

## New Jersey Court of Errors and Appeals

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REGINA LINCKS, Administratrix, &c.,	Petitioner, Appellant,	} On Appeal.
vs. ERIE RAILROAD COMPANY,	Respondent, Appellee.	

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### **BRIEF FOR PETITIONER, APPELLANT**

On September 24th, 1914, Henry W. Lincks, who resided at No. 12, Saint Paul's Place, Jersey City, was killed in the Erie Railroad Company yards at Jersey City. It is admitted that he was employed by the company at the time of his injury, that his wages were Sixty Dollars per month and that the company had notice of the injury (p. 14, p. 15). The deceased was struck by the breast beam of an engine which came from Fuller's Express Dock (p. 18). It was next to Four Pit which is a track that is dug out where engines are placed so the men can work under them. They lay engines there. They call it the Round House—The Farm (p. 19). Deceased filled cab lights, filled the steam

gauge light, water glass lights and the red light and white light and cleaned them with a piece of waste (p. 20). About 7:30 in the morning deceased was in the pit under track four (p. 22). Deceased was struck by the engine about 11:50 a. m. (p. 19). The duties of the deceased took him in and about and across the tracks, from one track to another. At the time he was struck there was an engine standing on Four pit, track four (p. 23). Engines on Four pit are put there to be repaired (p. 24). Deceased set his oil can on the tank of an engine which was standing on track number one. The engine which struck him came on track number two, as he was attempting to cross that track. He was walking towards the dispatcher's office (pp. 44-45). There is no testimony as to the last engine on which deceased worked nor as to the next engine on which he was to work.

It is insisted, because of its admission (p. 14), that the only question that can be raised by the prosecutor is the interstate commerce question.

As to this question the Court finds the facts as follows:

“I find that the said accident arose out of and in the course of the employment of said Henry W. Lincks; that the deceased at the time of the accident, was not engaged in a service which was part of interstate commerce, or commerce between any of the several states. I find that at times the deceased was engaged in preparing engines which did not leave the yards of the company at Jersey City, and known as drill or switch engines; that at times he was engaged in repairing engines that did not leave the State of New Jersey and which

were used in intrastate commerce; and at times he prepared engines used in interstate commerce. That at the time of the accident, the deceased was walking across the tracks of the respondent and while so doing and at the time of the said accident, he was not engaged in an act in furtherance of interstate commerce.”

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## POINTS

### I

**The petitioner in this case is entitled to recover irrespective of the Federal Act.**

The petitioner elected to recover under the New Jersey act and she is, therefore, not excluded from recovering under the New Jersey act, by anything in the Federal act. In *Rounsaville vs. Central R. Co.*, 94 Atl., 392, Justice Swayze says:

“The scheme is more like a pension scheme than a liability for a breach of contract, or damages in tort. The difference between the two kinds of legislation is illustrated in our act. Section 1 is an employer’s liability act similar to the act of Congress, and regulates the liability in a common-law action of tort. Section 2 creates and regulates the new statutory right. But for paragraph 8 of Section 2 there might have been a double recovery, a recovery for the tort in a common-law action, and a recovery of the statutory compensation by means of the statutory pro-

cedure. Nor would that double recovery have been illegal, however unjust it might be, and was in fact considered to be by the Legislature, for compensation by way of pension from the master is quite different in character from compensation by a tortfeasor, master, or third person, for a wrong not arising out of contract.

We think it clear that the act of Congress deals with an entirely separate matter from the act of our Legislature. No confusion would have arisen if the distinction recently pointed out by Justice Trenchard had been observed in the early days of this kind of legislation. *Gregutis v. Wac-lark Wire Works*, 92 Atl., 354."

If the Federal Act had the effect given to it by the New Jersey Supreme Court in its opinion of this case (p. 58) the Federal Act would be unconstitutional because it would impair the obligation of the contract under which the deceased worked for the Railroad Company. The New Jersey Act provides a pension and, therefore, is a part of that contract. The Supreme Court misconstrued and misinterpreted the Federal Act in finding that it excluded a recovery under the New Jersey Act.

*72 9th 10th 11th 12th 13th and 14th grounds of appeal  
respectfully urged as grounds*

*App. II*

*New Jersey R.R. Co. 15 At 154  
W. Field v. Erie R. Co. 96 At 394.*

**The deceased, at the time of the accident,  
was not engaged in interstate commerce.**

In the case of *Pierson vs. New York S. & W. R. Co.*, 85 At., 233, suit was brought under the Federal Liability Act:

"Defendant, a common carrier engaged in interstate commerce, having purchased

certain rails, after their arrival at destination caused them to be moved to the place where they were to be laid, and employed plaintiff and other servants to unload them from the cars. Plaintiff was injured by the dropping of one of the rails on his foot, due to the negligence of his fellow servants. Held, that such service was not work done in interstate commerce; and hence plaintiff could not recover under Federal Employer's Liability Act, April 22, 1908, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322).

In *Granger vs. Pennsylvania R. Co.*, 86 At., 264, it appears:

“The plaintiff was struck, while in the employ of the defendant, a railroad company, by a car running on the tracks of the defendant company, which were used for the transportation of interstate and intrastate commerce as the needs of the company required. The car, which struck the plaintiff and caused the injuries upon which his action was based, was not at the time being used for the purposes of transportation of freight, nor did it appear in the case that the movement of the car had any immediate relation to the making up of a train for the purpose of engaging in interstate commerce. At the time of the injury, the plaintiff was placing a cover over a switch mechanism which he had just oiled, according to a direction given him by his superior officer, and was standing so near the track that he was struck by the car. The right of the plaintiff to recover under his pleadings depended upon the question whether the

act of Congress, entitled 'An act relating to the liability of common carriers by railroad to their employers in certain cases' (*Act April 22, 1908, c. 149, 35 Stat., 65 U. S., Comp. St. Supp., 1911, p. 1322*) can be applied to these facts. HELD, that neither the car nor the plaintiff was engaged in interstate commerce within the meaning of the act evoked."

In *Van Brimer vs. Texas & P. Ry. Co.*, 190 Fed. Rep., 396, relief under the Federal Act was denied because, as stated by District Judge Russell:

"The plaintiff was a brakeman on a train of the defendant which contained cars being used for interstate shipments of freight. In the train was a car which was filled with merchandise destined for a point within the State. The shipment of this car originated in Texas and was to end in that state. When the plaintiff was injured, he was engaged in the work of completing the transportation of that intrastate car. He, with others, was doing the final work of landing that car at its destination and was doing no act towards furthering the interstate business of the railroad Company. Neither the railroad company nor the plaintiff nor any of his fellow employees were, at that time, engaged in commerce between any of the several states; but were engaging in an act in furtherance of the purely domestic and intrastate commerce of the defendant."

In the case of *Pederson vs. D. L. & R. R. Co.*, 197 Fed. Rep., 537, the Court says:

"The person in whose favor the liability is created or in the words of the statute,

the one who is employed by such carrier in such commerce, is confined to such employees as at the time of the injury have a real and substantial connection with the interstate commerce in which the carriers and their employees are engaged; for it will be noted, such construction does not by reason of the general character of their customary work draw an arbitrary line and confer the benefit of the act on certain employees, such as engineers, firemen, conductors, and brakemen, and exclude others, such as bridge builders, station employees and track laborers. On the contrary, it makes the relation of the employee's particular work to interstate transportation at the time the injury is sustained the test. This may be a difficult subject owing to the complicated character of a railroad business and illustrations may be misleading, but we think reflection will make it clear that the same kind of act may at one time be a part of interstate transportation, and, at another time, may have nothing to do with it. If, for example, the nature of an employee's occupation is such that he is sometimes helping to move interstate trains and again he is helping to move trains that are purely local, all that can be said as a general proposition is, that the Act of Congress protects him in one case and does not protect him in the other. The power of Congress is adequate in one case and does not exist in the other. It is inevitable that each situation must be considered by itself and must be tested by the requirements prescribed by Congress; was the Company en-

gaged in interstate commerce and was the employee employed in such commerce. If both of these questions are answered in the affirmative, the Act applies.

“A laborer engaged on a work train for the defendant company, injured while endeavoring to board a freight train on Sunday to get the mail for his camp, in compliance with the directions of his assistant foreman, HELD not engaged in interstate commerce, and not entitled to recover under the Federal Employer’s Liability Act.”

Meyers vs. Norfolk, N. W. Ry. Co., 78 S. E. (N. C.), 280:

“A railroad employee engaged in repairing a boiler which had been attached to and used in a wrecking train, and which was at the time lying in a round house, is not within the Federal Employer’s Liability Act.”

Ruck vs. Chicago M. & S. P. Ry. Co., 140 N. W., 1074, 153 Wis., 158.

“A fireman, whose run was wholly within the state, having oiled and prepared his engine, which was not then attached to any train, was killed while crossing the tracks to his boarding house for a personal purpose. His engine was to have hauled some freight which was interstate commerce, but the road upon which it operated was not an interstate carrier, though the lessee of the road was engaged in such commerce. HELD that the Federal Employer’s Liability Act (*Act April 22, 1908*, c. 149, 35 Stat., 65, U. S. Comp. St. Supp., 1909, p. 1171), which only applies to a carrier by railroad while

engaged in interstate commerce, and only to an employee suffering injury while employed in such commerce, did not apply, for the fireman was not then engaged in interstate commerce."

Zachary vs. North Carolina R. Co., 72 S. E., 858, 156 N. C., 496.

"A car which has just come in from an interstate trip and is being placed in the yard of a manufacturer at the time of plaintiff's injury, to be loaded for another interstate trip, was not in use in interstate commerce so as to authorize a recovery for the violation of the Act of Congress (March 2d, 1893), requiring that cars used in Interstate Commerce shall be provided with secure grabirons."

Campbell vs. Chicago, R. I. & P. Ry. Co., 149 Ill. App., 120, judgment affirmed, 90 N. E., 1106.

The case of *Illinois Central vs. Behrens*, 233 U. S., 478, holds:

"Here at the time of the fatal injury the interstate was engaged in moving several cars all loaded with *intrastate* freight, from one part of the city to another. That was not a service in *interstate* commerce, and so the injury and resulting death were not within the statute. That he was expected upon the completion of that task, to engage in another which would have been a part of *interstate* commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

## III

**The accident arose out of and in the course of the employment of deceased.**

There is no doubt that under the decisions in this state, the accident to deceased arose out of and in the course of his employment.

Houghten vs. Root, 35 N. J. L. J., 332.

Terlicki vs. Strauss, 36 N. J. L. J., 185,  
89 At., 1023.

Zabriskie vs. Erie Railroad Company,  
88 At., 824.

“Where decedent, in defendant’s employ at the time of his death, was found dead lying under a train with a hole six inches in diameter in his abdomen, the physical facts were sufficient to make out a *prima facie* case of accident.

“Where decedent had gone to his foreman in search of certain material, and while on such trip was killed and found lying under a train, it sufficiently appeared that his injury arose out of and in the course of his employment, within the Employer’s Liability Act (*3 Comp. St., 1910, pp. 3042-3044, Secs. 89-93*).

DeFazio vs. Goldschmidt, 88 At., 705.

It is respectfully insisted that the petitioner is entitled to recover and the decision of the Supreme Court should be reversed and the judgment of the Court of Common Pleas should be affirmed.

Respectfully submitted.

FRANK G. TURNER.

Attorney for and of counsel  
with Petitioner-Appellant.

NEW JERSEY

Court of Errors and Appeals.

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REGINA LINCKS, ADMX.,  
*Appellant,*

*vs.*

ERIE RAILROAD COMPANY,  
*Appellee.*

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*On Appeal from  
Supreme Court.*

**Brief in Behalf of Erie Railroad Company,  
Appellee.**

The appellant (hereinafter called petitioner) filed a petition in the Hudson County Court of Common Pleas to recover compensation under the New Jersey Workmen's Compensation Act (Chap. 93, Laws of 1911). The plaintiff's intestate was employed by the appellant (hereinafter called defendant) as an engine preparer in its Jersey City terminal, his duty being to fill the cab lights of the locomotives at that point. The engines of which he had charge were passenger engines. On the day of the accident (September 24, 1914) he started work at six o'clock A. M., and continued until 11.50 A. M., when he was killed while crossing one of the tracks on account of being struck by the breast beam of an engine moving through the yard on that track.

The Hudson Common Pleas entered judgment for the petitioner in the sum of \$7.20 per week for a period of 300 weeks (p. 18, ll. 20 30). Thereafter the defendant obtained a writ of certiorari for review of the judgment by the Supreme Court. The

latter Court reversed the judgment on the ground that at the time of the accident the defendant was engaging as a common carrier in interstate commerce, and the plaintiff's intestate was employed by him in such commerce, and that therefore the Federal Employer's Liability Act of 1908 controlled the rights and liabilities of the parties exclusive of the state statutes (pp. 58-59). Thereafter the petitioner took her appeal to this Court.

## Brief of the Argument.

### I.

**The petitioner did not sustain the burden of proof upon her to show that the accident arose out of and in the course of the employment of her intestate.**

Under the New Jersey Compensation Act, in order to entitle an employe or his representative to recover damages, it must appear that the personal injuries or death were caused "by accident arising out of and in the course of his employment." (Sec. 7 of Stat.)

The work upon which Lincks was engaged, *viz.*, filling the lamps which enable enginemen to see their water and steam gauges at night, was such that it was necessary for him to go about alone through the engine yard with his oil can, from engine to engine. He had been doing this during the morning upon which he was killed, but there is no evidence as to what he had done or what he was about to do at the time of his death. The testimony of a fellow employee in the yard, who was engaged as an apprentice working upon an engine, is all we have to go by as to what the deceased was doing at that time. This man noticed

Lincks walking along with his oil can between the tracks where the engines were standing and saw him set his can upon a locomotive and then start to walk across the nearby tracks, in doing which he was struck by a locomotive. No one knows where he was going or why he went in the direction he did, or what he intended to do when he started in that direction (p. 44, l. 30, *et seq.*).

The Court will not infer that the accident arose out of the employment (*Henry Steers, Inc. v. Dunnewald*, 85 N. J. Law, 449).

The Court therein stated:

“If we assume the latter as the more probable there is a conjecture, or a likely guess, no more. It does not reach the certainty of a logical inference, but even if such were the fact the best that could be said would be that the accident arose out of the course of the employment, and there would still be a failure of proof that it arose out of the employment.”

The burden of furnishing evidence from which such inference can be drawn rests upon the claimant. *Reimers v. Proctor Publishing Company*, 85 N. J. L., 441; *Bryant v. Fissel*, 84 N. J. L., 72.

Counsel for the petitioner cites several cases (see page 10 of his brief) in support of the question under consideration, but it is submitted that none of these are applicable to the case at bar.

In *Houghton v. Root*, 35 N. J. L. J., 332, the deceased was a general foreman of the excavating work and “he was supposed to see that everything was safe there around the work.” Following an electric storm a wire fell, and Mr. Houghton was

killed, due to an electric shock, said wire being a live wire. The Court said:

“Mr. Houghton was there representing the company, and it was part of his duty to see that the work was done, and, when apparently the men, or some of the men, could not proceed because of the wire dangling within three feet of the crane, he inspected the wire to find out ‘whether it was alive,’ to ascertain ‘the starting point and trace the wire along the street.’ While, as counsel contends, it may not have been his duty ordinarily to see that all the overhead electric wires were safe, in view of the suspension of the work due to the storm and the effect of the storm, I think it was his duty to make an inspection before ordering the men to proceed with the work.”

In *Terlecki v. Strauss & Co.*, 36 N. J. L. J., 185, the Court said:

“In my opinion the accident was occasioned by a condition which is inherent in the work that the claimant was called upon to do, and there was nothing unreasonable in the action of the petitioner at the time it occurred; it was incident to the employment, and in my judgment the accident arose out of and in the course of the employment.”

In the same case before the Supreme Court, 89 Atl., 1024, 85 N. J. L., 454, Swayze, J.:

“In fact, it is a necessary implication of the

contract of employment that the workman shall come to his work and shall leave with reasonable speed when the work is over. The preparation reasonably necessary for beginning work after the employer's premises are reached and for leaving when the work is over is a part of the employment. A workman is none the less in the course of employment because he is engaged in changing his street clothes for his working clothes, or in changing his working clothes for his street clothes."

In the *Zabriskie* case, 92 Atl., 385; 86 N. J. L., 266, there was positive evidence that at the time of the accident the decedent was going on a duty, which was necessarily incident to the proper execution of his duties. In the case of *DeFazio v. Goldschmidt*, 88 Atl., 705, (aff. 95 Atl., 549), cited by counsel, there was undisputed evidence that the decedent had gone to his foreman in search of certain material and that it was while on such trip he was killed.

There is absolutely no evidence as to where the decedent in this case was going, or for what purpose, or that he was going anywhere for any purpose incidental to his duties. It is respectfully submitted that the cases so cited by counsel do not support his contention in this regard, nor are they applicable to the case at bar.

## II.

The conclusion of the Supreme Court that at the time of the accident the defendant was engaging as a common carrier in interstate commerce and that the plaintiff's intestate

**was employed by it in such commerce was justified by the evidence; and, in so far as such conclusion is to be considered as a finding of fact, it cannot be reviewed by this Court.**

The finding by the Judge of the Common Pleas, as stated in his "conclusion," namely: "I did not find in this case that the deceased was engaged in interstate commerce, or that his injuries occurred while he was employed in such commerce" (p. 15, l. 10), is not controlling upon the reviewing Court in a case where the facts on this point are substantially undisputed—as they are in the present case. The Supreme Court had both the right and the duty to determine from the facts what was the legal conclusion to be derived therefrom. It was so decided by this Court in *Hully v. Moosbrugger*, 95 Atl., 1007, wherein it was held that, although the findings of the Common Pleas as to the facts are conclusive on review, nevertheless, "the law arising upon the ascertained facts is a question for the Court reviewing the decision."

In the present case there was no dispute as to the facts. Hence, the finding of the Common Pleas was a proper subject matter of review by the Supreme Court. The latter Court held that the defendant was engaging in interstate commerce and the employe was employed in such commerce (p. 59, ll. 30-35). If this finding of the Supreme Court be considered as a finding of *fact*, then it is, of course, conclusive on this Court.

*Lehigh Coal Co. v. Junction*, 68 Atl., 806.

*Yellow Pine Co. v. Board of Assessors*, 70 N. J. L., 590; 72 N. J. L., 182.

*Eugene Dubelbeiss v. West Hoboken*, 82 N. J. L., 683.

*Erie R. R. Co. v. Board of Public Utility Commrs.*, 85 N. J. L., 420.

On the other hand, if the finding of the Supreme Court is to be as a finding of law, then of course it may be reviewed by this Court; and on such a review we submit that the conclusion of the Supreme Court was correct as a matter of law.

The deceased was employed in performing a portion of the work necessary in order to run locomotives over respondent's railroad. There are numerous cases that hold that employees engaged in taking care of agencies of interstate commerce, such as locomotives, cars, engines, switches, etc., are engaged in interstate commerce. The engines entering and leaving the Jersey City station during the hours which deceased worked on the day of his death, together with the numbers of their trains, the time of arrival and departure, and the origins and destinations of the same, are shown in Exhibits R 2 and R 3 (pp. 51-4). It is undisputed that many of these locomotives left the State of New Jersey while on their runs, and we maintain that in the case of all of them they were engaged in interstate commerce. The principal business done on passenger trains coming into Jersey City is the carrying of through interstate passengers between points in New Jersey and New York City, and, therefore, the locomotives and trains arriving with such passengers are just as much engaged in interstate commerce as if they proceeded across the North River to New York City on a bridge instead of transferring their passengers to ferry boats or tube trains.

As we have stated, there is nothing in the testi-

mony which shows what was the last act of the deceased in connection with his employment, or what he was about to do in that regard, but we submit that if he was engaged in the service of the company at all, his employment at the time would relate to his entire duties for the day. Many cases have been decided in interpreting the statute, in citing which we have endeavored to quote those which bear most closely upon the facts in the case at bar.

The Federal Statute of 1908 provides that "every common carrier by railroad, while engaging in commerce between any of the several States and territories," etc., "shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative," etc. The defendant in this case was clearly engaged in commerce between the several States and we submit that the deceased was employed by the respondent in such commerce at the time of the accident.

In *Perry v. Illinois Central R. R. Co.*, 143 N. W., 724 (Minnesota), plaintiff was a conductor whose regular run was between two points in the same State. The trains in his charge were almost wholly, but not entirely, composed of interstate shipments. Plaintiff was injured while on the "return" trip, and on this particular trip it so happened there were no loaded cars to be taken and all that the conductor had on the train were some flat cars on which was loaded a pile driver belonging to the company. Held, that he was engaged in interstate commerce.

In *Central R. Co. v. Colasurdo*, 192 Fed., 901 (Circuit Court of Appeals, Second Circuit), held that the Federal Statute applied to a case where a

track foreman was repairing a switch in defendant's terminal, over which interstate and intrastate commerce was continually transported.

In *Lamphere v. Oregon, etc., R. Co.*, 196 Fed., 336 (Circuit Court of Appeals, Ninth Circuit), the statute was applied to the case of a locomotive fireman who was ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who was killed by the negligence of another crew while he was approaching the station.

In *Darr v. Baltimore, etc., R. Co.*, 197 Fed., 665, an engine used in hauling interstate trains had reached the end of its line and was on a fire track to await the time for starting on the return trip. Plaintiff was a repair man and was sent to replace a bolt which had been lost from the brakeshoe. Held, the statute applied. In this case the Court put its decision on the ground that the engine at the time of the accident was "habitually" used in interstate commerce.

In *Northern Pacific R. Co. v. Maekrl*, 198 Fed., 1 (Circuit Court of Appeals, Ninth Circuit), an employee of interstate railroad company was injured through the negligence of a fellow servant while he was working in a railroad shop in the repair of a car which was used in both interstate and intrastate transportation as occasion might arise, and had been so used for a long time. Held, that the Federal Statute applied, citing many other cases, including *Southern R. Co., v. U. S.*, 222 U. S., 20; 56 L. Ed., 72.

In *Pederson v. D. L. & W. R. R. Co.*, 229 U. S., 146; 57 L. Ed., 1125, an employe of an interstate railroad carrier was killed while carrying a sack of bolts to be used in repairing a bridge which was

regularly used in both interstate and intrastate commerce. Held, that the Federal Act applied. In this case the Supreme Court cited with approval the above cases of Darr, Maerkl and Lamphere. The Lamphere case, perhaps, goes further than any other decision, as at the time of the accident the fireman had not actually started his work; but he was, nevertheless, held entitled to the benefit of the statute.

Another recent decision of the U. S. Supreme Court is *St. Louis, etc., R. Co. v. Seale*, 229 U. S., 156; 57 L. Ed., 1129, in which the Federal statute was held to apply to the case of an accident to a yard clerk who was killed while proceeding through the yard to meet an interstate incoming freight train for the purpose of taking down the numbers of the cars, inspecting the seals, and checking them with the conductor's list, although it appeared that the yard was the terminal for the particular train and none of the cars were going to any point beyond that point.

The Court below relied upon the recent case of *Illinois Central R. R. Co. v. Behrens*, 233 U. S., 473, in determining that the deceased was not engaged in interstate commerce, nor that he was killed while he was employed in such commerce. The facts in the Behren's case are somewhat more fully set forth in the opinion of the Circuit Court of Appeals in remanding the cause with instructions to set aside the verdict in accordance with the views expressed by the United States Supreme Court. See *Illinois Central R. R. Co. v. Behrens*, 217 Fed., 967. The Circuit Court of Appeals there sets forth the facts as follows:

“John Joseph Behrens was killed in a head-on collision between trains of the Illin-

ois Central Railroad and of the New Orleans Terminal Companies during the night of November 28, 1909, in the city of New Orleans, State of Louisiana. The deceased was at the time of his death in the employ of the Illinois Central Railroad Company as a fireman, and was one of a crew attached to a switch engine that operated exclusively within the city of New Orleans, State of Louisiana. The general employment of said switching crew using said engine was to handle over the company's tracks and other tracks in the said city of New Orleans both intrastate and interstate commerce indiscriminately; that is, they might on one trip handle cars that were brought into the city of New Orleans from without the State of Louisiana, or a mixed train containing cars, either loaded or empty, brought into the city of New Orleans from without the State of Louisiana, and cars loaded with freight moving entirely within the State of Louisiana, and on another trip a train made up of cars, either empty or loaded with freight originating wholly within the State of Louisiana and moving to a point within said State.

“At the time of the collision which resulted in Behrens' death, the train on which Behrens was working consisted of the said switch engine and 13 cars loaded with sugar that originated in the State of Louisiana and were destined to another point within the State of Louisiana, namely, Chalmette, La. At Chalmette said

switching engine and crew were to take up other cars either loaded or empty, belonging to various railroad companies, and to take them to Harrahan, La., and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State."

We submit that there is a clear distinction between cases of the character cited above where the employe was engaged in various pursuits related in general to the interstate character of the employment and the situation in the Behrens case where at the very instant the accident happened the deceased was clearly engaged in an act which was part of local transportation within the State of Louisiana.

If, for instance, the deceased had been engaged at the time of the accident filling the lamps on a locomotive whose sole duty was that of drilling empty cars in the Jersey City yard, and which never went out of the State or moved cars engaged at the time in interstate commerce, he would not come under the protection of the Act of Congress and therefore the respondent would be liable under the New Jersey Compensation Act. On the other hand, if he had been engaged in filling the lamps on a locomotive which did habitually move in interstate commerce, he would have come within the purview of the Federal Act.

In this case, he was not engaged at the time in performing any positive act of one kind or the other, but he may have been performing a general act with respect to his entire employment. This brings us directly face to face with the question of whether a general act in connection with the em-

ployment of one whose activities carry him within the law can be related to the entire employment so as to bring the employed under the Federal Act with the consequence that state remedies are excluded. We submit that that is exactly what the Court has done in a number of cases which we have cited and such cases can be reconciled with the opinion in *Illinois Central R. R. v. Behrens* (supra) under the theory which we have just set forth. A particularly enlightening case is that of *North Carolina Ry. v. Zachary*, 232 U. S., 248.

Mr. Justice Pitney for the Supreme Court, sets forth the facts as follows (p. 254):

“Plaintiff’s intestate, being in the employ of defendant’s lessee, and engaged at the Selma switchyards in the discharge of his duties as fireman upon Engine No. 862, about eight o’clock p. m., on the date mentioned, after inspecting, oiling, firing and preparing the engine for starting on a trip from Selma to Spencer, N. C., attempted to cross certain tracks that intervened between the engine and his boarding-house, which was located a short distance away; that another engine, No. 716, was standing upon a sidetrack in such a position as to shut off intestate’s view of the main track; that No. 716 had its blower on, and was making a noise so loud that intestate could not hear a third engine—No. 1551, the shifting engine used in the yards—which at this time was running backward at a reckless and dangerous rate of speed, without headlight and without an adequate and competent crew; and that as intestate stepped

from the track in the rear of Engine No. 716 and was about to step upon the main line in the attempt to cross it, he was struck and killed by the shifting engine."

The defendant, on the trial, set up the defense that deceased was engaged in interstate commerce. The United States Supreme Court upheld this contention. Justice Pitney, saying with reference to the deceased's absence from his engine (p. 260):

"There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

The petition in the case at bar argued that there was a justifiable inference that the deceased was walking through the yard for some purpose connected with his employment, particularly since he was more or less of a "free lance" and worked by himself; if this premise be granted we insist that under the Zachary case just cited the deceased is clearly engaged in interstate commerce. If he was on duty at the time of the accident such duty must be assigned to his employment as engine preparer on engines about to be used in interstate commerce.

The case of *Missouri, Kansas & Texas Ry. Co. v. United States*, 231 U. S., 112, arising under the Hours of Service Act, was cited in the Zachary case (supra), with approval on the point of the continuance of the employment even though the employee be not engaged in some act in furtherance

of his duties. In that case, p. 119, the employes in question were waiting, doing nothing, while their engine was sent off for water and repairs, yet the Court holds that they were on duty.

In determining the question whether the injured employe was engaged in interstate commerce his general duties must be considered. *Montgomery v. Southern Pacific Co.*, 64 Oregon, 297; 131 Pac., 507, 47 L. R. A. (N. S.), 13.

In the last cited case it was held that a member of a switching crew, injured while attempting to move on a switch a tank car loaded with oil, for use both on switch engines and engines engaged in interstate commerce, is himself engaged in such commerce.

A somewhat similar case is *Horton v. Oregon, Washington R. R. etc. Co.*, 72 Wash., 503; 130 Pac., 897; 47 L. R. A. (N. S.), 8, where it was held that an employe whose duty it was to pump water to be used by engine both for interstate and intrastate commerce came within the Federal statute while he was proceeding from his home to his place of work upon a hand car furnished for that purpose. The decision is put upon the ground that a supply of water was necessary for the movement of trains and that therefore there was a "real and substantial" connection of the employment with interstate commerce.

The Court below determines what both petitioner and respondent freely admitted, that the work of the deceased was of a mixed character and related to both interstate and intrastate commerce, but took exception to the statement of counsel for respondent that it must clearly appear that the deceased was engaged solely in intrastate commerce at the time of the accident in order to recover.

This amounted to saying that the burden of proof was on respondent to show that the duties of the deceased were interstate in character and that all petitioner needed to show was the employment and the occurrence of the accident. We submit that such is not the law and that the burden of proof is upon the petitioner. The question of burden of proof was considered by the Supreme Court of Pennsylvania in *Hench v. Pennsylvania R. R. Co.*, 91 Atl., 1056. Here plaintiff endeavored to recover under the Federal act for the death of her husband, but the Court held that the burden of proof was upon plaintiff to show that decedent was engaged in interstate commerce or in its instrumentalities at the time of the accident, and that evidence merely showing that from time to time various cars containing both interstate and intrastate commerce were passing through the yard in which the accident occurred created no presumption that the cars being shifted at the time of the accident were intended for use in interstate commerce. Such being the law with respect to the proof necessary for a recovery under the act, we contend that the converse of the rule therein set forth is true, and that it was necessary in the case at bar for the petitioner to prove that decedent was occupied solely in intrastate commerce in order to recover under our State act, for under the decisions we have quoted any participation in interstate commerce, however small, excludes remedies under State acts.

Indeed, the Pennsylvania case merely follows the general rule of law on the subject of burden of proof, and that same rule would put the burden of proving the necessary facts for the application of the State act upon the petitioner. See also *Greg v. Chicago, &c., R. Co.*, 142 N. W., 505; *Bay v.*

*Merrill Lumber Co.*, 211 Fed., 717; *Ismura v. Great Northern R. Co.*, 58 Wash., 316; 108 Pac., 774.

In the recent case of *Pittsburg, etc., R. Co. v. Glinn*, 219 Fed., 149 (Circuit Court of Appeals, Sixth Circuit), a brakeman in a switching crew was killed while throwing a crossover switch to enable a locomotive, without cars, to cross from one track to another. Held, that he was engaged in interstate commerce. We quote from the opinion as follows (*italics ours*):

“Did the proof sufficiently tend to show that Morford was engaged in interstate commerce? At the moment, the switch engine was not hauling any cars, and so the true character of the employment can be determined only by a broader view. *The evidence showed that the railway company, in and about these yards, was continuously and indiscriminately hauling intrastate and interstate freight, and that, in this part of the work, no distinction whatever was made between the two classes*” (p. 149).

A recent decision in this State on this point is *Grybowski v. Erie Railroad Co.*, 95 Atl., 764. The Supreme Court held that an employe, who was employed generally in looking after an ashpit, used indiscriminately by engines engaged in both interstate and intrastate commerce, came within the protection of the Federal act even though there was no clear proof that at the time of the accident the particular engine was then engaged in interstate commerce. The Court said:

“The proofs show that the ash pit was a part of the plant of the defendant

company, that it was a necessary part of that plant, and that it was used both in interstate and in intrastate commerce. The keeping of it clean and thereby maintaining its effectiveness was required equally for both kinds of commerce, just as the keeping in repair of tracks or bridges which are used for both kinds of commerce is a necessary incident to each of them. In *Pedersen v. D., L. & W. R. R. Co.*, 229 U. S., 146, 33 Sup. Ct., 648, 57 L. ed., 1125, Ann. Cas., 1914C., 153, it was held that:

“ ‘One engaged in the work of maintaining tracks and bridges in proper condition after they have become and during their use as instrumentalities of interstate commerce is engaged in interstate commerce, and this, even if those instrumentalities are used both in interstate and intrastate commerce.’ ”

“ ‘And the application of this principle led the Court to hold that an employee who was injured while repairing a bridge which was so used, by being run down by an intrastate passenger train, was entitled to maintain an action under the Federal Statute. (Note: It is to be observed that the syllabus of the cited case shows that the train which ran down the employee was an interstate train. The body of the opinion, however, page 150 of 229 U. S., shows this statement to be inaccurate and that the train was an intrastate one.) Although in the *Pedersen* case it was conceded that the rail-

road company was engaged in interstate commerce at the time of the occurrence of the accident, the principle of the decision would necessarily have compelled such a finding, even in the absence of the concession, for the plaintiff could not, at the time of the accident, have been employed by the carrier in such commerce unless the latter at the same time was engaged therein. Under the law as laid down by the cited case, therefore, and which is controlling upon us, the present case comes within the Federal statute.

This decision was affirmed by this Court under date of June 19, 1916, on the opinion below.

We submit that these cases are conclusive on the proposition that at the time of the accident the defendant was engaging as a common carrier in interstate commerce and the plaintiff's interstate was employed by it in such commerce.

In the brief filed in behalf of the petitioner, the principal New Jersey cases relied upon are *Pierson v. N. Y. S. & W. R. R. Co.*, 85 Atl., 233, 83 N. J. L., 661; and *Granger v. Pennsylvania R. R.*, 96 Atl., 264, the latter being based upon the opinion in the former case. Both of these cases were based upon the decision of the U. S. Circuit Court of Appeals for the Third Circuit, in *Pederson v. Delaware, etc., R. R. Co.*, 197 Fed., 527—which case was reversed on writ of error to the U. S. Supreme Court, and the facts appearing therein were held to constitute an employment in interstate commerce. See 229 U. S., 146.

Counsel also cites the case of *Zachary v. North Carolina R. R. Co.*, 72 S. E., 858, 156 N. C., 496,

overlooking the fact that this case was reversed by the U. S. Supreme Court. See *North Carolina Ry. v. Zachary*, 232 U. S., 248, quoted *supra*.

We also call attention to several recent cases in the U. S. Supreme Court as follows:

In *Seaboard Air Line v. Koennecki*, 239 U. S., 352-355, Justice Holmes, speaking for the U. S. Supreme Court, said:

“In this case, as deceased was engaged in distributing cars from an interstate train, and clearing the track for another interstate train, he was engaged in interstate commerce.

“The possibility that a local train might, before arrival at final destination, where the accident occurred, have dropped all interstate cars, and taken up only local cars, is too remote to warrant withdrawal of a case under the Employers’ Liability Act from the jury.”

In *Chicago, Rock Island Ry. v. Wright*, 239 U. S., 548, it was said:

“As the injuries resulting in the intestate’s death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company’s responsibility was governed by the Employers’ Liability Act of Congress, c. 149, 35 Stat., 65; c. 143, 36 Stat., 291, and as that *act is exclusive and supersedes State laws upon the subject*, it was error to submit the case to the jury, as if the State act were controlling. *Wabash R. R. v. Hayes*, 234 U. S., 86, 89, and cases cited.”

In *Shanks v. D., L. & W. R. R. Co.*, 239 U. S., 556-558, the Court said:

“Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States*, 196 U. S., 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it.”

To the same effect see *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, U. S. Adv. Ops., 1915, p. 517.

The Supreme Court based its decision upon the Zachary case, in the U. S. Supreme Court, *supra*. We submit that its decision in this respect was correct. The only remaining question for consideration is whether, in a case to which the Federal statute applies, but where the accident happens *without negligence*, the Federal statute is exclusive of any recovery under a State Compensation Act.

### III.

**The Federal statute is exclusive of any proceedings under the State Compensation Law even though the accident happened without negligence.**

This is the exact point that was considered by this Court in the case of *Winfield v. Erie R. R. Co.*,

96 Atl., 394. The decision in that case was adverse to our contention. We presume it will be regarded as binding in the present case, although we respectfully submit that it is directly the contrary to other well considered decisions on the same subject.

See *Smith v. Industrial Accident Commission*,  
147 Pac., 600.

*Staley v. Illinois Central R. Co.*, 109 N. E.,  
342.

*Jarvis v. Daggett*, 151 Pac., 648.

*Schuede v. Zenith S. S. Co.*, 216 Fed., 566.

It should be stated in this connection that the judgment of this Court in the Winfield case is now under review by the United States Supreme Court, the argument thereon being had on March 1, 1916.

Up to the present time (July 1, 1916) no decision has been announced by the United States Supreme Court on this subject, and we therefore respectfully suggest that the decision in the present case be withheld until a decision is announced in the Winfield case, as of course the ruling of the United States Supreme Court on that question (the matter being one of the construction of a Federal statute) would be controlling.

COLLINS & CORBIN,  
Attorneys of Defendant.

GEO. S. HOBART,  
Of Counsel.

## INDEX

	Page
Notice of Appeal . . . . .	1
Order on Reversal of Judgment . . . . .	4
Writ of Certiorari . . . . .	5
Allocatur . . . . .	6
Return . . . . .	6
Petition . . . . .	7
Order for Hearing . . . . .	10
Answer . . . . .	10
Conclusion . . . . .	13
Determination and Rule for Judgment . . . . .	15
Motion to dismiss petition . . . . .	30
Reasons . . . . .	56
Opinion . . . . .	58

### TESTIMONY

#### *Petitioner's:*

Regina Lincks, Direct . . . . .	20
George F. Kunz, Direct . . . . .	23
Re-called: Direct . . . . .	33

#### *Respondent's:*

William Thierstein, Direct . . . . .	31
Bernard Gately, Direct . . . . .	37
Cross . . . . .	48

Louis Dimmock,	Page
Direct . . . . .	49
Cross . . . . .	50

EXHIBITS

	Offered Page	Printed Page
Exhibit R-2—Schedule showing train, departure, engine and destination of trains westbound from Jersey City from 6 a. m. to 12 noon Sept. 24, 1914 . . . . .	39	51
Exhibit R-3—Schedule showing train, engine, time turned, arriving from, of trains eastbound at Jersey City from 6 a. m. to 12 noon Sept. 24, 1914 . . . . .	45	53

Supreme Court  
OF THE  
State of New Jersey

**Notice of Appeal**

NEW JERSEY SUPREME COURT

REGINA LINCKS, Administratrix  
of Henry W. Lincks.  
Petitioner-Appellant,  
vs.  
ERIE RAILROAD COMPANY,  
Respondent-Defendant.

20

To COLLINS & CORBIN, Attorneys of Respondent-Defendant.

TAKE NOTICE, that the petitioner, REGINA LINCKS, Administratrix of HENRY W., LINCKS deceased, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

(1) Because the New Jersey Supreme Court reversed the judgment of the Hudson County Court of Common Pleas in this cause.

(2) Because the New Jersey Supreme Court refused to sustain and affirm the judgment in 40

## Notice of Appeal

this cause of the Hudson County Court of Common Pleas.

(3) Because the New Jersey Supreme Court held that the cause of action herein was governed by the Federal Employers Liability Act of 1908 to the exclusion of the State statutes.

(4) Because the New Jersey Supreme Court held that the cause of action herein was not governed by Chapter 95 of the Session Laws of New Jersey of 1911 being "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," and the supplements thereto and the amendments thereof.

(5) Because HENRY W. LINCKS, the deceased, at the time of the accident which resulted in his death, was not employed by the respondent in interstate commerce.

(6) Because the respondent ERIE RAILROAD COMPANY in that part of its business out of which arose the accident that caused the death of HENRY W. LINCKS, was not engaged in interstate commerce at the time it caused the death of the said HENRY W. LINCKS.

(7) Because the judgment of the Supreme Court was contrary to law, erroneous and defective.

(8) Because the New Jersey Supreme Court misconstrued and misinterpreted the laws of the United States.

## Notice of Appeal

(9) Because the New Jersey Supreme Court by its judgment violated the constitution of the United States.

(10) Because the New Jersey Supreme Court decided contrary to Section 2 of Article 6 of the Constitution of the United States: 10

“This constitution, and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the Supreme Law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

(11) Because the New Jersey Supreme Court by its judgment deprived petitioner-appellant of her property without due process of law in violation of the Constitution of the United States. 20

(12) Because the New Jersey Supreme Court by its judgment denied to petitioner-appellant the equal protection of the laws, contrary to the Constitution of the United States.

(13) Because the New Jersey Supreme Court by its judgment abridged the privileges and immunities of the petitioner-appellant contrary to the Constitution of the United States. 30

(14) Because the New Jersey Supreme Court by its judgment impaired the obligation of the contract under which the respondent, Erie Railroad Company was bound to the petitioner-appellant.

FRANK G. TURNER,  
Attorney and of Counsel with  
Petitioner-Appellant. 40

**Order on Reversal of Judgment**

NEW JERSEY SUPREME COURT

JUNE TERM, 1915.

10	REGINA LINCKS, Administratrix of Henry W. Lincks, de- ceased, Petitioner-Defendant, vs. ERIE RAILROAD COMPANY, Respondent-Prosecutor.
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On Certiorari from Hudson County Court of  
Common Pleas.

20 This cause having been duly argued at the  
June Term, 1915, of this Court by Collins &  
Corbin, of counsel for respondent-prosecutor, and  
Frank G. Turner of counsel for petitioner-defend-  
ant, and the Court having inspected the proceed-  
ings of the judgment returned with the certior-  
ari in this cause and the reasons assigned for re-  
versal.

30 It is thereupon, on this ninth day of July  
in the year of our Lord one thousand nine  
hundred and fifteen ORDERED that the judg-  
ment of the said Hudson County Court of Com-  
mon Pleas be in all things reversed, set aside and  
for nothing holden, and said record is hereby  
remitted to the Court below to be proceeded with  
according to law.

Entered July 10, 1915  
on motion of

40 COLLINS & CORBIN,  
Attorneys of Respondent-Prosecutor.

**Writ of Certiorari**

(Returnable April 3, 1915.)

NEW JERSEY, SS:

The State of New Jersey, to Honorable  
 George G. Tennant, Judge of the  
 (Seal) Court of Common Pleas, County of 10  
 Hudson, and John F. Crosby, Clerk  
 of said Court.

## GREETING:

We being willing, for certain reasons, to be certified of and concerning a certain order, proceedings and determination made and rendered by George G. Tennant, Esquire, Judge of the Court of Common Pleas in and for the County of Hudson, which determination was filed with the Clerk of the said Court on January 8, 1915, in certain 20  
 proceedings brought on behalf of Regina Lincks, petitioner, against Erie Railroad Company, defendant, to recover compensation under an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation there- 30  
 under," approved April 4, 1911, do command you, that the said order, proceedings, determination and judgment, together with all things touching and concerning the same, as fully as before you they remain or are in your custody or control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the third day of 40

## Return

April, 1915, that therein may be done what of right and according to law ought to be done.

WITNESS, William S. Gummere, Chief Justice of our Supreme Court at Trenton, aforesaid, this fifteenth day of March, 1915.

10

COLLINS & CORBIN,  
Attorneys.

Wm. C. Gebhardt,  
Clerk.

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**Allocatur**

I allow this writ. Let it be sealed.  
Dated, March 13, 1915.

20

C. W. PARKER,  
J. S. C.

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**Return**

The answer of George G. Tennant Esq., Judge of the Court of Common Pleas, holden in and for the County of Hudson, John F. Crosby, Clerk of said Court within named, the record and proceedings of the plaint whereof mentioned is within made with all things touching the same we certify to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed as within we are commanded.

30

GEORGE G. TENNANT,  
Judge.

Attest:  
John F. Crosby,  
Clerk.

40

**Petition***(Filed, October 9, 1914.)*HUDSON COUNTY COURT OF COMMON  
PLEAS

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 REGINA LINCKS, Administra-  
trix of Henry W. Lincks, De-  
ceased,

vs.

 ERIE RAILROAD COMPANY,  
Respondent.
 

---

10

} Petition.

*To the Judge of the Hudson County Court of  
Common Pleas:*

20

Your petitioner, Regina Lincks, administratrix of the estate of Henry W. Lincks, deceased, respectfully shows:

That Henry W. Lincks, the husband of your petitioner, was killed on the twenty-fourth day of September, 1914, while in the employ of the Erie Railroad Company, in an accident arising out of and in the course of his employment. That he entered the employ of the respondent on September third, 1914, and continued therein until his death. That the employment consisted of that of an engine tender or laborer, and at the time of the accident he was engaged in his duties, and while alighting from one engine he stepped on the adjacent tracks and was struck by an engine traveling in an opposite direction, and his death was caused thereby. The said accident occurred in the railroad yards of the defendant at Jersey City.

30  
40

## Petition

That the said Henry W. Lincks left him surviving your petitioner, his widow, and three children, Minnie Louise Lincks aged five years; Norwood Philip Lincks, aged four years, and Dorothy Elizabeth Lincks aged eight months, all of whom reside at Jersey City, New Jersey, and all of whom are actual dependents of the deceased at the time of his death.

That at the time of the said accident, the deceased was receiving from the respondent a salary in the sum of sixty dollars per month, or \$2.14 per day.

That the funeral expenses of the deceased amounted to the sum of about \$200.

That on the fifth day of October, 1914, your petitioner was duly appointed administratrix of the goods and chattels, rights and credits of the said Henry W. Lincks, deceased, by the Surrogate of the County of Hudson.

Your petitioner shows that the said defendant had knowledge of the occurrence of the said injury whereby the death of the said Henry W. Lincks was caused. That your petitioner is the surviving parent of the said infant children of the deceased.

Your petitioner claims compensation on behalf of herself and all others entitled thereto under the terms of "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, fixing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," Chapter 95 of the Laws of 1911 and the supplements thereto and amendments thereof.

## Petition

Your petitioner further prays that your Honor will fix a time and place for the hearing of the dispute between your petitioner and the said respondent, in accordance with the statute; and that your Honor will hear and determine said dispute in a summary manner and fix the amount of compensation to which your petitioner is entitled on behalf of herself and others. 10

And your petitioner will ever pray, etc.

REGINA LINCKS,  
Petitioner.

State of New Jersey, }  
County of Hudson, } ss:

REGINA LINCKS, being duly sworn according to law, on her oath deposes and says that she is the petitioner named in the foregoing petition, and has read the same and knows the contents thereof; that the said petition is true except as to those matters therein stated to be upon information and belief and as to those matters she believes the said petition to be true. 20

REGINA LINCKS.

Subscribed and sworn to before me this 5th day of October, 1914. 30

Helen M. Lasslett,  
Notary Public of New Jersey.

### Order for Hearing

(Filed, October 9, 1914.)

Application having been made by Frank G. Turner, Attorney of the Petitioner, it is ordered  
 10 that the hearing in this proceeding be and the same is hereby fixed for Friday, the 6th day of November, 1914, at the Court House in the City of Jersey City at ten o'clock in the forenoon.  
 Dated Oct. 9, 1914.

GEORGE G. TENNANT,  
 Judge.

Filed Clerk's Office,  
 Oct. 9, 1914,  
 Hudson County, N. J.  
 20 John F. Crosby, Clerk.

---

### Answer

(Filed, October 23, 1914.)

The answer of Erie Railroad Company, respondent, shows:

- 30 1. It admits that Henry W. Lincks was killed on the 24th day of September, 1914, while in its employ, and that he entered its employ on September 3, 1914, and continued therein until his death, and says that his employment consisted of that of engine repairer, and that said accident occurred in the railroad yards of this respondent at Jersey City and resulted in his death.  
 40 It denies that he was injured in an accident arising

## Answer

out of and in the course of his employment, and that he was alighting from one of the engines of respondent and stepped on the adjacent track and was struck by an engine traveling in the opposite direction.

2. It has no knowledge as to the widow and children said Henry W. Lincks left him surviving. 10

3. It admits that at the time of said accident he was receiving the sum of sixty dollars per month as salary.

4. It has no knowledge as to the amount of the funeral expenses of deceased.

5. It has no knowledge as to the appointment of an administratrix of the estate of the deceased. 20

6. It admits that it had knowledge of the accident which resulted in the death of said Henry W. Lincks, but has no knowledge as to the petitioner being the surviving parent of his infant children.

7. It denies that the petitioner has a right to compensation on behalf of herself and others under "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," and the supplements thereto and amendments thereof. 30

8. Further answering, this respondent says that at the time of said accident said Henry W. 40

## Answer

Lincks had temporarily abandoned his duties as engine repairer for this respondent and was walking along this respondent's tracks, after having left his oil can with which he was engaged in filling lamps on engines, and away from the location where he was supposed to perform his duties and that said accident did not arise out of and in the course of his employment.

10  
20  
30  
9. Further answering, this respondent says that at the time of the accident set forth in the petition, this respondent was engaged in commerce between and among the several states and territories of the United States, and also between the several states and territories of the United States and foreign nations, and that said Henry W. Lincks was employed by it as such carrier in such commerce, and that the legal rights of the petitioner and this respondent are determined exclusively by the Act of Congress of the United States entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and the supplements and amendments thereof, and that therefore this Court and the Judge thereof has no jurisdiction to entertain the petition in this matter or to make any order thereunder.

COLLINS & CORBIN.  
Attorneys for Respondent.

State of New York, }  
County of New York, } ss:

40 J. C. Brinton, of full age, being duly sworn according to law on his oath, says, that he is the

## Conclusion

assistant secretary of Erie Railroad Company, a corporation, the respondent mentioned in the foregoing answer and that the said answer is true to the best of his knowledge and belief.

J C. BRINTON.

Subscribed and sworn to at New York City, this 20th day of October, A. D. 1914, before me, the subscriber, a Foreign Commissioner of Deeds for N. J., in and for said County and State, duly commissioned and sworn, as witness my hand and official seal. 10

(Seal) A. L. Travis, 20

A Foreign Commissioner of Deeds for New Jersey in New York.

Filed, Clerks Office, Oct. 23, 1914,

Hudson County, N. J.

John F. Crosby, Clerk.

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**Conclusion**

30

*(Filed, December 29, 1914)*

The sole question which is before me is whether the compensation act in this State is superseded in this case by the Federal act.

Counsel have furnished me with briefs which review many cases. There seems to be no doubt but that the federal law obtains if the employee 40

## Conclusion

was injured while engaged in interstate commerce. Counsel for the defendant have emphasized this point, but I think the case must turn on the very small question whether or not at the time of the accident the deceased was actually  
 10 employed in interstate commerce within the meaning of the Federal Employers' Liability Act.

In this case it is obvious that the deceased was doing work of a mixed character. That is to say his work related to both interstate and intrastate commerce. Counsel for the defendant urges that where the employment is indiscriminate and aids both interstate and intrastate commerce, it is enough under the decisions to bring the right to recover within the Federal Statutes, "unless it  
 20 clearly appears that he was engaged in intrastate commerce solely at the time of the accident."

I do not think that this is the law, and I think the last statement that I have been able to find from the Supreme Court of the United States is much to the contrary.

In the case of Illinois C. R. Co., v. Behrens, 233 U. S., page 473, Mr. Justice Van Devanter delivered the opinion of the Court and discussed the question of the mixed nature of the work of  
 30 the work of the employee, and pointed out that the words of the Federal act of April 22, 1908, read "that every common carrier while engaged in commerce between any of the several states  
     \* \* \* shall be liable \* \* \* while he is employed by such carrier in such commerce;" and he adds "giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think  
 40 must be done, it is clear that Congress intended

### Determination and Rule for Judgment

to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce."

I do not find in this case that the deceased was engaged in interstate commerce, or that his injuries occurred while he was employed in such commerce. 10

In my judgment the petitioner is entitled to the relief prayed for, and counsel for the petitioner may draw up the statutory finding based on this memorandum, and either obtain the consent of defendant's attorneys or give notice of application for signing.

GEORGE G. TENNANT, J.

Filed Clerk's Office. December 29, 1914,

Hudson County, N. J.

John F. Crosby, Clerk. 20

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### **Determination and Rule for Judgment**

*(Entered, January 8, 1915)*

A petition having been filed in the above stated matter, praying for the compensation to which the petitioner may be entitled by virtue of the terms and provisions of an act of the Legislature of the State of New Jersey entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating the procedure for the determination of liability and 30 40

## Determination and Rule for Judgment

10 compensation thereunder," approved April 4th, 1911, together with the supplements thereto and amendments thereof; and a time and place for the hearing of the said petition having been fixed, and it appearing to the Court that said petition and the order fixing the time and place for the said hearing having been duly served upon the respondent on the 13th day of October, 1914, and an answer having been filed by the said respondent on the 23rd day of October, 1914, and the petitioner and respondent having appeared on the 6th day of November, 1914, the date set for the summary hearing herein, the petitioner being represented by Frank G. Turner, her attorney and the respondent by Collins & Corbin, its attorneys, and the hearing thereof having been adjourned from time to time to the eleventh day of December, 1914, and on that date, the Court having heard the testimony offered on behalf of the parties hereto, and counsel having been heard:

20 I do find and determine from the evidence taken in this cause as follows, to-wit:

30 FIRST: On the fifth day of October, 1914, Regina Lincks was duly appointed administratrix of the goods and chattels, rights and credits which were of Henry W. Lincks, late of the County of Hudson, by John P. Egan, Surrogate of the County of Hudson. That the said Henry W. Lincks left him surviving, the petitioner herein, his widow, and three children—Minnie Louis Lincks, aged five years; Norwood Philip Lincks, aged four years, and Dorothy Elizabeth Lincks, aged eight months, all of whom reside at  
40 Jersey City, New Jersey, and all of whom were

## Determination and Rule for Judgment

actual dependants of the deceased at the time of his death.

SECOND: It is admitted, and I find that Henry W. Lincks was killed on the twenty-fourth day of September, 1914, while in the employ of the Erie Railroad Company, and that he entered its employ on September third, 1914, and continued therein until his death, and that his employment consisted of that of engine preparer and that said accident occurred in the railroad yards of the Erie Railroad Company at Jersey City, New Jersey, and resulted in the death of the said Henry W. Lincks. At the time of said accident, the wages of the deceased were sixty dollars (\$60.00) per month. Respondent had knowledge of the accident which resulted in the death of the said Henry W. Lincks.

THIRD: I find that the said accident arose out of and in the course of the employment of said Henry W. Lincks; that the deceased, at the time of the accident was not engaged in a service which was part of interstate commerce, or commerce between any of the several states. I find that at times the deceased was engaged in preparing engines which did not leave the yards of the company at Jersey City, and known as drill or switch engines; that at times he was engaged in repairing engines that did not leave the State of New Jersey and which were used in interstate commerce; and at times he prepared engines used in interstate commerce.

That at the time of the accident, the deceased was walking across the tracks of the respondent and while so doing and at the time of the said

## Determination and Rule for Judgment

accident, he was not engaged in an act in the furtherance of interstate commerce.

FOURTH: That the funeral expenses of the deceased amount to the sum of two hundred dollars (\$200.00.)

10 FIFTH: That the petitioner is entitled to compensation on behalf of herself and the other dependants at the rate of seven dollars and twenty cents (\$7.20) per week, for a period of three hundred (300) weeks, from the twenty-fourth day of September, 1914, and expenses of burial in the sum of one hundred dollars (\$100.00) besides costs of this proceeding amounting to the sum of

20 It is, therefore, on this 8th day of January, 1915, on motion of Frank G. Turner, attorney of the petitioner ordered that the respondent herein pay or cause to be paid to the said petitioner the sum of seven dollars and twenty cents (\$7.20) per week for a period of three hundred (300) weeks, from the twenty-fourth day of September, 1914, and expenses of burial in the sum of one hundred (\$100.00) dollars, and also costs of this proceeding amounting to the sum of \$39.80.

30 It is further ordered, that Frank G. Turner, the attorney for the petitioner, be and he is hereby allowed the sum of \$250 counsel fee herein, of which said sum the amount of fifty dollars is to be paid out of the accumulated payments now due and the balance to be paid at the rate of \$2.20 per week until the full amount is paid.

40 GEORGE G. TENNANT,  
Judge.

Testimony

Rule actually entered this eighth day of January, 1915.

FRANK G. TURNER,  
Attorney of Petitioner.

Attest:

John F. Crosby, Clerk.

(Seal)

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**Testimony**

HUDSON COUNTY COURT OF COMMON  
PLEAS

REGINA LINCKS, Administra- trix of Henry W. Lincks, vs. ERIE RAILROAD COMPANY.	}	On Petition for Compensation. Under Em- ployer's Lia- bility Act.	20
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Trial of above matter, December 4, 1914, before  
HON. GEORGE G. TENNANT, Judge.

Appearances:

Mr. Frank G. Turner for the petitioner. 30  
Messrs. Collins & Corbin, for the respondent.

The Court: It is admitted that the deceased was employed by the Erie Railroad Company at the time of his injury, that his wages were sixty dollars per month, and that the defendant had notice of his injury. Do you raise any question except that what he did, or what occurred, grew 40

## Regina Lincks—Direct

out of his employment and occurred in the course of his employment?

Mr. Corbin: We raise the Interstate Commerce question.

10

REGINA LINCKS, sworn.

Direct-examination by Mr. Turner:

Q. You are the widow of Henry W. Lincks? A. Yes.

Q. Where do you live? A. 285 Van Wagenen Avenue.

Q. On September 24, 1914, your husband was killed in the Erie Yards? A. Yes.

Q. Where did you live then? A. 12 St. Paul's Place.

Q. Did your husband live with you at that address? A. Yes.

Q. On that day what time did he go to work? A. He left the house at half past five in the morning.

Q. Did he come home to lunch? A. No.

Q. He took his dinner with him? A. Took his dinner with him.

Q. In a dinner pail? A. Yes.

Q. After his death did you get his dinner pail from the Erie Railroad? A. Yes.

Q. On that day had he eaten his lunch? A. No, sir.

Q. His lunch was still left? A. His lunch was in the pail.

Q. Do you know where his dinner pail was kept?

A. I don't know. They brought it up to me.

40

## Regina Lincks—Direct

Q. By the employees of the railroad company?

A. One of the men of the railroad brought it up. I don't know who it was.

Q. How old was your husband? A. Thirty-nine.

Q. How many children have you? A. Three.

Q. What are their names and ages? A. Minnie 10  
Alice, six; Noah Philip, four; and Dorothy Elizabeth, eleven months.

Q. Did your husband support you and three children? A. Yes.

Q. Andbody else? A. No.

Q. Had no other dependents on him? A. No, sir.

Mr. Turner: I don't know whether the question of funeral expenses comes into this proceeding. 20

Q. Did you attend to his funeral arrangements?  
A. Yes.

Q. What was the funeral bill?

The Court: What date was the death.

Mr. Turner: September 24th of this year.

Q. What was the bill? A. It is over one hundred dollars, I ain't quite sure.

Q. About two hundred dollars, isn't it? A. Pretty near that, I guess.

Q. You were appointed administratrix were you, 30  
by the Surrogate of Hudson County? A. Yes.

Q. These are your letters? (Indicating) A. Yes.

Mr. Turner: I offer them in evidence.

The letters of administration are marked Exhibit P-1 in evidence.

Mr. Corbin: I have a question I want to ask this witness, but it is part of my own case. 40

## Regina Lincks—Cross

EXAMINATION by Mr. Corbin :

Q. I show you a little book which I will identify later. I would like to have it marked for identification.

10 The book is marked Exhibit R-1 for identification.

Mr. Corbin: This book is a book in which he kept a record of the engines in his charge.

Q. I show you page marked under the date of September 24th, two pages, there are a lot of numbers on that page, will you look and see if you can recognize that as his own handwriting? A. It is his handwriting.

20 Q. I point out the date, September 24, 1914. A. The eights are his.

Q. How about the other numbers? It is pretty dirty, I know. A. I didn't see the book home at any time.

30 Q. I just want you to look at the numbers and notice them carefully; you think the eights are his handwriting. How about the rest of the numbers? Here are a lot of nines and other figures. What do you think of those? A. If it was in his pocket it is his handwriting. Of course, I can't say, I didn't see the book home.

Q. You saw him write from time to time? You have seen him write? A. Yes.

Q. Here is September 23d, it is a cleaner page. Maybe you would recognize that better. How about those? A. It looks like his handwriting. I never seen him write anything home, but if it was in his coat pocket it must be his handwriting.

40 Q. You say you have seen him make out slips, at times, at home? A. Sometimes.

George F. Kunz—Direct

Q. Does this look like the handwriting he made when he made out the slips? A. Yes.

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GEORGE F. KUNZ, sworn on behalf of the 10  
petitioner.

Direct-examination by Mr. Turner:

Q. What is your business? A. I draw oil for these engines, light oil and valve oil, see that oil is on all engines.

Q. For the Erie Railroad Company you work? A. Yes.

Q. How long have you worked for them? A. Oh, about a year and a half. 20

Q. Did you have anything to do with the work of Henry Lincks? A. Well, they give me the first job of drawing the oil for these engines; then they put two men on filling the headlights and two men to fill the cab lights; the best way I see, was to split the engines, give each man so many engines.

Q. Were you the immediate boss of Lincks? A. No, sir; Mr. Coleman was.

Q. Did you assign the work to him? A. Assign it to him? 30

Q. Yes; are you the one that assigned him the work he had to do? A. What do you mean, assign to him the work?

Q. Did you tell him what he was to do? A. Well, there has been a man on this job before he left, and Mr. Lincks took his place.

Q. When did he take his place? A. I don't know, I can't tell you that. You will have to find it out in the office. 40

George F. Kunz—Direct

Q. Do you remember the day he was killed?

A. Yes.

Q. Did you see him killed? A. Well, I seen him and the breast beam meet, that was all.

Q. You saw him when he was struck by the breast beam of the engine? A. Yes, I saw them  
10 come together like that; I turned away.

Q. What engine struck him? A. No. 513.

Q. What was it used for? A. Passenger service.

Q. Where was that engine coming from when it struck him? A. Coming from—why it come from Fuller's Express, from the Fuller's well, the Fuller's dock.

Q. What was its destination? A. Destination,  
20 what do you mean?

Q. Where was the train and engine going? A. I guess to Waldwick.

Q. Do you know? A. No, I don't know.

Q. What track was his engine on? A. Why, I couldn't tell just exactly, I couldn't just exactly say what track it was, it was right—looked to me as if it was next to Four pit.

Q. What do you mean by Four pit? A. That was the pit there where they lay engines to work  
30 on, it is dug out. You put the engine on there and the men work under, to have room.

Q. Four pit is a track? A. It is a track.

Q. You say the track next to Four pit? A. I couldn't say whether it was the first or second track.

Q. Is that a switch track or a main line track? A. Well, there ain't no main line track, they lay engines there, that don't go out for one or two  
40 hours, they can use any track they come in on.

## George F. Kunz—Direct

Q. This track where it struck him was a track where they lay engines for an hour or two? A. Sometimes, not always. They lay them all over.

Q. What time of day was it he was struck? A. I guess it was eleven fifty, something like that.

Q. Where were the engines on which he was working? A. Where were they? That is something I couldn't say, they were all over. 10

Q. All over the yard do you mean? A. The yard and house.

Q. What house was this connected—were those yards connected with a house, what place do you call it? A. They call it the round house.

Q. It is the yard of the— A. "The farm."

Q. Just what is the location of this farm and round house? A. What do you mean, location? 20

Q. Where is it, in Jersey City? A. I don't know, right up a few feet from the dock, right from the terminal, where the terminal is, right on Pavonia Avenue. Part of the shop is on Pavonia Avenue.

Q. Do you call it the Pavonia Avenue yard? A. They call it the Jersey City yard.

Q. Did he always work on the same engines? A. Yes, unless an extra engine came down. Then the first man got hold of it would fix it up. 30

Q. What did he do on the engines? A. He filled cab lights, filled the steam gauge light, the water glass lights, and the red and white lights.

Q. What other work did he do? A. That was all—cleaning them with a piece of waste.

Q. The engine? A. No, the lights.

Q. Did he do anything else? A. Not that I know of.

Q. Did he clean brasses on engines or anything of that sort? A. No. 40

## George F. Kunz—Direct

Q. Did they keep him busy all the time looking after these lights? A. Well, it is according to the way the man works. If he works right along then it is just nice slow going.

10 Q. Did he have any time when he didn't have lights to be cleaned? A. I don't know. I had work of my own. I had thirty-five engines to draw for. I wasn't watching these men.

Q. Did you ever see him doing any other work besides cleaning lights? A. No, sir.

Q. You had switch engines in this yard, did you? A. Yes.

Q. Engines that never went outside the yard? A. Yes.

20 Q. Did he have some of those engines to take care of? A. His book is here.

Q. I am asking you, what you knew? A. Well, I don't know. He might have filled one or two switch engines, I don't know.

Q. Do you call drill engines switch engines? A. Yes.

30 Q. I understand you had some switch engines to take care of. You told him to take care of some, didn't you? A. I don't know. I don't know what is in that book any more, whether he had got any switch engines or not.

Q. Is there any way you designate the switch engines? A. What?

Q. By their numbers? A. Yes, 689, 689.

Q. All the six hundred numbers are switch engines? A. Yes.

Q. You don't know how many of them he had to take care of? A. No, sir.

40 Q. There were other engines there that made short runs in New Jersey, weren't there, passenger

George F. Kunz—Direct

runs? A. They were all passenger engines. I don't know where they went.

Q. At the time he was killed what was he doing?

A. I couldn't tell you.

Q. You saw him, didn't you? A. I just said I saw him and the breast beam meet, that was all. 10

Q. Was he standing still? A. I couldn't tell you what he was doing. I cannot tell you. I can only tell you I saw the two things meet together. That was all. I turned away.

Q. Did you see him before the engine struck him? A. No.

By the Court: Q. How long before you saw the engine strike him had you seen him? A. Why, I couldn't be—sometimes I didn't see him maybe once half a day. 20

Q. That day, do you remember having seen him that day? A. I remember seeing him in the morning about seven thirty, in the pit.

Q. What time do the men eat? A. They fix that themselves, generally some men have a habit of eating now and eating then.

Q. Is there no regular time? A. They got to make time whenever they can. It is a twelve hour job. You get paid for the twelve hours. If a man wants to eat at eleven o'clock he does. 30

Q. Do you remember having seen him any time that morning before he was struck? A. Well, I might have run into him.

By Mr. Turner: Q. How many tracks are there in that yard? A. I could not tell you.

Q. About how many? A. Oh, I should judge about eight.

Q. Did Mr. Lincks' duties take him in and about and across those tracks, from one track to another? 40

## George F. Kunz—Direct

A. It did, if the engines were laying there, he went to the engines.

Q. Whenever there was an engine laying he had to go to it to attend to it; if it was on one side of the station and he on the other, he would have to cross the tracks? A. Naturally he would.

10 Q. At the time he was struck was he in the act of crossing the tracks? A. I couldn't tell you.

Q. What engines were laying in the yard at the time? A. I couldn't tell you that either.

Q. Do you remember whether he had anything in his hand at the time he was struck? A. I don't.

Q. In performing his duties what would he carry with him about the yard? A. Why, a gallon can and a piece of waste.

20 Q. A gallon can of kerosene? A. No; signal oil.

Q. And a piece of waste? A. Yes.

Q. You don't remember whether he had those or not? A. No, I don't. I didn't see him.

Q. Who was the driver on the engine that struck him? A. Do you mean who ran the engine?

Q. Yes. A. Bernard Walsh.

Q. Bernard Walsh? A. Yes.

30 Q. Who was the fireman? A. I couldn't tell you.

Q. Do you know the number of the engine that struck him? A. 513.

Q. In which direction was he facing at the time he was struck? A. I couldn't tell you that either.

40 Q. Can you tell us whether the engine struck him when he had his back to the engine or was he facing it? A. I couldn't tell you that either. I just told you, I saw the both things meet together; I don't know which way he was standing.

George F. Kunz—Direct

Q. At the time he was struck by that engine was there any other engine in that close vicinity? A. What do you mean?

Q. Did any other engine pass? A. Do you mean running or standing still?

Q. Running? A. Not that I know of. 10

Q. Was there any standing still there? A. Well, there was engines on Four pit.

Q. On Four pit? A. Yes.

Q. Was there an engine on Four pit that had just come in and stopped? A. I couldn't tell you that.

Q. Do you know whether he stepped off an engine that come in on Four pit? A. I don't know.

Q. Was there an engine on Four pit he could have stepped off from and been in the same position he was in at the time he was struck? A. Well, I didn't see that. When I came out of the engine dispatcher's office I seen the fellow hit, that was all. 20

Q. How far were you away from the scene of the accident? A. I should think one hundred and fifty feet, I guess.

Q. This engine that strick him, in which direction was that going, east or west? A. That was going west. 30

Q. The engine on Four pit? (No answer).

By the Court: Q. Going away from Jersey City? A. Going away from Jersey City.

Q. The engine on Four pit, in which direction was it headed? A. I couldn't tell you that either. Mostly engines on Four pit are headed west, either they are working on them or doing something.

Q. Engines on Four pit are put there to be repaired? A. To be repaired, and working, yes. 40

## Motion to Dismiss Petition

Q. Is there anyone who keeps a record of the work done by these men, such as Mr. Lincks did, other than the men themselves? A. No, sir. Well, there is only one place that keeps a record of the engines that are running. That is in the engine dispatcher's office.

10

Mr. Corbin: I have some questions to ask this man, but they are not cross-examination. I suppose I had better leave that until I put in my own case.

Adjourned to December 11th, 1914.

20

December 11th, 1914.

## Continuation.

30

Mr. Turner: In view of the admissions that have been made in the testimony of the last witness, I have decided not to call any other witness at this time. I have asked Mr. Corbin to produce some people here and he has produced them. I may want to call them later, but not at this time.

Mr. Corbin: I move to dismiss the petition on the ground that the petitioner has not sustained the burden of proof which is upon him in that he has not shown that the accident arose out of and in the course of his employment.

40

The Court: There is an opinion by Mr. Justice Trenchard in that case against the

## William Thierstein—Direct

Erie Railroad Company where a man had left his work to get another tool of some kind—I believe it was either Mr. Justice Voorhees or Trenchard—who said that from the facts in the case the Court could reasonably infer he was killed while he was employed, in other words the injury arose out of and in the course of his employment. Why can I not from the facts already adduced, in the absence of any other testimony, reasonably infer that it being his work and he being engaged in it at about that time, the injury arose out of the employment? At this time I will deny the motion. 10

Mr. Corbin: I pray an exception. 20

The Court: You may have your exception noted.

---

 WILLIAM THIERSTEIN, sworn:

Direct-examination by Mr. Corbin:

Q. What is your employment? A. Foreman of wipers. 30

Q. At what place? A. Jersey City.

Q. For what railroad? A. The Erie Railroad.

Q. Were you around the Jersel City yard at the time Mr. Lincks was killed? A. I was not.

Q. Were you there shortly afterward? A. No, sir.

Q. Within an hour? A. An hour, yes.

Q. I show you a little book marked for identification Exhibit R-1. Have you seen it before?

A. Yes. 40

## William Thierstein—Direct

Q. When did you see it? A. About between the hours of twelve thirty and one o'clock.

Q. On what day? A. I couldn't tell you what day; on the same day as the man was killed. I don't quite remember the day.

10 Q. That was in the afternoon? A. In the afternoon.

Q. Daylight. That is the book you found? (No answer.)

Q. You found it on the ground, I believe? A. Found it on the ground.

Q. Did you find any blood on it at the time? A. I did.

Q. There is a brownish or red mark on it; that was blood? A. Yes.

20 Q. It was fresh at the time you found it? A. I couldn't tell.

Q. Look at it now? A. Yes, it looks drier.

Q. I point you to the first page. What is the name on the first page? A. H. W. Lincks.

Q. Was it there when you found the book? A. It was.

Q. How far from the place he was killed did you find it? A. I don't know where he was killed.

30 Q. Where did you find it? A. Between Four pit and No. 1 track.

Q. Do you know what the purpose of this book is? A. I don't.

No cross-examination.

George Kuntz—Direct

GEORGE KUNZ, re-called:

Direct-examination by Mr. Corbin:

Q. I show you a little book marked Exhibit R-1 for identification. What was the purpose of these little books, if you know? A. I suppose to keep track of the engines. 10

Mr. Turner: I object.

Q. What are they used for? Are you familiar with these little books, have you seen them used in the Erie yard? A. Yes.

Q. How are they used, who uses them? A. The different men.

Q. What men? A. Why, the boys on the ash-pit, men that have to keep track of engines they have to take care of, and what is done and what ain't done. 20

Q. Did the engine repairers who filled these cab lights have these little books? A. Yes.

Q. What were the men who kept these books supposed to do with them?

Mr. Turner: I object.

Q. What did they do with them? A. What did the men who kept these books do with them?

Mr. Turner: If he knows. ..

By the Court: Q. Was this book given to the employees who did the particular kind of work he did, for them to use in their work? A. Yes. 30

Q. Did the Erie Railroad Company furnish him with that book? A. Yes, they get them in the office.

Q. This is one of the books the Company furnish? A. Yes.

Q. What did the men do with those books? A. I suppose keep tract of the work. 40

## George Kuntz—Direct

Q. Do you know? Did you have a book like that? A. No.

Q. Did you ever in your work have a book like that? A. No.

Q. Have you seen men with such a book? A. Yes.

10 Q. What did they do with them when they had such a book? A. Keep track of what they have to do, and what haven't done yet.

Q. Did they put engine numbers in the book? A. Yes.

Q. What did they represent?

Mr. Turner: Do you know?

A. What did they represent?

Q. What numbers did they put down? A. That  
20 was according to what they have to take care of.

Q. Where did you get your information as to what was done with this book? A. When these men would be sent to me, to fill the lights, I had to split the engines between them, see that the engine lights were all filled up.

Q. You apportioned the work? A. Yes.

Q. Where did you get your information about this book? A. I have seen them carry them around the other man's book here.

30 The Court: Haven't you someone who can prove the book.

Mr. Corbin: The man kept his own book.

Q. When this man came to work two weeks earlier, did you tell him what to do? A. Why, he had another book, and those engine numbers were all in that book there, were in another book and he was supposed to get a new book and put them in there and keep the book himself because the book we had taken from another man wouldn't be  
40 any good to him.

George Kuntz—Direct

Mr. Turner: I move to strike out the answer.

The Court: It may be stricken out.

Q. What did you tell him about the numbers of the engines he had to take care of? A. What did I tell him?

10

Q. Yes. A. I told him he had to fill the red and white lights, the cab lights, the gauge lights.

Q. What engines did you tell him he had to take care of? A. I don't know.

Q. Did you give him the numbers. A. I gave him the other man's book, the man he took the place of.

Q. You told him to take care of those engines? A. Yes.

Q. Did you instruct him as to his keeping a record of the engines that he was to take care of from day to day? A. He did that for himself, so he wouldn't forget them.

20

Q. Are these the numbers of the engines you told him to take care of? A. Yes.

Q. Did you look through the numbers? A. Well, the man on his job to-day has the same numbers in his book.

Q. These numbers have been taken care of by the man on that particular job right along? A. Yes.

30

Q. Have you looked through the numbers in this book? You looked through them the other day? A. Yes.

Q. There are engine numbers that are in the yard every day? A. Yes.

Mr. Corbin: I offer the book in evidence.

Mr. Turner: I object on the ground that it is incompetent, immaterial and not properly proven.

40

## George Kuntz—Direct

Mr. Corbin: It has been proven to be his writing. His wife was a little uncertain as to certain numbers.

The Court: You may have it marked for identification. I will reserve it now.

10 Q. These engines in general, were engines that are used on all the lines of the railroad as passenger engines? A. Yes.

Mr. Turner: I object to the question; it is too general, it calls for a conclusion, and it is incompetent.

Q. Are you familiar with the general lines of the Erie Railroad, where they run? A. I know the different branches; I don't know where the engines go.

20 Q. You have been over the different branches, haven't you, at times too? A. I have been over the main line and the Hackensack Line, that is as far as I have been.

Q. How far on the main line have you been? A. I have been to Buffalo on the main line.

Q. That takes you outside of New Jersey into New York State? A. Yes.

Q. You had general charge of engines, every day, that run out over the main line.

30 Mr. Turner: I object. It calls for a conclusion.

Mr. Corbin: He says he is familiar with the railroad.

Mr. Turner: He says he is familiar with two or three different branches, he says he doesn't know where the engines go.

Q. Do you know where the engines go? A. I don't know where they tie up. They tie up in different places.

## Bernard Gately—Direct

BERNARD GATELY, sworn:

Direct-examination by Mr. Corbin:

Q. For whom do you work? A. Erie Railroad.

Q. What is your position? A. Engine checker.

Q. At what point do you check the engines? A. 10  
Jersey City.

Q. Those are passenger engines coming in from the different lines? A. Yes.

Q. Those engines are stored in the yard, called the Farm? A. The Farm, round house, Jersey City Terminal.

Q. Do you keep a record of the engines as they come in? A. Yes.

Q. How long have you been doing that? A. 20  
Three years.

Q. I show you a book with the number 1 on the outside. What is that book. A. The west bound book.

Q. By the west bound book, what do you mean? A. Outgoing trains, west going trains.

Q. Turning to page one hundred and eleven, I see it is headed September 24; that indicates the date on which the record was kept? A. Yes.

The Court: Was that the date on which he was killed. 30

Mr. Corbin: Yes.

Q. The first column has the word "Train" over it. What are the numbers in that column? A. Train numbers, the number of the trains.

The Court: It is kept in his handwriting?

Q. That is your handwriting? A. Yes.

Q. In the second column— A. That is the departure, time of leaving.

Q. The third column? A. Engine numbers. 40

## Bernard Gately—Direct

Q. The fourth column. A. Extra engines.

By the Court: Q. What do you mean? A. If the regular lays in, there has to be put on an extra in the place of it.

Q. This column represents what? (Indicating).

10 A. Departure.

Q. The next is the engine number? A. Engine number.

Q. Engine number that it departed with? A. Engine number of the train.

Mr. Corbin: That is the regular engine number.

Q. Where you find engine 960, you say 110 in the fourth column? A. That is the time.

Q. Where these substituted numbers are— A.  
20 These are extra engines.

Q. Suppose we take one—where is a column showing extra engines? A. Here. (Indicating).

Q. Engine 29, went out twelve-twelve? A. The 29th of June, going out, 817 went out in place of it.

Q. You find the 29 in as being the regular number and you find the substitute number 817? A. It was marked to go out, but it didn't go.

Q. The substitute numbers you say appear in  
30 the fourth column? A. Yes.

Q. Where engines are substituted for the regular engines the numbers appear in the fourth column? A. Yes.

Q. The fifth column is the time when it was ready to back down? A. Yes.

Q. The sixth column is what, where those names are? A. That is engineer and fireman's names.

Q. The sixth and seventh columns. A. Yes.

40 Q. You kept that record for the purpose of

## Bernard Gately—Direct

watching the engines and seeing that they were ready? A. This is regular routine of the days' work and it is done every day as the engines come along.

Q. Did all those engines go out on that day? (Indicating). A. Yes. 10

Q. On the trains you have indicated? A. Yes.

Mr. Corbin: I ask that this be marked for identification.

It is marked Exhibit R-2 for identification.

The Court: The purpose of this testimony, I suppose, is to show by this witness that a long list of trains went out on the tracks of the defendant?

Mr. Corbin: Yes. 20

The Court: You are going to show they went to different destinations?

Mr. Corbin: Yes.

Mr. Turner: If the purpose of this testimony is to prove anything in relation to interstate commerce I will object to the testimony on the ground that the answer sets up that at the time of the accident the deceased was not engaged in any duties in connection with interstate commerce, but had temporarily abandoned his duties as engine repairer and was walking along the respondent's tracks and therefore the testimony as to interstate commerce would be immaterial. 30

The Court: Is there anything in the answer that sets it up?

Mr. Corbin: Article nine.

Mr. Turner: By the terms of the eighth 40

## Bernard Gately—Direct

clause of the answer the respondent is bound.

The Court: They have made practically two answers.

10 Mr. Corbin: I don't understand; we cannot set up inconsistent defenses.

The Court: Your objection is what?

The Turner: That any proof as to their being engaged in Interstate Commerce is immaterial because of the fact that they allege that at the time of the accident he had temporarily abandoned his duties.

20 The Court: Well, the answer he makes to that is that under the ninth paragraph they set up he was engaged in interstate commerce.

Mr. Turner: As to that, sir, I say this, that they cannot be on both sides of the fence, as a matter of law.

The Court: Wasn't your proper procedure then to move to strike out either one or the other of those paragraphs? Where you wait until the trial and then we have both defenses in, can you take advantage of it?

30 Mr. Turner: It seems to me that the respondent in this case is bound. The petitioner has relied upon the eighth paragraph of the answer.

The Court: I will allow it.

Mr. Turner: I ask an exception.

40 The Court: Can we or can we not here agree—don't take this unless it is entirely clear—if this book were regularly kept, it shows the record of the outgoing trains.

## Bernard Gately—Direct

Your purpose now is to follow it up and show that some of these engines were going to destinations outside of the State?

Mr. Corbin: Yes, there is no question about the fact that they were.

The Court: Can we crystalize the facts by admissions in any way? 10

Mr. Turner: I can perhaps concede that this is a record of the outgoing engines, but I would object to it on the ground that it does not show that the deceased did any work on any of those engines.

The Court: I understand that. That being the case, is there anything further from this witness?

Mr. Corbin: I have a list showing what engines were operated between the six and the twelve, going in and out on trains that went out of the State. 20

The Court: You propose to show that these engines designated on page one hundred and eleven of this book produced by these witnesses, went on that day to various places. How do you propose to do this?

Mr. Corbin: This witness keeps the train numbers. 30

The Court: Does he keep a record of the destination?

How do you know where they are going?

The Witness: Just from being down there, working for the company.

Mr. Corbin: He does not keep track of where they go, but he keeps track of the destination. 40

## Bernard Gately—Direct

The Court: You know where they are supposed to go?

The Witness: Yes.

The Court: On the Erie?

Q. Do they have destination in the State of New Jersey? A. Some go outside, some do not.

Q. Are there any on this list that do not go outside?

Mr. Corbin: I am perfectly willing to admit there were a great many more engines besides these, that did not go outside the State, that ran between Jersey City and local points.

The Court: Can we admit in this case that some of these engines went to places outside the State, and as Mr. Corbin says, the larger part of them were engaged within the State?

Mr. Corbin: I do not know whether it was the larger part.

The Court: A large number of them.

Mr. Corbin: A large number of them were engaged on trains entirely within this State.

Mr. Turner: I would like to ask the witness if trains do not appear on this book, whose destinations are within the State?

The Witness: They are here. (Indicating).

Mr. Turner: Why don't you put them on the list?

A. I was asked to make up a list of trains that went out of the State.

Mr. Corbin: The purpose of this list was to show that those engines are engaged in interstate commerce.

## Bernard Gately—Direct

The Court: It now appears from the books, and is conceded to be true, that the engines leaving Jersey City station, took trains to various destinations partly within the State of New Jersey and partly outside of the State of New Jersey. 10

Mr. Turner: We concede that. I know that to be a fact.

Mr. Corbin: The reason I had that done, I was going to tie it up a little closer.

The Court: I don't want to preclude you. Go ahead.

By Mr. Corbin: Q. The engines that left and arrived, that were going to points outside of the State of New Jersey, between the hours of 6 a. m. and twelve o'clock noon on September 24th, that came within your work, are the numbers that appear on that list? A. Yes. 20

By Mr. Turner: Q. But those are not the only ones that went out of the station? A. Those are not the only ones. They are the ones that went out of the State.

Mr. Corbin: The book only shows the train numbers.

The Court: He has testified that these train numbers appearing on the book, went to different destinations, some in and some out of the State. 30

Mr. Corbin: I haven't them tied up to this little book. Is it admitted that the little book found on the body of the deceased shows some train numbers as having departed, as shown by this book, some within the State and some without the State. 40

## Bernard Gately—Direct

Mr. Turner: The book was not found on his body.

The Court: Alongside.

Mr. Turner: It was found about an hour after the accident. I wouldn't want to concede that, no, sir.

10

Mr. Corbin: I ask that this list be copied into the record as showing the list of engines and their destinations outside the State.

The Court: That list is taken from that book?

The Witness: Yes.

Mr. Turner: No, sir. Destination is from his own data apparently. It is not in the book.

20 Q. That list, I see, has a list of names opposite each one of those numbers. What connection have they with the numbers of the engines? (Indicating). A. That is the names of the destinations on that day.

Mr. Corbin: I would like to have the list read into the record.

Mr. Turner: If the witness is going to read the list at all I should think he should tell the destinations of all engines.

30 The Court: Yes. If you insist upon it it must be done in a competent way.

The Witness: Do you want it read from the book?

Mr. Corbin: The witness can very readily give the list and destinations of all engines. I would have had him prepare it in that way if I had anticipated it was desired.

40

The Court: Go on in your own way.

## Bernard Gately—Direct

Q. I show you also a similar book, that has the date of September 24th in it, with a big 2 on it. That has similar engine numbers in it with a column marked "Arrival." What does this show with respect to the numbers? A. This is the east bound, that is the train number, the engine number, time they arrive, engineer and fireman. 10

The book is marked Exhibit R-3 for identification.

Mr. Corbin: I have no desire to take up the time of the Court: I am willing to take your Honor's suggestion that it be put on the record, and not take up the time, to read all the engines in, in detail, although--

The Court: You can hand to the stenographer a copy from the book to save reading into the record what the book shows. That is what you want. I suppose, you want to get into the record the transcript of this book. 20

Mr. Corbin: I want to show the numbers.

The Court: I understand what you want to show, but you want to get the numbers as being identical with the numbers in the little book.

Mr. Corbin: Yes. 30

The Court: Why don't you hand to the stenographer the transcript to save the Court's time in digging it out of the book. There is no objection to that is there?

Mr. Turner: I think not.

The Court: Is there anything else from this witness?

Mr. Corbin: That is the only point I wanted to cover. I am not sure that I 40

## Bernard Gately—Direct

have made myself clear that the train numbers, in and of themselves, do not show which trains went out of the State. That was my purpose in preparing the list.

10 The Court: I understand that. Why don't you go on and prove it?

Mr. Corbin: I thought your Honor thought it was not necessary.

The Court: No, no. I thought possibly counsel might agree. You have a right to do that.

Mr. Corbin: This list shows the numbers that went out of the State. Your Honor suggested that I should have the numbers in the State.

20 The Court: I don't suggest anything. Go on and prove anything you think is proper. The objection is made. Mr. Turner objects to this witness reading from a paper which the witness has compiled from some other document. That is his objection. Of course, it is a proper objection. It is not competent testimony. You have the right to get in what you want to, but you must get at it in a legal way.

30 Q. Will you take Exhibit R-2 for identification, and from that exhibit tell me the numbers of the engines that appear therein and the points to which they are destined?

Mr. Turner: That means all the engines.

Q. All the engines, beginning with 6 a. m., on September 24th.

40 Mr. Turner: If your Honor please, before the witness answers, I make the same

## Bernard Gately—Direct

objection to it on the ground that it is immaterial because of the admission in the answer, in which they set up the fact that the deceased was not in the pursuit of his duties.

The Court: I will allow it.

10

Mr. Turner: I ask an exception.

Q. Read the engine number first and the destination of the train to which it was attached.

The Court: Does that paper call out what you are trying to get?

Mr. Corbin: Yes.

The Court: Have you any objection to the paper going in evidence on that point?

Mr. Turner: My objection is that it shows only those trains that went outside of the State and does not show those within the State. 20

The Court: It is already admitted that that is all that it does show, and that the book shows that there are a lot of other trains that remained in the State.

Mr. Corbin: I have no objection to making a revised list to show everything.

The Court: Some trains left the State and some trains remained within the State? 30

Mr. Corbin: That is the fact.

The Court: Why go any further—you have it, why not stop there?

Mr. Corbin: I wanted to tie this up, that this man attended to those trains.

The Court: Go to that point.

Q. I ask you to look for engine 963, west bound, on September 24th, and tell me if that engine left for a point within or without the State. 40

## Bernard Gately—Cross

The Court: Is it within your power in evidence?

Mr. Corbin: Yes, but he objected to putting it in without showing all the other trains.

10 By the Court: Q. Does this show in fact that engine 963 went out of the State? A. Yes.

Mr. Turner: Let him prepare his list showing the destinations of all those trains and let the stenographer have it.

The Court: When you get your book in, if you do, then the Court can say whether, by the testimony, Engine 963 mentioned in the little book, is the train as 963 in the big book.

20 Mr. Corbin: There is nothing in this book to show it went out of the State.

Mr. Turner: He can show the destinations in his list.

Mr. Corbin: I will have a complete list made up. I offer in evidence the two big books.

The Court: They may be admitted in evidence.

30 CROSS-EXAMINATION by Mr. Turner:

Q. Those books which are marked R-2 and R-3 for identification do they show all the east bound and west bound trains that came into the Erie Station at Jersey City on September 24th last? A. Yes.

40 Q. There are no other trains than the trains set forth in these books? A. No, sir; outside of freight trains.

## Louis Dimmock—Direct

Q. These books don't show switch engines, do they? A. No, sir.

Q. And they don't show engines used, such as repair engines? A. No.

Q. But regular engines? A. No, nor freight trains.

Q. Simply show passenger engines? A. Yes. 10

Q. They don't show freight engines? A. No, sir.

Mr. Turner: I suppose they are admissible for what they are worth.

The Court: In other words they show only departing trains from Jersey City Station on the Erie Railroad, engines departing, trains made up for the company destinations within and without the State? 20

The Witness: Yes.

The Court: They don't show drill engines and freight engines?

The Witness: No.

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LOUIS DIMMOCK, sworn:

Direct-examination by Mr. Corbin: 30

Q. Who do you work for? A. Erie Railroad.

Q. What is your business? A. Apprentice.

Q. What shops do you work in, or yard? A. The Erie yard, south side.

Q. On the 24th of September did you see this accident in which Mr. Lincks was killed? A. Yes.

Q. Where were you standing at the time of the accident? A. We were working on engine 841.

Q. That stood on— A. Track one. 40

## Louis Dimmock—Cross

Q. The train which struck him came out on what track? A. Number two.

Q. You were between engine 841 and the train which struck him as it came by you? A. Yes.

10 Q. Did you see him go walking along? A. I seen him when he was passing me.

Q. Did you see him after that? A. I seen him walking up a way, set his can on 841.

Q. The next engine, that is the one you were working on? A. Yes.

Q. He set his oil can— A. On the tank.

Q. Started doing what? A. And then started walking away over—

Q. Doing what? A. It seemed to me attempting to cross the track, was struck.

20 Q. Got struck by the engine? A. Yes.

Q. Did you see where he came from when he walked by you? A. No, sir.

Q. Do you know where he was going to? A. No, sir; I don't.

## CROSS-EXAMINATION by Mr. Turner:

Q. Did you see him working there? A. No, sir; I did not, not at that time.

30 Q. How long had you observed him prior to the time he was struck? A. I don't know.

Q. A few minutes? A. I don't know, probably was a few minutes.

Q. In which direction did he walk? A. He was walking west.

Q. West, that is towards what? A. Towards— away from Jersey City, going away from it.

40 Q. What is there to the west? A. What is there? The different towns.

## Exhibit R-2

Q. I mean to say in the yard there, is there anything to the west in the direction he was going, round house, or— A. Well, he was walking towards the dispatcher's office.

10

GEORGE KUNZ, re-called:

By Mr. Corbin: Q. Did this man have reason to go to the dispatcher's office? A. Not that I know of.

By Mr. Turner: Q. You have no idea about it, have you? A. No, sir.

By Mr. Corbin: Q. He was under your general direction, you knew what his general duties were? 20

Mr. Turner: I object. He has testified as to that.

The Court: I will sustain the objection.

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**Exhibit R-2**

**Trains departing from Jersey City from  
6 A. M. to 12 noon, September 24, 1914.** 30

(Copied from Book No. 1 westbound.) Exhibit R-2.

<i>Train</i>	<i>Departure</i>	<i>Engine</i>	<i>Destination</i>	
105	6.00	821	Waldwick	
603	6.15	838	Hillsdale	
1103	6.26	548	Nyack	
79	6.35	959	Waldwick	40

## Exhibit R-2

	<i>Train</i>	<i>Departure</i>	<i>Engine</i>	<i>Destination</i>
	303	6.44	812	Waldwick
	933	6.44	21	North Paterson
	115	6.55	971	Garfield
	111	7.04	813	Waldwick
10	1105	7.04	963	Nyack
	169	7.10	817	Rutherford
	507	7.29	848	Midvale
	173	7.30	2722	Port Jervis
	1107	7.34	514	Nyack
	605	7.40	824	Suffern
	Express	7.40	930	Middletown
	953	8.25	28	North Paterson
	307	8.30	847	Waldwick
	1109	8.35	957	Nyack
20	113	8.45	556	Waldwick
	903	9.08	30	Strousberg
	509	9.08	914	Sterling Forest
	1	9.15	2904	Buffalo
	607	9.24	822	Haverstraw
	175	9.30	2705	Middletown
	53	9.34	970	Suffern
	1111	10.00	526	Nyack
	311	10.00	833	Waldwick
	511	10.14	831	Essex Fells
30	107	10.25	961	Waldwick
	609	10.30	850	Suffern
	911	10.35	868	Butler
	177	11.00	943	Port Jervis
	513	11.30	916	Midvale
	1113	11.47	846	Nyack
	117	11.59	513	Waldwick

**Exhibit R-3****Trains arriving at Jersey City from 6 A. M.  
to 12 noon, September 24, 1914.**

(Copied from Book No. 2 eastbound.) Exhibit R-3.

<i>Train</i>	<i>Engine</i>	<i>Time Turned</i>	<i>Arriving From</i>	
102	956	6.00	Waldwick	10
500	848	6.11	Little Falls	
1102	963	6.17	Nyack	
600	519	6.20	Spring Valley	
930	21	6.24	North Paterson	
300	813	6.37	Waldwick	
50	971	6.43	Suffern	
910	7	6.46	Butler	
602	824	7.03	Spring Valley	20
302	829	7.06	Waldwick	
52	967	7.09	Suffern	
1104	514	7.12	Nyack	
502	834	7.15	Midvale	
604	844	7.25	Hillsdale	
912	25	7.30	Wortendyke	
914	28	7.50	Butler	
54	556	7.53	Suffern	
1106	957	7.55	Nyack	
304	847	7.59	Waldwick	30
108	970	8.20	Waldwick	
608	966	8.30	Hillsdale	
506	914	8.35	Midvale	
610	822	8.36	Spring Valley	
316	833	8.47	Waldwick	
916	27	8.50	Butler	
106	910	8.55	Waldwick	
192	935	8.59	Newburg	
124	971	9.00	Rutherford	40

## Certificates

	<i>Train</i>	<i>Engine</i>	<i>Time Turned</i>	<i>Arriving From</i>
	56	961	9.30	Suffern
	110	916	9.35	Waldwick
	170	943	9.39	Port Jervis
	934	23	9.42	North Paterson
10	188	937	9.45	Middletown
	1116	960	9.53	Nyack
	112	964	9.56	Waldwick
	918	26	10.02	Butler
	468	807	10.04	Essex Fells
	312	825	10.20	Waldwick
	116	812	10.40	Waldwick
	1114	965	10.50	Nyack
		49	10.55	Yard eng. at J. C.
	1126	515	11.00	Nyack
20	518	841	11.00	Midvale
	618	815	11.01	New City
	514	840	11.10	Midvale
	154	521	11.20	Newburg
	118	959	11.30	Waldwick
	622	511	11.35	Spring Valley
	1130	514	11.40	Nyack
		688	11.50	Yard eng. at J. C.
	1124	963	12.06	Nyack

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**Certificates**

I, Frederick N. Esher, a stenographer regularly acting for George P. Kelley, the official stenographer of the County of Hudson, duly appointed to report stenographically the evidence given before the Courts of said County and the Judges of

40

## Certificates

said Courts, in all cases, hearings and proceedings, do hereby certify that the foregoing is a transcript of the evidence given on December 4th and 11th, 1914, before Honorable George G. Tennant, Judge of the Hudson County Court of Common Pleas, upon the hearing of the petition filed by Regina Lincks, administratrix of Henry W. Lincks, against Erie Railroad Company. 10

IN WITNESS WHEREOF, I have hereunto set  
[L. s.] my hand and seal this eighteenth day  
of January, nineteen hundred and fif-  
teen.

FREDERICK N. ESHER.

I, John F. Crosby, Clerk of the County of Hud-  
son, and also Clerk of the Hudson County Court of  
Common Pleas, do hereby certify that the forego- 20  
ing is a transcript of the evidence given upon the  
hearing of the petition of Regina Lincks, admini-  
stratrix of Henry W. Lincks, deceased, against  
Erie Railroad Company, on December 4th, and  
11th, 1914, as certified by Frederick N. Esher, the  
stenographer appointed to report such evidence  
stenographically.

IN WITNESS WHEREOF, I have hereunto set 30  
[L. s.] my hand and seal this 26th day of  
March, nineteen hundred and fifteen.

JOHN F. CROSBY.

**Reasons**

*(Filed, April 9, 1915)*

The prosecutor herewith files the following reasons upon which it will rely for a reversal of the determination and order directing payment in this case:

10 1. Judgment should have been entered denying compensation claimed by petitioner and dismissing the petition.

20 2. The determination and finding of fact by the Judge of the Hudson County Court of Common Pleas was not in accordance with the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for the 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 and amendments thereto.

3. The determination of fact by the Judge of the Hudson County Court of Common Pleas was not based upon the evidence.

30 4. No evidence was produced by the petitioner that the death of Henry W. Lincks, for whose death compensation is claimed, was caused by an accident arising out of and in the course of his employment, and therefore compensation to petitioner should have been denied and the petition dismissed.

40 5. There is no evidence that the death of said Henry W. Lincks was caused by an accident arising out of and in the course of his employment.

## Reasons

6. There is no evidence which justifies the determination by the Judge of the Hudson County Court of Common Pleas that the death of said Henry W. Lincks was caused by an accident arising out of and in the course of his employment.

7. The evidence is that at the time of the accident resulting in the death of Henry W. Lincks, the said Henry W. Lincks had temporarily abandoned his duties as engine preparer, and was walking along the railroad tracks after having left behind his oil can with which he was engaged in filling lamps on locomotives, and away from the location where he was supposed to perform his duties, and that said accident did not arise out of and in the course of his employment.

8. The Hudson County Court of Common Pleas and the Judge thereof had no jurisdiction to entertain the petition in this matter or to make any order thereunder, because the legal rights of petitioner and defendant are determined exclusively by the Act of Congress of the United States, entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the supplements and amendments thereof.

9. The evidence is that at the time of the accident the defendant was engaged in commerce between and among the several states and territories of the United States, and also between the several states and territories of the United States and foreign nations and that said Henry W. Lincks was employed by it as such carrier in such commerce.

COLLINS & CORBIN,  
Attorneys of Defendant-Prosecutor.

**Opinion***(Filed July 6, 1915)*

## NEW JERSEY SUPREME COURT

JUNE TERM, 1915

10	REGINA LINCKS, Administratrix of Henry W. Lincks, de- ceased, Petitioner-Defendant, vs. ERIE RAILROAD COMPANY, Respondent-Prosecutor.	}	On Certi- orari.
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Argued June 3, 1915; Decided July 1915.

20 Frank G. Turner, Esq., for Petitioner-Defend-  
ant.  
Messrs. Collins & Corbin, for Respondent-Pro-  
secutor.

Before JUSTICES GARRISON, TRENCHARD and BLACK.

## PER CURIAM:

30 The petitioner, Regina Lincks, filed a petition in  
the Hudson County Court of Common Pleas, stat-  
ing that Henry W. Lincks was her husband; that  
he was killed on the twenty-fourth day of Septem-  
ber, 1914, while in the employ of the Erie Rail-  
road Company at the terminal yards in Jersey  
City; his employment was that of an engine tender  
or laborer; that is, he filled cab lights, filled the  
steam gauge lights, the water glass lights and the  
red and white lights and cleaned them with a piece  
of waste; that at the time of the accident he was  
40 engaged in his duties, and while alighting from an  
engine he stepped on the adjacent track and was

## Opinion

struck by an engine traveling in an opposite direction. The petitioner asked that she be awarded compensation for his death. The principal business done by the respondent in passenger trains coming into Jersey City at the terminal yards, was the carrying of through interstate passengers between points in New York, New Jersey and New York City. There is no substantial dispute about the facts. The defense was, that at the time of the accident, the respondent was engaged in commerce between and among the several states and that the legal rights of the petitioner and the respondent are determined exclusively by the act of Congress of the United States and not by the New Jersey Workmen's Compensation Act. The Court found in favor of the petitioner and against the respondent.

We think this is error. The case falls within the decision of the United States Supreme Court, in the case of North Carolina R. R. Co. vs. Zachary, 232 U. S. 248. Mr. Justice Pitney, speaking for the Court, said that in order to bring the case within the terms of the Federal Act (Employers Liability Act of 1908, 35 Stat., 65, c 149) the defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and the injured employe must have been employed by such carrier in such commerce. When the defendant is a common carrier engaged in interstate commerce and the employe for whose injuries the suit is brought was employed by the defendant in such commerce, the Federal Employers Liability Act of 1908 governs to the exclusion of the State statutes.

The judgment of the Hudson County Court of Common Pleas is reversed.

