

NEW JERSEY COURT OF ERRORS
AND APPEALS.

WILLIAM C. HENDEE, Ad-
ministratoꝛ of the Estate
of HARRY C. HENDEE, De-
ceased,

Prosecutor-Appellee,

vs.

WILDWOOD AND DELAWARE
BAY SHORT LINE RAIL-
ROAD COMPANY,

Respondent-Appellant.

ON CERTIORARI.

ON APPEAL.

BRIEF FOR RESPONDENT-APPELLANT.

This was an action brought under the provisions of the workmen's compensation act of April 4th, 1911 (P. L. 1911, p. 134).

Testimony was heard before Hon. Henry H. Eldredge, Judge of the Common Pleas of Cape May County.

It is not denied that the prosecutor's intestate was, at the time of his death, in the employ of the respondent; that he earned an average weekly wage of \$20.77, and that he left him surviving his widow and a minor child, both of whom are dependents within the terms of the statute. Neither was it denied that decedent's

death was due to an accident. As was stated in the finding of facts and determination of the Common Pleas Judge, the one question before him for decision was "whether the accident arose out of and in the course of the decedent's employment?" (State of the Case, page 19, line 30.)

The Common Pleas Judge found the following facts: Petitioner's decedent was employed by the respondent as a locomotive fireman. On the day of the accident in question the train from Wildwood on which Hendee worked left Wildwood about 18 minutes late and arrived late at Wildwood Junction. The crew consisted of engineer, fireman, brakeman and conductor. The conductor at the time of the accident was at the station and the other members of the crew were drilling the train. Two cars were lying on a siding and a third car was being shoved in to couple with these two cars. The brakeman ran ahead to make the coupling between the tank of the engine and the single car, and the decedent left his engine and ran to the other end of the car to make the coupling between the single car and the two cars standing on the siding. The engineer was in charge of the train at the time. While making this coupling the decedent received the injury from which he died. (State of the Case, p. 19.) The Common Pleas Judge also further found as a fact that the decedent was employed as a regular railroad fireman; and further, that the claim on behalf of the petitioner that it was the custom of the employees of the road to perform more than one kind of work, and that decedent through a long course of conduct acquiesced in by the respondent company had extended the scope of his employment beyond that of an ordinary fireman, was not substantiated by the testimony. On this point the Common Pleas Judge found as a fact

that the testimony indicated nothing more than that on other occasions the decedent had left his engine and performed duties outside of the line of his employment, but that there was no evidence that he was directed to do so by any one in authority, or that his employers even had knowledge of the fact.

Based upon the above ascertained facts, the Common Pleas Judge determined that a man employed as a railroad fireman who is injured while coupling cars is not doing what a man so employed may reasonably do within a time within which he is employed and at a place where he may reasonably be during that time, nor is he in any sense doing what he has to do in fulfilling his contract of service. The learned Judge further held that under the conditions above mentioned the decedent could not be considered other than as a volunteer who was engaged in doing work outside the scope of his employment, either with the intention of benefiting his employer or of doing a good turn to a fellow-workman, and that in such a case, on both principle and authority, there could be no recovery. In his determination the Common Pleas Judge stated, "Where an employee assumes duties other than those for which he was employed, without the knowledge of the employer, an accident occurring while the employee is so engaged cannot be said to arise out of the employment." (State of the Case, p. 22, line 18.)

The petition was therefore dismissed.

On certiorari to the Supreme Court the judgment was reversed, and the record ordered remitted for a new trial. In the opinion of Mr. Justice Swayze the conclusion of the Common Pleas Judge to the effect that decedent was acting as a volunteer in coupling the cars was questioned. The learned Justice held that the fireman was acting in an emergency in the

place of a brakeman, and that under the evidence it was his duty to so act. The learned Justice further held that the trial Judge had attributed to the word "employment" a too narrow and special meaning, and that decedent's act was one necessary to the running of the train, as shown by the testimony. Although the opinion of the learned Justice does not say so in express words, his evident conclusion is that decedent's act in coupling the cars was in the course of his employment. In fact, it is expressly stated that decedent's special employment was that of a fireman, but his general employment was to assist in running the train. (State of the Case, pp. 87, 88.)

It is respectfully submitted that the findings and determination of the Common Pleas Court upon the facts will be accepted by the appellate court if there be any legal evidence to warrant them.

For this position the citation of authorities seems unnecessary, but

Sexton vs. Newark Dist. Tel. Co., 84 N. J. L. 85 (affirmed by this Court in 86 N. J. L. 701);

Jackson vs. Erie R. R., 86 N. J. L. 550;

Bryant vs. Fissell, 84 N. J. L. 72;

Sessler vs. Peter, 98 Atl. 834;

are directly in point.

The rule has been laid down by our Courts that the finding of the Common Pleas Judge will not be reversed merely because the appellate Court might on the same evidence take a different view, or might not be prepared to go as far as the trial Judge in saying that there was no proof of certain necessary facts, nevertheless, the appellate Court is bound by the findings of the trial Judge so far as the facts are

concerned, by reason of the express words of the statute.

Scott vs. Payne Bros., 85 N. J. L. 446;
Banister vs. Kriger, 84 N. J. L. 30;
Siemientkowski vs. Berwind-White Coal Mining Co., 92 Atl. 909.

In the opinion of the Supreme Court some emphasis was laid upon the fact that according to the rules under which respondent's road was operated, it was the duty of the fireman when necessary to protect the front of the train. (State of the Case, p. 87, line 7.) From which statement the learned Justice argued that it may be inferred that the coupling of cars may also have been within the scope of decedent's employment. Had the accident occurred while decedent was protecting the front of the train the rule above referred to might be successfully invoked. As a matter of fact, decedent was not at the time of the accident engaged in protecting the front of the train, but in doing a wholly different service. Is it not therefore clear that the finding of the Common Pleas Judge that the scope of decedent's employment did not extend beyond his regular duties as fireman is sustained by the extract from the company's rules above referred to, showing that only in the very unusual circumstances there named would the duties of fireman be considered to embrace those of an emergency brakeman?

In the opinion of the Supreme Court the suggestion is made that this train was being operated with an insufficient crew. It should be borne in mind that at the time of the accident the train was merely being "made up," which was the purpose of shifting the cars from one track to another. After the train had been "made up" it would then regularly proceed to

the station to receive its passengers. It is therefore clear that as the train was not at the time of the accident engaged in the transportation of passengers it was not obliged to conform to any definite standard regarding the size of the crew.

It is submitted that a careful examination of the evidence leads to the conclusion reached by the Common Pleas Judge that decedent in performing the hazardous work of coupling cars was purely and absolutely a volunteer. That he performed this task without any direction from his superior, and that the risks incident thereto could not have been considered by either employer or employee when decedent was engaged as a railroad fireman. The evidence also clearly showed that decedent was fully familiar with the scope of his duties as fireman, because he had been obliged to pass a rigid examination covering those duties in detail.

What then is the position of one who is employed for a definite and specific duty and who voluntarily engages in an independent, hazardous occupation without receiving directions to do so from his employer?

In *Bradbury on Workmen's Compensation*, 2d ed. vol. 1, p. 459, occurs the following succinct statement to the effect that "where a servant is employed to do a certain service and is injured in the performance of a different service voluntarily undertaken, the master is not liable."

Several recent English cases in which the opinions are most carefully considered are directly in point.

In *Davies vs. Crown Perfumery Co., Butterworth's Workmen's Compensation Cases*, vol. 6, page 649, which was a case in the English Court of Appeal, in 1913, it appeared that the claimant was a soap stamper, whose occupation also required him to make

himself generally useful. He voluntarily went to help a fellow-workman remove a piece of soap that had jammed in a machine with the result that his hand and arm were caught and injured by the knives of the machine. The Court held that he could not recover, as the accident did not arise out of and in the course of the employment, as the claimant had gone outside the sphere of his employment to an obviously dangerous place.

In *McCabe vs. Henry North & Sons, Butterworth's Workmen's Compensation Cases*, vol. 6, page 504, which was also a case in the English Court of Appeal in 1913, Cozens-Hardy, the Master of the Rolls, uses the following language:

“There is a distinction, and really a very simple one, between a man who is employed to do a particular thing and to do it in a particular way, who may obtain compensation although in the course of doing that work he nevertheless embarks on a dangerous mode contrary to the regulations, and a man being employed at A.—A being limited to the sphere of his operations—who goes into B and meets with an accident. In the latter case the employer is not liable; the man has done something which he was not authorized or employed to do.”

In *Naylor vs. Musgrave Spinning Co., Butterworth's Workmen's Compensation Cases*, vol. 4, page 286, which was a case in the English Court of Appeal, in 1911, the claimant was a boy who was employed to piece broken ends of yarn in a spinning mill, and who was injured while cleaning machinery in motion. The Court held that the claimant was not employed to clean machinery, and that therefore there could be no recovery.

In *Plumb vs. Cobden Flour Mills Co.*, L. R. App. Cas. 1914, p. 62, the appellant was employed with two others in a room in the respondent's mill to stack bundles of sacks. The bundles were always stacked by hand. After the men had raised the bundles as high as they could by hand the appellant resolved to utilize for this purpose a revolving shaft which ran along the room near the ceiling, but was not used in connection with any machinery in that room. A rope was thrown over the shaft and one end was made fast to a bundle which was then hauled by means of the shaft to the top of the stack. The appellant, who was standing on the stack, while endeavoring to extricate a bundle which had been hauled too high and had stuck between the shaft and the ceiling, got his arm entangled in the rope and was carried around the shaft and injured: *Held*, that there was no evidence to support a finding by the county court Judge that the accident arose out of the workman's employment within the workmen's compensation act. In the opinion of Lord Dunedin in this case, he says, that it is not enough for the applicant to say that the accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place. He must go further and must say that the accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger. The unanimous conclusion of the House of Lords was that in this case the evidence failed to show any circumstances which could justify a finding that the accident arose out of the employment.

In *Herbert vs. Fox & Co.*, L. R. 1 App. Cas. 1916, 405, a workman was employed as a shunter upon his employer's private railway, and was seriously and

permanently injured from falling from the buffer of a wagon upon which he was improperly riding. His duty was to walk in front of the wagons and not to ride on them. While riding he fell and was run over. Upon a claim for compensation under the English workmen's compensation act of 1906, the county court Judge found that the accident arose in the course of and out of the employment. This finding was reversed by the court of appeal, and on being taken to the House of Lords the latter affirmed the finding of the court of appeal. The opinions of Lord Atkinson, Lord Shaw and Lord Wrenbury are particularly worthy of note. Lord Loreburn and Lord Parmoor dissented upon the ground that in their judgment there was some evidence to justify the finding of the county Judge that the employer was liable under the statute. In the opinion of Lord Wrenbury, attention is called to the fact that the act in which the workman was injured was outside the scope of his employment. He further stated that it was comparable to the act of a miner employed to work in level A, which is safe, who goes to work in level B, which is dangerous, and there sustains personal injury. The risk was an added peril due to the conduct of the servant himself.

In the case at bar it is respectfully submitted that when the deceased left his engine and voluntarily performed the duties of a brakeman in coupling the cars, he passed entirely outside the scope of his employment, which was limited to his engine, except under the unusual circumstances mentioned in the book of rules under which the respondent's road was operated. When he passed beyond the scope of his employment he voluntarily assumed to do work of a hazardous character which he was not bound to do,

and the accident which resulted in his death occurred while doing such hazardous work.

It is therefore respectfully submitted that neither upon reason nor authority can it be claimed that the accident which resulted in the death of decedent arose either out of or in the course of his employment, and that therefore the judgment of the Supreme Court should be reversed and the findings of the Court of Common Pleas affirmed.

J. FITHIAN TATEM,
*Counsel for Respondent-
Appellant.*

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BRIEF FOR PROSECUTOR-APPELLEE.

The learned trial Judge says that he finds as a fact that "the decedent was a mere volunteer"; we submit that he erroneously christened his own mental off-spring.

His Honor may name it a finding of fact, but we think it is a conclusion unwarrantably drawn from many facts. The facts in the case are so many mental steps to be ascended by the trial Court, on its journey up-stairs toward the verdict. The trial Court must find and build the steps before it can move; in this function the trial Court has great power, and not subject to review, with this single exception there must be some evidence or step building

material in the case, or the trial Court cannot find a fact or build a step, so this step building or fact finding is legitimate trial Court work, but the work of determining where a constructed mental step or found fact leads; whether it be up or down; whether it be for or against a party, involves the application of fixed rules and principles of law to the determined fact, this is the reason why it is called a question of law, it is really an estimation of the worth of a fact; a fixing of its value and force in deciding the case; quite a different function, from a mere sifting of testimony. Now, in our estimation, the following facts might have been correctly found by the trial Court, to wit, deceased was killed on the 25th day of July, 1914, at Wildwood Junction, in the county of Cape May and state of New Jersey, while coupling cars on a train operated by the defendant. Deceased was a member of the train crew operating the train which killed him.

Deceased was employed as a fireman, and was required to perform the duties of brakeman, under certain conditions and circumstances. When deceased met his death, he was obliged by the rules to be under the orders of the engineman, who was his immediate superior. At the time of the accident the said engineman was in entire and supreme charge of the train, because the conductor was absent, and there was no other brakeman present. The deceased was assisting the engineman by signalling and otherwise, to such an extent that the engineman was regulating and controlling his movements, and those of the train from and by the information and assistance furnished him by the deceased. That deceased had performed similar duties many times before, to the knowledge of the engineman and other members of the crew. That deceased was married and

left a widow, him surviving, and that his pay was as testified. Now, all these are facts, and undisputed facts, and, consequently, questions of fact, but when it comes to finding the law to fit these facts they become questions of law and mixed questions of law and fact, and, therefore, there can be no lumping of law and fact, so that the trial Court can say "I find as a fact that decedent was a volunteer"; what he, the trial Judge, did then was to find a verdict, which was all the facts and all the law, it was his final decision. He might as well say, "I find as a fact that the plaintiff loses," of course, his decision was just that, but this being a mixed question of law and fact is reviewable.

In the case *Sessler vs. Peter*, 98 Atl. Rep. 834. The case of *Bryant vs. Tissell*, 84 N. J. L. 72, is commented upon and shows the Court's ruling where there are disputed questions of fact, whereas, in this case, the facts are not in dispute, but, the conclusions be deduced from given facts, when the law shall have been applied of the real questions in dispute.

The only contention of the appellant that seems to be worthy of argument is that the Supreme Court erred in holding that the question as to whether the decedent was a volunteer or not was a mixed question of law and fact.

The decision of this pregnant query requires a judicial declaration upon the status of the decedent at the time of his death, this in turn necessitated a definition of the decedent's employment under all the evidence by that tribunal reviewing the findings of the lower Court.

Now, the definition of the word "employment" cannot be a question of fact; any definition in a case like this, involving as it does a legal determination

as to the force and effect to be given printed rules and implied rules binding the company because of precedents must necessarily be a question of law for the Court and not question of fact. It should be remembered that most all the testimony in this case is not only uncontradicted but is the testimony from the defendant's own unwilling witnesses.

Counsel for the appellant claims that the Supreme Court placed unwarranted strictures upon the trial Judge when they described his view of the decedent's status as being "too narrow." Whereas, we think that the trial Judge assumed too wide a view of his own powers when he took such a narrow view of the decedent's employment.

If the decedent were a mere volunteer the engineer must have been a volunteer also, because, if he, the engineman, had a proper right under the terms of his own employment to direct the decedent to perform the work on which he met his death, then Hendee was certainly obeying orders coming direct from the fountain-head of authority down through the engineer, to whom they delegated such authority, because the undisputed testimony shows that Engineer Fahl, who according to the undisputed testimony, was in entire charge of the train operated the same from signals given him by the decedent who was performing a brakeman's duty, with the help of the engineer. General Manager Slaughter said, page 59, state of case, viz.:

"Q. In the conductor's absence, who has charge of the train and crew?

A. The engineer."

So that the engineer, having charge of the train at the time of the accident, was the decedent's employer for the time being; could he then be classed

as a volunteer, when acting right under his employer's eye when his every act was within full view of his employer, who was benefiting from what he did, and without which the train could not be run? Could we say he should be classed as a volunteer when his employer, who held the throttle, waited for his signal to move the train and move the train only when according to his own testimony he received that signal?

See testimony of Manager Slaughter, pages 61-62, state of case. Showing that this was not the first time that the decedent had performed the same duties that he performed on the day of the accident, because the uncontradicted testimony shows that they all jumped in and helped each other in an emergency.

Then, again, it seems to us to be an outrageous contention and not only a narrow construction of the word "employment," but also a cheap, niggardly and mean policy for a concern to accept the services of brakemen who always have their lives in their hands, and then after they have profited by many short-handed trips to evade the spirit of the law.

Such a construction would prevent a brakeman from bringing a train to a standstill if the engineer and fireman at any time happened to be incapacitated; it would prevent a conductor or a brakeman from throwing a switch which might prevent a collision between two heavily laden trains.

Such a construction would place such a strict and iron-clad limitation upon the duties of men operating trains that the lives of passengers would be constantly in peril, and we assume this to be the spirit of the Supreme Court's reasoning in deciding this case.

The duties of trainmen are in themselves sufficiently dangerous without the men being called upon to look for extra hazardous duties; there is nothing in this case to show that the decedent was a man who was then looking or ever had been looking for more dangerous duty than ordinarily fell to his portion; the testimony in this case shows that he was the only man upon or around the train at the time to do this very essential work that he was then and there doing, unless he did that work there was no one else to do it as the train couldn't and wouldn't run.

The engineer had to have signals, and unless the decedent was the right, proper and competent man to do it, the engineer as his superior should not have moved the train.

The testimony shows that the train was eighteen minutes late, this was an emergency in which the public welfare and the defendant's own interest demanded that the work which the decedent performed at that time.

See trial Court's findings of fact, page 19, state of case.

In the case of *Scott vs. Payne Brothers*, 89 Atlantic Rep., page 927, a late case upon the New Jersey Employers' Liability Act, Mr. Justice Swayze, in writing the opinion, says in part:

"We cannot accede to the suggestion of the defendant that disobedience of a specific order to stop work ends the employment for the time being. The man does not cease to be an employe because at certain instants of time he is not actually engaged in work. Employment within the meaning of the statute refers rather to the contract than to the labor done in pursuance of the contract."

And now, I respectfully call the Court's attention to one of the rules which defendant company claim they operate their railroad under. I refer to rule 99, which was admitted by the learned trial Judge over counsel's objection.

It reads as follows:

“Q. Mr. Diebert, will you turn to the book of rules and read rules 99 and 99a?

(Objection and argument. Objection overruled.)

A. Rule 99, ‘When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail when the conditions require it. The front of the train must be protected in the same way, *when necessary, by the front brakeman, or in his absence by the fireman.*’ ”

(See testimony of Mr. Diebert, page 50, state of case.)

Here is a rule of the Atlantic City Railroad Company, which defendant company claims to operate under, at any rate the book of rules offered in evidence by the defendant to show that a fireman's duty is on his engine and nowhere else, and that he has no business to act as a brakeman or to assist the brakeman, and yet the rule specifically states that in the absence of the head brakeman the fireman takes his place, this crew had only one brakeman, as the baggage master or the assistant or rather first assistant brakeman was not there, why there was

no other person at the junction at that time whose duty it was to help and assist Brakeman Fowler in making up this train but the fireman, Harry C. Hendee, the petitioner's intestate, and he was doing it, why that was just exactly what he was employed to do, under their very rules the fireman was to take the place of the head brakeman.

Now, the fact that before the time of the accident, Hendee had performed the very same duties which he was performing when killed shows the construction placed upon the duties of the engineer who was in charge of the train and by the other members of the crew who were absent upon other duties and by the man himself who was killed.

In the case of *Bryant vs. Fissell*, 84 N. J. L., page 72, the Court said:

“Within the purview of the Employers' Liability Act of 1911 (Pamph. Laws, page 134, chapter 95), an accident arises 'In the course of the employment' if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.”

In the case at bar decedent was doing what he was employed to do, viz.: assisting the brakeman (see rule 99). Fahl says he had done it before, frequently, he said at the coroner's inquest, at the trial he said he acknowledged that he had done it occasionally (see testimony (*supra*) and Fowler, state of case, pages 79-80), and in order that the Court may see the difficulty counsel for petitioner had in getting the truth out of defendant's own witnesses, we respectfully submit the following questions and answers in the cross-examination of Mr. Fowler:

“Q. Mr. Fowler, how long had you known Hendee?

A. Why, in January.

Q. Of 1913?

A. Twelve.

Q. January, 1912?

A. Yes, sir.

Q. Did you ever know him to make couplings before?

A. Once or twice.

Q. Is that all?

A. Yes, sir.

Q. Didn't he couple cars that morning before this?

A. What, this same day?

Q. That same morning?

A. Not that I know of.

Q. Didn't you testify to that before the coroner's jury?

A. That he made a coupling that same day?

Q. Right there on that trip, right out at Wildwood Junction that he uncoupled a car? Now, then, I want you to tell just what took place, so if you can recollect I am going to get you to read this in a minute.

A. Do you mean did he make a coupling before that trip that morning?

Q. No, on this same trip, didn't he make a coupling or uncouple a car that very morning on this same ten or eleven o'clock trip out?

A. Not that I know of.

Q. Then, if you had said that at the coroner's inquest that he had, which you told, was it untrue? The one that you say now, that you didn't think he had or the one that you said then?

A. I didn't think he did.

Q. Well, if you said that at the coroner's jury three or four days after the accident, would that be liable to be the truth, or the statement you make today?

A. Now.

Q. It would be fresher in your mind about four or five months after the accident than it would four or five days?

A. I don't know that it would be any fresher.

Q. As a matter of fact, wouldn't it be fresher in your mind three or four days after the accident?

A. Yes, sir.

Q. This is what you said, this is the question: 'Did he make the coupling on the train before that was switched?' Your answer is, 'That is before that was switched, yes, sir.'"

(See state of case, pages 79 and 80, Fowler's cross-examination.)

The same difficulty was experienced with all of the witnesses which were produced by the company, and they were really the only ones that petitioner could produce for the purpose of showing the duties of the various workmen of the defendant, and when these men endeavored to retract or modify the statements they made at what was really a previous trial, the defendant showed only too clearly that they knew they were liable under the Employers' Liability Act to this widow and orphan child for the small allowance provided therein, but were not going to leave a stone unturned to avoid the payment of same.

Petitioner's intestate was not disobeying any orders, he had not been ordered to stop coupling those

cars, but on the other hand he was encouraged in making that coupling the day he was killed and at that very time. By whom? Why, the engineer, Fahl, who was in full and absolute control of the train, not only by his implied consent but by the actual assistance and cooperation of his superior, he said, "Hendee held out his hand and I applied the brakes gently." Fahl, who was the only agent and representative of the defendant at that time, in answer to question by counsel, said he knew that he (meaning Hendee) was going to make the coupling; and we respectfully submit that there is nothing to show in the entire case where he, Fahl, told him not to make it, even if he had told him not to make it, the opinion written by Mr. Justice Swayze in *Scott vs. Payne, Ibid.*, says in part:

"The man does not cease to be an employe because at certain instants of time he is not actually engaged in work."

We respectfully submit that the decision of the learned trial Judge is wrong both as to question of law and of fact, that there was no evidence offered by the defendant to warrant his findings; that his findings are based upon evidence concerning which there is no substantial dispute, so that the real question in this case is a question of law upon the testimony agreed to by both sides.

The real gist of this case must be gathered from the testimony of unwilling witnesses, whose bias, of course, must be allowed for, and considering the liberal construction which this act must receive we confidently insist that the lower Court must be reversed.

This fireman, of course, was not in a position to refuse to couple these cars in the absence of the baggage master, who was an assistant brakeman;

not being an educated man and not being used to critical discrimination and interpretation of thick books full of rules, he was largely governed by the custom of the road and what he had been used to doing heretofore with the knowledge and approval of his immediate superior, the engineer, who testified that he himself even coupled and uncoupled air hose.

The stamp of approval of this defendant company was placed upon the act which the deceased was doing when killed by the engineer when he operated the engine in response to the signal which the deceased gave him the instant before he was killed so that it cannot be said that he was merely a *volunteer*, when the admitted fact is, that the train could not have been moved without the services which he was performing when he was killed.

To deny recovery in this case would be to place a premium upon the running of short-handed trains, when all legislation of late has tended toward full train crews with all those safe-guards which the law recognizes as necessary for the protection of the traveling public and the train crews themselves.

This defendant seeks to capitalize its own niggardly and parsimonious policy of retrenchment and money-saving to its own advantage, whereas it certainly should operate against them; if they choose to operate their trains shorthandedly and save money thereby, they, of course, and they alone, should stand the loss when loss comes.

In looking over the state of the case we have discovered some rules read into the case regarding the duties of the employees, especially the relations existing between the enginemen and fireman, which we think throws additional light on the actions of the enginemen and decedent on the day of the accident,

the same is found on page 55, state of the case, and is as follows:

“Cross-examination.

By Mr. French:

Q. Will you take that book of rules? Will you read on page 101, ‘Rules for fireman,’ section 992?

A. 992. ‘They must clean and polish the engine when required and assist in making repairs when necessary.’

Q. And on page 102, 994.

A. 994. ‘They must not run the engine in absence of the enginemen without permission from the superintendent or road foreman of engines except in emergency, when they are permitted to do so by the conductor or some officer in charge.’

Q. Turn back to 101 and read section 990.

A. 990. ‘Firemen report to and receive their instructions from the train master. They must obey the orders of the road foreman of engines and when at the engine house they are under the directions of the engine house foreman. When assigned to an engine and while on duty on the road they will follow the instructions of the engineman.’ ”

So it will be seen that according to rule 990, found on page 55 of state of the case, that the fireman was compelled, under that rule, to follow the instructions of the engineman and the fact that the engineman was assisting the fireman and the fireman was assisting the engineman in operating the train, this shows that he was not a volunteer in any sense.

In closing, we submit that this is a case of great public importance and no doubt will be typical of

many like happenings and upon the ground of public policy this case should be decided in favor of the petitioner and in accordance with well-settled rules of law bearing upon the evidence contained in the state of the case.

Respectfully submitted,
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SAMUEL T. FRENCH,
*Attorneys of Prosecutor-
Appellee.*

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WRIT OF CERTIORARI.

NEW JERSEY, ss.

THE STATE OF NEW JERSEY to the
Court of Common Pleas in and for the
[L. s.] County of Cape May, and A. Carlton
Hildreth, Clerk of the said Court, and
Wildwood, Delaware Bay Short Line 10
Railroad Company,

GREETING :

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the twenty-fourth day of December, A. D. nineteen hundred and fourteen, by the Honorable Henry H. Eldridge, Judge of the Court of Common Pleas, in and for the said County of Cape May, in certain proceedings brought on behalf 20
of William C. Hendee, administrator of the estate of Harry C. Hendee, deceased, petitioner against the Wildwood, Delaware Bay Short Line Railroad Company, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey, entitled:

“An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of 30
compensation and regulating procedure for the determination of liability and compensation thereunder.”

approved April 4th, nineteen hundred and eleven, and the acts amendatory thereof and supplemental thereto, we command you that the said determina-

tion and judgment, together with all proceedings for the making of the same, and all things touching and concerning the same, as fully an entirety as before you they remain, or are in your custody and control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature at Trenton on the sixth day of February, nineteen hundred and fifteen, that therein may be caused to be done what of right and according to law ought to
 10 be done.

Witness, the Honorable Charles C. Black, one of the Justices of the Supreme Court of New Jersey, at Trenton, N. J., this 12th day of January, A. D. 1915.

WILLIAM C. GEBHARDT,
Clerk.

WILLIAM C. FRENCH,
 SAMUEL T. FRENCH,
Attorneys.

20

[ENDORSED]

Allocatur—This writ is allowed, let
 it be sealed.

C. C. BLACK,
 J. S. C.

30

AFFIDAVIT.

NEW JERSEY SUPREME COURT.

<p>WILLIAM C. HENDEE, Ad- ministrator of the estate of Harry C. Hendee, de- ceased, <i>Petitioner and Prosecutor,</i></p> <p style="text-align: center;">VS.</p> <p>WILDWOOD, DELAWARE BAY and SHORT LINE RAIL- ROAD COMPANY, <i>Defendant and Respondent</i></p>	}	<p>ON CERTIORARI.</p> <p>AFFIDAVIT.</p>	<p>10</p>
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STATE OF NEW JERSEY, SS:
 COUNTY OF CAMDEN,

SAMUEL T. FRENCH, of full age being duly sworn according to law, on his oath says that he together with William C. French, are the attorneys of William C. Hendee, administrator, etc., of Harry C. Hendee, the petitioner in the above-entitled cause, and his agents in this behalf.

30

Deponent further says that the above cause came on for hearing and summary determination on Wednesday, the 18th day of November, last past.

That the trial Judge, Honorable Henry H. Eldridge, having heard the testimony of Charles H. Fahl, engineer and witness on behalf of both the pe-

titioner and defendant and of William Fowler, brakeman, a witness produced on behalf of the defendant, and having received brief of cases and contention of counsel upon practically the only question involved, to wit, whether petitioner's intestate was killed by accident arising out of and in connection with his employment, or whether he acted merely as a volunteer, made an order, dated, on or about the 24th day of December, nineteen hundred and four-
10 teen, that judgment be entered holding that petitioner's intestate was killed by accident arising out of the scope of his employment, while he was acting merely as a volunteer and that petitioner's petition be dismissed with costs.

Deponent says that said judgment was an improper and abusive use of the discretionary power of the Court, as provided in the seventh section of the act under which said suit was brought.

Deponent further says that no facts or circum-
20 stances were stated on behalf of defendant sustaining defendant's contention that petitioner's intestate was killed while acting in a voluntary capacity and not while performing work for the employer in the capacity for which he was employed, and that no facts or circumstances were stated or produced on behalf of defendant showing that petitioner's intestate was killed by his own intentionally self-inflicted act or while he was intoxicated.

Deponent further says that defendant failed to
30 show that petitioner's intestate was employed only as a fireman, but that on the contrary it was proven that petitioner's intestate was employed as a fireman on the train, and as an engineer running an engine and pump at Wildwood Junction for the defendant, and that petitioner's intestate had assisted both the brakeman and engineer on occasions before

the accident, and that other employees of the defendant had assisted each other times before without criticism, and that no evidence was offered to show that petitioner's intestate was ever ordered or cautioned not to assist the brakeman or any other employees, or that they were employed only in any one capacity.

SAMUEL T. FRENCH.

Sworn and subscribed before me, this 11 day of 10 January, A. D. 1915.

DAVID H. GOFF,
M. C. C. of N. J.

REASONS.

NEW JERSEY SUPREME COURT.

20

WILLIAM C. HENDEE, Administrator of the Estate of HARRY C. HENDEE, Deceased,

Petitioner and Prosecutor,

vs.

WILDWOOD, DELAWARE BAY AND SHORT LINE RAILROAD COMPANY,

Defendant and Respondent

ON CERTIORARI.

REASONS.

30

The prosecutor, by William C. French and Samuel T. French, his attorneys, relies on the following rea-

sons for reversal of judgment for the defendant, Wildwood, Delaware Bay and Short Line Railroad Company.

I. Because the Court erred in finding as a matter of law upon admitted facts that the deceased met his death while he was doing work which did not come within the scope of his employment, and was not in the scope of his line of duty at the time of the
10 accident aforesaid.

II. Because the Court improperly rendered its decision and gave judgment thereon upon the theory that petitioner only proved that petitioner's intestate met his death while in the employ of the defendant and while actually performing work for the defendant, whereas, petitioner proved by defendant's own witnesses that at the time of the accident petitioner's intestate was in the employ of the defendant, actually engaged in defendant's work, and performing work for the defendant which he had performed at other times, and that no evidence was offered to show that defendants had employed petitioner's intestate as only a fireman, or that defendant had employed any of its employees to act exclusively in any one line of employment; evidence was also offered showing that petitioner's intestate was employed both in the capacity of a fireman for the engine and as an engineer and pumpman at Wildwood
20 Junction, and that he had performed services of nearly every other employee connected with the locomotive upon which he worked and other members of the train crew, and that the other members of the train crew had at different times assisted each other; evidence was also offered and uncontradicted that at the time of the accident the train was over
30

eighteen minutes late, that upon arriving at Wild-wood Junction, the scene of the accident, that the train crew was a man short of its complement, and that at the time of the accident said crew was two men short, and that defendant required the remaining members of the crew to perform the services of the missing members, showing clearly that petitioner's intestate was not only in the employ of the defendant but actually engaged in work for the defendant necessary for some members of the then short crew, to perform the services of the missing members of the crew, to wit, the baggage master, who is an assistant brakeman, and the conductor. 10

III. Because the order of the Court rendering judgment in favor of the defendant was an improper exercise of the discretionary power of the Court, inasmuch as the Court erred and overlooked and totally disregarded the evidence adduced at the trial, and that there was no legal evidence to warrant the Court's finding of the facts as stated. 20

IV. Because the order of the Court is not in accord with the exercise of sound judicial discretion.

V. Because the defendant failed to show that petitioner's intestate at the time of his death was killed by accident which was intentionally self-inflicted or was under the influence of intoxicating liquor. 30

VI. Because the Court erroneously found as a fact that petitioner failed to produce evidence that defendant had knowledge that petitioner's intestate had ever coupled cars before, or that he had ever performed services for defendant outside of his duties as a railroad fireman. Where, as a matter of

fact, it was proved and uncontradicted that he was employed also in the capacity of an engineer and pumpman and had on other occasions coupled cars and was at the very time of the accident which resulted in his death engaged in coupling cars, and working in conjunction with his engineer who was in charge of the train and the remainder of the crew which was then left him to work with, so that if he was not working on direct orders of the defendant

10 he was acting for the defendant under the implied orders of the engineer and could not under these circumstances be classed as merely a volunteer.

VII. Because the Court erroneously permitted evidence to be introduced tending to show that defendant's railroad was operated under the same rules and regulations as the Atlantic City Railroad in spite of objection of counsel or petitioner when it was not proved that defendant ever had any rules,

20 other than for the purpose of examination of its employees, and while it was proven by the defendant's own witnesses that they did not even live up to a schedule for running their trains, and that reports were not made to the manager of any irregularities in connection with the running of the train or the operation and management of its road in general.

VIII. Because the Court failed to render judgment in favor of petitioner, inasmuch as it was conclusively proved that accident was caused by reason

30 of defective appliances and equipment.

IX. Because the Court gave judgment for the defendant for costs as well as the dismissing of the petitioner's petition.

X. Wherefore, the prosecutor prays that judgment below be reversed.

WILLIAM C. FRENCH,
SAMUEL T. FRENCH,
Attorneys of Prosecutor.

[ENDORSED]

Service of copy of within reasons,
hereby duly acknowledged this 5th day
of February, A. D. 1915.

10

J. FITHIAN TATEM,
Atty. of Respondent.

PETITION.

COURT OF COMMON PLEAS.
CAPE MAY COUNTY.

20

WILLIAM C. HENDEE, Ad-
ministratoꝛ of the Estate
of HARRY C. HENDEE, De-
ceased,

Petitioner,

vs.

WILDWOOD, DELAWARE BAY
and SHORT LINE RAIL-
ROAD COMPANY,

Defendant.

PETITION.

30

*To Hon. Henry H. Eldridge, Judge of the above-
named Court:*

The petition of William C. Hendee respectfully
shows unto your Honor:

I. That your petitioner files his petition in accordance with the provisions of an act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplements thereto.

10

II. That your petitioner resides at No. 255 W. Pine Avenue, Wildwood, in the County of Cape May and State of New Jersey, and resided at the said address at the time of the said injury hereinafter stated.

III. That the Wildwood, Delaware Bay and Short Line Railroad Company, the defendant in this cause, is a corporation organized under the laws of the State of New Jersey; that it was authorized to transact business in the State of New Jersey; that the said defendant is engaged in the business of carrying passengers and operating tracks, trains, cars, locomotives and appurtenances, etc., in the County of Cape May and State of New Jersey, that while so engaged and while the said Harry C. Hendee, petitioner's intestate, was attempting to couple or connect two cars of the said defendant, which was one of the duties incident to his employment, at Wildwood Junction in said County and State aforesaid, said petitioner's intestate was caught between said cars and crushed to his death, and without his fault.

IV. That the injuries of your petitioner's intestate were not intentionally self-inflicted, nor was

your petitioner's intestate intoxicated at the time of receiving the said injuries.

V. That the said Wildwood, Delaware Bay and Short Line Railroad Company, the defendant, had actual knowledge of the said injury.

VI. That at the time of the accident your petitioner's intestate was receiving weekly wages averaging at the sum of \$25.00. 10

VII. Petitioner further shows that petitioner's intestate did not receive any notice from the said Wildwood, Delaware Bay and Short Line Railroad Company, the defendant therein, prior to the said accident, nor was anything ever said between petitioner's intestate and the said defendant prior to the said accident, that Sec. 2, of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee while in the course of employment; establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, should not apply to the contract of employment between you petitioner and the said defendant. 20

VIII. That your petitioner is entitled by virtue of the provisions of Sec. 2 of the statute in such case made and provided to receive the sum of \$10.00 per week, for a period of 300 weeks. 30

IX. That your petitioner was appointed administrator of the goods and effects, rights and credits of Harry C. Hendee, deceased, on the nineteenth

day of August, nineteen hundred and fourteen, by Edward Rice, Surrogate of the County of Cape May, and State of New Jersey, and that your petitioner brings into court here the certificate of such appointment.

X. Petitioner further shows that your petitioner's intestate had surviving him at the time of his death as his dependent and heir at law, a wife and a child
10 age nine years.

XI. Your petitioner therefore prays that an order, directed to the said Wildwood, Delaware Bay and Short Line Railroad Company, may be made compelling it to show cause why the petitioner should not be paid the said sum, petitioner is, as administrator of the goods and effects, rights and credits of Harry C. Hendee, deceased, entitled to, under the act aforesaid, in the lump sum, or in such
20 sum or sums as this Honorable Court may order.

And your petitioner will ever pray, &c.

WILLIAM C. HENDEE,
Petitioner.

WILLIAM C. FRENCH,
SAMUEL T. FRENCH,
Attorneys for Petitioner.

30 STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

WILLIAM C. HENDEE, being duly sworn, on his oath deposes and says that he is the petitioner named in the foregoing petition, and that the matters and things therein set forth are true.

WILLIAM C. HENDEE.

Sworn and subscribed to before me this 29th day of September, A. D. in the year nineteen hundred and fourteen.

H. C. SCHLICHTING.
Notary Public.

Commission expires Nov. 16/16.

RULE TO SHOW CAUSE.

10

COURT OF COMMON PLEAS.
CAPE MAY COUNTY.

WILLIAM C. HENDEE, Ad-
ministratoꝛ of the Estat
of HARRY C. HENDEE, De-
ceased,

Petitioner,

vs.

WILDWOOD, DELAWARE BAY
AND SHORT LINE RAIL-
ROAD COMPANY,

Defendant.

ON PETITION FOR
COMPENSATION. 20

RULE TO SHOW
CAUSE.

30

It appearing by the petition of William C. Hen-
dee, administrator, &c., that of Harry C. Hendee,
deceased, that plaintiff's intestate while in the em-
ploy of the said Wildwood, Delaware Bay and Short
Line Railroad Company, received injuries which re-
sulted in his death, and is therefore entitled to com-

10 pensation as such administrator to demand of and receive from the said Wildwood, Delaware Bay and Short Line Railroad Company, for the benefit of the dependants under an Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee while in the course of employment, and establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," and which petition is duly verified by the affidavit of the petitioner.

 IT IS on this fifth day of October, A. D. 1914. ORDERED, that the said Wildwood, Delaware Bay and Short Line Railroad Company show cause before this Court, on the fourth day of November, A. D. 1914, why the prayer of the petition should not be granted.

20 And it is further ordered that a copy of this "Rule to show cause," and the petition, both of which may be uncertified, be served upon the defendant the said Wildwood, Delaware Bay and Short Line Railroad Company, within six days from the date hereof.

HENRY H. ELDRIDGE,
Judge, Court of Common Pleas.

ANSWER TO PETITION.

COURT OF COMMON PLEAS.
CAPE MAY COUNTY.

WILLIAM C. HENDEE, Ad-
ministratoꝛ of the Estate
of Harry C. Hendee, De-
ceased,

Petitioner,

vs.

WILDWOOD, DELAWARE BAY
and SHORT LINE RAIL-
ROAD COMPANY,

Defendant.

10

ANSWER TO PETITION.

20

The answer of Wildwood and Delaware Bay Short
Line Railroad Company to so much and such parts
of the petition of William C. Hendee as this defend-
ant is advised it is material for it to answer unto,
answering, says:

2nd. This defendant has no knowledge as to the
allegations of the petitioner, and leaves him to make
such proof thereof as may be necessary.

30

3rd. This defendant admits its organization un-
der the laws of the State of New Jersey; its author-
ization to transact business in said State, and that
it is engaged in the business of carrying passengers
and freight, and operating railroad trains, cars,
locomotives, &c., in the County of Cape May in said

State; it admits that the petitioner's intestate, Harry C. Hendee, was in the employ of this defendant at the time he received the injuries which resulted in his death; this defendant avers, however, that the said Harry C. Hendee was employed by it as a fireman; that the accident which resulted in his death did not arise out of or in the course of his employment; that the connecting or coupling of cars was no part of his duty, and was done by him without
10 the authority of the defendant, either express or implied; and that the sole cause of said accident was the wilful carelessness and negligence of the said Harry C. Hendee.

4th. This defendant admits the allegations contained in paragraph 5 of the petition.

5th. This defendant admits the allegations contained in paragraph 5 of the petition.

20

6th. This defendant denies that at the time of the accident petitioner's intestate was receiving weekly wages averaging the sum of twenty-five dollars, and avers that the wages paid to the said intestate on which compensation under the Act in question is to be based were at the rate of \$90.00 per month, or \$20.77 per week.

7th. This defendant admits the allegations contained in paragraph 7 of the petition.
30

8th. This defendant denies the allegations contained in paragraph 8 of the petition, and avers the fact to be that whatever sum your petitioner is entitled to under the section of the Act therein referred to should be based upon the weekly earnings of this intestate, as stated in paragraph 6 of this answer.

9th. This defendant has no knowledge as to the allegations contained in paragraph 9 of the petition, and leaves petitioner to make proof thereof.

10th. This defendant has no knowldege as to the truth of the allegations contained in paragraph 10 of the petition, and leaves petitioner to make proof thereof.

11th. This defendant, for the reasons set forth 10 above, avers that the claim of the petitioner is not well founded in law, and prays that the petition may be discharged.

WILDWOOD AND DELAWARE BAY SHORT
LINE RAILROAD COMPANY.

By J. Fithian Tatem,
Attorney.

20

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

EVANS G. SLAUGHTER, being duly sworn according to law, says that he is the general manager of the defendant named in the foregoing answer, and that the matters and things therein set forth are true to the best of his knowledge and belief.

EVANS G. SLAUGHTER. 30

Sworn and subscribed to this fifth day of November, A. D. 1914, before me,

MARY F. LYONS,
Notary Public.

(SEAL)
Commission expires February 23, 1917.

FINDING OF FACTS AND DETERMINATION.

CAPE MAY COUNTY COURT OF COMMON
PLEAS.

10 WILLIAM C. HENDEE, Ad-
ministratoꝛ of the estate
of HARRY C. HENDEE, de-
ceased,
Petitioner,

vs.

THE WILDWOOD, DELAWARE
BAY AND SHORT LINE
RAILROAD COMPANY,
Respondent.

IN EMPLOYERS' LIA-
BILITY.
FINDING OF FACTS
AND DETERMINATION.

20

For the Petitioner, SAMUEL T. FRENCH.
For the Respondent, J. FITHIAN TATEM.

By the Court:

This is an action brought for relief under the
terms and provisions of an Act of the Legislature of
30 the State of New Jersey, entitled "An Act pre-
scribing liability of an employer to make compensa-
tion for injuries received by an employee in the
course of employment establishing an elective sched-
ule of compensation and regulating procedure for
the determination of liability and compensation
thereunder," approved April 4th, 1911, and the Acts
supplementary thereto and amendatory thereof.

The matter was heard at Cape May Court on Wednesday, November 18th, 1914.

There is no dispute as to the manner in which the accident occurred and the facts briefly stated are as follows: The petitioner's decedent, Harry C. Hendee, was employed by the Wildwood, Delaware Bay and Short Line Railroad Company as a locomotive fireman. He was also employed as engineer at the company's pumping station, but this additional duty has no connection with the present case. On the day of the accident in question the train from Wildwood on which Hendee worked left Wildwood about eighteen minutes late and arrived at Wildwood late. The crew consisted of engineer, fireman, brakeman and conductor. The conductor at the time of the accident was at the station and the other members of the crew were drilling the train. Two cars were lying on a siding and a third car was being shoved in to couple with these two cars. The brakeman ran ahead to make the coupling between the tank of the engine and the single car and the decedent left his engine and ran to the other end of the car to make the coupling between the single car and the two cars standing on the siding. The engineer was in charge of the train at the time. While making this coupling the decedent received the injury from which he died.

It is admitted that the decedent was receiving twenty dollars and seventy cents a week wages, and that he left two dependents, namely, a widow and child nine years of age. It is further admitted that the decedent's death was due to an accident. This leaves but one question for the decision of the Court, namely, whether the accident arose out of and in the course of the decedent's employment.

It is contended on the part of the petitioner that he is entitled to recover because his decedent was

employed by the respondent company at the time of the accident and when the accident occurred was actually engaged in his master's business; that having proven this much, he has discharged the onus which the statute imposes upon him.

10 If this contention were true there could be no doubt of the petitioner's right to recover in the present case, but on neither principle or authority can this broad ground be maintained. An employee is entitled to recover for injuries caused "by accident arising out of and in the course of his employment." The words in quotations are spoken of by Justice Trenchard in *Bryant vs. Fissel*, 55 *Vroom* 72, as the "pertinent language of paragraph seven of our Act." In the same case he continues:

20 "Even though the injury arose out of and in the course of the employment if it be not an accident within the purview of the Act there can be no recovery. Even if there be an accident which occurred in the course of the employment if it did not arise out of the employment there can be no recovery; and even though there be an accident which arose out of the employment if it did not arise in the course of the employment, there can be no recovery."

30 The burden then is upon the petitioner to prove not only that the injury resulted from an accident while the decedent was employed and engaged in some part of his master's business but also to show that the injury arose out of and in the course of his particular employment.

An accident arises in the course of the employment "if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where

he may reasonably be during that time." An accident arises out of the employment "when it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it," and "a risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service." *Bryant vs. Fissel, supra.*

For the petitioner then to recover, his decedent 10 must have been injured by accident while he was doing what a man so employed might reasonably do within a time during which he is employed and at a place where he might reasonably be during that time, and he must also have been injured by an accident the risk of which belonged to or was connected with what the decedent had to do in fulfilling his contract of service. Measured by these standards, if we assume that the decedent was employed as a regular railroad fireman, we do not think there can be any 20 recovery. According to uncontradicted testimony, it was shown that the respondent company operated under the same rules as used by the Philadelphia and Reading Railway Company and that according to those rules the duties of a fireman extend no further than his engine. A person then employed as a railroad fireman who is injured while coupling cars is not doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during 30 that time, nor is he in any sense doing what he has to do in fulfilling his contract of service.

That brings us, then, to the question of whether the decedent's employment extended beyond that of an ordinary fireman. The petitioner attempted to prove that it was the custom of the employees of the

road to perform more than one kind of work, and that decedent through a long course of conduct acquiesced in by the respondent company had extended the scope of his employment beyond that of an ordinary fireman. There is little, however, upon which to base that claim. The testimony indicated nothing more than the fact that on other occasions the decedent had left his engine and performed duties outside of the line of his employment. There is no
10 evidence that he was directed to do so by anyone in authority or that his employers even had knowledge of the fact. Under such conditions he cannot be considered other than as a volunteer who was engaged in doing work outside the scope of his employment, either with the intention of benefiting his employer or of doing a good turn to a fellow workman. In such a case, on both principle and authority, there can be no recovery. Where an employee assumes duties other than those for which he was
20 employed, without the knowledge of the employer, an accident occurring while the employee is so engaged cannot be said to arise out of the employment.

Petitioner has failed to prove that the decedent was injured by an accident arising out of and in the course of his employment and petition is, therefore, dismissed with costs.

HENRY H. ELDRIDGE,
Judge.

TESTIMONY.

CAPE MAY COUNTY COURT OF COMMON PLEAS.

WILLIAM C. HENDEE, Ad- ministratoꝛ of the Estate of HARRY C. HENDEE, De- ceased, <i>Petitioner,</i>	}	EMPLOYERS' LIABIL- ITY ACTION.	10
vs. WILDWOOD, DELAWARE BAY AND SHORT LINE RAIL- ROAD COMPANY, <i>Defendant.</i>			20

Cape May Court House, N. J., November 18, 1914.

Before HON. HENRY H. ELDRIDGE, Judge.

APPEARANCES:	30
For the Petitioner, WILLIAM C. FRENCH, ESQ., MATTHEW JEFFERSON, ESQ.	
For the Defendant, J. FITHIAN TATEM, ESQ.	

Mr. Tatem: We will admit the employment, we will admit that Mr. Hendee left him surviving a widow, Mary L. Hendee, and a minor child of the age of nine years, and that these two were dependants upon him under the provisions of the Employers' Liability Act.

The Court: How about the question of wages?

10 Mr. Tatem: I understand it is this: Mr. Hendee's regular employment brought him in a regular salary of ninety dollars a month. From time to time he did extra work. As I understand the statute it is the regular employment which fixes the basis of compensation.

Mr. French: I don't agree with you there. I think the money that he earned from the railroad company.

20

Mr. Tatem: During a period of six months?

Mr. French: Yes.

Mr. Tatem: Well, we have our pay sheets here.

Mr. French: Mr. Tatem, do you admit that he was in the employ of the company?

30 Mr. Tatem: We admit that Mr. Hendee was in the employ of the railroad and that is a common carrier and that the provisions of the Employers' Liability law in New Jersey apply to the defendant.

Mr. French: Then he was in the employ at the time of his death?

Mr. Tatem: That he was in their employ at the time of his death.

Mr. French: And that he was performing work for the company at the time of his death?

Mr. Tatem: You better just prove that. I am willing to admit anything I can. We will admit further that Mr. Hendee's death was the result of the accident in question.

10

WILLIAM C. HENDEE, SWORN.

Direct examination.

By Mr. French:

Q. Mr. Hendee, you live in Wildwood?

20

A. I do.

Q. And are the brother of Harry C. Hendee, deceased?

A. Yes, sir.

Q. And were you appointed administrator of his estate?

A. I was.

Q. For the purpose of refreshing your memory I want you to look at that, and ask you if that is a paper given you by the Surrogate of Cape May 30 County?

A. Yes, sir.

Q. Will you just read the date of those letters?

A. "I do certify that on the nineteenth day of August ——"

Q. That is all; I am asking the date.

A. Nineteenth day of August, 1914.

Q. And you as administrator of his estate have instituted or filed a petition under the Employers' Liability Act for compensation for the benefit of his widow, Mary L. Hendee, and his minor child of the age of nine years?

A. Yes.

10

Mr. French: I offer that certificate in evidence.

Mr. Tatem: No objection.

Q. Have you any knowledge about the wages that your brother made from the first of July, of your actual knowledge I want to know?

A. Only what he told me.

20 MARY L. HENDEE, SWORN.

Direct examination.

By Mr. French:

Q. Mrs. Hendee, you are the widow of Harry C. Hendee, deceased?

A. I am.

Q. You have a minor child of the age of nine
30 years?

A. I have.

Q. And your husband was your sole support?

A. He was.

Q. Both yourself and the little girl's?

A. He was.

Q. What did he make a month working for the Delaware Bay and Short Line Railroad?

A. He made ninety dollars a month until about the twenty-eighth of June or the first of July. They would be raised to standard wages, the rate of twenty-six cents an hour.

Q. That ninety dollars a month was his wages as fireman?

A. Yes.

Q. Did he get anything extra by reason of acting in another capacity?

A. I think tending to the pumping station and 10 all was included in the ninety dollars up until that time.

Q. You are not clear about that?

A. No, I am not sure.

Q. Do you know whether or not he made over-time?

A. No.

Q. You don't know?

A. No.

Q. Don't know whether he worked overtime, 20 longer than his regular hours?

A. Yes, he did, very often the train was late.

Q. Did you have occasion to know just what money he received?

A. Yes, he always did use to make out his time sheet at home.

Q. Did you see the money he brought home?

A. Yes, sir.

Q. He would bring that home to you?

A. Yes, sir.

Q. And tell you what he made?

A. Yes.

Q. And you had access to use it?

A. I did. He gave it to me.

Cross-examination.

By Mr. Tatem:

Q. Mrs. Hendee, your husband received ninety dollars a month all except in the summer time?

A. Yes.

Q. And in the summer time for two or three
10 months they raised the wages of the men to what were called standard wages, as I understand it?

A. Yes, they did.

Mr. French: I am willing to agree that the wages are twenty dollars and seventy cents a week or ninety dollars a month.

20 MICHAEL KANE, SWORN.

Direct examination.

By Mr. French:

Q. You live in Wildwood?

A. Yes, sir.

Q. What is your business?

A. Last three years I have been with the Eastern
30 Telephone Company.

Q. Were you at Wildwood Junction on the twenty-fifth day of last July, when the accident occurred?

A. Yes, I was there that day.

Q. When Harry C. Hendee was injured?

A. Yes, sir.

Q. Did you see it?

A. I did.

Q. Will you just state to the Court what you saw?

A. It was a half a baggage car, laying out the window when they backed in this one car loose from the engine, and this other fellow, I don't know his name—he sits there—he jumps off and goes next to the tender. Harry jumps off the engine and runs by him to the other end of the car, and the engine hit these cars. There was another car back of that and the coupling didn't make and the two cars kicked back. Harry goes in to make—I don't know what he was doing in there, but this fellow tells the engineer to go on back, he laid out of the cab just the same as I laid out of the window, and he turned the car and engine and went back, and when Harry fell out, I said, "My God, there is Harry killed." I thought he fell out dead. One of them fellows that was in the woods, they ran out and carried him in the train. 10

Q. What was Harry doing there? 20

A. He was in between the cars. I suppose he was in there to fix the coupling or something because when the engine—one car stood between the two—it made a hit and knocked these two cars back and one car stopped and this other fellow stood out and Harry went to fix something because that left the two cars away from the engine, and I don't know what he meant, and he beckoned his hand.

Q. Harry beckoned his hand?

A. No, sir. 30

Q. You saw him go in between the train?

A. Yes.

Q. And you saw him fall out?

A. I saw him fall out.

Q. He was in there fixing something?

A. He must have been fixing something. I don't know what he was at, but he fell out.

By the Court:

Q. Was this between the first and the second car?

A. No, sir, it was between the engine and one car. There two cars laid there for an hour and three quarters. The two cars laid on the side. They brought one car out and shoved it in with these two and then the engine came in with them all, and this fellow, he stops here and Harry jumps off and runs
10 around to where these two cars was, and when these cars came back it bumped the two cars back; the engine hooked to the first one but missed the two, and Harry went in to fix something.

Q. Went in where, between what?

A. Between the two cars.

Q. What two cars, the first car and the second car?

A. The baggage car.

Q. In between the car which was attached to the
20 engine?

A. No, between the other cars. See, there was three cars, and Harry goes in between the two cars and the one car.

Q. He went in between the first and the second car?

A. From the engine, yes.

By Mr. French:

30 Q. In between the engine and the car?

A. No, sir.

Q. In between the car and the second car?

A. They left two cars out from the train. We went out ten forty. Then, they went in, made a trip in with the train, and then they came back with one car to pick up these two cars to take in.

Q. Was the conductor there?

A. No, sir.

Q. Where was the conductor?

A. I didn't see the conductor until after they loaded Harry on the train and went around the Y and backed up to the depot and got the passengers.

Q. Do you know where he had been?

A. I can't say that. I didn't see nobody but this tall gentleman and the engineer and the gentleman who has charge of the railroad. I didn't see him 10 when it happened. I seen him running up to the depot, I suppose, to telephone for some one.

Q. Do you know whether or not the train was on time?

A. All I know about that, because they said they was about five minutes late.

Q. Who said that?

A. Well, the manager, he rode in the car with me; I went in on the train. He said they was about five minutes late. I don't know whether he is man- 20 ager, gentleman has charge there.

Q. The only ones who were there at the time of this accident; then, was the engineer and Hendee, the fireman, and the fellow that attempted to make the first coupling?

A. Yes, ony ones that was there, yes, sir. When I say the only ones that was there, that other gentleman was there, but he ran right away up to the depot, that is, he started right off running. Just as soon as he seen him he ran right off. 30

Q. Who was that?

A. I don't know his name. He sits off there.

Q. Is he working for the company?

A. Yes, sir.

Q. Railroad man?

A. Yes, sir.

Q. That was the man who attempted to make the first coupling?

A. No.

Q. Another one besides that?

A. He wasn't on the side, he was on the other side of the main track.

Q. Is that the ticket agent from Wildwood?

A. Maybe he might be a ticket agent. I thought he was general manager.

10 Q. Do you know?

A. No, I don't know what he was.

Cross-examination.

By Mr. Tatem:

Q. Mr. Kane, just where was this car standing in which you were seated?

A. Where was it standing?

20 Q. Yes.

A. It was standing on the side where it was left in the woods.

Q. It was standing on the straight part of the track which ran along practically parallel with the main Cape May lines?

A. Yes, sir.

Q. And this car in which you were sitting was one of the two cars?

A. Yes, sir.

30 Q. And which they had brought out before and which they were now shoving the engine and the other car into in order to take into Wildwood?

A. Well, yes, they threwed the one car, when I came out they throwed it back and left it, I should judge half the length of a car.

Q. Now, on which side of that car were you sitting?

A. I was sitting on the wood side.

Q. That is on the east or the west?

A. I should call it the east.

Q. We will call it that?

A. Yes.

Q. You were sitting on the side towards the ocean, the ocean side?

A. I don't know whether you would call it east or not. It ran down along the wood side.

Q. You were sitting on the opposite side from the 10 side of which is the main Cape May line?

A. That is right.

Q. Now, you say you were looking out of the window?

A. I was.

Q. And you saw this one car and the engine, you saw the one car; when you first noticed, it was standing there when the engine attached to it, as I understand the matter?

A. Yes, sir. 20

Q. The engine then came up to that car and then that car and the engine came down to the two cars, in the one of which you were sitting?

A. No, the one car was there. They came down with the one car, threw the one car in on the side, like a Y, then they came down with the engine, this tall fellow gets off the engine and also the other one, and Hendee runs around where he stops, I should think as near as I can say, to make a coupling between the engine and this one car. Hendee passed 30 him to make the other coupling of the two cars that I sat in, and when the engine made the hit it held the one car and the two cars jumped back, and this tall fellow waved his hand to come on back and they came back with the engine and the one car, and at the time the other fellow sat in there, Mr. Meley; I said, "My God, there is a fellow killed."

Q. When Hendee got off of the car on which he was riding on which side did he get off, the side toward the main track or the side away from the main track?

A. The side away from the track, on the wood side.

Q. He got off the same side on which you were sitting?

A. Yes, sir.

16 Q. And then you saw him come along. Then did he go along past that one car?

A. Yes, sir.

Q. And then the next thing you saw, you saw him disappear between the one car and the car in which you were sitting?

A. I saw him walk in, yes.

Q. That is what I mean. Of course, what happened after that you were not able to see?

20 A. All I can say, when they came back the second time it was right in me that there is a man killed for not waiting a half a second or minute for him.

Q. As a matter of fact, you don't know whether at that time the engine and the one car were coupled or not, do you?

30 A. Well, all I know about that, because I stayed right there and looked when they came back and he fell out, the engineer jumps out and runs down to him, and they picked him up and they carried him in and he runs himself to the engine and goes away with the engine and the one car. When they came back the second time that is just when he fell out, and if it wasn't coupled the first time ——

Q. In other words ——

A. It was stopped.

Q. You don't know whether it was actually coupled the first time or not?

A. No.

Q. But you do know when the engineer came back afterward and went on; then the engine and the first car were coupled?

A. Yes, I know because there wasn't any one in between the engine and the first car.

CHARLES H. FAHL, SWORN.

10

Direct examination.

By Mr. French:

Q. Mr. Fahl, where do you live?

A. I live in Camden, 437 Chambers Avenue, but I really make my home in Wildwood —

Q. What is your business?

A. Hotel Abey, Pine Avenue.

20

Q. What is your business?

A. Engineer on the Delaware Bay Short Line.

Q. How long have you been an engineer?

A. Around thirty years.

Q. You testified before the coroner's jury in this matter?

A. Yes.

Q. You were subpoenaed by Mr. Hood to appear here today on the part of the petitioner?

A. Yes, sir.

30

Q. On the twenty-fifth day of July last were you on the engine at that time?

A. Yes.

Q. And had you charge of the train at the time Harry C. Hendee was killed?

A. Partly.

Q. Don't you have absolute charge of the train, Mr. Fahl?

A. Yes, when the conductor ain't there, when he can't be there I have charge of the train.

Q. Will you just tell to the Court how this accident occurred?

A. Well, the same as the other witness testified, Mr. Kane. We left Wildwood around ten fifty-seven with one car. We had left two cars on the siding.
10 We brought two cars out at nine twenty-three, left them at the junction, and we got four cars of the Philadelphia connection, took them into Wildwood, and we brought one car from that train, the hind car out to the junction, and then we backed down and made a drop of this car to get the other two cars, and as we went back to these two cars, the car that we dropped in stopped pretty near a car-length from the other two cars that we had left there. Finally when I came in there with the engine against
20 this one car, I stood partly at the end of the curve, the connection didn't make.

Q. The connection between the engine and the first car?

A. And this car didn't make. I had to follow this car back pretty near a car length where the other two cars stood. You can't hardly make a coupling on a curve with them couplings; you can't drive the spring in hard enough for the two knuckles to catch, so I had to drive the first car back, and at that time
30 Hendee was on the hind end of this vestibule car that we had run in at the hind end, and as soon as I started the car to go back to push it. He was on the step and held his hand out for me to slow up. I applied the brakes gently.

Q. In response to his signal?

A. In response to his signal. He must have got

off on the opposite side from me. This car bumped back because I didn't have no control of the car, bumped back and backed against these two cars. I still felt it with the engine, but he just held his hand out for me to slow up. I didn't have no control, the car went down and bumped against these two cars, and as near as I can judge, he got off on the opposite side and came through. The car went again and came back as near as I can judge about two feet and he stepped through there and in that time when this car bumped again, those springs came back, he stepped through and must have run in, as near as I can judge. To my judgment this car hit the tank and didn't couple and came back, as near as I can judge, the car had come away from the other two cars about that far. 10

Mr. Tatem: So that the stenographer's record will amount to something, we will insert the words, "Witness indicated a distance of about three feet." 20

A. A man can't tell on the inch. I judge the car—the springs are strong on them cars and as soon as you hit it, if they don't couple they run away. The car came back, these two cars were there and they came back very little, and this heavy steel car went against them. It was bound to come back and bump against my tank.

Q. And that is what made the coupling on your engine? 30

A. It didn't make the coupling.

Q. Not when it came back from the rebound?

A. No, it didn't make the coupling.

Q. That is the second crack you had at the coupling?

A. Yes, didn't hit her enough to make the coup-

ling in that little space. Hendee must have got in and ran back to pull the knuckle open between that one car and that combination car, and that combination car; them two cars and the combination car, and that time was so short it came back and hit him because it showed plainly that the man must have run in because he had his face down to the bumpers. The bumpers caught this jaw here on the right side of the car, and the big steel car caught him here (indicating). It stands simply to reason if my engine

10 had been coupled up, the weight from my engine would have went against him. If my engine had been pushing and went against him, it would have flattened him flat, it would have smashed him up.

Q. But in response to his signal you stopped your engine?

A. Not until I was about three feet near.

Q. Couldn't you in response to that signal stop the engine; your engine stopped?

A. Yes.

20 Q. And your car kept on going?

A. The car went up against these two.

Q. That is by reason of the fact that you didn't make the coupling on the first car?

A. Simply the reason I hadn't control of the car. It would have touched about that distance.

Q. Five or six feet?

A. No, some two or three feet, as near as I can judge.

30 Q. You were working around pretty rapidly to connect on to those cars and get back to Wildwood?

A. No, we hadn't worked fast because you dasent.

Q. I don't mean work the train, but the men were on the jump to get the work done and get back to Wildwood for that excursion train?

A. We have to work fast. You can't throw the time away.

Q. You had left way late on that day?

A. Yes, we were late.

Q. How much?

A. The connection from Philadelphia was late. We got into Wildwood, I didn't count the minutes late on the trip, as long as there ain't a fast train due, but as near as I can judge we left Wildwood about two or three minutes after eleven.

Q. And you should have left there about ten forty-five?

10

A. At ten forty-five.

Q. You have been working on this road for how long?

A. Since the road opened.

Q. On the Delaware Bay and Short Line?

A. Yes, I run the work train before it opened. I run the first train these two years December coming.

Q. How long had Hendee worked for them?

A. He worked for me. He was on the work train. Me and him took the work train on the third day of December. 20

Q. From the time that you both went there, didn't you both at times do each other's work when you were cramped?

A. Not outside of the engine. The engineman and the fireman, they stick together. If there is anything to do between us two we have to do it. That is a rule and regulation of the railroad.

Q. Didn't Hendee make a practice of helping out the brakeman? 30

A. Not very likely, because a fireman ain't got time to do it.

Q. You say very likely, but he did at times?

A. Very likely such things happen that a man has time. When he does, it is generally a rule he has to finish his own to help somebody else out.

Q. But Hendee had to your knowledge several times made couplings?

A. He had went off the engine several times to very likely—I don't remember, on my oath to say at this time that I can remember that this summer that he went off. To tell the truth I can't say that he went off.

Q. Weren't you short a man on that trip?

A. On the train that we were handling?

10 Q. To bring back the one that you were making up?

A. You see we only had the one car out and the two cars back. That left us a full crew for that purpose.

Q. What would be a full crew? You say you were going to bring back three cars?

A. That only requires engineer, fireman, conductor and brakeman.

Q. Were they all there at the time this happened?

20 A. The conductor was at the station. He has to make his reports and receive orders.

Q. Where was the baggage master?

A. He wasn't there as far as I know.

Q. Wasn't it customary for the baggage master to be there as a sort of assistant brakeman?

30 A. They do the work between them. When we get a big train, when we have more than four cars, they have to do the work between themselves. Now, Mr. French and the Court, when we come to the junction, the baggage master takes and signs, and if he has any express matters to come off of his train to the train that we met, he takes his book and the baggage master on the other train has to sign. The same way with a special train. When they come there and they got anything to transfer over to us, why, our baggage master must sign for them. Anything gets

lost, if it gets lost, our man is responsible. The baggage master must get off and tend to his duties. When I came around the Y with the brakeman we had twelve or thirteen minutes to go around there. On an occasion that the baggage master wasn't needed to make any signs he would stay on the hind end, but if he had any things to receive he had to stay at the office.

Q. Now, you say the conductor was over to the station getting orders?

10

A. Yes, sir.

Q. The baggage master wasn't there?

A. He wasn't there.

Q. Didn't make that trip with you at all from Wildwood and the train was about seventeen or eighteen minutes late?

A. Yes, we left eleven three as near as I can tell and arrived at Wildwood Junction about ten or eleven minutes after eleven, and left there as near as I can tell somewhere around twenty or twenty-one and got to Wildwood about twenty-seven, something like that.

20

Q. And there was only one brakeman on the train. You say that you slowed up in response to the signal given you by Hendee; he held out what hand?

A. Yes.

Q. And you knew that he was making the coupling?

A. I thought he was going to make the coupling but, as a rule, Mr. French and the Court, when a man wants to go in between the cars he must signal to stop and wait until they stop.

30

Q. That wasn't an answer to my question.

Mr. French: I will ask that be stricken out.

Q. I say you knew he was going to make that coupling?

A. I expected he was.

Q. When he put up his hand you stopped your engine in response to that?

A. Yes.

Cross-examination.

By Mr. Tatem:

10 Q. Mr. Fahl, were there any passengers on that train at the time of the accident?

A. On the train going out?

Q. Were there any passengers in those cars at the time of the accident?

A. Oh, as near as I can say, there was two Eastern Telephone men sitting in the car, but they were in the combine car; them two cars that stood there.

Q. As a matter of fact, it is against your rules to receive passengers while you are shoving cars?

20 A. It is against the rules whatever.

Q. How long had Mr. Hendee been employed as a fireman?

A. I can't swear exactly to it. I think he was hired in August, sometime in August by the Delaware Bay Short Line to fire, and fired the work train for a while, and the work train was taken off on the sixteenth day of October.

Q. That is 1912?

30 A. Yes, and he done some other work down at the drawbridge for the people and didn't come back to fire until the third day of December, when I took hold of the work train.

Q. As a matter of fact, he had a short time before his death passed his examination as a engineman?

A. He passed as an engineman under my instructions.

Q. In order to pass that examination it is necessary for him to be familiar with the book of rules, in which it describes the duties of the different men on the train and the method of operating the train?

A. Yes, sir, thoroughly.

Q. You said that you were late in leaving Wildwood, ten or fifteen minutes. As a matter of fact, had this train any special connection to make on its return?

A. Into Wildwood?

10

Q. Yes.

A. No.

Q. Was there any special reason why it should reach Wildwood exactly on time?

A. No.

Q. The reason that you made this shove of this car on this occasion, as you did, was because there was an extra train?

Mr. French: Objected to. It is not proper cross-examination and inasmuch as this is an employee, the man in charge of the defendant's train on that day I don't think the question should be a leading one. 20

Mr. Tatem: I think you are right.

Q. Why was it you couldn't go around the Y, the long leg of the Y on the north?

A. On account of an empty excursion train going north, engine 338. She left Wildwood that morning before we did and she came to the junction and backed around and lay on the west leg of the Y. She laid there and waited for orders to go to Camden. That was the idea I was to make this shove and come in that direction. I couldn't get there with a car coupled fast to the engine. 30

Q. You shoved those cars the only way you could under the conditions?

A. Shoved this one car under them conditions.

Q. Whose duty was it to make the coupling between the engine and between those cars?

A. Brakeman Fowler. He was there to make the first coupling when I came against with the engine, when I came against the first car, but he had to wait until I had the car back so the couplings would couple.

10 Q. What duty had Mr. Hendee in regard to coupling the cars?

A. Well, he had none whatever.

Q. What orders—

Mr. French: I don't think that is competent cross-examination, whose duty it was to make this coupling. He did it. There has been nothing said about whose duty it was to make the coupling.

20

The Court: You are bringing new testimony.

Mr. French: I think that all should be stricken out regarding the duty.

Mr. Tatem: Suppose we strike out that question in order to keep the record straight.

30 Q. On which side of the car, of the train, east or west side, did Mr. Hendee go in between the cars to make the coupling?

A. Yes, it is called the west side. When he held his hand out he was on the east side, on my side, the same as I am on this side. The engine hit it and I backed down to get these two cars. He was on the step of these two cars, but after he held his hand out

I stopped the engine but she didn't stop between two or three feet as near as I could judge, and he got off on the west side of the main line of the Cape May branch; got off on that side because I didn't see him. If he got off my side I could have seen him, but I couldn't see him. He got off that side, and when this one car went against it, came back, he went. The car bound against my tank and then caught him in that short space.

10

By the Court:

Q. He was caught on the second rebound?

A. Yes.

By Mr. Tatem:

Q. Did he give you any signal except the first signal?

A. Only the first signal. That is all I seen of Mr. Hendee. I couldn't have done any more if it had been my own son because I hadn't positively control of that car. 20

Re-direct examination.

By Mr. French:

Q. You say there was no special time for you to get back to Wildwood after you had gone to meet that train. Wasn't there a schedule that that train was running on and wasn't there a time that that should be back into Wildwood? 30

A. Yes.

Q. What was that time?

A. We were supposed to leave the Wildwood

junction at eleven two and leave Wildwood at eleven twelve.

Q. And it was eleven twelve when you got out there?

A. Ten eleven when we got out.

Q. You are supposed to live up to that schedule both on this end and that end even though there are no connections to make?

A. We make the time if we can. If the time can be made we make the time.

10 Q. Mr. Fahl, while Harry Hendee received his injury he was in the act of coupling the car?

A. Yes.

Q. That was the business of the company, for him to work?

A. It was the business of the company but not Harry. Harry was not hired for that. He was only hired to fire the engine for me.

Q. You let him do it?

20 Mr. Tatem: Let the witness answer.

A. It wasn't my place.

Q. I don't want you to tell me about what you are hired to do. You let him do it?

A. I have to let him do it when he left the engine. I hadn't control when he got off of the tank. He was back in the tank when he got off the tank and went back.

30 Q. You had charge of the train?

A. I had charge of the train.

Q. You had charge of him, you were his superior?

A. He was under my instructions.

Q. He was under your orders?

A. I didn't give him any orders, but he is under my instructions all day long. I am boss of him as

far as the engine, as far as firing and doing the work on the engine, but if he undertakes to get out of that, I ain't no boss. If I had said something to him, he would have said, "Go ahead, Pop"—he always called me Pop—"I am doing this."

Q. Did you tell him not to make that coupling?

A. I hadn't told him anything.

Q. You acted in conjunction with him?

A. I didn't tell him anything at all. I didn't talk to him.

Q. No, but, Mr. Fahl, you stopped the engine in 10 response to the signal?

A. I stopped the engine when he held his hand out.

Q. You recognized his signal in the action that he was doing for that company?

A. Why, certainly, I had to.

PETITIONER RESTS.

20

EDWARD DEIBERT, SWORN.

Direct examination.

By Mr. Tatem:

Q. Where do you live, Mr. Deibert?

A. Haddon Heights.

Q. You are connected with the Atlantic City Rail- 30
road, are you not?

A. Yes, sir.

Q. In what capacity?

A. Chief dispatcher and examiner.

Q. Is it part of your duty to examine enginemen
and trainmen for licenses?

A. That is, it is my duty to examine them for advancement.

Q. Does the Atlantic City Railroad perform that service for the Wildwood and Delaware Bay Short Line Railroad?

A. Yes, sir.

Q. The examination which is given for the Wildwood, Delaware Bay and Short Line Railroad men is based upon the rules and regulations of the Atlantic City Railroad, is it not?

A. Yes, sir.

Q. Do you remember whether in May of this year you examined Harry C. Hendee for license as engineman?

A. Yes, sir.

Q. Mr. Deibert, I show you paper marked Philadelphia and Reading Railroad Company, name Harry C. Hendee together with a certificate, "I certify that Harry C. Hendee has satisfactorily passed an examination on the book of rules. Signed, E. I. Deibert, examiner." That is your signature?

A. That is my signature.

Q. And that is the examination which Mr. Hendee passed?

A. Yes, sir.

Q. Now, I show you book entitled, "Philadelphia & Reading Railroad Company and affiliated lines rules of the operating department," and ask you if that is a copy of the book of rules under which Mr. Hendee was examined?

Mr. French : Is that the book of rules of the Delaware Bay and Short Line Railroad Company?

Mr. Tatem: No, Mr. Deibert has testified that the Wildwood, Delaware Bay and Short Line Railroad

operated under their rules, and that the employees of the Wildwood, Delaware Bay and Short Line Railroad Company were examined in Camden by Mr. Deibert.

Mr. French: Unless the book can show that these rules were in vogue, that this company had adopted these rules, I don't think it is competent.

(Argument followed.)

10

Mr. French: If it can be shown that they are the same rules that are in vogue in this company and that these rules are strictly enforced, if that was done, I think this would be all proper evidence. If Mr. Tatem says he is in a position to prove that, I am willing it should go on.

A. That is a copy of the book of rules.

Q. That is a copy of the book of rules to which the examination voucher written by Mr. Hendee related? 20

A. It is.

Q. And the questions in his paper were answered in concurrence with that book of rules?

A. They were.

Q. Mr. Deibert, will you turn to the book of rules and read rule 99 and 99A?

Mr. French: I think, if your Honor pleases, I will enter an objection to that on the ground of its not being material and incompetent, based on the grounds that our contention is that Hendee was working for the railroad; it has been admitted that he was working for the railroad, that he was acting as a brakeman at the time he met his death, he was 30

fulfilling or performing work there for the company. That is all admitted.

(Argument followed.)

The Court: Objection overruled.

Mr. French: I would like to have an exception noted.

10

A. Rule 99. "When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail when the conditions require it. The front of a train must be protected in the same way, when necessary, by the front brakeman or in his absence by the fireman." 99A. "On double track when a train crosses over to or obstructs the other track, unless otherwise provided, it must be protected as prescribed by rule 99 in both directions on that track."

20 Q. Referring to Mr. Hendee's examination, I ask you, Mr. Deibert, whether Mr. Hendee passed an examination on those particular rules?

A. Yes, sir.

Q. Will you kindly read the question and answer in the paper relating to that?

30 A. That rule there is an answer to question one hundred and seventy in this examination paper. It reads like this: "When a train stops or is delayed under circumstances in which it may be overtaken by another train, what is the duty of the flagman? Repeat rules 99 and 99A." Here is the answer: "99. When a train stops or is delayed——"

By Mr. French:

Q. Mr. Deibert, are you reading from the rule book or are you reading from this answer?

A. From Hendee's answer.

Q. That is the answer written out by Hendee?

A. Yes, sir.

Mr. French: I would like to have the privilege before this gets into the record of cross-examining 10 Mr. Deibert on that record.

Cross-examination.

By Mr. French:

Q. Were these answers written in your presence?

A. Some of them were.

Q. You are not able to say which ones were?

A. No. 20

Q. Then, you are not able to say whether Hendee personally answered all those questions?

A. This was Hendee's book given to him to fill out.

Q. Did you give it to him personally?

A. I think I handed it to him, but if I didn't either Mr. Wood or somebody else did. He was turned over to me for examination. I think most of it was done at my office at a side desk. Part of the time I seen him work on the book and part of the 30 time I didn't watch him, and I can't say whether he was two or three days on the job.

Q. He didn't take the book away from the office?

A. Not to my knowledge. No, the books are all left on my desk until completed. After that I go over them and correct them, and then the operative

is sent for and brought back and I go over each one of the corrections and have him correct them himself, and all the questions he is not familiar with I see he has an understanding.

Q. Are there any corrections such as that indicated in that book?

A. Yes, sir.

Q. May I see one of the questions? Is this——

A. This is one hundred and seventy.

10 Q. And this is a correction that he made himself in your presence?

A. No, that is the right answer. One hundred and seventy is not marked as wrong.

Q. This is the right answer?

A. Yes, sir.

Q. Why was that written on the paper instead of in the book?

20 A. For the reason that there wasn't space enough there to write the entire question, and cases like that we give them permission to write that on the slip and pin it in under the question. I don't know whether he has any more like that, but I have a sample book with sample questions written in just that way.

Q. Were there any there that he had to come back and correct?

A. Not unless they are marked.

Q. Where are the corrections noted in the book? Are there any noted in the book?

30 A. These are the questions that he had to correct.

Q. How were they corrected?

A. This is thirty-eight, "What is the main track?" He made a correction here adding and changing a word.

Q. That was done in your presence?

A. Yes, sir.

Q. After that examination, Mr. Deibert, what became of the book, after the corrections were made?

A. The book was turned over by me to the assistant superintendent, Mr. Weidler.

Q. You haven't seen that book since the day of the examination or since the day of the correction shortly after the examination?

A. Not until this morning.

Q. Then, you don't know where the book has been or whether there has been anything added to it or 10 taken away from it or anything of the kind?

A. I can't say what happened to the book in the meantime, no.

Q. Is that given to a custodian, is the assistant superintendent a custodian for that company?

A. Yes, in our office we have files up there and this book along with any other papers are filed in as a record of the men.

Q. Then, if it was in the ordinary course, that has been filed? 20

A. Yes, sir.

Q. But you don't know whether it has been or not?

A. If he was an employee the book would be filed away with the papers.

Q. Therefore, he wasn't an employee. You don't know what was done with it?

A. I don't know what Mr. Weidley done with it. I know Mr. Slaughter had it this morning, and the supposition is that it was sent to him, as Mr. Hendee 30 was an employee of the Delaware Bay and Short Line Railroad.

Q. Instead of going to Mr. Weidner it was turned over to Mr. Slaughter?

A. No, it was turned over to Mr. Weidley by me.

Q. At that time?

A. Yes, sir.

Q. You don't know when Mr. Slaughter got it?

A. No, sir, I can't say.

Direct examination, resumed.

By Mr. Tatem:

A. 99. "When a train stops or is delayed under
10 circumstances in which it may be overtaken by another train the flagman must go back at once to stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail when the conditions require it. The front of a train must be protected in the same way, when necessary, by the front," he has got a word there, he has meant that for brakeman, "B-R-A-K-M-A-N, but in his absence by the fireman." 99A. "On double track when a train
20 crosses over to or obstructs the other track, unless otherwise provided, it must first be protected as prescribed by rule 99 in both directions on that track."

Q. Mr. Deibert, turn to rule 106. Read that.

A. Rule 106. "In all cases of doubt or uncertainty the safe course must be taken and no risks run."

Q. On page 102, under the heading, "Rules for fireman." Read 999.

A. Rule 999. "They must be familiar with the
30 rules for engineman and observe how they are carried out and observe rules for other classes of employees so far as they relate in any way to the proper discharge of their duties."

Cross-examination.

By Mr. French:

Q. Will you take that book of rules? Will you read on page 101, "Rules for fireman," section 992?

A. 992. "They must clean and polish the engine when required and assist in making repairs when necessary."

Q. And on page 102, 994.

A. 994. "They must not run the engine in the absence of the engineman without permission from the superintendent or road foreman of engines except in emergency, when they are permitted to do so by the conductor or some officer in charge."

Q. Turn back to 101 and read section 990.

A. 990. "Fireman report to and receive their instructions from the train master. They must obey the orders of the road foreman of engines and when at the engine house they are under the direction of the engine house foreman. When assigned to an engine and while on duty on the road they will follow the instructions of the engineman."

Re-direct examination.

By Mr. Tatem:

Q. It is the duty of the fireman, is it not, to follow the instructions of the engineman?

30

Mr. French: I object to that.

(Argument followed.)

Mr. Tatem: Question withdrawn.

EVANS G. SLAUGHTER, SWORN.

Direct examination.

By Mr. Tatem:

Q. Where do you live, Mr. Slaughter?

A. Wildwood, New Jersey.

10 Q. What is your connection with the Wildwood, Delaware Bay and Short Line Railroad?

A. General manager.

Q. Are the employees of the Wildwood and Delaware Bay Short Line Railroad subject to the rules of the operating department of the Philadelphia and Reading Railroad Company?

A. They are.

20 Q. When your men apply for advancement is it your custom to send these men to the examining officials of the Atlantic City Railroad for examination?

A. We always do.

Q. That was the reason, was it not, then, for Mr. Hendee taking his examination for engineman from the Atlantic City Railroad officials in Camden?

A. Yes.

Q. What work was Mr. Hendee employed by your company to do?

A. He was employed as a fireman.

30 Q. What other duties did he have than this which would apply strictly to the position of fireman?

A. He had charge of the pumping station at Wildwood Junction.

Q. Under the rules enforced on your road, who was authorized to give directions or instructions to a fireman?

Mr. French: I object to that. The rules speak for themselves.

Q. Then, Mr. Slaughter, as general manager of your road, who is authorized to give instructions to fireman?

Mr. French: I object to that. The rules speak for themselves. If they don't go by these rules that must all be stricken out, and if they do, the rules speak for themselves. 10

(Argument followed.)

The Court: Objection overruled.

A. On the road the engineer has charge of his fireman in the absence of any higher authority.

Q. As far as you know, was Mr. Hendee ever instructed to couple cars? 20

A. Never.

Q. So far as you know, was he in the habit of performing that service?

A. No.

Q. So far as you know, was he in the habit of performing any service outside of his regular duties as fireman and the pumping service for which he was specially detailed?

A. Not to my knowledge. 30

Cross-examination.

By Mr. French:

Q. How much experience have you had in rail-roading?

A. Since December, 1912.

Q. Never had any occasion to look up these rules before, have you?

A. Well, since that.

Q. Have you familiarized yourself with the contents of that book of rules?

A. Not thoroughly.

Q. Are you thoroughly versed on the running and operation of a railroad?

10 A. Fairly well.

Mr. Tatem: It seems to me that Mr. Slaughter is not here as an expert.

The Court: He has testified, Mr. Tatem, to some of the rules, and I think it is perfectly proper that Mr. French should break him down as to his knowledge of the road, if he can. I overrule the objection.

20 Q. Were you the manager of the road when Mr. Hendee went to work for it?

A. In 1912, yes.

Q. Were you the manager when he was working on the train completing the road?

A. No, he was not working for the road then in that capacity. He was employed by the Atlantic City Railroad. He was working the work train. He went in the employ of the Wildwood, Delaware Bay and Short Line road in December twelfth, 1912. It

30 was a construction proposition before that.

Q. You have been manager of that road ever since Mr. Hendee has been working for it or ever since it has been a road?

A. Yes.

Q. Have you made it a study of the management and operation of a well governed railroad?

A. To the best of my ability I have.

Q. Then, you are thoroughly familiar with the requirements of the operation of a railroad?

A. I don't know so thoroughly; I am fairly familiar, I think.

Q. What is the complement of a full train crew?

A. My understanding is up to four cars, engineer, fireman, conductor and one brakeman for that, another brakeman up to, I don't know just the number of cars, whether it is four or five cars, but that is usually the number of cars that is handled in South Jersey. 10

Q. That is a custom rather than a conformation with the rules?

A. No, I understand that is the rules.

Q. Did you know that on the morning of this accident that they were short handed?

A. I didn't know.

Q. Had it been called to your attention that day or since that they were? 20

A. On that one trip I was informed afterwards one man was off.

Q. What man was that?

A. Baggage master.

Q. What were his duties?

A. Tending to the baggage and express and helping in braking.

Q. Did the conductor have any of these duties to perform? What were the conductor's duties?

A. The conductor has charge of the train. He gives the signal to move it and has charge of the men. 30

Q. In the conductor's absence who has charge of the train and the crew?

A. The engineman.

Q. Do you know from your own knowledge

whether the conductor was there at the time of the accident?

A. I wasn't there.

Q. Have you a report of the accident?

A. I have.

Q. Have you it with you?

A. I have not.

Q. Who made the report?

A. Conductor.

10 Q. Did he report to you that Wilson wasn't there that day, the baggage master, on that trip?

A. I don't know anybody by that name.

Q. Whoever it was, the baggage master?

A. That must be in the report.

Q. Pile?

A. I can't remember that, he made a report.

Q. Have you investigated whether it was so?

A. I am satisfied it was so.

20 Q. Did you discipline Pile for not being on that trip?

A. No, I didn't.

The Court: I don't see what bearing that has.

(Argument followed.)

The Court: The last question I think is not proper as to whether or not they disciplined their employees. Objection sustained.

30

Q. Had you any other notice of a man having been short that day or any other day?

A. No.

Q. Since the road's been opened?

A. No.

Q. As a matter of fact, do you know that there was a man short on another trip that very day?

Mr. Tatem: Objected to as immaterial. They are not dealing with the other trip.

(Argument followed.)

The Court: Objection overruled.

Q. Did you know that?

A. I did not.

Q. Never any report made to you about that? 10

A. No.

Q. Did you testify that you didn't know that Hendee had coupled cars?

A. When is that?

Q. Before that day.

A. Today, you mean?

Q. No, before the day he was killed.

A. I never knew him to couple cars.

Q. Didn't you ever hear of his coupling cars for your company? 20

A. Never did.

Q. Did you ever know that the engineer had coupled or connected your hose before that day?

A. Yes, they often do that.

Q. As a matter of fact, don't they all jump in and assist each other?

A. Not to my knowledge.

Q. Were you at the coroner's inquest?

A. I was.

Q. Did you hear at the inquest Mr. Fahl say and 30
Mr. Fowler, the brakeman, that at times in cases of
emergency, "We all jump in and assist each other"?

A. I heard what he said.

Q. Did you hear that?

A. Yes.

Q. Then you did hear that this man had coupled

cars and done other work that was not required of them by the Atlantic City Railroad Company?

A. I heard it through that testimony. I never heard it in any other way.

Q. From your own employees. You had no reason to disbelieve it?

A. I heard it that way.

Q. You believed it, didn't you?

A. Yes.

10 Q. Was there any effort made on your part to stop that as manager of the road?

A. I don't think it has ever been done since that was done before. I think that is enlarged.

Q. Have you any knowledge of what Mr. Hendee made, what he averaged?

A. Wages?

Q. Yes.

20 The Court: I thought we agreed on that, twenty dollars and seventy-seven cents a week.

Mr. French: Question withdrawn.

CHARLES H. FAHL, recalled.

Direct examination.

30 By Mr. Tatem:

Q. How long have you been an engineman?

A. About thirty years, little more.

Q. What road have you worked on?

A. That road and Atlantic City.

Q. How long have you worked with the Wild-

wood, Delaware Bay and Short Line Railroad Company?

A. Ever since they opened their road in 1912, third day of December.

Q. How long was Mr. Hendee with you as fireman?

A. He came on the same day, the third day of December.

Q. What were Mr. Hendee's duties as fireman?

A. To get the steam up, keep the engine clean and assist me in helping to do the work on the engine. 10

Q. What duty had he in regard to coupling cars?

A. None whatever.

Q. Was it his custom to couple cars or assist the brakeman?

A. Now, really, I can't remember in the last two or three months that he has.

Q. You testified, Mr. Fahl, that he gave you the signal to stop just before the accident. If such a signal were given you by any trainman it would be your duty for safety to obey the signal, would it not? 20

A. Sure.

Q. And the question as to whether the man giving the signal was doing exactly his own duty or not would not have any bearing on the question as to whether you should obey the signal?

Mr. French: I move that that question be stricken out and the witness be allowed to answer the question. 30

Mr. Tatem: I think you are right. Let the stenographer strike that out.

Q. Mr. Fahl, if any one of the trainmen gave you

a signal which is recognized as a signal to stop, what would be your duty to do?

A. To stop as soon as I possibly could.

Q. If the man giving the signal was not the man who usually gave the signals, what would be your duty?

A. It would be my duty to stop.

Q. Mr. Fahl, were the cars between which Mr. Hendee was crushed both equipped with levers for
10 the purpose of operating the air brakes?

A. Yes, sir.

Q. Operating the couplers, I should say?

A. Yes, sir.

Q. From your knowledge of these cars, what necessity was there for a man to go between them in order to couple them?

A. None whatever, as far as my railroad career learned me and experience I had.

Q. Where was the brakeman Fowler when the acci-
20 dent happened?

A. Back of the tank making the first coupling.

Q. Whose duty would it have been to couple between the one car and the two cars?

A. Fowler as soon as he had made the first one. He had to make the first one first.

Q. Had you taken on your passengers on these cars when the accident happened?

A. No.

Q. Where were you to receive your passengers?

30 A. Up at the station.

Q. You had to stop at the station and receive your passengers before going on into Wildwood?

A. Yes, sir.

Q. What order was given before to Mr. Hendee to couple these cars or to do any other work off the engine that morning?

A. None whatever. What he done he done voluntarily, got off without my consent.

Cross-examination.

By Mr. French:

Q. Now, Mr. Fahl, you testified at the coroner's inquest, didn't you?

A. Yes, sir.

10

Q. Did you state at that time that Hendee had frequently made those couplings?

A. I have said occasionally he would get off the engine.

Q. When the conductor wasn't there he was under your direct supervision?

A. As far as the engine was concerned.

Q. As far as the train was concerned. When the conductor was away the train was in your charge, when the conductor was away? Answer the question. Whose charge was the train in when the conductor wasn't there?

20

A. Was in my charge.

Q. Then the men who were on the train were under your charge, weren't they? Now, answer the question.

The Court: Answer the question yes or no, and then explain.

30

A. Yes, sir. Now, let me explain it. If I gave my fireman, Mr. Hendee, orders to do anything outside of his business on the engine, he didn't have to do it, but could tell me to mind my own business, which he would as sure as I ordered him.

Mr. French: Cut that out.

Q. You know he had done that times before, don't you? You have testified to that.

A. I know he got off the engine.

Q. You know he had made couplings numerous times before this day?

A. Not numerous times.

Q. Didn't you state that in your examination?

A. Not numerous.

Q. Before the coroner's jury?

10 A. Not numerous.

Q. Didn't you state that?

A. No.

Q. What did you state?

A. I said he got off occasionally and went out to hand up any orders.

Q. You didn't give him any orders about that?

A. I had no business to.

Q. You knew or did you know when he got off the engine that day that he was going back to couple that car?

A. He didn't tell me.

Q. Didn't you state at the coroner's inquest that Fowler was standing on the tank or on the tender of the engine and Hendee on the other end of the car waiting to couple the other two cars together?

A. I judge he was there.

Q. Didn't you say that?

A. I judge he was there to make that coupling.

Q. Answer the question.

30 A. That is as near as I can think.

Q. If I show you your answer, would that refresh your memory any?

A. Go ahead. I am here to tell the truth as near as I possibly can.

Q. Now, I show you question of Mr. Coan's on page eleven, at the bottom of the page, "Did he

make a habit of doing that? A. Sometimes if a man is busy, he gets out to help out. Do you know that there was any such orders given, that he was to help out? A. There was no such orders given at all for anybody, to do anything of that kind, but sometimes he would get off the engine to uncouple cars or uncouple hose." That was your answer?

A. Yes.

Q. Is that your answer today?

A. How could I—

10

Q. Is that your answer today that he did that?

A. I acknowledge that he got off occasionally.

Q. You are familiar with the rules of the company and the Atlantic City Railroad Company, aren't you?

A. Yes.

Q. You know that they are the rules that have been adopted and are now in use by the Delaware Bay and Short Line Railroad Company, you know that?

20

A. They adopt the Atlantic City rules.

Q. You know they are going under those rules?

A. Yes, sir.

Q. Do you know that you as engineer have absolute control over your fireman?

A. To a certain extent on the engine.

Q. Don't you know you have absolute control over that fireman?

A. Only as far as work goes.

Q. If he does anything outside of that you have the privilege of discharging him?

30

A. No.

Q. Well, you have the privilege of reporting so he will be discharged or reprimanded.

A. I can report him not as long as he doesn't neglect his duty on the engine. If he neglects his duty

on the engine and I tell him to and he don't then I have to report him to the superior officer.

Q. If he don't do as you tell him, then you have the authority to report him?

A. If he don't do his duty.

Q. Have you any authority at all to report him if he don't do as you tell him?

A. If he don't do as I tell him.

Q. Did you report him when he uncoupled any of
10 those cars?

A. No.

Q. Why didn't you?

A. Because he went off voluntarily.

Q. You never stopped him?

A. I had no right to stop him.

Q. Mr. Fahl, regarding these bumpers. I think you testified a little while ago there was no occasion for a man getting in between there as there were levers on it. Is that true?

20 A. Yes.

Q. Did you testify at the coroner's inquest that "Hendee was on the back, Fowler was to make the first coupling but those knuckles on the cars, our couplers don't lock every time. We can't make them lock. You can't make them lock until you get on a straight line"?

A. That is the reason I pushed that car back.

Q. Was that the reason Hendee went between those cars?

30 A. You don't have to go between them to open them; the levers are there.

Q. "That is them levers? Answer, Yes, they have levers. Question, Then you don't have to get in between at all? There are levers on the cars?" this is the answer, "But sometimes they don't open enough, far enough, so he reached in his left hand to pull them back." Did you say that?

A. Yes.

Q. Then why do you say now he didn't have to go in between those cars?

A. He didn't have to go there.

Q. Why did you say so? Why did you say a few minutes ago that he didn't have to go in between the cars and here a few days after the accident you testified that he had to go in there to pull that knuckle back?

A. He didn't have to go there.

10

Q. Here is the testimony.

A. I said he didn't have to go in. He reached in to open that knuckle further.

Q. Read that answer, this is the answer that you made before the coroner's jury. Just read that.

A. "There are levers on the car, but sometimes they don't open quite far enough, so he reached in his left hand to pull them open, pull them back."

Q. Why, he did, didn't he?

A. He didn't have to do it.

20

Q. Didn't he?

A. No.

Q. What did he do it for if he didn't have to go in between them to pull that out, why didn't he use the levers?

A. He used the levers but they don't spring back far enough. He could have waited until I got away and then use the levers, but he took a chance.

Q. You knew what he was doing?

A. I couldn't say when he came there. You hear 30
other testimony and you will find out I was correct.

Q. This is on your oath. It ought to be the same thing here as it was then.

A. It is the same thing.

Q. As a matter of fact, wasn't the reason that you permitted Hendee to go and make that coupling was

because the baggage master wasn't there to do his work?

A. I didn't permit him. He went of his own mind and made it. He didn't ask me whether he could make it or not. I didn't speak to him. He was back on the tank and he got off there.

Q. Wasn't he a willing worker around? He always tried to help out, and wasn't one reason that you permitted him to do it was because you were
10 eighteen or twenty minutes late and you wanted to get on schedule?

A. I didn't think about them couple of minutes.

Q. Do you call eighteen or twenty minutes a couple of minutes? Didn't you have a schedule? Didn't you have a time to get back in Wildwood for that excursion train?

A. That wasn't an excursion, it was a local.

Q. Didn't you have a schedule to get back to Wildwood?

20 A. Yes.

Q. Didn't you always live up to your schedule?

A. We got in on as near time as we could.

Q. And isn't that the reason Hendee was permitted to do the work that day?

A. No, sir.

Q. Did you do any coupling yourself that day?

A. No, sir.

Q. Did you uncouple the hose that day?

A. Yes, sir.

30 Q. Then sometimes you went out of your engine, didn't you?

A. I did.

Q. Were you ever criticized or brought to account?

A. Nobody knew that I done it.

Q. Isn't that the reason that you let Hendee go around and do other work?

A. No reason at all.

Q. Now, as a matter of fact, didn't all of you go out and do whatever work there was to be done to assist each other?

A. Very rarely done. There was no necessity.

Q. You testified before the coroner's inquest that you all jumped in to get through to finish your work?

A. I said sometimes we would help out.

Q. This was one of those times? 10

A. One of those times as I said to get off.

Q. You didn't stop him, didn't tell him not to go?

A. I didn't tell him that he could or tell him he couldn't. He got off the back part of the engine, off the tender and went through.

HARRY C. PHILLIPPI, SWORN.

20

Direct examination.

By Mr. Tatem:

Q. Where do you live, Mr. Phillippi?

A. Wildwood.

Q. Are you in the employ of the Delaware Bay and Short Line Railroad?

A. Yes, sir.

Q. In what capacity? 30

A. Capacity as agent.

Q. At what station?

A. At Wildwood Station.

Q. Did you go out to Wildwood Junction on the morning of July twenty-fifth, did you?

A. Yes, sir.

Q. Just state what happened there so far as you saw it.

A. I went out, I left Wildwood and went out to make the local connection leaving about eleven o'clock, went out to make local connection. We had a passenger for Cape May. We went up to the station, the passenger was discharged. I went back over the Shore Road and made a trip in the car. The car ran, itself, down to within a half a car length
10 of where two cars, which had been left out on the siding prior to us getting there; went down to within a half a car length of these two cars. In the meantime the engine had backed up against these two or had come along the two had backed up to the car intending to make the coupling on the first car that had dropped down the track and then to couple on to the two that was stationary. Before they dropped the car, I was inside the car, when they started the engine, when the engine started to
20 push the car to make the drop I got up and stood on the platform. When I got out on the platform I saw Hendee there on the platform. He had one of his feet on the step and the other one on the platform, that is, he was endeavoring to get hold of the brake handle to drop the car down, but I, being in position that I could get it quicker, I, myself, got hold of the brake handle and broke it just enough to break it to slacken the speed so it would come around the curve. When she hit the end of the curve
30 and the straight rail the car stopped. It was then that the engine came down and bumped against the car and shoved it to within, I should say, about three or four feet of the two cars, and I then got off on to the west side of the track. We were between the two tracks, between the tracks of the Atlantic City Railroad main line to Cape May. We walked down

with the car until they hit, when the two cars came back. We were both on the same side, between the cars and the Atlantic City track, but the couplings didn't catch and the steel car rebounded, I should say about eighteen inches. It was then that Harry went from the west side of the Atlantic City Railroad side through the cars or through the opening between the cars to the east side. I don't believe it was more than about eighteen inches because when he went through he went through sideways, and the knuckles scraped back and front of his jumper, and he didn't go all the way through. It was then that the car had stopped and it came down of its own he was in a position parallel with the two cars when he was caught. That is all I know. I was directly beside on the other side of the car when the thing happened. 10

Q. What necessity was there for his going between there to couple the cars?

A. Well, none that I know of other than he couldn't work very good from the position that he was in. 20

Q. Why not?

A. Because he would have had to work right-handed and he couldn't work right-handed. He was left-handed. He had to get on the other side.

Q. What levers or instruments were there on those cars for opening the knuckles?

A. The necessary appliances, the safety levers and wheel on the platform. 30

Q. At the time of the accident had the train taken on any of its passengers?

A. No.

Q. Where would it take on passengers?

A. It had to go up to the station again.

Q. At the place where the accident occurred was

that then what you called within the Wildwood Junction yard?

A. Oh, yes, the Wildwood Junction yard runs down to the end of the siding there.

Q. When this accident occurred the train was; was the train in switching service?

A. The train was being made up, yes, sir.

Q. And had to go to the station before it took on passengers?

10 A. Before it could get the passengers.

Q. From your knowledge did the engineman or any one else in authority give Hendee any orders to couple those cars?

A. I didn't hear that. I was inside the car. I didn't hear anything going on.

Q. Where was Mr. Fowler, the brakeman?

A. Fowler was down at the switch to throw the switch over to permit the engine to go on one track and the car on another.

20 Q. Then did Fowler come up on the engine?

A. Came up on the tank of the engine.

Cross-examination.

By Mr. Jefferson:

Q. What were you doing on that train in the afternoon?

A. That was in the morning.

30 Q. In the morning?

A. I was going to go out to the junction and Wildwood to get two iron jacks.

Q. You were not any part of the train crew there?

A. No.

Q. You know who were on the train by way of a crew?

A. Well, the only one I saw was the conductor and Fowler, the trainman.

Q. Was the baggage master there?

A. I didn't see him.

Q. Where were you, in the baggage car?

A. This wasn't a baggage car.

Q. There was only one man beside the conductor and the man who worked on the engine?

A. Only one man, yes, sir.

Q. Who gave you permission to leave your place and go out there? 10

A. No one.

Q. You were not doing any part in the management of that train or the running of the train or making it up out there?

A. Not there, no, sir.

Q. Did you any part of that trip take part in the work of the train?

A. On the trip?

Q. Yes, from the time you left Wildwood until you got back? 20

A. Yes.

Q. What was it?

A. Broke that car down.

Q. Where did you break the car down?

A. After you made other trips along there, did you go out that way before that day, had you gone other times?

A. Yes.

Q. You have been around the railroad from Wildwood to Wildwood Junction? How long have you been in their employ? 30

A. I guess it was a year last August.

Q. You noticed the running of trains there?

A. Yes.

Q. Isn't it a fact that you had different employees

of the road doing work outside of their recognized duty like you did that day?

A. No.

Q. You never saw the engineman doing anything except running the engine?

A. No, not in Wildwood, and there is where I am particularly located.

Q. You never saw the fireman doing anything except firing his train and work around the engine?

10 A. Oh, yes.

Q. You saw him do that?

A. I saw him working out at the pump.

Q. Did you see him do anything else in the management of the train except on the train and fire it?

A. Not until this time.

Q. Isn't it a fact that Hendee was a kind of a handy man around the yard, a willing worker?

A. He was a willing fellow.

20 Q. And was interested in the success of the new company?

A. Yes, the success of the company meant his own success.

Q. And this morning at the time of the accident he was taking the place of the brakeman in addition to his duties as fireman?

A. I don't know whether he was taking the place of the brakeman, but in this particular instance he did brakeman's work.

30 Q. And it was his custom, as you say, to advance his own interest?

A. I don't know whether it was his custom, but he did it in this particular instance.

Q. Did you ever see him do it before?

A. No, sir.

Q. Anywheres?

A. No, sir.

Q. Don't you know as a matter of fact that Hendee was a fellow that boosted the road in every way by helping?

A. I believe he did.

Re-direct examination.

By Mr. Tatem:

Q. You said you knew of Mr. Hendee helping at the pump?

10

A. Yes.

Q. That was part of his business?

A. That is what he was engaged for, yes, sir.

WILLIAM FOWLER, SWORN.

20

Direct examination.

By Mr. Tatem:

Q. Where do you live, Mr. Fowler?

A. Wildwood.

Q. What is your business?

A. Firing.

Q. Are you in the employ of the Wildwood, Delaware Bay and Short Line Railroad?

30

A. Yes, sir.

Q. Were you in the employ of that company on July twenty-fifth last?

A. Yes, sir.

Q. In what capacity?

A. Braking.

Q. Were you out at Wildwood Junction when Mr. Hendee received the injury that resulted in his death?

A. Yes, sir.

Q. Just tell briefly what happened so far as you saw it.

A. As far as I can tell you I was down to the switch and made the flying switch. I got off at the switch and I didn't know what they did; then I got
10 off to switch and made this switch; the engine came around one way and the car the other, and the engine came back and I got on the tank and we went around to the cars.

Q. Just state what happened after you got on the tank.

A. I got on the tank and rode around and we hit this car to make the coupling and it didn't do it. We pushed it on a little ways further and somebody put their hand out, Mr. Hendee, I guess, and we stopped.
20 That is all I know about it.

Q. Whose duty was it to make these couplings?

A. Mine.

Q. Was it your duty to make the coupling between the tank and the first car?

A. Yes, sir.

Q. Was it also your duty to make the coupling between the first car and the first one of the two cars?

A. After I made the first one.

30 Q. Why should you make the first coupling between the tank and the first car first?

A. That is generally the rule. Always do that first so you can have control of the car.

Q. So far as you know, who gave Mr. Hendee directions to couple those cars?

A. Nobody, that I know of.

Q. You know of any instance where Mr .Hendee was given directions to do this work either the morning of the accident or before that time?

A. No, sir, I do not.

Cross-examination.

By Mr. French:

Q. Mr. Fowler, how long had you known Hendee? 10

A. Why, in January.

Q. Of 1913?

A. Twelve.

Q. January, 1912?

A. Yes, sir.

Q. Did you ever know him to make couplings before?

A. Once or twice.

Q. Is that all?

A. Yes, sir. 20

Q. Didn't he couple cars that morning before this?

A. What, this same day?

Q. That same morning?

A. Not that I know of.

Q. Did't you testify to that before the coroner's jury?

A. That he made a coupling that same day?

Q. Right there on that trip, right out at Wild-wood Junction that he uncoupled a car? Now, then, I want you to tell just what took place, so if you can recollect I am going to get you to read this in a minute. 30

A. Do you mean did he make a coupling before that trip that morning?

Q. No, on this same trip, didn't he make a coup-

ling or uncouple a car that very morning on this same ten or eleven o'clock trip out?

A. Not that I know of.

Q. Then if you had said that at the coroner's inquest that he had, which you told, was it untrue; the one that you say now that you don't think he had or the one that you said then?

A. I don't think he did.

10 Q. Well, if you said that at the coroner's jury three or four days after the accident would that be liable to be the truth or the statement you make today?

A. Now.

Q. It would be fresher in your mind about four or five months after the accident than it would be four or five days?

A. I don't know that it would be any fresher.

Q. As a matter of fact wouldn't it be fresher in your mind three or four days after the accident?

20 A. Yes, sir.

Q. This is what you said. This is the question: "Did he make the coupling on the train before that was switched?" Your answer is, "That is before that was switched, yes, sir. That train was standing there, we came down upon the way, this way (indicating), the track runs this way. We make the drop and then came around the Y before we backed to make the connections (illustrating). We came back here and make the drop, we left the car around here and we came down here—here is where the two cars were standing. We were coming in on this leg of the Y, and he was between those two cars of the train and this one here. I did not see him at all when he got hurt. Here stands the other car here after we make the drop. We came right up to this point before we stop, over here we come in." Did you make that statement?

30

A. Yes, sir.

Q. Did you make a statement before that jury that sometimes he helped you out?

A. Yes, sir.

Q. Now, Mr. Fowler, the conductor knew that Hendee was in the habit of helping out on these couplings out there?

A. No, sir, I can't say that.

Q. The engineer knew it?

A. I can't say that, no, sir, I can't tell you.

Q. You heard the engineer testify?

10

A. Yes, sir.

Q. Haven't you ever talked with the engineer about this case?

A. Not that way.

Q. Did you ever talk to the conductor?

A. No, sir.

Q. Ever talk to Mr. Slaughter?

A. Yes, I have talked to him.

Q. When did you talk to Mr. Slaughter?

A. I talked with him near every day.

20

Q. About this case?

A. No, not about the case.

Q. That is what I am asking you about. I asked you if you ever talked to Mr. Slaughter about this case?

A. Sunday, I think it was last Sunday.

Q. Talked with him frequently since the accident?

A. Yes, sir.

Q. What did he tell you to say?

A. He didn't tell me to say anything.

30

Q. What did you tell him you were going to say?

A. I didn't tell him what I was going to say.

Q. Now, as a matter of fact, is that the reason you wanted to switch this testimony of today and the testimony you made before the coroner's jury?

A. I don't know what you mean.

LEWIS HELD, SWORN.

Direct examination.

By Mr. Tatem:

Q. Where do you live, Mr. Held?

A. Wildwood.

10 Q. Were you employed by the Wildwood, Delaware Bay and Short Line Railroad?

A. Yes, sir.

Q. What capacity?

A. Freight clerk.

Q. Were you at the Wildwood Station on August twenty-fifth?

A. Yes.

Q. When Mr. Hendee was brought in on the train?

A. Yes, sir.

20 Q. Did you have any conversation with him?

A. Only when the train came in. I went in the car and seen how bad he was hurt. He says to me —

Mr. French: I object to any conversation taking place between the two of them. What he said isn't evidence here.

(Argument followed.)

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The Court: It is not anything proper, just hear-say. I am going to sustain the objection.

JUDGMENT.

CAPE MAY, COMMON PLEAS.

<p>WILLIAM C. HENDEE, Ad- ministrator of HARRY C. HENDEE, Deceased, <i>Petitioner,</i></p> <p>vs.</p> <p>WILDWOOD and DELAWARE BAY SHORT LINE RAIL- ROAD COMPANY, <i>Respondent.</i></p>	}	<p>ON EMPLOYER'S LIA- BILITY PROCEEDING. JUDGMENT FOR RE- SPONDENT FOR COSTS.</p>	<p>10</p>
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Judgment for costs on decision of the Court in an action for compensation under the Workmen's Compensation Act of April 4th, 1911, is hereby entered in favor of Wildwood and Delaware Bay Short Line Railroad Company, respondent, and against William C. Hendee, administrator of Harry C. Hendee, deceased, petitioner, in the sum of Thirty-seven Dollars and twenty-nine cents costs. \$37.29.

Judgment entered December 30th, 1914, at 5 P. M. 30

HENRY H. ELDREDGE,
Judge.

RETURN.

STATE OF NEW JERSEY, }
 COUNTY OF CAPE MAY, } ss.

I, A. C. Hildreth, Clerk of the Court of Common
 10 Pleas in and for said County, do hereby certify that
 the foregoing is a true and correct transcript of the
 determination and judgment of said Court in a cer-
 tain action under the Workmen's Compensation Act
 of 1911, wherein William C. Hendee, administrator
 of Harry C. Hendee, deceased, is petitioner, and
 Wildwood and Delaware Bay Short Line Railroad
 Company is respondent, together with all proceed-
 ings for the making of the same, and all things
 touching and concerning the same, as fully and en-
 20 tirely as they remain on file or of record in my office.

In Witness Whereof I have hereunto
 set my hand and affixed the seal of said
 (Seal) Court, at Cape May Court House, this
 third day of February, A. D. nineteen
 hundred and fifteen.

A. C. HILDRETH,
Clerk.

OPINION.

(Filed May 13, 1916.)

NEW JERSEY SUPREME COURT.
FEBRUARY TERM, 1915.

10

WILLIAM C. HENDEE, Ad- ministrator,	}	OPINION.
vs.		
WILDWOOD, DELAWARE BAY and SHORT LINE R. R. Co.		

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Submitted February Term, 1915; Decided.

Certiorari to Cape May Pleas.

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Before JUSTICES SWAYZE, PARKER & KALISCH.

APPEARANCES:

WILLIAM C. FRENCH and SAMUEL T. FRENCH, for
plaintiff;
J. FITHIAN TATEM, for defendant.

The opinion of the Court was delivered by
SWAYZE, J.:

The facts found by the trial Judge are as follows:
The petitioner's decedent, Harry C. Hendee, was employed by the Wildwood, Delaware Bay and Short Line Railroad Company as a locomotive fireman. He was also employed as an engineer at the company's pumping station, but this additional duty has
10 no connection with the present case. On the day of the accident in question the train from Wildwood on which Hendee worked left Wildwood, as the Judge found, about eighteen minutes late and arrived at Wildwood late. The crew consisted of engineer, fireman, brakeman and conductor. The conductor at the time of the accident was at the station and the other members of the crew were drilling the train. Two cars were lying on a siding and a third car was being shoved in to couple with these two cars. The
20 brakeman ran ahead to make the coupling between the tank of the engine and ran to the other end of the car to make the coupling between the single car and the two cars standing on the siding. The engineer was in charge of the train at the time. While making this coupling the decedent received the injury from which he died.

Upon these facts, the Judge held that the decedent was a volunteer engaged in doing work outside the scope of his employment. This result was based
30 upon the facts found as above stated, and upon what the Judge said was uncontradicted testimony that, according to the rules of the company, the duties of a fireman extend no further than his engine, notwithstanding the testimony that on other occasions the decedent had left his engine and performed duties outside of the line of his employment. It is

important, therefore, to examine the rules and testimony as to Hendee's acts upon other occasions and as to the situation at the time of the accident. Rule 99 provides for the protection of a train when stopped or delayed under circumstances in which it may be overtaken by another train. The rule reads in part as follows: "The front of a train must be protected in the same way, when necessary, by the front brakeman, *or in his absence by the fireman.*" Under some circumstances, then, it was the duty of the fireman to take the place of the front brakeman. Whether these circumstances were present in this case is not conclusive upon the question involved. At the time of the accident only the engineer, fireman and brakeman were present with the train. The services of two brakemen seem to have been either necessary or desirable. There was uncontradicted evidence that on other occasions the decedent had acted as brakeman, and that on this particular occasion the engineer, who was in charge of the train, not only knew that Hendee had gone back to a point where the cars were to be coupled, but that the locomotive was operated by the engineer in response to Hendee's signals. The fireman was acting in an emergency in place of a brakeman. 10 20

We cannot review the trial Judge's findings of fact, but as there is no distinct finding that the fireman's act was not in the line of his employment in the emergency that occurred, we are not controlled by the holding that the decedent was a mere volunteer. That holding is a mingled conclusion of law and fact, and depends in part upon the definition to be given to the word employment. We think the Judge erred in adopting too narrow a definition. Hendee's special employment was that of fireman, but his general employment was to assist in running the train. We think the uncontradicted evidence re- 30

quires the conclusion that Hendee's act was one necessary to the running of the train. The trial Judge could not then have found for the defendant unless he attributed to the word employment the narrow and special meaning. We think this was erroneous. The judgment must be reversed and the record remitted for a new trial.

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RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

WILLIAM C. HENDEE, Ad-
 ministrator of the Estate
 of HARRY C. HENDEE, De-
 ceased,
Petitioner-Prosecutor,

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vs.

WILDWOOD and DELAWARE
 BAY SHORT LINE RAIL-
 ROAD COMPANY,
Defendant.

} RULE FOR JUDGMENT.

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The Court, having inspected the proceedings and judgment returned with the certiorari in this case, the reasons assigned for reversal, and heard the argument of counsel thereon and considered the same, do order that the said judgment be reversed and the record remanded to the Cape May County Court of Common Pleas to be proceeded with in accordance with the view expressed in the opinion of this Court.

Entered July 28, 1916,

On motion of

J. FITHIAN TATEM,
Attorney for defendant.

NOTICE OF APPEAL AND REASONS.

NEW JERSEY SUPREME COURT.

(Filed August 4th, 1916.)

WILLIAM C. HENDEE, Ad-
 ministrator of the Estate
 of HARRY C. HENDEE, De-
 ceased,
Prosecutor-Appellee,
 vs.
 WILDWOOD and DELAWARE
 BAY SHORT LINE RAIL-
 ROAD COMPANY,
Defendant-Appellant.

ON CERTIORARI.
 NOTICE OF APPEAL
 AND REASONS.

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*To William C. French and Samuel T. French, Esqs.,
 attorneys for prosecutor-appellee:*

Take notice that the Wildwood and Delaware Bay
 Short Line Railroad Company, Defendant-Appellant,
 appeals to the New Jersey Court of Errors and Ap-
 peals from so much of the judgment entered in this
 case as adjudges the judgment of the Cape May
 County Court of Common Pleas be reversed, and
 that the record be demanded to said Court to be pro-
 ceeded with in accordance with the views expressed
 in the opinion of the Supreme Court upon the follow-
 ing grounds:

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1. The Supreme Court erroneously determined that it was not controlled by the finding of the trial Judge that the decedent was a mere volunteer.

2. The Supreme Court erroneously determined that the decedent was not a volunteer engaged in doing work outside the scope of his employment.

10 3. The Supreme Court erroneously determined that the finding of the trial Judge was a mixed finding of law and fact.

4. The Supreme Court erroneously determined that the trial Judge erred in adopting too narrow a definition of the word "employment."

20 5. The Supreme Court erroneously determined that according to the evidence, the decedent, who was employed as a fireman, was acting in an emergency in place of a brakeman.

6. The Supreme Court erroneously found that the uncontradicted evidence required the conclusion that the act of the decedent was one necessary to the running of the train.

J. FITHIAN TATEM,
Attorney for
Defendant-Appellant.

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Service of a copy of the within Notice of Appeal and Reasons duly acknowledged this 28th day of July, A. D. 1916.

WILLIAM C. FRENCH,
SAMUEL T. FRENCH,
Attys. for Prosecutor-Appellee.

CERTIFICATE.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Notice of Appeal filed, and also of a rule entered in the minutes of the Court in the above stated cause.

10

In Testimony Whereof, I have hereunto set my hand and the seal of said court, at Trenton, this third day of August, A. D. nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

(Seal.)

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