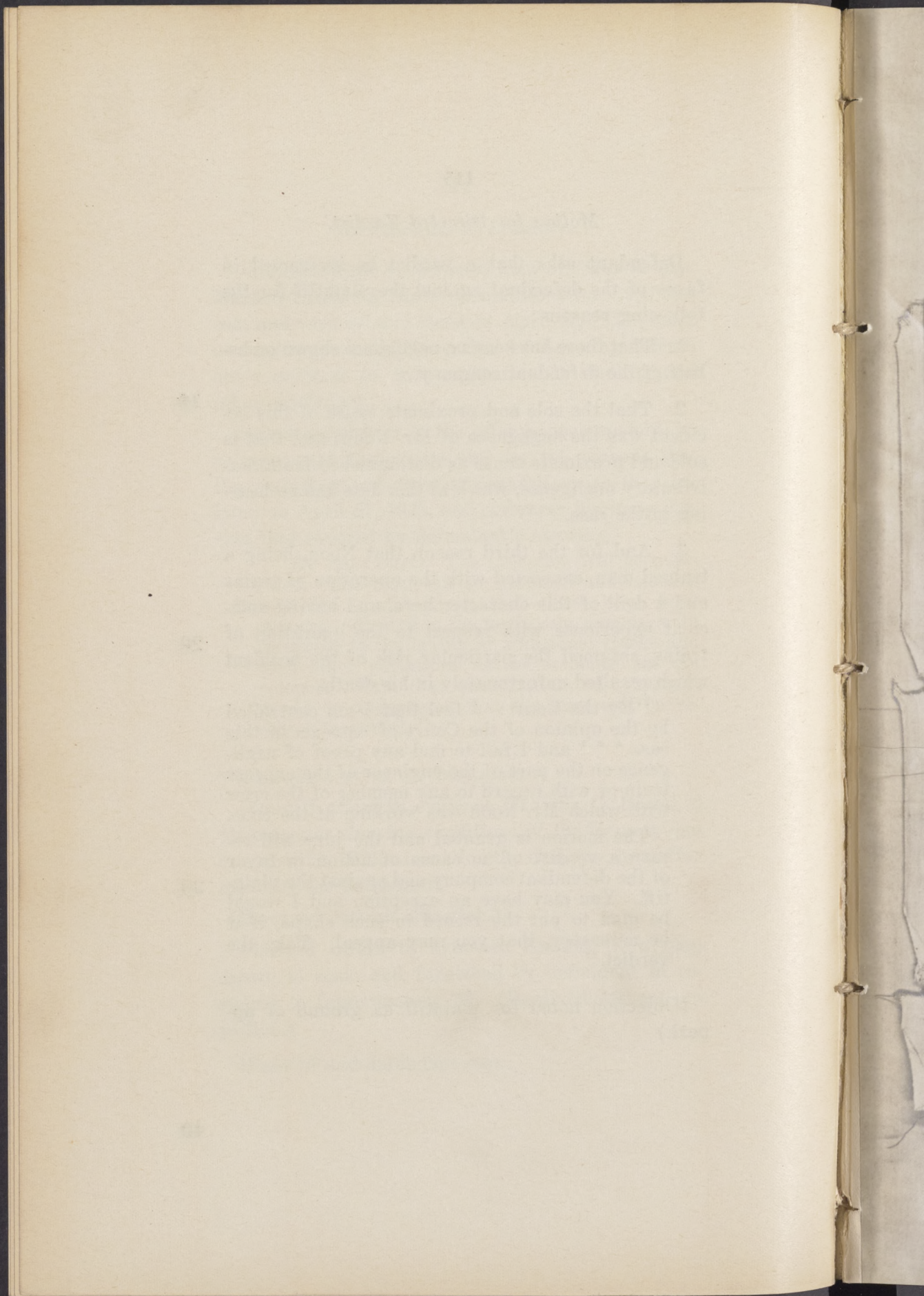
2. That the sole and proximate cause of this accident was the negligence of Mr. Noon; and that is sole and proximate cause as distinguished from contributory negligence, which at this date has no bearing in the case. 10

3. And for the third reason that Noon, being a trained man, connected with the operation of trains and a drill of this character here, and having sufficient experience with respect to the operation of trains, assumed the particular risk of the accident which resulted unfortunately in his death. 20

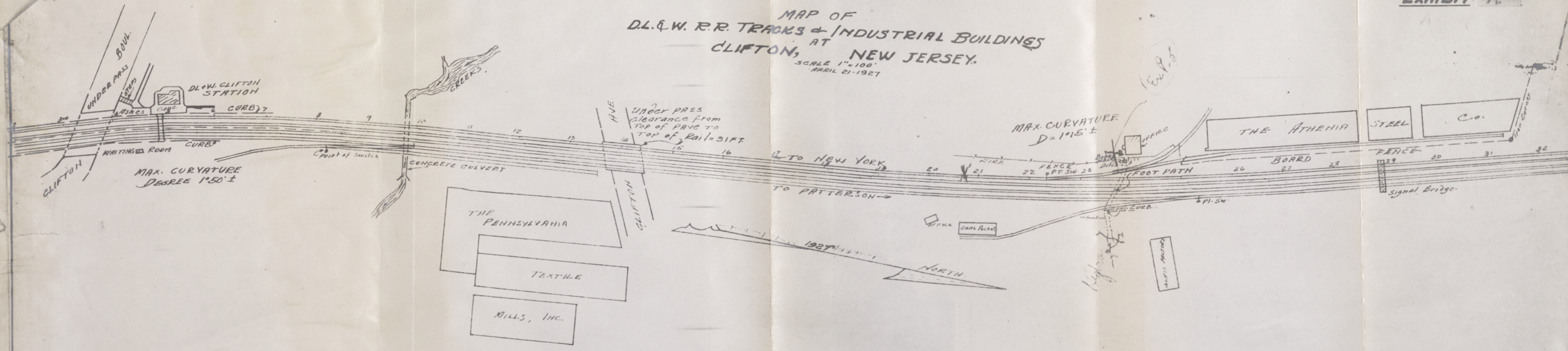
“By the Court: I feel that I am controlled by the opinion of the Court of Appeals in this case * * * and I fail to find any proof of negligence on the part of the engineer of the express train or with regard to any member of the crew with which Mr. Noon was working at the time.

The motion is granted and the jury will return a verdict of no cause of action in favor of the defendant company and against the plaintiff. You may have an exception and I would be glad to put the record in such shape, if it be necessary, that you may appeal. Take the verdict.” 30

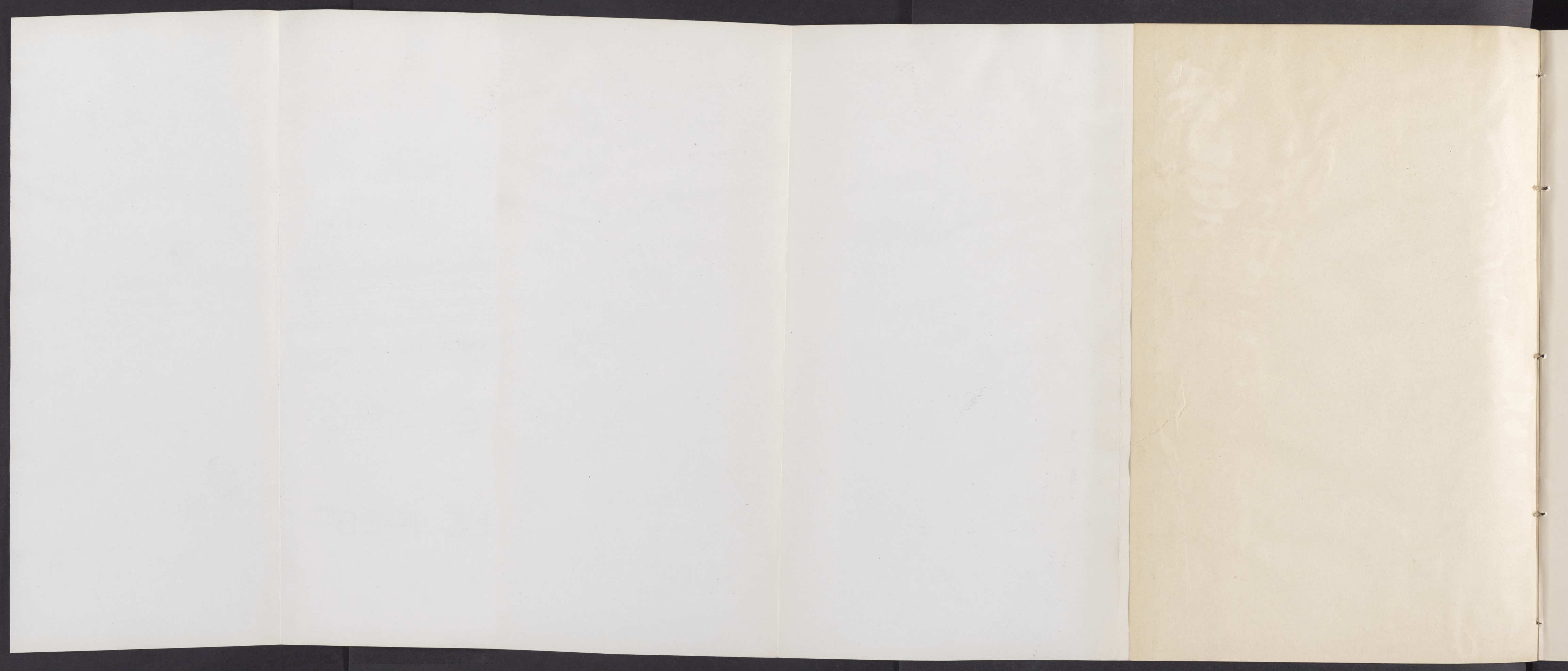
(Objection noted for plaintiff as ground of appeal.)



MAP OF
D.L. & W. R.R. TRACKS & INDUSTRIAL BUILDINGS
AT
CLIFTON, NEW JERSEY.
SCALE 1"=100'
APRIL 21-1927



John C. Fellow
ENGINEER & LAND SURVEYOR
No. 1932.





NO. 4
VIEW LOOKING EAST
FROM A POINT 40 FEET WEST
OF STEEL CO. SWITCH

4-20-27
H.B.

EXHIBIT 7

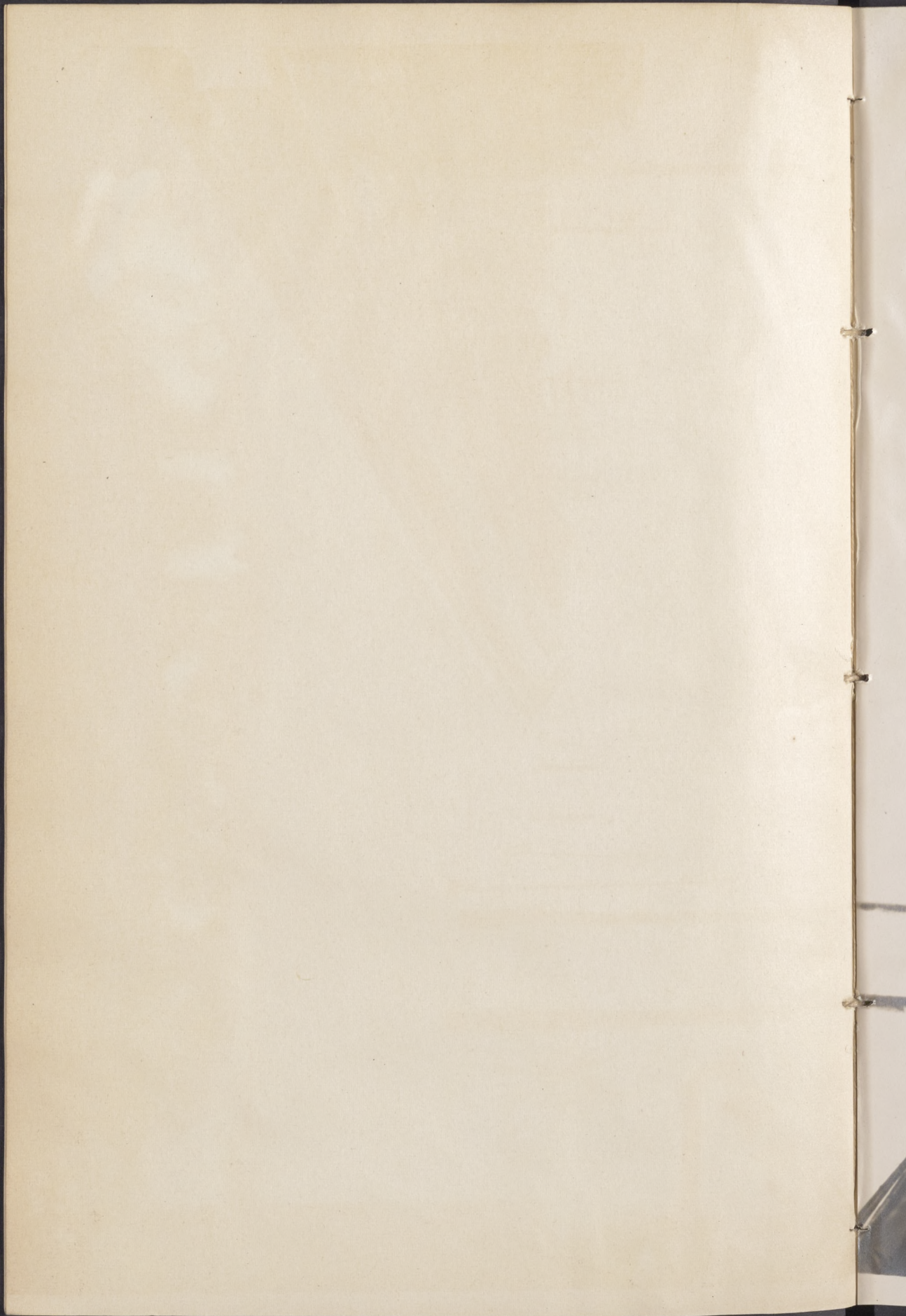
2



No 5
VIEW LOOKING WEST
FROM A POINT 40 FEET
EAST OF STEEL SWITCH

4-21-27
H.B.

EXHIBIT 8



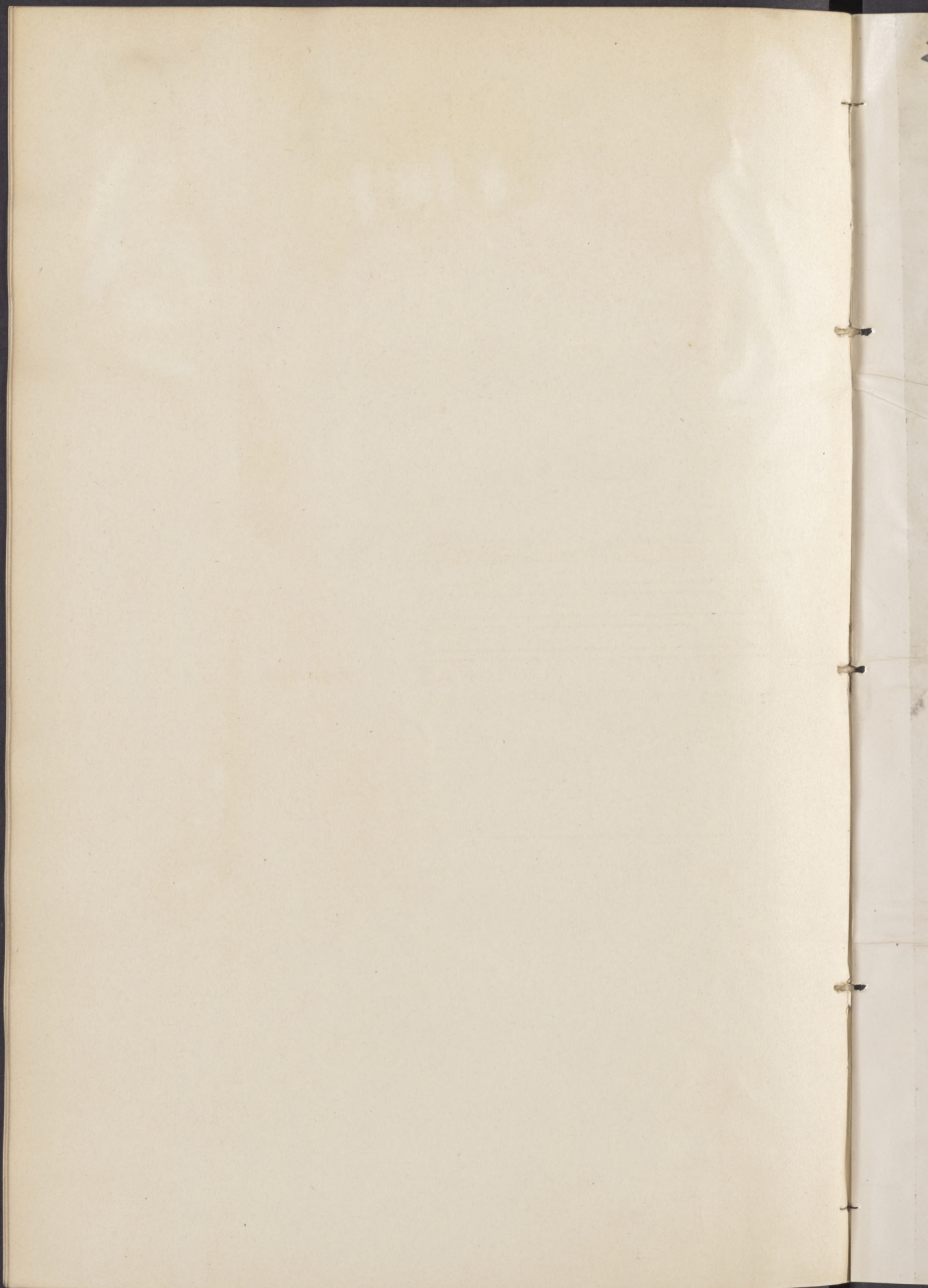


EXHIBIT

E

VIEW FROM STATION PLATFORM
LOOKING WEST

4-21-27
H.B.





VARIETY GLASS PRODUCTS COMPANY

CLIFTON PLACE

MEIR AND THORBURN COAL COMPANY

COAL POCKET

TO PATERSON

TO PASSAIC

THE ATHENIA STEEL AND WIRE COMPANY

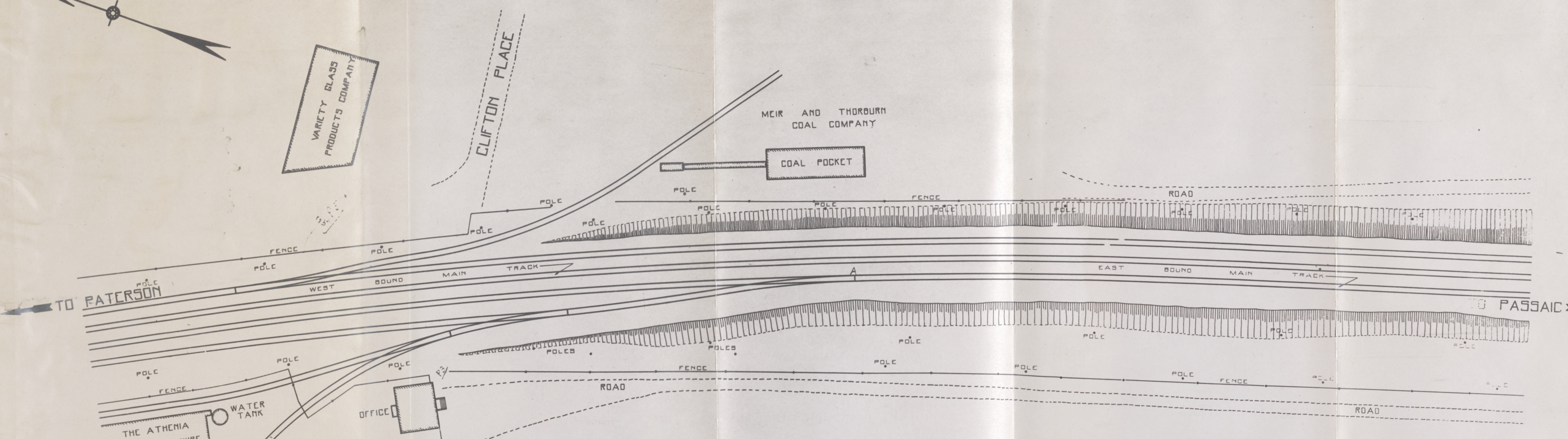
WATER TANK

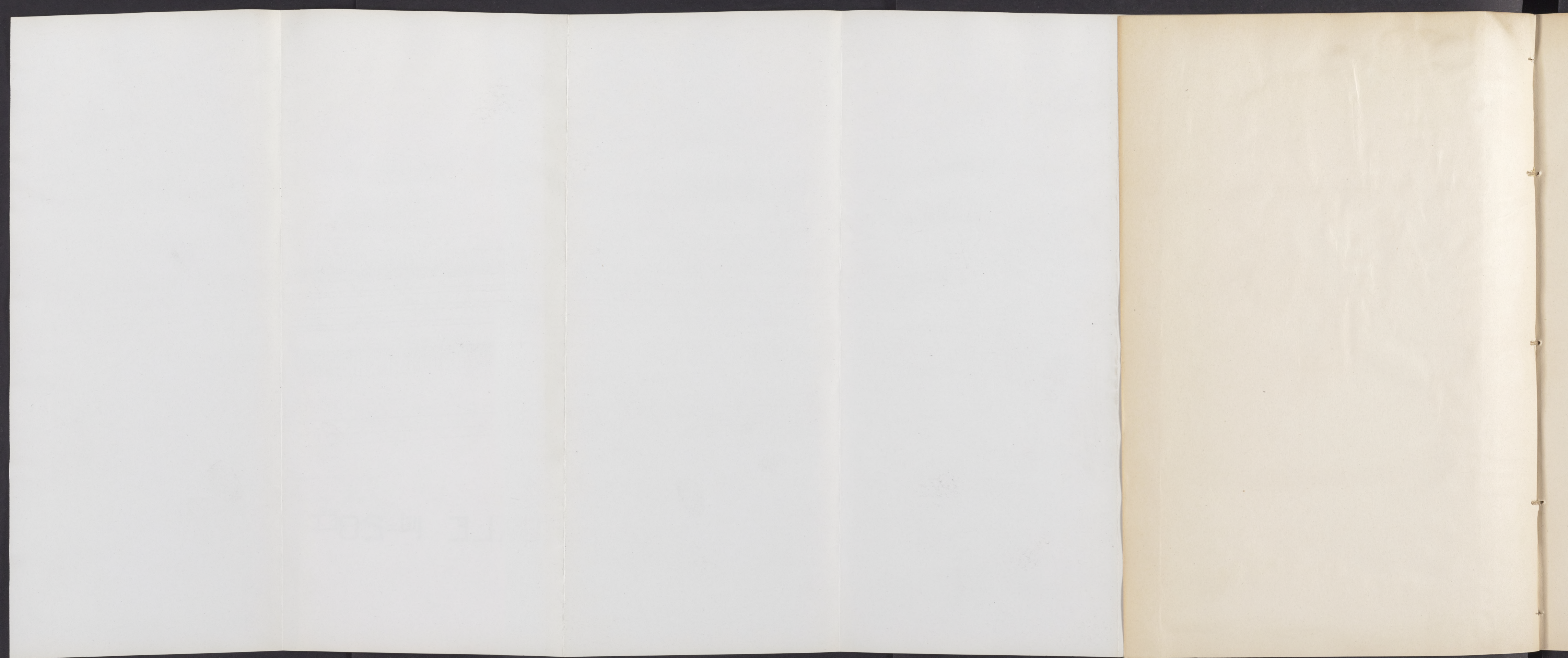
OFFICE

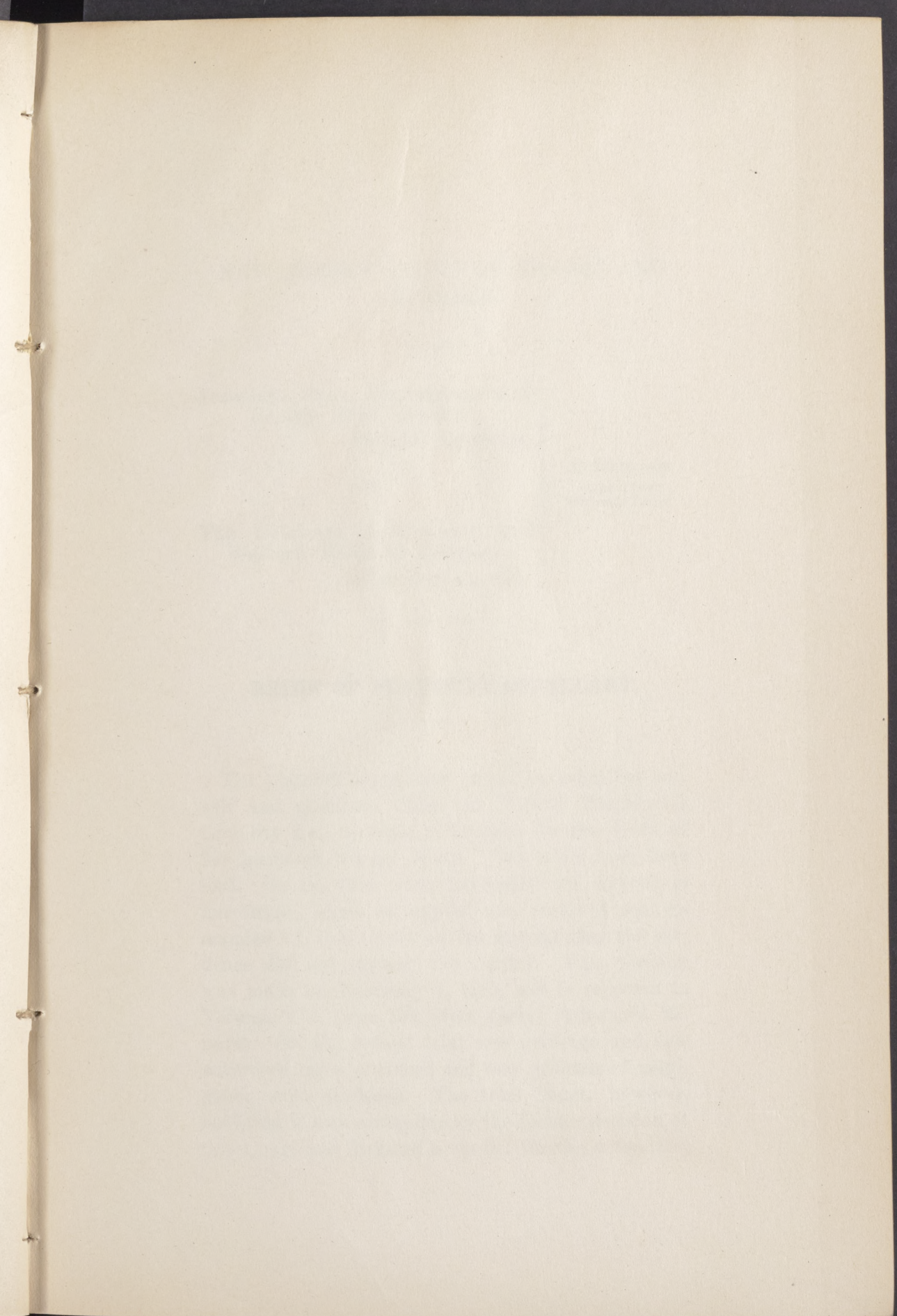
EXHIBIT - G

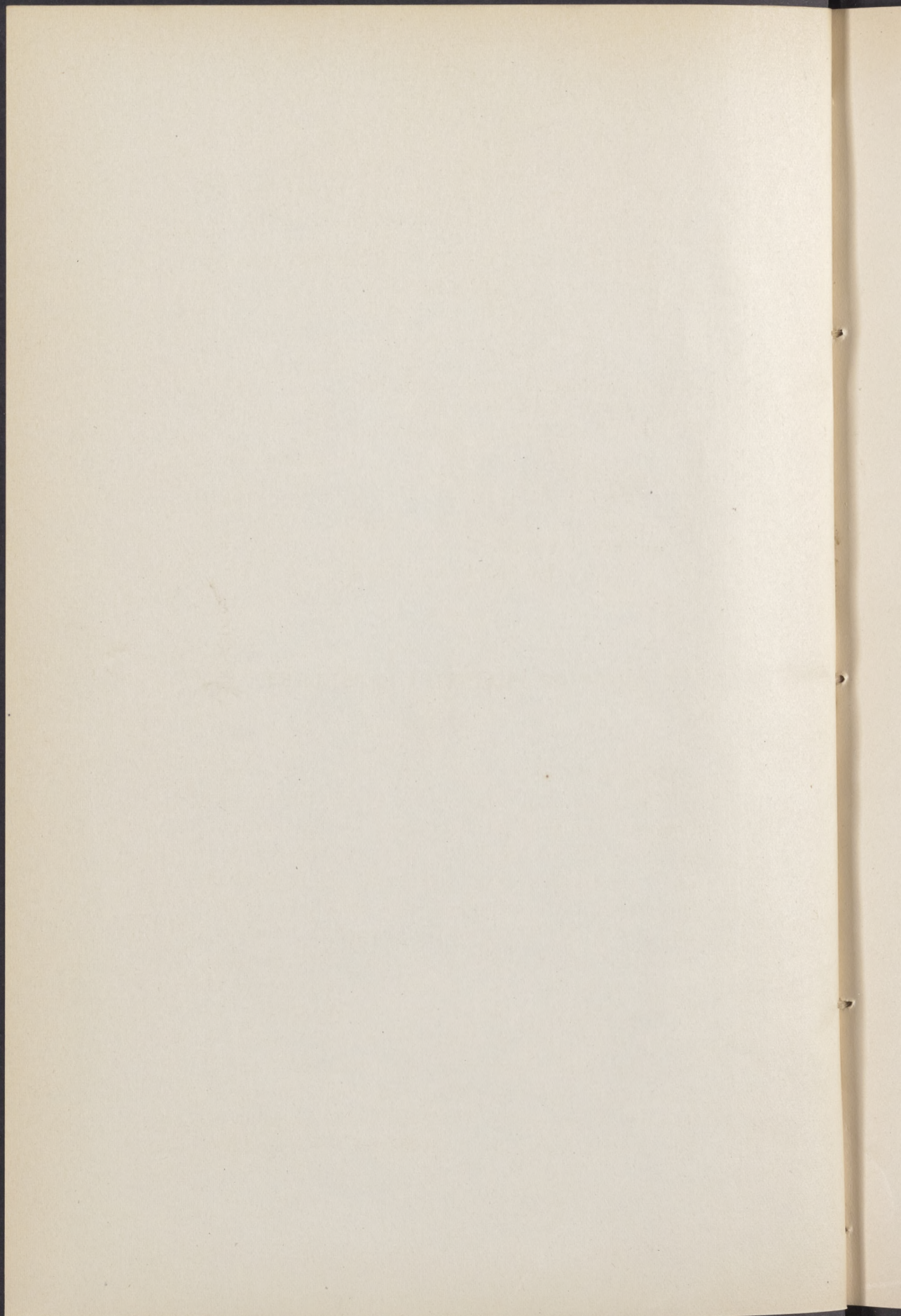
SCALE OF THIS PHOTOSTATIC COPY 1" = 40 FT

SCALE 1" = 20 FT









NEW JERSEY COURT OF ERRORS AND
APPEALS.

Josephine Noon, Administratrix of
George Noon, deceased,
Plaintiff-Appellant,

vs.

The Delaware, Lackawanna and
Western Railroad Company,
Defendant-Appellee.

Action at Law.
Appeal from
Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

The plaintiff began this action on behalf of herself and children, under the Federal Employer's Liability Act, to recover damages for the death of her husband, George Noon. Two trials have been had. On the first trial, judgment was entered in her favor, which on appeal was reversed and remanded by this Court on the ground that the evidence did not support the verdict. This decision was made on February 4, 1929, and is reported in Volume VII, page 258, New Jersey Advanced Reports. On the second trial new evidence and new witnesses were produced and new grounds of negligence were disclosed. The trial Court, however, held that it was controlled by the former decision of this Court and directed a verdict for the defendant.

Judgment was entered thereon, from which judgment she takes this appeal.

The deceased was killed on April 27, 1925, at Clifton, New Jersey, while in the defendant's service as a brakeman. He was one of a crew, engaged in switching cars off of a main track on to a lead track and was struck by an express train passing on an adjacent track. It was three minutes late and was running forty-five miles per hour. It approached the place of the accident without taking any precautions. It rang no bell and sounded no whistle, until within a few feet of Noon, when it sounded an emergency whistle, too late for him to escape. Its engineer had an unobstructed view of Noon's train working on the adjacent track for 2,000 feet. In failing to warn its crew of his approach, he disregarded the custom and practice of reasonable prudent engineers, under like conditions. When killed, Noon was standing between two main tracks, trying to stop his train and prevent threatened injury to persons and property. He was working under the stress of a sudden emergency, at a time and place required by his work. He was absorbed with his work and oblivious of his peril. His view of the express train was obstructed until it was very close to him and his clearance between trains was so narrow that he had to stand sideways to avoid a passing train.

The negligence relied on is that of the engineer of the express train, in failing to sound a timely whistle, of the engineer of Noon's train in failing to watch him for signals, and of the defendant, in failing to promulgate a reasonable rule, prescribing the duties of its engineers and to adopt a reasonable safe method of work.

I.

STATEMENT OF FACTS.

The facts shown in this record are that on April 27, 1925, the defendant operated two main line tracks through the City of Clifton, New Jersey. The southerly track was called the east bound and the northerly track the west bound track. Two hundred and sixty feet west of the station, these tracks, equidistant, curved southerly to the left and at 1,000 feet west of the station, curved northerly to the right, forming an elongated letter "S." Fifteen hundred feet west of the station, a lead track switch was located in the east bound track on the point of the northerly curve. Noon was killed at this switch and much of the testimony centers about it. Out of this switch, ran a lead track for 250 feet, where it continued west for over 600 feet as the storage track. This lead and storage track were on the defendant's right of way outside the gates and fences of the Athenia Steel Company. Off this lead track, ran two other tracks southwesterly into the steel company's plant and were called respectively the coal and commercial tracks. They were enclosed by the gates and fences of the steel company. On the northerly side of the two main tracks was a third track, off of which branched an industry track, serving the glass company and the coal company.

Exhibit G, prepared by the defendant, shows all conditions as they existed on April 27, 1925, including the switch and storage track on its right of way.

After the accident the defendant removed this switch from the point of the curve and placed it 175

feet west of its old location and removed the storage track as shown in Exhibit D. It also widened its south embankment fifteen feet at the place of the accident and installed one additional track. No changes, however, were made in the curvature clearances or grades of the other main tracks. (Int. and Ans. 31-33, page 31.)

Exhibit A shows the curvature in the tracks and the distances referred to herein as they existed on April 27, 1925. The cross marked thereon indicating the location of the switch on that date.

Exhibits E, C, and D are photographs showing curves and conditions existing on that date, except as to changes made by the defendant after the accident and described in its answers to interrogatories.

Both main tracks were used in switching cars for these industries and were frequently blocked by standing cars and engines. (page 75; line 23.) Many through trains passed over them at short intervals, and on the afternoon of April 27, 1925, thirty-one regular trains used them. (page 31; Ans. 25.) The operating conditions were such that the territory was known as "switching territory," where engines were operated as when operated within station limits. (page 41; line 9.)

On April 27, 1925, at 4:40 P. M. the train on which Noon was working, consisting of an engine, caboose, one tank and two box cars, left Patterson for Clifton, on the east bound track. The engine was on the east end facing west. On arrival at Clifton, this train stopped opposite the plant of the Athenia Steel Company and proceeded to work, viz.:

1. Set out two box cars on the east bound main track, several hundred feet west of the switch.

2. Engine, caboose and tank car backed east on the main track, then moved west on to the lead track, to the coal track, where the tank car was placed.

3. Engine and caboose then backed out on the lead track and moved west on the commercial track, picking up one car.

4. Engine, caboose and car backed out over the lead track, onto the main track, east of the switch.

5. Moved west over the switch, on the main track and picked up the two box cars left thereon in the first movement.

6. Engine, caboose and three cars backed east on the main track and stopped east of the switch. The train was then standing on the point of the western curve in the east bound track. Engineer Graves was on the north side of his engine; Conductor Ahrends was in the second box car from the west end; Brake-man Hicks was on the step of the northwest corner of the head box car; Flagman Seaman was in the west field, and Noon was near the switch stand, south of the east bound track. The next move was to set the two head box cars on the commercial track. Noon directing the movement, threw the switch, crossed to the engineer's side and standing between the east and west bound tracks gave the engineer the "go-ahead" signal. He then mounted the car step on which Hicks was standing and repeated the signal. The train stood on the main track for one minute before the last signal was given (page 65; line 18). As it started to move, the watchman of the steel company closed the gates across the commercial track, thereby creating an emergency which required the train to be stopped at once. Hicks hollered to Noon

that "the old man was closing the gates." In order to see the engineer, Noon stepped off at the switch and, standing between the main tracks, gave him a stop signal. The engineer was not looking and did not see the signal and the train continued to move towards the gates.

Getting no response to his signal, Noon called to his conductor, who was then passing by on the train, that the gates were closed. As he did so, an express train, passing on the west bound track, caught him between the two trains, where the clearance was so narrow that a man must stand sideways to avoid injury from a passing train (page 76; line 20). When struck he was standing between the main tracks, at the switch; and his body was found there (page 33; A. 36, 38). When he gave the stop signal, the west car was "just starting in the switch" and had not moved a car length (page 66, line 13; page 65, line 30). He was struck ten seconds after he gave that signal and his train had moved sixty feet during that time. He had worked on this run for only eleven days, five in April, 1925, and six in 1924.

For convenient reference the following testimony of Hicks and Graves, brakeman and engineer of the drill train is copied:

"By Mr. Hicks:

Q. The reason that Noon got off the box car was that you hollered to him, 'The old man is closing the gates?'

A. Yes, sir (page 73; line 39).

Q. Why did he want to stop?

A. The watchman of the Athenia Steel was closing the gates (page 66; line 39).

Q. The gates had been left open by the crew, had they?

A. Yes, sir (page 67; line 1).

- Q. Whose duty was it to close the gates?
A. Athenia Steel people.
- Q. Noon got off to give the stop signal?
A. Yes, sir (page 74; lines 1, 2).
- Q. And you saw him give that stop signal?
A. Yes, sir.
- Q. You didn't see him struck?
A. No, sir (page 70; line 26).
- Q. Why didn't you?
A. Because I had turned around to watch the gates.
- Q. Can you see the engineer from where you were standing, holding onto the side of the car?
A. No, sir (page 68; line 11).
- Q. You have to get off to get a vision, don't you?
A. Yes, sir.
- Q. That was what Noon did?
A. Yes, sir.
- Q. How far did he have to go to get a vision?
A. Just to step across from the east bound in the middle of the east and west bound (page 68; line 20).
- Q. Where he did go?
A. Yes, sir.
- Q. You say it was necessary for him to go there?
A. Yes, sir.
- Q. In order to see the engineer to give a signal?
A. Yes, sir (page 68; line 20).
- Q. Did he have to go where he did to give that signal?
A. Had to step out. The first car was just starting in the switch to the plant. Kind of small curve (page 66; line 13).
- Q. Small curve?
A. Yes, from the main track to the siding.

Q. How do you know that Noon had a clearance there?

A. Why, if you stand sideways the two main tracks can pass you there (page 76; lines 20-30).

Q. And is that all the clearance there is there, just enough for a man to stand sideways for the two trains?

A. As far as I know (page 76; line 23).

Q. Did you hear the emergency whistle of that express train?

A. I heard one long blast (page 69; line 30).

Q. And how soon after that was it that the express train passed?

A. It was stopping then.

By Mr. Graves:

Q. You didn't see Noon give you a signal to stop, did you?

A. No, sir, I did not (page 83; line 30).

Q. If he had given any signal (after his go-ahead signals) would you have seen it?

A. Probably I would if I hadn't been looking at Paddy Seaman (page 85; line 11).

Q. Where were your cars and engines when the accident happened?

A. Leaving the main track to go in on the commercial track (page 85; line 29).

Q. How fast were you moving?

A. Not very fast taking that switch. Probably I was going about three or four miles (page 86; line 17).

The following answers to statutory interrogatories, contain admissions of record, binding on the defendant:

"Int. 36. Where was Noon located when he was killed?

A. Between the east and west bound tracks (page 33).

Int. 41. What direction was Noon facing when he was killed?

A. South, according to railroad direction (page 34).

Int. 38. Was Noon east or west of the switch points of the plant of the Athenia Steel Mills Company when he was killed?

A. He was about opposite the switch point of the switch which served the industrial track (page 33).

Int. 17. How far from the place of the accident was Noon's body thrown or carried?

A. Noon's body was found near by to the point or place of contact (page 30).

Int. 43. What was Noon about to do or in the act of doing when he was killed?

A. Just prior to the accident Noon opened a switch and shortly prior to meeting his death called his conductor's attention to the position of the gates of the Athenia Steel Company plant (page 34).

Int. 21. For what distance could the men on the engine of Train No. 367 have first seen Noon if they had been looking out for him.

A. Five hundred feet (page 30).

Int. 47. What were the other switchmen in Noon's crew doing at the time he was killed?

A. Noon's foreman or conductor was in the second car from the west end of the train, giving signals to the engineer which were relayed to him by one of his trainmen (page 34).

Int. 53a. Who saw said train and how far east of the switch at or near which Noon was killed, was the approaching train first seen?

A. Conductor, twenty-five feet'' (page 35).

Noon was struck by a west bound, regular express train, running forty-five miles per hour. It was three minutes late and ran from Pasaic Tower to the place of accident, a distance of one and one-half

miles, in two minutes (page 38; lines 4, 30). As it approached the place of accident, its engineer had a clear view for 2,000 feet of the drill train working on the adjacent track. (Exhibit A.) It was working on the curve, and obstructed his view of Noon between the tracks and of his own track west of the drill train. He approached and entered this obstructed area, without taking any precautions. After he saw Noon a few feet ahead of him, he blew his whistle, too late to avoid the accident and continued blowing it after his train stopped. By its formal answers to Interrogatories 34 and 35, the defendant admitted that it took no precautions to protect its employees on or near the tracks, where the accident occurred (pages 32, 33).

The evidence shows that the work of a trainman requires him to be on either side of his train at any time (page 91; line 30) and that getting on or near adjacent tracks is a necessary part of his work (233 Fed. 118); that such action must be anticipated in passing a train on an adjacent track and a whistle sounded in time to give him a reasonable chance to protect himself; that it is the general custom and practice of reasonable prudent engineers, when approaching and before passing a train, standing or working on an adjacent track, to blow such timely whistle; that the defendant had no rule requiring its engineers to sound a timely warning when passing a train working on an adjacent track, irrespective of what the circumstances might be; and that it was the duty of the engineer of the drill train to watch Noon for signals and he failed to do so.

II.

ARGUMENT.

Grounds of Appeal Nos. 1, 1 (a) and 1 (h).

The trial Court erred in sustaining as a matter of law the defendant's motion for an instructed verdict and in giving such instruction.

Plaintiff asserts that under the evidence and the reasonable inferences to be drawn therefrom the issues should have been submitted to the jury.

In passing upon the sufficiency of evidence in this class of cases, the settled rule of the Federal Courts is that the decision is peculiarly within the province of the jury and its conclusion will not be disturbed unless it is entirely clear that it is erroneous. Those Courts do not approach this question as an original one and consider whether in their judgment the testimony does or does not prove negligence but they accept the verdict, if there is *any* evidence, upon which it can be based and in case of uncertainty as to proof, the issue is for the jury.

In *Grand Trunk Ry. v. Ives*, 144 U. S. 408, often cited with approval, that Court, in its opinion said:

“When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered as one of law for the court.”

Rights and obligations under the Federal Act depend upon the Act and applicable principles of com-

mon law, as interpreted and applied in the Federal Courts.

So. Ry. v. Gray, 241 U. S. 333.

St. L. & F. R. v. McWhirter, 229 U. S. 265.

In reliance upon this law, the plaintiff appeals to the record, in support of the following contentions:

I.

That by reason of the unusual circumstances shown by the evidence and of the general custom and practice of reasonably prudent engineers under like circumstances, the engineer of the express train negligently failed to sound a whistle in time to give Noon a reasonable chance to escape.

He should have anticipated what happened and blown his whistle at least fifteen seconds before the accident happened or not less than 1,000 feet east of Noon. No claim is made that he saw Noon in time to avoid the accident or that after seeing him he failed to exercise ordinary care.

The unusual circumstances were that the express train was a regularly scheduled train, running three minutes late and at high speed; that it was approaching and about to pass the drill train, standing or working on an adjacent track; that for 2,000 feet its engineer had a clear view of that train, its location on the curve and its movements east and west over the switch, on the east bound track and of its flagmen and trainmen working on or about the train; that the drill train was standing or working on a curve which cut off the engineer's view at a point 500 feet of where Noon was struck; that west of

that point, he could not see his own track or the space between the tracks, where Noon stood; that after passing that point he was on the outside of the curve and the front end of his engine obstructed his view of Noon until within twenty-five feet of him; that the clearance between the main tracks where Noon was struck, was so narrow that men had to stand sideways to clear a passing train; that the drill train was working in "switching territory" using the main tracks for switching cars and frequently blocking them by standing cars and engines; that the drill train worked every day at the same hour and at the same place as an extra, without the protection of time cards or orders, and that just before the accident, it made six movements on the main track east and west of the switch, each movement requiring the switch to be thrown, a stop and a start of the engine and a signal from the trainmen to the engineer.

Each of these circumstances involved elements of danger and taken together, created a dangerous situation. Neither delay nor high speed standing alone, constitutes negligence but when both are present, they create dangers and aggravate other conditions. If the express train had been on time, this accident would not have happened. One minute before the accident Noon was standing at the switch stand, south of all the tracks. If this train had not been running forty-five miles per hour, but at its usual speed, the accident would not have happened.

The passage of two trains necessarily involves some danger. It has often been the subject of laws, rules and court decisions. The passing of a train at high speed, of another train, standing or working on an adjacent track, increases such danger. All are

familiar with the dangers incident to the passage of a standing automobile by another at high speed. Railroad experts testified that the danger incident to passing a train standing or working on an adjacent track was that its trainmen were required by their work to be at any time on either side of their train and that getting on or near adjacent tracks, was a necessary incident of their work; that such action is to be anticipated and that the whistle should be sounded to warn them of their danger, in time to avoid injury. The defendant recognizes such dangers by its rule requiring the bell always to be rung when passing a train on a siding or an engine switching along the main track (page 42; line 38).

The obstructed view of the engineer of the area between the main line tracks, where Noon was struck, obviously increased the hazards of passing the other train. The existence of this obstruction was clearly established by the evidence and in answer to the following interrogatory, the defendant admitted the fact:

“Int. 21. For what distance could the men on the engine of Train No. 367 have first seen Noon, if they had been looking out for him?

A. Five hundred feet.”

Exhibits C and D show vividly the character of the curve involved and Exhibit A shows its degree of curvature. J. C. Fellows, a civil engineer, with railroad experience, measured this curve and ascertained to what extent it might obstruct the view of and from an approaching train. He testified that its degree of curvature was one degree and fifteen minutes, its cord 400 feet long and its depth from the cord to the top of the segment four and four-tenths feet (page 111; line 30). He also testified that three

cars, standing on the east bound track just east of the switch, as located on April 27, 1925, would prevent a man standing in the *center* of the *west bound track*, opposite the switch, from seeing more than 500 feet to the east (page 112; line 3). When struck, Noon was *between* the *main tracks*, not in the *center* of the west bound track and his view to the east was not more than twenty-five feet. The engineer's view was also obstructed by the front end of his engine. The curvature in both main tracks was the same at the place of the accident. (Exhibits C, D, E.) The engineer's position was on the outside of the curve and the Court will take notice that it is impossible for an engineer under such conditions to see his left-hand rail for some distance. With the exception of an obstruction on the track, nothing could be more dangerous than an obstructed view. It greatly increases the dangers incident to the passage of trains, under normal conditions. Prudent motor drivers sound their horn and reduce their speed under such conditions. For more cogent reasons, this engineer should have done likewise. If Noon's view had not been obstructed, he might have seen the approaching train in time to have escaped. If the engineer's view had not been obstructed, he might have seen him in time to have saved his life. It is apparent that the obstructed view involved dangers which should have been foreseen and avoided. All the unusual circumstances in evidence, were open and obvious. The engineer of the express train had been running this train for at least three years and it was his regular run (page 40; line 22). He could and should have known of all of them, should have anticipated the dangers and given a timely warning.

The following cases illustrate when and what unusual circumstances impose on railroad companies the duty of warning their trainmen of moving cars and engines. All of them involve the same issues and facts similar to those of the case at bar. In all of them the questions of negligence, contributing negligence and assumption of risks were held to be questions of fact.

In *Seaboard Air Ry. v. Koennecke*, 239 U. S. 352, a switchman was run down by a road engine backing into a small station yard without giving a timely signal of its approach, held that the defendant's negligence was for the jury. The special circumstances involved were that the accident occurred on a main line track was not a yard or switching movement, and no warning was given. The character of the yard was not at issue and was not considered.

In *Hughes v. D. L. & W. Ry.*, 240 Fed. 941 (C. C. A.) a switchman was killed while walking on or near a track, in switching territory, on each side of which, was an adjacent track eight feet distant. On one of them, cars were standing and on the other, a train was moving. Another train, backing up on the center track without warning, overtook him. His duties required him, as a matter of course, to move on or across the track, held defendant's negligence an issue of fact and in defining the defendant's duty the Court said:

"While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving trains, there is a concurrent or secondary duty independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an em-

ployee who may neglect to protect himself, and the extent of that duty is measured by the peculiar circumstances of the case.”

In *Lehigh Ry. v. Scanlon*, 259 Fed. 137 (C. C. A.), a switchtender, alighting from a standing car and standing beside it, was struck by a train passing on an adjacent track, which gave no warning of its approach: Held, that defendant's negligence was an issue of fact.

In *McMarshall v. Chi. Ry.*, 80 Iowa 757, a conductor, working in switching territory, after coupling cars in his train, stepped on to an adjoining track to signal his engineer and was struck by a passing train, which gave no warning of its approach: Held, that defendant's negligence was an issue of fact.

In *Davis v. So. Ry.*, 175 No. C. 648, a messenger boy, stood between two tracks in switching territory and while delivering a message to the conductor of the standing train, was struck by an engine passing on the adjacent track, which gave no warning of its approach: Held, the defendant's negligence was an issue of fact.

In *Director General v. Templin*, 268 Fed. 482 (C. C. A.), a brakeman jumped from between cars, when his train was slowing down at a station, and was killed by an express train, following on an adjoining track, which failed to give timely warning of its approach, although customary to do so: Held, that the negligence of defendant was for the jury to determine.

In *Lehigh R. R. v. Mangan*, 278 Fed. 85, (C. C. A.), a conductor watching repair work on his engine, stepped on an adjacent track to the one his train

occupied and was struck by a west bound train, running thirty miles an hour and giving no warning of its approach. Both tracks were much used main line tracks and only four feet apart. The accident occurred on a curve, which caused his view to be obstructed to the east. The rules required the approaching train to ring a bell when passing a train on an adjoining track, and the Court sustained a verdict for the plaintiff.

In *Lassiter v. R. Co.*, 133 N. C. 244, a conductor, in charge of a freight train in a railroad yard, while giving orders to his men on the train, stepped back, without looking, onto a side track and was killed by a passing train. When he stepped on the side track, the train was about twenty feet from him, moving about four miles per hour. There was no lookout on the train and no evidence that the bell was not ringing or that the whistle was not sounded. The Court held the negligence of the defendant was for the jury, saying that:

“there was no watchman or flagman * * * to give notice to the engineer of the peril of the intestate and there was evidence that the engineer himself could not see the intestate on the track.”

The foregoing decisions hold in effect, that it is the duty of railroad companies to exercise ordinary care for the protection of every employe working on or near their tracks and that as to trainmen, a timely warning of approaching cars, trains and engines is required *when the circumstances are unusual, when it is the custom or rule to warn, when a train is passing a train on an adjacent track and when the presence of such employe on or near the track should be anticipated.* Six of them involved

accidents to trainmen, arising out of passing trains on an adjoining track and all hold that the *presence* of the *employe on or near* the track, should have been anticipated. They stress the dangers involved in such circumstances and the duty to reasonably anticipate such dangers. In none of the citations, was there such a combination of unusual circumstances as in the case at bar. If the combination of unusual circumstances shown by the evidence herein, imposed no duty on the defendant to give Noon's crew a timely warning, we are unable to conceive what circumstances would impose such duty.

The evidence herein justifies the inference that the circumstances were so unusual that a timely warning should have been given Noon's crew. The engineer of the express train saw or knew or should have seen and known, all these unusual circumstances. With his experience in the service and on this run, his late train, his high speed and obstructed view of the place where Noon was working and with his knowledge of the curves, narrow clearance between trains and the work done every day by the drill train, at the same hour and place, he should have anticipated just what happened and sounded his whistle when he first saw the drill train.

II.

The engineer of the express train was negligent in failing to anticipate what happened and in failing to follow the custom and practice of reasonably prudent engineers, under the facts in evidence.

Witnesses, experienced in railroad operations and the practice of locomotive engineers, testified, viz.:
H. O. Smith, for fifty-one years a locomotive en-

gineer of the Pennsylvania Railroad and for nine years a road foreman, riding on engines operated by others and observing their methods (page 103; line 25), testified that he was familiar with the custom and practice of locomotive engineers, in using the whistle under varying conditions (page 97; line 10); that when he was about to pass a train on an adjacent track, either working or standing, he would use a whistle before he got to them (page 97, line 29; page 98, line 3); that he usually sounded two long and two short whistles (page 98; line 28); that if he saw the rear end of such a train, he would blow the whistle as soon as he saw it (page 98; line 32); that the reason for so doing, is the possibility of one of the crew, stepping out from between the cars (page 99; lines 14-20); that he would sound his whistle when the other train was on a curve:

“Q. Would you blow if you saw a train on an adjacent track standing still?

A. If it was a place where they were liable to be working any part of the crew. I would.”
(page 100; line 8).

In answer to what precautions are usually taken by reasonably prudent engineers when operating a delayed regular train, at forty-five miles per hour and about to pass a freight train working or standing on an adjacent track on a curve, based upon what he had observed when riding with other engineers, he said the majority of them would use their whistle, the same as he did (page 104; line 29); that “other engineers have orders to take every precaution when passing trains along the road and my precautions are what the rest of them took” (page 103; line 16).

T. S. Graves, for thirty-one years a locomotive engineer of the defendant, testified that he knew

what was the custom and practice of the reasonably prudent engineers of the Lackawanna, R. Co., when operating trains and giving signals and made answer, viz.:

“Q. What precautions, if any, are usually and customarily taken by reasonably prudent and careful engineers when operating a delayed regular train at about forty-five miles per hour when about to pass a freight train which is switching cars and members of the train crew are working on or about it?

A. One whistle.

Q. Whereabouts would that whistle be blown?

A. Just as soon as the engineer sees a car working or such men, he blows a whistle to draw their attention right away (page 87; line 20).

R. M. White, for nineteen years superintendent of the defendant, testified that he was familiar with the work of locomotive engineers and of the customary precautions taken by them (page 89; line 30) and that “if a man knows that a crew is *working in a certain locality* * * * it is customary to give some sort of a signal to notify them of the approach of the train” (page 94; line 29); that the whistle should be given “where it would give a man a reasonable chance to step off the tracks” (page 93; line 1); and that under certain conditions, a trainman’s work takes him on both sides of a train and away from the train (page 91; line 30).

He further testified, viz.:

“Q. What precautions, if any, are usually and customarily taken by reasonably prudent engineers, when operating a delayed regular train, at about forty-five miles per hour and when about to pass a freight train, standing or working or switching on the curve of an adja-

cent track, which in part, obstructed the view of the track that the engineer is running on?

A. He might sound the whistle, there is no rule would tell him to do so (page 91; line 40).

Q. The use of the whistle, I assume, is in the discretion to a large extent, of your engineers.

A. It is (page 94; line 25).

Q. Have you any rule fixing those (station) limits?

A. No, sir, we don't use that rule at all" (page 96; line 11).

He defined the term "station limits" viz.: "Station limits are so much of the main line and ground outside the switches as are in use for reaching side tracks, within the switches" (page 96; line 21).

The custom and practice of defendant's engineers and those of other railroad companies was competent testimony of what should have been done and is recognized as such by the Federal Courts.

Texas Ry. v. Behymer, 189 U. S. 468.

Reynolds v. Taylor, 23 Fed. (2d) 36 (C. C. A.)

Lake v. Shenings Co., 160 Fed. 887 (C. C. A.)

The evidence justifies the inference that the drill train was on the east bound track east of the switch, for thirty seconds in plain view of the express train; and that its engine, caboose and at least one car, were on that track, east of the switch, when Noon was killed. It showed the average length of cars as forty feet, of cabooses as twenty feet and of engines as fifty feet; the speed of the express train as forty-five miles per hour, equivalent to sixty-six feet per second, and the speed of the drill train at

four miles per hour, equivalent to six feet per second. It required thirty seconds for the express train to run 2,000 feet from where the drill train could have been first seen, to the place of the accident and it required thirty-two seconds for the drill train to move its length west of the switch, a distance of 190 feet.

The conductor was in the second box car from the west end and first saw the express train, when it was twenty-five feet east of the switch. He must have been facing north, standing in the center door of his car as it moved past Noon. Defendant admits that when Noon was struck, he was facing south calling out to the conductor the position of the gates (page 34; line 13). He and the conductor were then facing each other about three feet apart. At that time the west car and one-half of the second car of the drill train, were west of the switch on the lead track and the engine caboose and one car and one-half, were east of the switch on the main track. This train stood sixty seconds on the main track before Noon gave his last "go ahead" signal (page 65; line 18). For thirty seconds of that time, it was in sight of the express train, for twenty seconds thereof it was *standing* on the main track, and for ten seconds thereof it was *moving* west. It had moved only sixty feet of its length west of the switch when the accident occurred. At four miles per hour, it took ten seconds to make this move, and ten seconds elapsed from the time Noon gave his stop signal until he was killed. Hicks testified that when Noon gave his stop signal, the head car was "just starting in the switch" (page 66; line 13). Noon got off that car *before* he gave this signal and was at the switch at that time. When

struck, he was between the main tracks, opposite the switch points, where his body was found after the accident (page 33, Ans. 36, 38; page 30, Ans. 17).

The emergency whistle did not begin to blow until the express train was within twenty-five feet of Noon and it was the only warning given him. These facts may be reasonably inferred from the evidence. Johnson, the section foreman, at his home 500 feet away, heard the whistle and hastened to the place of the accident. He recognized it as an emergency whistle and heard none other. Hicks, a brakeman, heard only "one long blast of the whistle when the express train was stopping." Defendant contends that it was under no duty to sound a timely warning to Noon's crew and answered that it gave no such warning. It did not recognize an emergency whistle as a timely warning. The character of the whistle blown indicates that it was an emergency whistle. Its length, the place it was sounded and the circumstances confirm this statement. It was not the kind of whistle usually sounded to warn a working crew of an approaching train and it was not sounded when the engineer first saw the drill train.

In answer to Interrogatory 31, defendant admitted that if its engine men had been keeping a lookout they could not have seen Noon until within 500 feet of him. This answer implies that they kept no lookout. The evidence demonstrates that neither of them could have seen Noon before reaching that point. At that point, however, the front end of the engine obstructed the engineer's view of Noon until he rounded the curve. When rounding a right-hand curve, as in this case, the engineer on the outside of the curve cannot see his left-hand rail for thirty or forty feet ahead of him. Noon was stand-

ing *south* of that rail *between* the main tracks and was out of the engineer's sight until he rounded the curve. Ahrends, the conductor, first saw the express train when it was twenty-five feet east of the switch at which Noon was standing. It is evident that the engineer did not blow his whistle *until* after he saw Noon and he couldn't have seen him for more than twenty-five feet. It may have been less, if the conductor saw the train before the whistle began to blow.

The evidence justifies the inference that it was the custom and practice of reasonably prudent engineers when approaching a train standing or working on an adjacent track, to sound their whistle in time to give its crew a reasonable chance to avoid injury. It shows when, where, why and what kind of a whistle should be sounded, that it should be sounded when the train on the adjacent track is first seen and in time to give its crew a reasonable chance to escape; that when such a crew is working in a *certain place* or on a *curve*, a timely whistle, of two long and two short blasts, should be sounded; that the duties of such a crew require them, at any time to be on or near other tracks and that their presence there should be anticipated. The engineer of the express train had been many years in the service and had been on this run for three years. He knew or should have known of the custom and practice of prudent engineers under like conditions. He knew the drill train worked every day at the time and place of the accident. He knew it was then and there in "switching territory" where switch engines work without time cards or orders and where they used the main tracks for switching cars, frequently blocking them by cars and engines. He knew the duties of trainmen about their trains

and adjacent tracks. Few others had better opportunities of knowing when, where and what the drill train did every day, at the same hour and place and of its work just prior to and at the time of the accident. The sounding of his emergency whistle twenty-five feet east of Noon was not a compliance with the custom and practice of prudent engineers when approaching a train standing or working on an adjacent track. He should have sounded two long and two short blasts of his whistle when he first saw Noon's train (page 98, line 32; page 87, line 20) and if he knew or should have known that this crew was usually at work at the time and place of the accident, he should have sounded such whistle (page 73; lines 12, 18). He should have foreseen what happened and observed the practice of other engineers. His failure to do so was evidence of negligence.

III.

Decedent's alleged negligence and assumption of risks.

One ground assigned for the directed verdict was that Noon's negligence was the sole proximate cause of his death. The trial Court was requested, as a matter of law, to find him guilty, but did not do so. If there was any negligence on the part of the defendant, Noon's negligence, if any, would not bar this action. *Gt. N. R. v. Wiles*, 240 U. S. 444. It is difficult to find wherein Noon was negligent. When killed, he was working under an emergency at a time and place required by his work. This emergency threatened injury to persons and damage to property and required his train to stop at

once. He could not signal the engineer from the ladder on the end of the west car where he and Hicks were riding. He, therefore, got off before the west car "started in the switch" and standing between the main tracks, at the switch, facing east, began signalling the engineer to stop. His view of the approaching train was then obstructed until it was within twenty-five feet of him and his clearance between passing trains was so narrow that he had to stand sideways to avoid injury. He was struck within ten seconds after he got off his train. During that time he was continuously trying to stop the train. He first gave a stop signal to the engineer and getting no response, he, no doubt, repeated that signal. As the conductor, riding on the train, passed in front of him, Noon warned him of the closed gates. As he did so, the express train, moving sixty-six feet per second, came in sight, twenty-five feet east of him. Unable to co-ordinate his mind and muscles, he was caught in the dangerous trap between the two trains. He had less than one-half of a second, after the express train came in sight, to realize his situation and escape his peril. Defendant answered that he was facing south when struck and Hicks testified that if he did not stand sidewise he could not clear passing trains. Apparently, he did not have time to look east towards the express train and if he had turned about facing east he would have lost his clearance. If he had been given a few seconds to realize his peril and to act, he might have taken a chance and jumped on the drill train, or laid down on the ground or located the center line between the main tracks. He was, however, absorbed with his work, oblivious of his peril and his care or want of care was for the jury to decide.

Another ground assigned for the directed verdict was that Noon "assumed the *particular risk of the accident.*"

The trial Court did not so find. The assignment is limited to the "particular risk of the accident" and disregards risks incident to the work and open and obvious risks. It is so indefinite and uncertain that it has no legal significance. The Federal Courts, however, have ruled on the issue presented. In *Reed v. Director General*, 258 U. C. 92, a switchman, while riding on an engine, was killed by the derailment thereof, caused by the negligence of the engineer and the Court said:

"* * * In actions under the Federal Employer's Liability Act, the doctrine of assumption of risk has no application when the negligence of a fellow servant which the injured party could not have foreseen, is the sole, direct and immediate cause of the injury."

In *Chi. R. v. Ward*, 252 U. S. 18, the Court held that:

"the defense of assumption of risk is inapplicable when the injury arises from a single act of negligence, creating a sudden emergency, without warning to the servant or opportunity to judge of the resulting danger."

In all the cases hereinbefore cited involving the same issues and similar facts, the Court held that negligence, contributory negligence and assumption of risks were issues of fact.

It seems to have been the custom and practice of defendant's engineers to sound a timely whistle under the circumstances of this case. There is no evidence that the engineer of the express train ever disregarded this custom except when Noon was

killed. It follows, that Noon could not have foreseen such action and did not assume the negligence of the engineer.

IV.

Ground of Appeal No. 1 (g).

The engineer of the drill train negligently failed to watch Noon for signals and to see and obey his signals.

All testimony on this issue was received without objection. Noon was head brakeman (page 73; line 12) giving the signals prior to and at the time of the accident. After throwing the switch for the last movement, he crossed to the engineer's side and gave a go-ahead signal. He then mounted the step of the head car and repeated the signal. At that time the train had stood one minute on the main track east of the switch (page 65; line 8). Before the head car entered the switch, the steel company's watchman closed the gates across the commercial track. Warned of that fact, Noon got off the train at once and signalled the engineer to stop. He was not watching Noon for signals, did not see the stop signal and continued moving his train ahead. When Noon gave that signal, he was on the engineer's side, about 190 feet west of him and in plain sight. The west car was then "just starting in the switch" (page 66; line 10) and had not moved a car length. The engineer testified as follows:

"I didn't watch Hicks, I took Noon's signals" (page 83; line 18).

I had to watch my brakeman on a job like that (page 89, line 8).

Q. You didn't see Noon give you a stop signal, did you?

A. No, I did not.

Q. Who did give you a signal to stop?

A. Paddy Seaman, the flagman (page 83; line 25).

Q. You say you didn't see Noon give you any signal?

A. No, sir, not after he got on the box car.

Q. That was the last time?

A. That was the last time I noticed Noon.

Q. If he had given any signal after that would you have seen it?

A. Probably I would if I hadn't been looking at Paddy Seaman" (page 85; lines 1-7).

He admitted that it was his duty to watch Noon for signals; that he did not do so, and if he had watched him, he would have seen his stop signal. Seaman's post of duty was one mile west of his train (page 62; line 32). He had started in, saw the accident and then gave the stop signal. In order to watch Seaman, the engineer had to look over and beyond Noon, and was evidently very indifferent to his duty. His failure to watch Noon for signals prevented him from seeing his stop signal and stopping the train. His failure to stop the train was a direct cause of Noon's death. If the train had stopped promptly on Noon's signal, it would have relieved him from the necessity of stopping it and given him time to consider his own safety. His mind would have been freed to think of himself and to provide some way of escaping his peril.

It would have given him ten seconds for protection, instead of the fraction of a half second he was given.

The fact that the drill train stood on the main track for one entire minute before it started the last movement, is to be noted. This delay caused

the gates to be closed and Noon to be killed. The crew of this train had been working rapidly in order to clear the main track of standing cars. They left Patterson at 4:40 P. M. and the accident occurred at 4:52 P. M. In twelve minutes, they moved six miles and made six switching movements, each requiring a start, a stop and a signal, not to mention the coupling and uncoupling of cars and the application and release of the air brakes. The standing of this train on the main track for sixty seconds was unusual and apparently unnecessary. The watchman and the flagman must have assumed that the crew had finished their work and were waiting for the flagman to come in. As a result the watchman closed the gates and the flagman started to come in. The closing of the gates forced Noon to get off his train and the approach of the flagman, diverted the engineer's attention from Noon. It also gave the express train time to arrive. It was coming at the rate of 3,960 feet per minute and this delay meant death for him.

V.

Ground of Appeal No. 1 (a).

The defendant negligently selected the most dangerous method of work.

There was no excuse for blocking the main track with the two box cars. They should have been placed on the defendant's storage track, provided for that purpose. If this had been done, no movements on the main track would have been necessary except to move off and onto it. Had this been done,

the accident would not have happened, the gates would not have been closed and the drill train would not have been on the main track when the express train passed. In adopting a dangerous method of work in lieu of a safe one, the defendant was negligent and the trial Court erred in refusing to submit the issue to the jury.

VI.

Ground of Appeal No. 1 (i).

The defendant negligently failed to adopt and promulgate a rule requiring its engineers to sound a timely whistle, when passing a train standing or working on an adjacent track.

In her amended complaint the plaintiff alleged that the "defendant negligently failed to adopt any rules or regulations, requiring its enginemen on approaching trains, to give warning of their approach or to put their trains under control" and that such negligence was the proximate cause of her loss.

The following decisions of the Federal Court state the general rule of law:

In *DeAtley v. C. & O. Ry.*, 20 Fed. 591, the complaint alleged negligence in the defendant's failure to adopt rules forbidding the practice of brakemen mounting trains while in motion. It involved a construction of the Federal Act and the Court held that:

"If it was negligence not to adopt and promulgate such rule, it was the negligence of the officers, agents and employes of the defendant and was within the terms of the Federal Act."

In *Patlatch Co. v. Anderson*, 199 Fed. 742 (C. C. A), the Court said:

“Where a master is engaged in a complex or hazardous business, he must promulgate rules and regulations for the conduct of his business and if he fails to do so, he will be responsible for injury resulting from failure of compliance. It was a question of fact for the jury to determine whether or not the company adopted such rules, provided, of course, they found that the business was a hazardous one, which required the adoptions and promulgation of rules.” *B. & O. Ry. v. Doty*, 133 Fed. 870 (C. C. A.)

In *Nelson v. So. Ry.*, 158 Fed. 92 (C. C. A.) a switchman was killed by a train backing in on cars, he was coupling and giving no warning of its approach. One charge of negligence was that the defendant negligently failed to adopt a rule requiring a warning of such movement. The Court in passing thereon, said:

“The work in which the deceased was engaged was of a kind which is highly dangerous and we think upon the circumstances which the evidence tended to show, the jury might have found that the defendant was negligent in not prescribing rules for the management of its business in such circumstances, which were calculated to guard its employees from the dangers incident thereto.”

Mr. White, defendant's superintendent, testified viz.:

Int. “Is there a rule covering the case of a delayed train, running at high speed and approaching a train, switching or standing on an adjacent track on a curve? Ans. No, Sir, not so far as any warning to be given to a car on an adjacent track.” (Page 93; Line 32.)

By interrogatory 34, the defendant was asked:

“What rules or regulations had you in effect on April 27, 1925 for the guidance of your engineers and the protection of your other employees, when your trains are rounding curves or approaching places, where your employees may be working on or near your tracks.” (Page 32.)

Its only answer was a copy of Rule 526, requiring a lookout only for trackmen and handcars and by necessary implication admitting it had no such rule for its trainmen.

By interrogatory 35, the defendant was asked:

“What rules or regulations had you in effect on April 27, 1925 and what precaution had you taken to protect your employees when working on or near your tracks extending 2000 feet east and west of the switch at or near which Noon was killed?” (Page 33.)

Its answer was a copy of Rule R reading in part, viz.:

“Employees must not place themselves in positions where the movement of a car, engine or train would injure them. *In the performance of their duties in connection therewith, they must know that they are fully protected as prescribed by the rules.*”

By necessary implication, this answer admits the defendant had no rule in effect for the protection of its trainmen.

This rule required no more than the instinct of self-preservation and did not relieve the engineer from his duty of warning Noon. *Schlerein v. Mo. R.*, 115 Mo. 102. The part of this rule in italics, requires special consideration. It is an unusual pro-

vision and more than an assurance of safety. It is a promise by the defendant to its employees that it will "fully protect" them by other rules. By law, the defendant was only obligated to exercise ordinary care in adopting and enforcing reasonable rules. By this rule it agreed to adopt other rules which would fully protect the deceased from injuries resulting from a moving car, engine or train and the defense of assumed risk is not available when an express agreement exists to the contrary.

Notwithstanding the failure of the defendant to adopt a rule for the protection of its trainmen, the custom and practice of its prudent engineers and those of other railroads, was to sound a timely whistle, under like conditions. So far as the evidence shows, the engineer of the express train was the only one of the defendant's engineers who ever failed to sound a timely whistle, under such circumstances and this was his first failure to do so. If there had been such a rule in effect on April 27, 1925, all the probabilities are that he would have sounded a timely whistle, one giving Noon and his crew a reasonable chance to escape.

The business of the defendant was complex and hazardous, and the danger involved in the passage of trains, was obvious and should have been foreseen by the defendant. A rule requiring a timely warning was practicable and reasonable and if, observed, would have prevented the accident.

It is remarkable that with a custom so well established, so well adapted to the protection of employes at work and so humane in its aim, this defendant had no rule protecting its trainmen under such circumstances.

In defiance of law and disregard of its promise to "fully protect," the defendant admits that it had no such rules. Obviously it was negligent and the issue should have been submitted to the jury.

VII.

Ground of Appeal No. 1 (1).

The trial Court erred in following the decision of this Court on the former appeal, as the law of the case.

On the second trial of this case, new witnesses and new evidence were produced and new grounds of negligence were disclosed by the evidence. Facts material to the issues were established by railroad experts and by Hicks, a member of Noon's crew, who was not produced on the first trial. The experts testified as to the custom and practice of prudent engineers when approaching and about to pass another train, standing or working on an adjacent track and as to when and where the whistle should be sounded and the character of the whistle. Hicks testified when and why Noon got off his train and for the first time, informed the plaintiff of such material facts.

The following material facts were not shown on the former trial:

That when Noon was last seen alive, he was not on a car but standing between the main line tracks, trying to stop his train by signals.

That when he was struck, he was standing between the main line tracks and not on or near the west bound track.

That he was then and there acting under the stress of an emergency, requiring his train to stop at once, and did not voluntarily place himself in a place of danger.

That ten seconds after he got off his train, he was struck by the express train.

That when struck, he was standing *at* the switch and *facing south*.

That the clearance between passing trains at the place of accident, was so narrow that a man had to stand sideways to avoid injury from such trains.

That the view of the engineer of the express train, of the place where Noon was struck, was so obstructed that he could not see him until within a few feet of him, and that he should have anticipated Noon's presence when and where he was struck.

That the custom and practice of prudent engineers, under like circumstances, was to blow the whistle when approaching and before passing another train, standing or working on an adjacent track, to give its crew a reasonable chance to keep out of danger.

That the defendant had no rule or regulation requiring its engineers to sound a timely whistle when approaching and about to pass a train, standing or working on an adjacent track, irrespective of what the conditions might be.

That the engineer of the drill engine negligently failed to watch Noon for signals, and that defendant negligently selected the most dangerous method of switching cars into the steel company's plant at the time of the accident.

That the storage track was located on the defendant's right of way, outside the gates and fences of the Steel Company; and that the place of accident was in "switching territory" where engines were operated as when within station limits.

On the first trial, the grounds of negligence were that the engineer of the express train, negligently failed to see Noon in time to avoid the accident or that after seeing him, he failed to exercise ordinary care to avoid the accident and that some member of Noon's crew should have notified him of the express train. Such contentions were not made on the second trial and are not made on this appeal. The negligence now relied on is that said engineer negligently disregarded the custom and practice of prudent engineers to sound the whistle as soon as they saw a train standing or working on an adjacent track as a warning to its crew that they might have a reasonable chance to avoid danger. It is immaterial when or where the engineer first saw Noon. A whistle sounded 2,000 feet from the drill train was required by the customs and practice of other engineers. One sounded within twenty-five feet of it, did not comply with such custom and practice. The other grounds of negligence presented herein and not presented at the first trial, are that the engineer of Noon's train failed to watch him for signals and failed to stop his train when signalled to do so; that the defendant failed to provide a reasonable rule, requiring their engineers to sound a timely whistle when approaching another train on an adjacent track and negligently failed to adopt a safe method of work. The evidence and the issues presented on this appeal are substantially

different from those involved on the former trial and the trial Court erred in adopting this Court's decision as the law of the case.

VIII.

CONCLUSION.

The plaintiff contends that the evidence herein and the reasonable deductions, inferences and presumptions arising therefrom, were sufficient to sustain a finding that the defendant was negligent.

All the interrogatories and answers copied in this brief and relied on by plaintiff, are judicial admissions binding on the defendant.

22 Corp. Juris 342.

Nichols v. Allen, 112 Mass. 23.

All other interrogatories and answers in conflict therewith, are not binding on the plaintiff and should not be considered on this appeal. *Gallagher v. McBride*, 66 N. J. L. 367. The plaintiff is entitled to the most favorable construction that can be placed on the evidence and conflicting evidence must be disregarded.

If reasonable minds might fairly differ or there be any uncertainty as to the proof, the issue was for the jury. The plaintiff respectfully asks the Court to carefully consider the federal decisions, cited by her. As this action is based on a federal statute, the sufficiency of the evidence is a substantial issue, raising a federal question, subject to review. It is therefore important to the parties that

these cases be considered and properly applied and special stress is laid on the rule of that Court for weighing the evidence expressed, viz.:

“It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.”

The history of this case shows that reasonable men have differed in weighing the evidence and it is apparent that such difference continues to exist.

In conclusion, the plaintiff submits that the evidence was sufficient to sustain a verdict in her behalf and that the judgment against her is erroneous. It must be conceded that the defendant was obligated by law to warn the deceased of moving trains and engines, when the circumstances were unusual, when such warning was usually given or required by rule and when his presence in a particular place should have been anticipated. The evidence justifies a finding that all of these conditions existed and that no timely warning was given him. Her case is distinguishable from the cases relied on by defendant, in that, this accident involved a road movement, not a yard movement, was caused by an express train and not a switch engine and occurred on a main track and not on a switch track. The U. S. Supreme Court has held that these facts imposed on the railroad the duty of giving a timely warning. *Seaboard R. v. Koennecke*, 239 U. S. 352 and refused to follow decisions involving yard switching accidents.

Plaintiff's case is noteworthy as showing the uncertainties of life and how acts, seemingly unimportant, may cause tragic results. Deceased was the victim of an unusual combination of circum-

stances, every one of which "broke" against him. If the express train had not been late or if it had been running at its usual speed, or if its engineer's view of him had not been obstructed, or if his view of the express train had not been obstructed, or if the drill train had not stood on the main track for sixty seconds before making its last movement, or if the engineer of that train had stopped it on Noon's signal, or if the Steel Company's watchman had not closed the gates across the commercial track, or if the two box cars had been set in on the defendant's storage track, instead of on the main track, he would not have been killed. If only one of these acts had been favorable to him, he would have escaped. It is not probable that all of them were accidental, that no one was responsible for them and that the plaintiff and her children must bear all the loss. The tragedy of such a result and our belief in the justice of her claim, constitutes our apology for the length of this brief. We respectfully bespeak for her, the Court's careful consideration of her brief and legal rights.

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JAS. B. SHEEAN,
Attorneys for Plaintiff-Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

Josephine Noon, Administratrix of
George Noon, deceased,
Plaintiff-Appellant,

vs.

The Delaware, Lackawanna and
Western Railroad Company,
Defendant-Appellee.)

Action at Law.
Appeal from
Supreme Court.

REPLY BRIEF OF PLAINTIFF-APPELLANT.

By admissions and omissions, the defendant's brief eliminates many of the questions presented in the plaintiff's brief and thereby simplifies the work of the Court. It does not controvert or suggest any changes in the plaintiff's statement of facts. It does not question or qualify the law cited and relied on by the plaintiff and it accepts as correct the plaintiff's application of the law to the facts. Its main contention is that the issues and the evidence presented on this appeal are the same as they were on the former appeal.

In his statement of the history of the case, counsel gives a sketchy outline of the facts up to the time when Noon gave his last go-ahead signal, soon followed by his stop signal. No reference is made to the testimony, for the first time introduced, of why and where Noon got off

his train and why and where he was when killed. All these facts are recited in the plaintiff's statement and need not be restated. Notwithstanding such omissions, counsel asserts that his history contains all the evidence of Noon's actions prior to his death. (Brief, p. 5.) He also asserts that there was no eyewitness of the accident and that the cause thereof is a matter of conjecture notwithstanding the defendant judicially admitted in answers to interrogatories 36 and 38 that when Noon was killed, he was between the main tracks, opposite the switch points of the lead-track switch. It is true Hicks did not see the accident because he was watching the gates. (p. 70; l. 21.) The engineer of the drill train did not see it because he was watching the flagman out in the west field and the engineer of the express train, could not have seen it because his view was obstructed by the front end of his engine. The defendant's claim agent, under oath, made these answers and they necessarily imply that Noon was struck by the express train and someone witnessed that fact.

Counsel also assert in his history, that there was no evidence to show when Noon stepped off the west bound track or when and where the engineer of the express train could have first seen him. (Brief, p. 6.) *There is no evidence that Noon was ever on the west bound track.* On the contrary, the defendant admitted that when killed, he was between the main tracks, opposite the switch points. The fact, that after hearing the emergency whistle sounded within twenty-five feet of him, he moved or shied away from the approaching train does not modify that admission. Hicks testified that Noon got off his train just *before* the first car entered the switch (p. 66; l. 13) which placed him opposite the switch points and that he was standing there between the tracks, facing east, when last seen by him. (p. 69; l. 40.)

Based on the speed and length of the drill train as shown by the evidence, Noon got off his train ten seconds before he was struck and defendant does not question this fact. The defendant also admitted in answer to interrogatory 21 that the engineer of the express train could have first seen Noon when he was 500 feet east of him if he had been looking. (p. 30.) Counsel seems to ignore all of defendant's answers to the interrogatories and to treat them with silent contempt.

Under the Federal Act contributory negligence was not a defense and the plaintiff does not contend that the engineer of the express train negligently failed to blow his whistle when he first saw Noon. It is immaterial when Noon got off his train or when and where the engineer first saw him. Plaintiff's contention is that this engineer, under the unusual circumstances in evidence and the custom and practice of prudent engineers, under like circumstances, should have sounded his whistle when he first saw or could have seen the *drill train* working or standing on the adjacent track and that a whistle sounded while passing it, disregarded the custom and practice and the requirements of ordinary care.

The facts, when Noon was on the west bound track and where the engineer could have first seen him, were at issue on the former appeal but are not at issue on this appeal.

In answer to counsel's repeated assertions that the evidence on the last trial was the same as on the first trial, we appeal to the record which counsel has not done. The following facts were not shown on the first trial and were shown on the last trial, to wit:

The switch in question connects the east bound track with a lead-track and not a siding. (p. 113; l. 26.) The storage track was a continuation of the lead-track and

was located on defendants' right of way, twelve feet from the main track, outside the gates and fences of the steel company.

The exact length, depth and curvature of the curve in controversy, were shown and expert testimony fixed to what extent cars standing east of the switch on the curve, would obstruct the view to the east of a man standing just north of the switch.

When last seen alive, Noon was between the main tracks, opposite the switch points and facing south. In the performance of his duties and to meet an emergency caused by an unexpected obstacle across the track, Noon got off his train and thereafter until killed, was not in a place of safety.

Noon was not on the west bound track, just before or at the time he was struck.

When Noon was struck, the engine, caboose and not less than one box car, were on the east bound track, east of the switch and he was struck ten seconds after he got off his train.

The drill train stood east of the switch on the east bound track, sixty seconds just prior to Noon's last go-ahead signal. For twenty seconds of that time it was in plain sight of the engineer of the express train.

The clearance between trains at the switch was so narrow that trainmen had to stand sidewise to avoid injury.

The custom and practice of prudent engineers under the circumstance in evidence was to blow a whistle when they first came in sight of a train, standing or working on an adjacent track.

The defendant had no rule or regulation requiring its engineers to conform to this custom and practice.

It was the duty of the engineer of the drill train to watch Noon for signals and he failed to do so.

On the last trial plaintiff's grounds of negligence were: (1) the failure of the engineer of the express train to anticipate what happened and to blow his whistle when he first saw or could have seen the *drill train* on the adjacent track; (2) the failure of the engineer of the drill train to watch Noon for signals; (3) the failure of the defendant to have a rule requiring its engineers to blow a whistle under the circumstances in evidence, and (4) the adoption of the most dangerous method of work, when a comparatively safe one was available. None of these grounds of negligence was involved on the former appeal and the decision therein is not the law of this case.

I.

Custom and Practice.

Defendant answers there was no evidence of a custom and practice of prudent engineers to sound a whistle when approaching another train, standing or working on an adjacent track to give *its crew* a reasonable chance to keep out of danger. Its counsel ignores all the testimony of railroad experts, testifying to the existence of such custom and practice, copied at length in plaintiff's brief (Brief, pp. 19-22) but takes excerpts from their testimony, giving their construction of defendant's rules which are not in evidence. All of these witnesses, excepting Smith, were employes of the defendant and the record shows how evasive and self-serving their testimony was. Despite that fact, they were forced to admit the existence of such a custom and practice. Counsel criticises the testimony of Smith because not given in the form of the legal

formula. He testified what had been his custom and practice during the fifty-one years of service, that other prudent and careful engineers did the same thing (p. 98; l. 13) that the majority of our people would use their whistle the same as I have (p. 104; l. 31) and that other engineers have orders to take every precaution when passing trains along the road and my precautions are what the rest of them took (p. 103; l. 16). This was his way of answering the question and was more to the jury's understanding than a categorical answer would have been. Its form may be criticised but its substance was certain and convincing. The testimony of engineer Graves on this subject was more formal but no less convincing and should not be ignored. (p. 87; l. 20.) We respectfully submit that there was competent evidence on this issue to sustain a finding for the plaintiff.

Counsel argues that if there was no evidence of custom and practice, the decision on the former appeal as to this engineer's negligence, must control. Such result does not follow and counsel ignores the new evidence on this issue. There was evidence that defendant's rules required a bell to be rung, when passing a train on a siding or a train switching along the main track. In answer to interrogatories 34 and 35 the defendant admitted that it took no precautions to protect Noon's crew. Its engineer therefore kept no lookout, rang no bell, sounded no timely whistle and did not put his train under control.

Superintendent White testified that "if a train on an adjoining track were standing still, the rules * * * provide * * * for ringing the bell" (p. 92; l. 14) and further "The brakemen naturally are working, their attention is on their work more than it would be watching for trains." (p. 91; l. 23.)

Train Dispatcher McGowan testified, "Of course, passing a train on a siding or a train switching along the main line track, the bell should ring" and that the defendant's rules required such action. (p. 42; l. 37.) He also testified that there were no yard limits at Clifton, because it was in "switching territory" where switch engines were permitted to use the main tracks in doing their work, often blocking them by standing cars and engines (p. 40; ll. 40, 41-43). Based on the speed and length of the drill train, we have shown in our first brief (p. 22) that that train was on the east bound track east of the switch for thirty seconds in plain view of the express train when it approached and that for twenty seconds of that time it was standing still. The failure to ring a bell was evidence of negligence and was sufficient to sustain a verdict based thereon. It will be noted that this rule was not referred to in the opinion on the former appeal.

On the first trial, there was no testimony that the *locus in quo* was in "switching territory" where engines, without orders or time cards, used the main tracks for switching cars frequently blocking them by standing cars and engines. Those facts imposed upon this engineer a higher degree of care than was shown on the first trial. Combined with the other unusual circumstances, they charged the engineer with the duty of anticipating what happened and of taking some precaution to protect Noon and his crew. If there were no evidence of custom and practice, the character of the *locus in quo*, and this engineer's knowledge of the drill train's work day after day, at the same place, was evidence of negligence. It is certain that all reasonable minds, would not agree that it was not negligence and it was therefore, under the federal law, a question for the jury.

II.

Negligence of Drill Engineer.

The defendant's only answer to the charge that the engineer of the drill engine negligently failed to watch Noon for signals and to stop his train when signalled to do so, is that such failure had "no relevant bearing as a proximate cause of Noon's death" because "the train apparently was stopped in as soon a time as if he had actually received Noon's signal." (Defendant's Brief, pp. 21, 22.) The engineer testified positively that he did not see and did not stop on Noon's signal but on the flagman's "washout" signal (p. 83, l. 30; p. 85, l. 11.) The evidence was that Noon got off his train to give the stop signal before the first or head car started into the switch and gave his signal when "the first car was just starting in the switch to the plant." (p. 66, l. 13.) The engine, caboose and three cars were then east of the switch, moving west on the main line. When they were stopped on the flagman's signal the whole train was west of the switch, having moved 250 to 450 feet after Noon gave the signal to stop.

Engineer Graves testified, viz.:

"Q. You didn't see Noon give you a signal to stop, did you? A. No, sir, I did not.

Q. Who did give you a stop signal? A. Paddy Seaman, the flagman.

Q. When did you stop? A. Just as soon as I possibly could.

Q. Where was your engine when you stopped?

A. In the commercial track, head in on the commercial track." (p. 83; ll. 30-40.)

Exhibits A and G, drawn to scale, show that the east end of the commercial track was some 250 feet west of the lead track switch.

Brakeman Hicks testified, viz.:

“Q. Well, didn't you go back to where the body was? A. Yes, I went back after the accident.

Q. Then, where was the engine with reference to the body? A. I believe it just cleared the frog of the switch.

Q. The engine? A. Yes.” (p. 71; l. 12.)

The map exhibits indicate that this frog was some sixty feet west of the lead-track switch. The drill train moved four miles per hour or six feet a second. (p. 86; l. 17.) It required sixty-three seconds to move in on the commercial track, a distance of 440 feet from where Noon gave his stop signal, if the engineer's testimony be followed and it took thirty-one seconds to move west of the frog, a distance of 190 feet from where Noon gave his stop signal, if the brakeman's statement be followed.

Noon was struck ten seconds after he gave his stop signal and the flagman's signal must have been given more than ten seconds after Noon gave his signal and sometime after Noon was struck. The engineer said he could start and move his train over this switch in a second or two (p. 84; l. 31) and could, no doubt, have stopped it within that time. He said he stopped it on the flagman's signal just as soon as he could. This train was not stopped until thirty-one to sixty-three seconds after Noon gave his signal and during that time it moved from 190 to 440 feet. So that in the words of counsel, it was not stopped “in as soon a time as if” the engineer had seen and promptly obeyed Noon's signal.

If he had promptly obeyed that signal, Noon would have had nearly ten seconds to look out for his own safety. As a matter of fact, he had only a split second to do so. As the train continued to move towards the closed gates, Noon probably repeated his signal and when

the conductor moved by him, he warned him that the gates were closed against the train. He was confronted by an emergency and was doing all he could to stop his train and prevent damage and possible injury. If the train had stopped on his signal, he would have been relieved of responsibility and free to consider his own safety. He could have mounted his train or crawled under it or laid on the ground or located the center line of safety between the tracks, or have stood facing the passing train. If he did not stand sideways, one or both of the trains would hit him. (p. 76; ll. 20-31.)

Counsel's argument that this train stopped as soon on the flagman's signal as if the engineer had stopped on Noon's signal is not supported by the evidence. No question is raised that it was not the duty of the engineer to watch and obey Noon's signals and that without excuse, he failed to do so. The question of this engineer's negligence was not involved on the first trial and none of the facts referred to in this part of the argument has ever been before this Court.

III.

Assumption of Risk.

Defendant makes no claim that Noon was guilty of contributory negligence or that his negligence was the sole proximate cause of his death. Its counsel asserts but does not argue that he "assumed the risk of his injury." This is based altogether on Hick's testimony "that the crew knew the express train went by about that time every night." There is, however, no evidence that the express train was ever before late or the engineer of the express train ever before failed to sound a timely whistle to warn the crew of the drill

train, or the engineer of the drill train ever before failed to watch his brakeman for signals. The last two were single acts of negligence, creating a sudden emergency, without warning to Noon or opportunity to judge the resulting damage. He could not have foreseen such acts and did not assume the risks arising therefrom.

Under this heading of assumed risk, counsel asserts there was no proof of an improper clearance between the main tracks at the place of accident and cites decisions to the effect, that railroad companies are under no obligation to adopt or maintain any particular standard for spacing their tracks. Plaintiff has not assigned or argued any error grounded on such matters and concurs in the decisions cited. In this case, however, the clearance between trains was one of the circumstances which the engineer knew of, or should have known of, and the dangers of which he should have appreciated, when he approached the drill train, without any warning.

The lead-track switch was located at the apex of the curve and necessarily reduced the usual clearance between *trains*, making it so narrow at that point, that a man had to stand sideways to avoid injury from passing trains. After the accident to Noon, this switch was moved off of the curve to a point 175 feet west of its old location. Counsel offers no explanation why this was done, and the reasonable inference is that it was done to widen the clearance at the switch between passing trains.

IV.

Adoption of Rules.

The defendant answers the charge that it negligently failed to adopt and enforce a reasonable rule requiring

its engineers to sound a timely whistle when approaching a train working on an adjacent track within switching territory, by ignoring the facts, the law and character of the proposed rule, presented at length in plaintiff's brief. Its answer appears to have been written without a reading of that brief and deals only with irrelevant matters, in no way responsive to the subject. It answers nothing and calls for no reply.

V.

Methods of Work.

Defendant's only answer to the charge that it negligently selected the most dangerous method of doing the work at the time of the accident, is in the words of counsel, that "not one word of evidence was offered to show that the work Noon was doing could have been done in any other or safer manner." It does not question the facts or the law applicable thereto. When the drill train arrived at Clifton, the work to be done was to place three of its cars on the tracks of the Steel Company and to take one car away. There were two methods of doing this work, one dangerous and the other comparatively safe. The method adopted is described in detail in plaintiff's statement of facts in the first brief. It resulted in blocking the main track while the crew was setting in one car and picking up another and the making of six engine movements on the main track about and over the switch located on the apex of a curve. Each movement on the main track exposed the trainmen to the dangers of passing trains, which were increased by the location and operation of the switch on the curve. The other method of work, was to spot the two box cars on the *storage track*, spot one car on the coal track, pick up the

car on the commercial track, pick up the two cars on the *storage track* and spot them on the commercial track.

Exhibit A shows how this method of work could have been adopted. It appears so simple and evident that the average juror could have readily seen and understood it. No other testimony was necessary to prove what was so obvious.

If this method had been adopted, the main track would not have been blocked and no movements would have been made on that track except to move off it and onto it. The storage track was over 600 feet long, was on defendant's right of way, and outside of the Steel Company's fences and gates, and, no doubt, was constructed and maintained for such usage. Had the latter method been adopted, the drill train would not have been on the main track when the express train passed by, the gates would not have been closed, Noon would not have been between the main tracks trying to stop his train, and would not have been killed. Obviously, it is more dangerous to do switching work on a main track, adjacent to other active tracks, than it is to do such work in a private plant, where there *are no other* engines or trains. It was so obvious that the most dangerous method was adopted that expert testimony was not offered and should not have been received. In disposing of a similar question in *Chicago Ry. v. Moore*, 166 Fed. 633 (C. C. A.) the Court said:

“In respect of questions, upon which men of ordinary observation and experience have some knowledge and are not incapable of forming opinions of their own, jurors are not dependent upon the opinions of experts, even though they would be assisted by them.”

To the same effect,

Canadian Co. v. Senske, 201 Fed. 637, (C. C. A.)

We respectfully submit that the trial Court erred and that under the evidence, the case should have been submitted to the jury on one or all of the grounds of negligence established. We ask that the judgment be reversed and the case remanded for a new trial.

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New Jersey Court of Errors and Appeals.

JOSEPHINE NOON, as Administratrix
of George Noon, deceased,
Plaintiff-Appellant,

AGAINST

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Defendant-Appellee.

Action at Law

Appeal from
Supreme Court.

BRIEF OF DEFENDANT-APPELLEE.

Statement.

This is a plaintiff's appeal from a judgment entered in the Supreme Court on May 17, 1929, on the verdict of a jury directed against the plaintiff and in favor of the defendant on May 4, 1929, in the Ocean Circuit of that court. The accident involved in this case between the said parties having already been before this Court, the reported decision of which was made on February 4, 1929, and is reported in Vol. 7, page 258, New Jersey Advance Reports.

Appellant brought this action against the appellee under the Federal Employers' Liability Act. In the direction of a verdict in favor of the defendant by the Trial Court, in the exclusion of certain operating rules of the appellee and to the Court's adaptation, and following the decision of this Court on the former appeal as the law of the case, the appellant claims prejudicial error.

History of the Case.

On April 27, 1925, about 4:52 P. M., the appellee's decedent, a trainman employed by the appellee in its freight service, was struck either by the locomotive or by the cars of an express train traveling westerly over the Morris and Essex branch of the appellee's road in the vicinity of Clifton, N. J., on its way to Paterson, N. J., and beyond.

The plaintiff produced no eye witness of the accident, but established sufficient evidence to warrant an inference that contact with either the engine or cars of said westerly train was the proximate cause of her decedent's death.

On appellee's Boonton Line running from Hoboken in a northerly direction through Secaucus, Passaic and Clifton, N. J., to Paterson, N. J., and beyond, it operated two main line tracks known to railroadmen as "westbound" and "eastbound" respectively. Of these the track farthest south (geographically west) was the eastbound track. Trains running from Paterson toward Hoboken used the eastbound track and were called eastbound trains; and those running in the contrary direction, using the west bound track, were called westbound trains.

Off both main tracks in the territory between Secaucus and Paterson ran sidings serving various industries. In the vicinity of one of these, the plant of the Athenia Steel Company, there was a drill or switching movement at or about the time

of the accident here in question, which makes desirable a description of the track lay-out of this industry.

The plant of the steel company was served by a siding taking off from the railroad company's eastbound main track at a point approximately 300 feet easterly of the easterly side of the steel company's office building, at the point marked "A" on defendant's trial map—Plaintiff's Exhibit P-E which is the last exhibit in the plaintiff's Book of Exhibits is shown the switch stand and lever operating this switch and controlling movements of cars to and from the eastbound main track and the industrial tracks of the steel company were located on that side of the eastbound main track nearest the Steel Company's plant.

These industrial tracks were known, respectively, as "storage track", "commercial track" and "coal track". The storage track was a continuation of the railroad siding extending westerly toward Paterson parallel with and substantially 12 feet distant from the eastbound main track, measured from the nearest rail. The commercial track branched from the storage track at a point approximately 100 feet easterly of the easterly side of the steel company's office building, and ran in a westerly direction, diverging from the storage track toward the south. The coal track took off from the commercial track at a point approximately 20 feet easterly of the easterly side of such office building and turned sharply to the

south. Movements to and from the coal track were controlled by a switch located a few feet easterly of such office building.

It may not be amiss to here point out that these tracks are not shown on Plaintiff's Exhibit "A" printed first in the Book of Exhibits, but are shown on the defendant's trial map used at the trial as a plaintiff's exhibit and printed as the last exhibit in the Book of Exhibits.

On the day of the accident a train known as the "Passaic Drill", the function of which was to switch cars in and out of the various industrial sidings in this territory, proceeded from Paterson toward Secaucus on the railroad company's eastbound main track with three cars and a caboose. The engine of the drill, with head end to the west toward Paterson, was backing up pulling after it a caboose and three cars. As the drill approached the siding serving the Athenia Steel Works the conductor cut off two of the three cars and then the drill placed the remaining car on the coal track of the steel company above described. After placing that car on the coal track the drill backed out beyond the point of switch on the commercial track and shoved in on the latter track, picked up one car there and backed out onto the eastbound main track. Here it picked up the two cars cut out as aforesaid by the conductor and backed easterly to clear the point of switch controlling movements from the eastbound main track to the industrial siding.

Thereupon the decedent, Noon, threw that switch and the drill with the three cars moved onto the industrial siding for the purpose of placing on the commercial track the two cars just picked up on the eastbound main track. After Noon threw the switch to permit the movement just described, he stepped over the eastbound main track to a point between it and the westbound track and gave the engineer the "come ahead" signal, and, thereafter, as the drill started to enter the industrial siding he, Noon, got on the step of the most westerly box car with a trainman by the name of Hicks and gave the engineer the come ahead signal. That was the last time that the engineer saw Noon alive. As the drill started to shove into the steel plant Noon got off the step of the box car while it was moving to give a stop signal. The last seen of him by his fellow trainman, Hicks, being when he went by the step of the box cars between the eastbound and westbound tracks. After the giving of this signal the drill stopped, but not because of said signal.

The foregoing was all the evidence of the witnesses produced by the plaintiff-appellant as to the actions of Noon immediately prior to the accident resulting in his death. No eye witness of the accident was produced. Plaintiff-appellant endeavored to supplement this testimony as to happenings immediately prior to the death of Noon by reading in evidence certain interrogatories propounded to the defendant, and its answers thereto,

the following being all that was developed and established in that way:

"36. Where was Noon located when he was killed? A. Between the east and west-bound tracks.

"37. Was Noon standing or walking when killed? A. Noon was seen moving away from the track at the time he received his injuries.

"38. Was Noon east or west of the switch points of the plant of the Athenia Steel Mills Co. when he was killed? A. He was about opposite the switch point of the switch which served the industrial track.

"40. Was Noon struck between the east and westbound main tracks or was he between the rails of the westbound track when he was killed? A. Noon was struck while jumping away from the westbound main track.

"43. What was Noon about to do or in the act of doing when he was killed? A. Just prior to the accident Noon opened a switch and shortly prior to meeting his death called his conductor's attention to the position of the gates of the Athenia Steel Company plant.

"52. What service had Noon done just prior to his death? A. Opened switch leading from eastbound main track."

There was no evidence to show or from which could be inferred the point of time when he stepped upon the westbound track or took position so near thereto as to place himself in jeopardy. And the relation of that moment of time to the

time and place when and where the engineer of the westbound train might first have seen him had he looked, nowhere appears.

Evidence was sought to be adduced that the engineer of the westbound train disregarded the custom and practice of prudent engineers to sound the whistle as soon as they saw a train standing or working on an adjacent track as a warning to its crew that they might have a reasonable chance to avoid danger, and, also, that the engineer of Noon's drill train failed to watch him for signals and failed to stop his train when signalled to do so. This being the appellant's case and the appellee have rested without offering any evidence in reply thereto, it moved for a direction of a verdict in its favor which the Trial Court granted.

ARGUMENT.

POINT I.

No error was committed by the Trial Court in directing a verdict for the defendant.

In the opinion of this Court, reported in Vol. 7, page 258, New Jersey Advance Reports, this Court speaking relevant to the first trial, said that:

“The trial judge left the case to the jury under a charge that it was for the jury to determine as a question of fact whether the members of the crew of which Noon was a member were negligent in failing to exercise such due and reasonable care as the circumstances required and whether the engineer

of the express train failed to use the due and reasonable care that the occasion demanded by not giving a signal to warn Noon that the express train was approaching", p. 261.

And in describing the train movements then involved set them out numerically as being seven in number, p. 260.

From an inspection of appellant's brief, pp. 4, 5, the train movements involved on the second trial of the cause, from which trial this appeal arises, show them by comparison to be similar to those on the first trial upon which this Court rendered its decision referred to. It is apparent, therefore, that so far as the movements of the trains involved in this matter are concerned, that there is no real or substantial difference from those already reviewed by this Court to differentiate the case with respect to train movements from the opinion already rendered. Also the photographic exhibits and maps too are the same as were before this Court on the prior appeal. It therefore remains to ascertain the distinguishing features of the instance case from the prior one. These features the appellant sets forth in her brief to be as follows, p. 38:

"On the first trial the grounds of negligence were that the engineer of the express train negligently failed to see Noon in time to avoid the accident, or that after seeing him he failed to exercise ordinary care to avoid the accident and that some member of Noon's crew should have notified him of

the express train. Such contentions were not made on the second trial and are not made on this appeal. The negligence now relied on is that the engineer disregarded the custom and practice of prudent engineers to sound the whistle as soon as they saw a train standing or working on an adjacent track as a warning to its crew that they might have a reasonable chance to avoid danger. It is immaterial when or where the engineer first saw Noon. * * * The other grounds of negligence presented herein and not presented at the first trial are that the engineer of Noon's train failed to watch him for signals and failed to stop his train when signalled to do so, that the defendant failed to provide a reasonable rule requiring their engineers to sound a timely whistle when approaching another train on an adjacent track and negligently failed to adopt a safe method of work."

In the opinion of this Court in the prior case it was said by this Court, with respect to the alleged negligence of the engineer of the express train which struck the appellant's decedent, p. 262:

"It is next set forth that the engineer of the express train failed to discharge his duty by not giving by whistle or bell a warning to Noon. There is no evidence as to how long Noon was on or near the westbound track when the express train passed. He may have just stepped on the tracks as the westbound train passed. The engineer may have had no opportunity to see him on the track or if he did see him it may have been too late

to give any warning. The evidence is barren of any fact which would show that the engineer of the express train had an opportunity to warn Noon in time to avert the accident.
* * * We fail to see in what respect the engineer of the train was negligent."

As to the dereliction of the members of Noon's drill crew, which necessarily involved the engineer Graves, your Court said, p. 261 :

"The plaintiff contends that some member of the drill crew should have apprised Noon of the approach of the express train. At the time of the accident each member of the crew was engaged in the performance of his duties. To place upon each member of the drill crew the duty of watching the movements of every other member of the crew and warning him of an approaching danger would result in a crew performing little if any work, as the time of the crew would be taken up in the discharge of such a duty."

The appellant, however, contends that the issues presented on this appeal are substantially different from those involved on the former trial, because new witnesses and new evidence were produced and new grounds of negligence were disclosed by the evidence, an analysis of the additional testimony given upon the trial of the instant case is therefore necessary to ascertain its character and effect.

The additional pertinent testimony elicited by the appellant on the trial of the instant case came from the following witnesses: McGowan, the

chief dispatcher of the appellee; White, its Superintendent; Hicks, a trainman of the drill crew, and Smith, a retired engineer of the Pennsylvania Railroad.

From White, the Railroad's Superintendent, was elicited the information that on the M. & E. Division of the Railroad, where the accident involved in this case happened, the Railroad operated;

"a great many trains and the question of a delayed train means nothing so far as any action that the engineer" (of the express train) "would take, the train being three minutes late or four minutes late would actually mean nothing so far as any action he would take on account of notifying anybody. On that Division we run a great many trains, a great many extra trains, a great many freight trains that run at high speed. They are not scheduled, so that the delayed train proposition would have absolutely no bearing in this case or in any other case of an accident of that sort," p. 90.

He further testified that the reference placed in the Company's rules about delayed trains was due to the fact, p. 90, that

"on some portions of our road and portions or other roads where there are very few trains in a day a brakeman and others would know that a train was due say at noon that did not get along until three or four o'clock in the afternoon on account of being delayed a couple of hours, then it would be important."

And further, dealing with the care to be used by engineers operating delayed trains at a high speed and approaching another train working or switching on an adjacent track, he said that the fact that a train was working or standing on a curve which obstructs any part of the view beyond a certain portion of the train, p. 90,

“would have no bearing at all unless the engineman” (of the delayed train) “should observe that some man of the other train crew was not looking or was not in a position where he would observe him coming; then he would naturally warn him of his approach.”

But nowhere does his testimony disclose that there was a usual and customary method followed by reasonably careful engineers when operating a delayed regular train at about forty-five miles an hour and when about to pass a freight train standing or working or switching on the curve of an adjacent track which in part obstructs the view of the track that the engineer is running on, his testimony with respect to that inquiry being that some of the engineers “possibly would give one blast of the whistle”, p. 92, line 29 *et seq.*, and some of them would not, p. 92, line 33.

McGowan, the Railroad's chief dispatcher, whose duties confined him to his office at the Railroad's terminal at Hoboken, N. J., some 15 to 18 miles from the scene of the accident, p. 43, line 20 *et seq.*, since 1908, was sought to be qualified by the appellant as to “the precautions” (it

will be observed that the inquiry was not about customs or practices) usually taken by prudent and careful engineers of the appellee when operating a delayed regular train 45 miles an hour, where the view is obscured of the track ahead. But aside from saying, "I am sure that we have got an order in the book of rules that the bell should ring and how long he will ring the bell. He was one of the best men on the road. Of course * * * passing a train on a siding or a train switching along the main track the bell should ring", p. 42, line 35 *et seq.*; or if he saw a person on the track "any engineer would blow the whistle", p. 43, line 1 *et seq.* There "precautions", however, it will be observed did not deal with the points of negligence urged by the appellant of "custom or practice." Neither did they have any significance on the situation of the drill train as the appellant expressly urges in her brief that it was "immaterial when and where the engineer of the express train was when he first saw Noon", so that McGowan's testimony is concededly immaterial as to the signals which the engineer of the passenger train would give "if he saw a person on the track".

Smith, a retired engineer of the Pennsylvania Railroad, whose knowledge of the custom and practice of reasonably prudent engineers was sought, appears to have devoted his entire time to railroading on the Pennsylvania railroad, said that "the majority of our people would use the whistle the same as I have, the majority of our

people", p. 104, line 31 *et seq.*; although in his experience as road foreman of engines, riding engines with other engineers, he found his experience to be that "some people will do something that they wont do when he" (meaning acting as a road foreman of engines) "ain't there", p. 104, line 1 *et seq.*; and that the basis of his method of signalling was to be "safe rather than sorry", p. 99, line 31. Nowhere throughout this witness's testimony is found or established a custom and practice that can be said to be a criterion from which the jury would have had a right to judge the acts of the engineer of the express train involved in the instant case,—although it may be said to this witness's credit that he apparently was more than the "ordinary prudent man" so aptly described by this Court in *Evers v. Davis*, 86 N. J. L. 196, at pp. 196-203.

No rule or custom having been established by the evidence adduced by the appellant's additional witnesses that the engineer of the express train failed in performing any duty to sound a whistle signal (as soon as they saw a train standing or working on an adjacent track as a warning to its crew so that they might have a reasonable chance to avoid danger), we take it that the opinion of this Court on the prior trial would be still applicable and controlling with respect to his not being negligent, this Court having there said:

"It is next said that the engineer of the express train failed to discharge his duty by not giving by whistle or bell a warning to

Noon. There is no evidence as to how long Noon was on or near the westbound track when the express train passed. He may have just stepped on the track as the westbound train passed. The engineer may have had no opportunity to see him on the track, or if he did see him it may have been too late to give any warning. The evidence is barren of any fact which would show that the engineer of the express train had an opportunity to warn Noon in time to avert the accident. Neither were any facts testified to from which such an inference can be drawn. We fail to see in what respect the engineer of the train was negligent."

It is necessary, therefore, to analyse the testimony of the remaining additional or new witness—Hicks—of the appellant to see if his testimony gave a different complexion to the instant case, respondent still contending that it does not change the conclusions of this Court from the conclusions reached on the former trial. On the former appeal of this case, this Court said:

"The evidence is barren of any fact which would show that the engineer of the express train had an opportunity to warn Noon in time to avert the accident. Neither were any facts testified to from which such an inference can be drawn. We fail to see in what respect the engineer of the train was negligent."

An examination of this witness's testimony will show that he carried the story of the facts prior

to Noon's death a few steps further than that which appeared before this Court on the former appeal, but he too, like the witnesses on the former trial did not see Noon killed, or how he was killed, leaving that matter again to inference.

This witness was a trainman working in the same drill crew as Noon and the pertinent additional testimony he gave, which was absent from the first trial, culled and to the point, is as follows:

“Q. Then what happened? A. George got on the step with me.

Q. And then what did he do? A. We started to shove in.

Q. To the steel plant? A. Yes, sir.

Q. Then what? A. George got off the step.

Q. Where was he when he got off? A. On the same step with me.

Q. And about how far from this main track switch? A. Oh, we hadn't gone a car length, I don't believe.

Q. Then was your train moving? A. Yes, sir.

Q. What did Noon do then? A. Got off to give a stop signal.

Q. Where did he go? A. The last I saw of him he went by my step between the two tracks”, p. 65, line 20 *et seq.*

“Q. Two main tracks? A. Yes, sir.

Q. To give a stop signal? A. Yes, sir.

Q. To whom was he to give the stop signal? A. The engineer.

Q. Do you know whether or not he gave it? A. Yes, sir.

Q. Did they stop? A. Yes, sir", p. 66,
line 1 *et seq.*

* * * * *

"Q. Now you have given us the last time you saw Noon. How long was it before your train stopped? A. I wouldn't just state the time, because I don't know how long it took them.

By the Court:

Q. You say you saw Noon step out? A. Yes, sir.

Q. Between the east and westbound tracks? A. Yes, sir.

Q. Was he actually between those tracks? A. As far as I can remember.

By Mr. Sheean:

Q. Where were you at the time the express train went by? A. Standing on the side of the box car.

Q. Why didn't you see the rest of it? A. Because he was past me.

Q. Who, Noon? A. George Noon.

Q. He was east of you, was he? A. Yes, sir.

Q. You had passed west of him? A. Yes, sir.

Q. Where did that car stop that you were on? A. I don't just remember where it stopped.

Q. You were shoving in? A. Yes, sir", p. 67, line 11 *et seq.*

* * * * *

"Q. Now, you spoke of Noon stepping out a little. That was on a curve, wasn't it? A. No, he was shoving into the plant.

Q. Wasn't the course a curve? A. No, sir; there is no curve there", p. 68, line 2 *et seq.*

* * * * *

"Q. How far did he have to go to get a vision? A. Just to step across from the east-bound in the middle of the east and west-bound.

Q. Where he did go? A. Yes, sir.

Q. You say it was necessary for him to go there? A. Yes, sir.

Q. In order to see the engineer to give a signal? A. Yes, sir.

By Mr. Sheean:

Q. Did you know the train came alone and hit Noon? A. No, sir; I didn't know it.

Q. When did you learn that fact? A. From the flagman.

Q. Where were you at that time? A. On the car", p. 68, line 20 *et seq.*

* * * * *

Q. The last you saw of Noon he was standing between the east and westbound tracks? A. Yes, sir", p. 69, line 38 *et seq.*

* * * * *

"Q. So that the last you saw of Noon, he was standing with his back to the direction in which the express train came? A. Standing with his face that way. He had stepped off and faced the engineer to give the stop signal.

Q. Facing the direction from which the train came? A. Yes, sir.

Q. Is that the way he should have been standing? A. He had to do it in order to see the engineer.

Q. What direction were your cars moving? A. We were being shoved west into the Athenia Steel.

Q. The engine was on the rear? A. Yes, sir.

Q. He had to turn west to see the engineer? A. Yes, sir.

Q. He was facing in the direction from which that express train came? Yes, sir.

Q. You didn't see him struck? A. No, sir.

Q. Why didn't you? A. Because I had turned around to watch the gates.

Q. At the steel yard? A. Yes, sir.

Q. Did you give the time that elapsed between the time when you last saw Noon and the time that you heard this long whistle? A. No, sir; I don't remember how long it was.

Q. Have no impression at all? A. Well, I can't say that I have. I don't know just how long it was.

Q. Well, was it a matter of seconds? A. It couldn't have been a minute, I don't believe", p. 70, line 3 *et seq.*

* * * * *

"Q. It was less than sixty seconds, anyway? A. Yes, sir", p. 71, line 1 *et seq.*

* * * * *

"Q. And the last signal that you saw Noon give was a stop signal to his engineer? A. Yes, sir.

Q. At that time he was standing in a place of safety? A. Yes, sir.

Q. He was in a position of safety then? A. Yes, sir.

Q. And the express would not have hit him? A. No, sir; he could clear them.

Where he stopped and got off he could clear the westbound main", p. 73, line 21 *et seq.*

* * * * *

Q. As a result of that signal as far as you know, your train, string of cars, came to a stop? A. Yes, sir", p. 74, line 13 *et seq.*

* * * * *

"Q. Were you rounding the curve? A. There wasn't a curve there; it was more of a straight shove in, excepting the switch point.

Q. How do you know that Noon had a clearance there? A. Why, if you stand sideways the two main tracks can pass you there.

Q. If you stand sideways? A. Yes, sir.

Q. That would give you a clearance of what, a foot and a half? A. I don't know. I can't tell you how far it will give you standing there.

Q. No, but you say if a man would stand sideways the train could go by without catching him. A. From what I have seen", p. 76, line 14 *et seq.*

* * * * *

"Q. You don't know how much of your train was on the industrial track? A. No, sir; I don't. I don't remember just how it was.

Q. But you know you had started in on it? A. Yes, sir.

Q. You said that rather than it being a curve it was a sort of a straight shove in? A. Yes, sir", p. 77, line 1 *et seq.*

No testimony was elicited from this witness whatsoever as to any custom or practice of engineers of regular or delayed regular westbound

trains giving signals of their approach to the drill train while working in the vicinity of the Athenia Steel Company, although this witness was a regular member of the Passaic drill. The reason for the appellant's failure to examine him on this subject being quite obvious, because he and the members of his crew knew that the express train went by there about the same time every night, p. 73, line 9 *et seq.* It is therefore contended that so far as the insisted charge of negligence by the appellant that the railroad-responent is liable on account of the failure of the engineer of the west-bound train to comply with a duty (?) to warn by whistle arising out of the custom or practice of reasonably prudent engineers, failed because of lack of proof.

The other insistent of the appellant that the engineer of Noon's train failed to watch him for signals and failed to stop his train when signalled to do so by Noon appears under the evidence to have no relevant bearing as a proximate cause of Noon's death. True, the engineer, Graves, in answer to the question of the Court, said:

“Q. You say you didn't see Noon give any signal? A. No, sir, not after he got on the box car, to give me the two go ahead signals.

Q. That was the last time? A. That was the last time I noticed Noon.

Q. If he had given any signal after that, would you have seen it? A. Probably I would if I hadn't been looking at Paddy Seaman. Paddy Seaman was giving me what

railroad men known as the washout signal. He was almost down on his knees, swinging this red flag across the track as hard as he could.

Q. When did he give that signal? A. When the accident happened.

Q. How soon did the accident happen after you saw Noon giving that signal? A. Well, I didn't notice just how quick it was.

Q. Where were your cars and engine when the accident happened? A. The cars and engine was going in on the commercial track", p. 85, line 2 *et seq.*

* * * * *

"Q. Who did you give a signal to stop? A. Paddy Seaman, the flagman.

Q. Where did you stop? A. Just as soon as I possibly could", p. 83, line 32 *et seq.*

But irrespective of whether Engineer Graves stopped the train in response to Paddy Seaman's signal or not, the train apparently was stopped in as soon a time as if he had actually received Noon's signal, because the witness Hicks, who saw Noon give the stop signal, was evidently under the impression that Noon's stop signal was the cause of the stoppage of the drill, for he testified:

"Q. As a result of that signal as far as you know, your train, string of cars, came to a stop? A. Yes, sir", p. 74, line 12 *et seq.*

The evidence on the instant case showed that each member of the crew at the time of the accident was engaged in the performance of his

duties. Therefore, it would appear that whether or not the engineer of Noon's train failed to watch him for signals, he did not fail to stop his train when signalled to do so, bringing about the stoppage of said train at a time simultaneous with the time it would have been stopped if he had observed Noon's signal. It but remains to point out to the Court that Paddy Seaman was the flagman out of the drill, and that he was out on the tracks west of the drill protecting it from any movements eastbound on the east bound main track on which the drill was from time to time operating.

No evidence having been adduced upon the trial of the instant case on the grounds of negligence which the appellant now specifically relies upon, page 38, appellant's brief, with respect to a dereliction of duty of the engineer of either the express or drill train, the Trial Court was not in error in directing a verdict on those grounds, and following the opinion of this Court on the prior appeal, as well as the other grounds urged by the appellee and hereinafter to be discussed.

POINT II.

Plaintiff's decedent assumed the risk of the injury to him.

The evidence shows Noon's familiarity with the *locus in quo* as well as the train operations involved in the instant case, because the express train known as Train 367 passed there every day when the crew was working around there in the afternoons, and the crew knew that the train went by there about that time every night, page 73, line 20. Further, there was no evidence that the deceased was injured by reason of any departure from some custom or practice generally followed on the Morris and Essex Division of the appellee's railroad. Neither from the proof was there shown to be an improper clearance between the east and westbound tracks, these various insistments being fully covered by the case of *Toledo, St. L. & W. R. R. Co. v. Allen*, 276 U. S., at 169, 170-1.

"The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 529. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not

prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. (Citing cases.) Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri Pacific Railroad Co. v. Aeby, supra.* The court erred in submitting that question to the jury."

The same court in *D. L. & W. R. R. Co. v. Koske*, 279 U. S. 7, at page 11, reiterated the same doctrine by saying:

"Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varying judgment of juries."

POINT III.

There was no evidence that the appellant failed to promulgate rules for Noon's safety.

It is true that in some manner Noon was struck by some part of a train moving west on the appellee's westbound track, but one searches in vain to find any evidence to justify even an inference that Noon was obliged at the time of his accident to be in a place of danger. Nothing occurred or was occurring to require him to seek or place himself in a position of danger to signal his engineer, Graves. No accident or untoward occurrence was taking place or took place to his train then safely on the siding which branched off the eastbound main track, and what more could be done or what actions could have been regulated by the promulgation of additional rules would be or should be was left entirely to speculation and conjecture.

When last seen giving his stop signal to Graves he was facing the direction from which the express train was coming, p. 70, line 13 *et seq.*; also, line 24 *et seq.* Bearing in mind that in the introduction of the appellee's rule R the deceased was enjoined to "stand outside and clear of all main tracks while trains are passing. They must not rely upon others to notify them of the approach of a train", one finds a complete answer to this allegation of negligence.

POINT IV.

There was no evidence that the appellee failed to adopt a safe method of doing the work in which Noon was engaged.

The mere happening of the accident to Noon established nothing, as an action under the Federal Employers' Liability Act must be predicated upon negligence. While one may imagine how the accident was brought about, no finger can point to any dereliction of duty on the part of any member of the drill crew, except on the part of Noon himself. Not one word of evidence was offered to show that the work Noon was doing could have been done in any other or safer manner. As said by this Court in *Kingsley v. D. L. & W. R. R. Co.*, 81 N. J. L. 540:

“A person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. A violation of this duty, which we call negligence, cannot be presumed but must be proved. The liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done. And so it cannot be predicted on any particular act that it is *per se* negligence; it is only so because it is a breach of some duty which must appear as a substantive factor in the case.”

POINT V.

Grounds of Appeal B, C, D, E and F, page 3, line 1 *et seq.*, seem to have been abandoned by the appellant as the eight points of the appellant's brief do not deal either specifically or inferentially with the grounds or appeal set forth.

The *locus in quo* involved in the instant case being the same as they appeared on the former trial, see maps and photographs contained in the Exhibit Book and the testimony of the witnesses establishing the same, we will but call this Court's attention to what it said with respect to the rules in questions at pages 262-3 of the opinion on the former appeal. The additional testimony of McGowan, referring to the territory in question as "switching territory", p. 41, line 7 *et seq.*, and specifically referred to in the appellant's brief in no way changes the situation of this case from the former case, p. 40, line 31 *et seq.*; p. 41, line 1 *et seq.*

Conclusion.

True, as said by the appellant in her brief,

“The business of the defendant was complex and hazardous and the danger involved in the passage of trains were obvious.”

But as said by your Court in its opinion on the prior appeal of this case

“In actions based on the Federal Employers’ Liability Act negligence must be proven. It will not be presumed.”

When the appellant failed to establish such negligence the Trial Court did not err in directing a verdict for the appellee, and for those reasons no other grounds of error being pressed, but having been abandoned by the appellee, the judgment entered in the instant case should be affirmed.

Respectfully submitted,

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