

no. 68

New Jersey Court of Errors and Appeals 10

DONATO MARCONE, Administra-
tor, etc., of Joseph Marcone,
deceased,

Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.
On Appeal.

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BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

This is an appeal from a recovery by the admin-
istrator of Joseph Marcone, under the Interstate 30
Commerce Act. Joseph Marcone was working for
the New York Central Railroad Company in inter-
state commerce. He was working at the round-
house at Granton, New Durham. He had been
oiling engines in the roundhouse, which was used
in Interstate Commerce and when he was killed,
was working engine 3835, which was an interstate
engine. He was killed by engine 3709, which was
on the track next to the track on which the engine 40
was, upon which he was working and the jury

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might have found the following facts concerning his death.

10 That no warning was given of the intention to move 3709 while he was working in proximity thereto on engine 3835; that the only warning that he had to rely on was a blackboard in the roundhouse upon which was marked the time, 3 A. M., that engine 3709 which killed him would be moved, and that the said engine instead of being moved at that time was moved at 2:30 A. M., in the morning, without any proper warning. He was put to work at 3835 by his superior, Siddell (p. 72) and told him to finish 3835 the time that was on the board for the engine to be moved was 3:00 A. M. The jury, therefore, could have found that the engine was moved at 2:30 A. M., while the deceased was so near thereto as to be in danger, although the deceased was unaware of said movement or intended movement without fall on his part relying upon the blackboard. The jury could have found that the engine was moved at 2:20 A. M. The deceased all during the work he was doing when he was killed would have to stand near the engine that killed him (p. 90, line 25) (line 22, p. 90).

20 The locomotive that killed the man took a train at 4:00 A. M. (p. 23, line 13), was to have been taken out at 3 o'clock in the morning (p. 23, line 23).

30 There was the usual absence of records in this case as in most cases of this kind tried (p. 25). The hostler who moved the engine went to the roundhouse (p. 37, line 23) and did not make any inspection which disclosed the presence near the engine of the man after killed (p. 27).

40 Distance between tank to tank is 3 feet (p. 33, line 34). The blood stains ^{ended} were thirty feet from

the roundhouse (p. 36). The warning the men got was from the blackboard (p. 40).

The hostler who propelled the killing engine was told not to take the engines out too early (p. 43, line 10). The jury could have found at the time on the blackboard 3 o'clock for the movement of the engine was moved at either 2:20 or 2:40 A. M. (p. 44, lines 18 to 30).

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As to the custom of the blackboard, see page 47. The hostler having been told not to move this engine too early, took it out in spite of the order in five minutes (p. 50, line 3).

As to missing records, see page 50, lines 35 to 40.

The killing was done between 2:30 and 2:40 A. M. (see p. 59, lines 8 to 10).

The fact that the engine was out earlier than it should have been is in the evidence of John Maloy, who is the turntable man (p. 60), and he was down in the pit of the turntable because he did not expect this engine out so early; because of this he did not hear the first signal (p. 62).

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The jury under this evidence was justified in finding the following facts: that the deceased was working on an interstate engine when he was killed; that he was killed because the engine was moved out of the roundhouse without any warning to him at a time other than that on the blackboard, which by reason of the custom of the roundhouse he had to rely on; that the hostler of the engine that killed him made a careless inspection because he was unaware of the presence of the man now deceased, although it would have been disclosed by a careful inspection, and that the deceased was either struck by an overhanging moving engine or was too close to the same, believing that it was stationary at the time it was moved.

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POINT 1.

A case in which the facts were very similar to the facts here (under the Interstate Act) the unexpected moving of an engine in a roundhouse is *Douda vs. Chicago R. R.*, 1141 Iowa, 82, 119 N. Y., 272.

10 As to the general principles see *Szary vs. Erie*, 253 U. S., 86; *Collins vs. Erie*, 253 U. S., 77. Many cases collected in 26 Negligence Compensation Cases Annotated, pages 117, et seq.

Whistles have no meaning in the roundhouse because engines are always whistling there from the place of the engine that killed the man meant nothing, the real warning was the blackboard and there was no notice to decedent of the engine (paragraph 4, point 1 of the appeal).

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It is said by appellant that the hostler made a careful observation. That is a clear begging of the question. If the decedant was working near the engine about to move the moving engine and the hostler did not see him, the jury could have found that it was not a careful but a careless observation.

In *McCombe vs. Public Service*, 95 N. J. L., 187, there was nothing but the circumstances of the body of Saunders under the car. In the *Adriance* case, 95 N. J. L., 185, nobody knows or could surmise from the evidence what happened. In the *Price vs. N. Y. C. R. R.*, 92 Id., 429, the citation is taken from the first trial of the *Price* case where there was no proof of any fact exclusive of presumption. In the instant case the facts are clearly proven as heretofore recited.

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Patton vs P. S., 227 Fed., 810 is the case of a pedestrian without any violation of any duty by

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defendant. In the instant case the facts show violation of duty, i. e., moving the locomotive at any time other than that on the blackboard and one-half hour earlier with the decedent working in close proximity thereto.

Point 2 of the defendant-appellant's brief is that at the time of the accident the decedent was not engaged in interstate commerce. The brief shows that when he was last seen alive he was at work and he was killed while at work or immediately after he had finished filling the grease cups in state of case heretofore. 10

In the Krysiak case it was clear that Krysiak had finished his employment. It was not clear in the instant case. If he was leaving the roundhouse when killed he would be clearly within the doctrine of Winfield vs. Erie. 20

The court would have charged the matter of law that decedent was engaged in Interstate Commerce but instead of that he left it to the jury which was all that the defendant could ask.

Grybowski vs. Erie, 89 L., 361;
Illanordo vs. Erie, 137 A., 917.

Point 5. The objection of the appellant to the Court's charge on contributory negligence is against the charge giving the defendant more than he should have been allowed, i. e., to reduce damages which the jury evidently did. 30

The second "Point V" of defendant's brief complains that there was no allegation in the complaint that the early moving of the engine without warning was alleged in the complaint. It is not necessary to plead evidence and what the complaint says is: 40

“* * * failed to use reasonable care * * *
to give warning of the movement thereof”
(p. 2, S. of C., referring to the killing engine).

10 Point 5. The number is used twice in the ap-
pellant's brief. The second 5 is as to evidence
objected to. “Did you take this engine out this
night at about the usual time you are accustomed
to take the engine out for this particular train?”
The exclusion of this question and the like is as-
signed for error, but all this matter was proved
elsewhere the exact time that the engine was taken
out, so that there was no lack of proof at to that.

20 The other question on page 24 of the brief had
to do with the hostler going to the blackboard.
Clearly this was relevant because the blackboard
was the pivot in the case. The blackboard was
what the defendant had furnished as a notice to its
workers around the engines as to the movement
of the engines. This was the custom of the round-
house. There was ample evidence and it was a
jury question. That it is clear that the blackboard
was used for this purpose, see page 48, line 20;
page 47, lines 10 to 40. Leaving time to be put
on the board as in this case 5 o'clock in the after-
noon by the foreman (p. 40, lines 1 to 20).

30 Bells and whistles going on all the time in warn-
ing (p. 42, lines 10 to 30). The time of the en-
gine that killed the man was put on the board be-
fore Kelly coming to work. He was assistant fore-
man (p. 46).

Austin vs. Penn. R. R., as to circumstantial evi-
dence:

40 “All that is required is that the circum-
stances be so strong that a jury may properly,

on grounds of probability rather than of certainty, exclude an inference favorable to the defendant'' (82 L., 416).

If the jury found decedent was working on an interstate engine and was killed by the moving of another engine in the vicinity of his work at an improper time without notice to him, then the jury could clearly have found that the master did not use reasonable care to supply him a safe place in which to work. The verdict in the case was very moderate and appellee insists finding for plaintiff is warranted and a much larger amount would be justified. 10

Respectfully submitted,

ALEXANDER SIMPSON, 20
Attorney of Plaintiff-Respondent.

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