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- D-1—Photograph. Offered in evidence at p. 65; not printed.
- D-2—Map. Offered in evidence at p. 67; not printed.

Notice of Appeal.

(Filed March 27, 1917.)

To Alexander Simpson,
Attorney of Plaintiff:

TAKE NOTICE that the defendant appeals to the
Court of Errors and Appeals from the whole of
the judgment entered in this cause.

Yours respectfully,

COLLINS & CORBIN,
Attorneys of Appellant.

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Grounds of Appeal.

(Filed May 4, 1917.)

The defendant states the following grounds of
appeal:

1. The trial court refused to non-suit the plain-
tiff when thereunto moved, whereas non-suit
should have been granted for one or more of the
reasons urged in behalf thereof, to wit,

(a) There was no evidence of negligence on
the part of the defendant or any of its servants
or employes.

(b) The risk of injury was assumed.

(c) The death of the plaintiff's intestate was
the result of a mere accident.

(d) There was no evidence of violation of any
order.

2. The trial court refused to direct a verdict
in favor of the defendant when thereunto moved,
whereas the motion for direction of verdict should

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Grounds of Appeal.

have been granted for one or more of the reasons urged in behalf thereof, to wit,

(a) There was no evidence of negligence on the part of the defendant or any of its servants or employes.

(b) The risk of injury was assumed.

10 (c) The death of the plaintiff's intestate was the result of a mere accident.

(d) There was no evidence of violation of any order.

(e) Because it clearly appeared that the plaintiff's intestate was properly warned.

(f) Because the plaintiff's intestate knew or should have known of the danger of the movements of trains back and forth in the yard.

20 3. The Court charged the jury:

30 "But the plaintiff says this, that there was a custom in use by the employees of the defendant company in this particular yard by and through which the employees were to keep a lookout for other employees engaged in the yard and to warn them of danger in and about the moving of trains or cars in the yard, and that in the movement of this particular car the employees in charge of that movement or its movement did not live up to that custom, and that their failure to do so is what brought about this occurrence and the resulting death of John A. Healey. Both of these matters are matters which the plaintiff must establish to your satisfaction by a fair preponderance of the evidence.

40 "Now, remember, gentlemen, I say that both of these allegations must be established by the plaintiff by a fair preponderance of the evidence in order to warrant a verdict under any circumstances for the plaintiff. The first thing that the plaintiff must establish is this, and establish to that manner and that degree which I have just indicated, that

Grounds of Appeal.

a custom to keep a lookout and warn employees in the yard existed. That any such thing existed at all is the first thing that they must establish. If they have not established that by a fair preponderance of the evidence then you may stop right there. If they have, then you must go this much further, not only that such a custom or practice existed, but that it was so general and certain that employees of the defendant lawfully in the yard in question were warranted in relying upon and assuming that reasonable care would be taken by the employees in the control and management of the movement of cars and trains to keep a reasonable lookout and to give a reasonable warning of danger. I have said, gentlemen, the burden is upon the plaintiff to establish that by a fair preponderance of the evidence. If it has not been established in that manner then you may cease your deliberations, because then again an essential thing to be made out by the plaintiff has not been made out.”

4. The Court charged the jury:

“If that has been established in that manner, then your attention must go to the second thing which I have already called your attention to, and that is, did the persons, did the servants and agents of the defendant company failed to keep a reasonable lookout and use reasonable care in respect to the giving of warnings, and if so, was such a failure a proximate cause of the injury.”

“Now, understand me, gentlemen, these are the two things that the plaintiff must lookout and to give warning by persons or servants of the defendant company in the control and management of the movement of trains and cars in that yard existed, and that it was so general and so certain as to warrant the employees of the company lawfully in the yard of the company to rely upon the observance of that custom; and, second,

Grounds of Appeal.

if that has been established, then has the plaintiff established by a fair preponderance of the evidence that this thing that happened make out: First, that a custom to keep a to John A. Healey happened as the proximate natural result of the failure of the employees, or some of the employees of the defendant company in the charge, management and control of this car, to use reasonable care to keep a reasonable lookout and to give reasonable warning under the circumstances. If either one of those two things has not been established by a fair preponderance of the evidence upon the part of the plaintiff, then there cannot be a verdict in this case for the plaintiff, but the verdict must be for the defendants because you see, gentlemen, those are the things that they are relying upon to have a verdict and if they have not made them out, and the duty and the liability and the responsibility is upon them to do so by a fair preponderance of the evidence—if they have not done so, then they have not met that burden which the law puts upon them, and are not entitled to have a verdict. And remember, gentlemen—understand me—it is not enough if they make out either the one or the other of those two things; they must have made out both in order to be entitled to a verdict. If they have not, then your verdict must be for the defendant and you need not consider any other matter in the case.

“If they have made them out, then it will be necessary for you to consider other matters.”

5. The Court charged the jury:

“The first is, that if the plaintiff is entitled to a verdict, then what that verdict under the law may be for. This action, as I have said, is brought under the Federal Employers’ Act, or under the Federal Act, and the quantity of the verdict and what it may

Grounds of Appeal.

be for is controlled by what we know as the Death Act in this state. The Death Act is the only act upon which and through which a verdict in case of death may be supported, and therefore you will understand, gentlemen, that you have no latitude, you have no right to go outside of what that act provides in determining what your verdict shall be for. In other words, you are absolutely limited, as is the court, in its charge to you, and its direction to you, in finding a verdict, if one is to be found, within the requirements and within the provisions of that statute. It is entirely immaterial to you, gentlemen, or to myself, as to whether or not we think that act is proper or improper. The fact that the act exists and it is the only act permitting a recovery and is the only act giving the measure of damages which will be represented in a verdict, if one is to be had, is the only concern you and I have before us, and our only concern is to follow the provisions of that statute.

“The right of recovery is entirely a pecuniary or money right, and a recovery in an action of this kind, under the Death Act, may be for the present worth of the pecuniary loss which reasonably would fall on the widow and next of kin of the deceased party because of his death. There is nothing to be added to your verdict or considered in the determination of what the verdict shall be for grief or sorrow or loss of society or wounded feelings or anything of that character.

“The situation is this—and the burden, of course, gentlemen, is upon the plaintiff to satisfy you of all those essential things necessary to give you a basis upon which your verdict may be properly predicated—the decedent, it is said was fifty-one years of age at the time of his death. His widow was forty-two or is forty-two, I am not sure as to what the testimony is upon that point. The accident happened or the occurrence happened on April 15,

Grounds of Appeal.

1916. There are, I believe, four children, their ages being fifteen, fourteen, seven and three. The testimony is that the deceased party was earning at the time of his death one hundred and fifty-five dollars per month. There is some testimony which may go to the question as to what the decedent during his lifetime contributed for and towards the benefit of his family, then consisting of his wife and four children. What they are entitled to recover, if anything, is this, that sum of money which you may find from the evidence it is reasonable to say that he would have contributed for and toward the benefit of his widow or his wife and children during the remainder of his life had he lived—that sum reduced to its present worth. The reason for requiring it to be reduced to its present worth is this: because had he lived he would have been contributing such sums, if any he contributed, from month to month or week to week and as he earned them, and therefore the wife and the children would have had the benefit and the use thereof over the period of time which marked the balance of his term of life and ability to contribute, receiving those sums, you see, in those stated periods, or at those different times; and now by a verdict you see you are giving to them that which otherwise would have been spread over a period or term of years. So, therefore, they are not entitled to the gross sum that it may be found by you that if he had lived he would have contributed, but they are only entitled to the present worth of what that sum would have been. Now in estimating and determining that, gentlemen, you are to take into consideration all the possibilities. It is said that this decedent was fifty-one years of age at the time of his death. You are to determine what in reasonable probability would have been the length of his life beyond that time had this thing not happened to him. Of course you must also take into consideration, in considering that, the possibility that he might have died within a short time after

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Grounds of Appeal.

this occurrence from other or natural causes. Of course, had that happened, his contributions would then, you see, have been cut off, and his family, that is, his wife or widow, and next of kin, would have been deprived from the use or from the benefit of such contributions. It might have been that had he lived he might have been taken ill or might have met with other causes which would have prevented him from earning, and then, of course, naturally, from contributing. That is another item which you must take into consideration. It might have been, had he lived, that he would have for other reasons met with financial reverses, such as would have prevented him from contributing to his family, and therefore, of course, they would not have had the benefit of those contributions. You must also take into consideration the fact that had he lived his widow might have died before he did, and therefore his contributions to her would have ceased. Again, you must take into consideration this circumstance, that there are four children. Some of them or all of them might have died, had he lived, before he did, and of course then these contributions to them would have ceased. You also have a right to take into consideration that these children, had they lived, might ultimately have arrived at that age, particularly the age of twenty-one, if not before, when they would have been self-sustaining, self-supporting, and his contributions, in the natural course of events, to them would have ceased. Of course, if they did, then they are not entitled to recover to that extent in a case of this character. There may be other circumstances, gentlemen, which I have not particularly named to you, but which may occur to you in your good judgment and your good reasoning, which are matters which you feel that you should consider in determining the question of what the loss, if any, is or has been established under the rule which I have given you. And understand, that they are entitled to only just that sum, if any, which is the present worth or will be the

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present worth of that pecuniary loss which they have shown or may have shown they have met with or will in reasonable probability meet with, which is the deprivation of a reasonable expectation of contributions upon the part of the deceased, Mr. Healey, had he not met with his death at the time he did. That, and that only, gentlemen, is the sum which may be represented by the verdict at your hands."

10 Dated, May 2, 1917.

COLLINS & CORBIN,
Attorneys for Defendant-Appellant.

Return.

(Filed May 3, 1917.)

20 The answer of Luther Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and proceedings of the Plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last report of all causes at Trenton, N. J., at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

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Complaint.

(Filed July 27, 1916.)

HUDSON COUNTY CIRCUIT COURT.

FLORENCE HEALY, Administratrix of
the Estate of John A. Healy,

Plaintiff,

vs.

ERIE RAILROAD COMPANY,

Defendant.

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The plaintiff above named, who resides at No. 980 West Side Avenue, Jersey City, County of Hudson, and State of New Jersey, says:

1. She is the administratrix for the Estate of John A. Healy, deceased, and brings into Court letters of administration granted on the estate by the Surrogate of the County of Hudson, bearing date, 18th day of July, 1916.

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2. The said John A. Healy in his lifetime was in the employ of the defendant.

3. The defendant is now and was at all times hereinafter mentioned a foreign corporation, in the State of New York, and was a common carrier by railroad engaged in interstate commerce at the time of the happening hereinafter described in that it transported and was transporting freight for hire from the State of New Jersey into other States and Territories of the United States, and from other States and Territories in the United States into the State of New Jersey.

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4. That while the defendant was so transporting freight from the State of New Jersey into other States and from other States into the State of New Jersey on April 15th, 1916, the said John

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Healy was struck and killed by a freight train by reason of the negligence of the defendant and its agents and servants, while he was assisting in the transportation of said freight.

5. The negligence consisted in this, that the said defendant by its servants and agents caused to be propelled against the body of said John A. Healy, without giving him any warning of the approach thereof, and without using reasonable
 10 care to keep and maintain control of the same, and propelling the same improperly manned and with brakes in an improper condition on a freight car which struck him and threw him under another moving freight train and he was thereby killed.

6. That the plaintiff's intestate left him surviving a widow and the following named next of kin, Florence Healy, Dorothy Healy, John Healy and Harold Healy, who have suffered pecuniary
 20 injury by reason of his death.

7. That the within action is commenced within twenty-four calendar months from the date of the death of the said John A. Healy.

The plaintiff demands \$30,000 damages.

ALEX. SIMPSON,
 Attorney for Plaintiff.

Answer.

30 (Filed, Aug. 4, 1916.)

Defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey at the foot of Pavonia Avenue, Jersey City, says that:

FIRST DEFENSE.

1. It has no knowledge or information as to the allegations of paragraph one.

Answer.

2. It admits the allegations of paragraph two.
3. It admits the allegations of paragraph three.
4. It admits the allegations of paragraph four, except that it says that the accident to said John A. Healy was not caused by any negligence on the part of this defendant or any of its agents or servants.
5. It denies the allegations of paragraph five. 10
6. It has no knowledge or information as to the allegations of paragraph six.
7. It admits the allegations of paragraph seven.

SECOND DEFENSE.

The accident set forth in the complaint was due to one of the risks of injury assumed by the plaintiff's intestate as part of the terms of his contract of employment with this defendant. 20

THIRD DEFENSE.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff's intestate, and the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff's intestate.

FOURTH DEFENSE.

Before the happening of the accident set forth in the complaint, plaintiff's intestate made an agreement with the defendant whereby he surrendered his right to any method form or amount of compensation or determination thereof, other than as provided in Section II of Chapter 95, Laws of 1911, of the State of New Jersey; under Paragraph 8 of said Act, said agreement binds his personal representatives, his widow and next of kin, and is a bar to the present action. 30

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COLLINS & CORBIN,
Attorneys of Defendant.

Reply.

(Filed, Aug. 23, 1916.)

The plaintiff denies the matters set up in the answer of the defendant in paragraphs entitled "Second Defense", "Third Defense" and "Fourth Defense."

Dated, August 22, 1916.

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ALEX. SIMPSON,
Attorney for Plaintiff.

Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit March 12, 1917.

The cause having been heard and submitted to the jury they returned their verdict as follows:

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They say they find for the plaintiff, and against the defendants and they assess the damages of the plaintiff on the occasion of the premises at the sum of Eight thousand four hundred dollars (\$8,400.00).

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Whereupon it is adjudged that the plaintiff recover of the defendants the sum of Eight thousand four hundred dollars damages and his costs which are taxed at Fifty-five dollars and ninety-seven cents (\$55.97) making in the whole the sum of Eight thousand four hundred fifty-five dollars and ninety-seven cents.

Judgment entered this 12th day of March 1917.

LUTHER A. CAMPBELL,
Judge.

(Seal.)

Attest:

John J. McGovern,
Clerk.

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Dennis Regan—Direct.

DENNIS REGAN, SWORN.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. Where do you live, Mr. Regan? A. 3049 Boulevard.

Q. Who are you employed by? A. Erie Railroad.

Q. How long have you been employed by the Erie Railroad? A. Over eighteen years. 10

Q. On the 19th of April, 1916, between four and five, were you at work for the Erie Railroad? A. Yes.

Q. What were you doing? A. Switching cars in Croxton yard.

Q. What was your work; what did you do? A. I am a conductor of the Erie.

Q. Conductor of what? A. Engine 119. 20

Q. How many cars did she have? A. She had one car.

Q. Where had she got that car? A. Little further up the yard, track called the spur.

Q. Were you the conductor on the engine or the conductor on this car? A. I was conductor of the engine.

Q. Not of the car? A. I was not on the car.

Q. What? A. I was not on the car.

Q. But weren't you in charge of the car? A. In charge of the car— 30

Q. You are the man who told them what to do with the car? A. Yes.

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

Q. Where did you get this car? A. Off of a track known as the spur.

Q. Who was the engineer? A. W. T. Walsh.

Q. Did you tell him to get the car? A. I didn't tell the engineer, no; I told the man that went with the engine. 40

Dennis Regan—Direct.

Q. Who was that? A. Charles W. Weil.

Q. To take out this car? A. To get this car, yes.

Q. When you got it what did you tell him to do with it? A. To cut this car off and lug it out off it and make it drop in F-5, in the freight track toward F-5, and we would pick him up.

10 Q. You told him to cut this car out from the train and make a block towards what? A. Towards the eastbound freight track, which would lead towards F-5.

Q. He was to drop towards the eastbound freight track; how would he get into the eastbound freight track? A. By leaving the engine on the crossover and car down on freight track.

20 Q. How many switches would he come in through from the place he cut the car out and the place where the car reached the destination? A. He passed two—he would pass two.

Q. What tracks would he go on? A. He would go on F—on the eastbound freight track F-5.

Q. Go on any other tracks to make the point he wanted to make? A. No, sir.

Q. Only on those two tracks; who was the switch man who turned the switches for him? A. I turned switches for him.

30 Q. You turned both? What was the first switch you turned? A. One was already set. One was what you call a driller and the other was a head on switch where I left my engine.

Q. Was the driller the first switch you opened? A. That was already set.

Q. Was that the first switch you came to? A. That was the first switch he passed.

Q. The first switch he passed was a driller? A. That was already set.

40 Q. What was the one you set? A. Switch leading from the spur to the crossover.

Dennis Regan—Direct.

Q. Where would that send a car? A. Would send the car on the eastbound freight track.

Q. Where was this engine and car when you turned this switch you turned? A. The engine was not—the engine was gone on the crossover and the car was coming behind for to go on the eastbound freight track.

Q. It had not reached the switch yet, had it, when you turned it? A. No, it had not, because if it had I couldn't have turned the switch. 10

Q. How far from the switch was it? A. **Maybe** tewnty or twenty-five feet, to give me a little room to throw the switch.

Q. Had it been cut from the engine then? A. Yes.

Q. Who had ordered it to be cut from the engine? A. I did.

Q. When did you order it cut from the engine? A. About a few minutes before that. 20

Q. You were then waiting at the switch to turn the switch? A. Yes.

Q. Who was on the car? A. Charles W. Weil.

Q. Where was he on the car; could you see him? A. He was on the west end of the car.

Q. That is on the end away from you? A. The end nearest to me.

Q. The end nearest to me? A. Yes.

Q. The car was going which way? A. The car was going west. 30

Q. Going west, and he was on the west end when you saw him? A. Yes.

Q. That is he had a clear view of everything in front of him? A. He should have, yes.

Q. Any trouble about seeing in any way in front of him? A. No; daylight.

Q. **As** he came along and you turned the switch did you see the man now dead standing around the switch? A. Mr. Healey, you mean? 40

Dennis Regan—Direct.

Q. Yes. A. I seen him.

Q. Where was he standing? A. He was standing between the two leads, between the south yard lead and the eastbound freight track.

Q. Was that on or near the track that your car was coming on? A. Yes.

Q. What do you mean, was it on or near? A.
10 Near.

Q. How near to it? A. Well, seven or eight feet between the tracks.

Q. He was between the two tracks? A. He was between the two tracks.

Q. What tracks was he between? A. Between the south lead and the eastbound freight track.

Q. This car was coming on the eastbound freight track, was it? A. Yes.

Q. Was that the last you saw of Healey? A.
20 Yes.

Q. Before you saw his body? A. Yes.

Q. When you saw him standing—how far was he from the switch then that you were turning? A. Must be a hundred and fifty feet or so.

Q. How far from this car that was coming? A. Well this car had—about the same distance to go, but after it passed me it obstructed my view.

Q. Oh no, you don't understand me at all. You say it was a hundred and fifty feet from the
30 switch and the car had not reached the switch, so he must have been more than a hundred and fifty feet from the car, mustn't he? A. The car had not reached the switch. The car should have reached the switch.

Q. Had the car reached the switch when you saw Healey?

THE COURT: The switch which you were about turning or about turned?

40 A. It would have been right close there.

Dennis Regan—Direct.

Q. When you first saw Healey? A. Yes.

Q. Not what it could be, but was it? A. It must have been.

Q. Not what it must have been; was the car at the switch point? A. A few feet of it. If it was right on the switch I couldn't throw the switch.

Q. Are you guessing? A. No, sir; if the car was right on the switch I couldn't throw the switch. 10

Q. It had not reached the switch? A. Just about to reach the switch.

Q. Just about to? A. Yes, when I throw.

Q. So Healey was about one hundred and fifty feet away from you when you saw him? A. Further west.

Q. Which direction was he walking? A. He was not walking. 20

Q. What was he doing? A. He seemed to be standing around there.

Q. Which direction was he facing? A. To the best of my recollection he faced west.

Q. The same way the car was going—not towards the car but away from the car? A. Looking that way.

Q. Well, "Looking that way" means nothing. Was he looking west? A. Well, kind of west, sideways like. 30

Q. Was not south-southwest—southwest? A. Yes.

Q. Sure about that? A. Yes, that is the last I seen him.

Q. You are still working for the Erie? A. Yes.

Q. Is that the last you saw of Healey before you knew that he was killed? A. Yes, sir.

Q. Well then, you turned the switch and did your car take the switch then, this car? A. The car went where we had intended it to go. 40

Dennis Regan—Direct.

Q. It was kicked, -was it? A. No. str.

Q. How do you explain that motion, if it proceeded alone without any engine, if it was not kicked? A. It is started by the engine and the engine ran away from it.

Q. Then how did it move, under what power?
A. Under its own power.

10 Q. How would it be stopped? A. By hand brake.

Q. This car had only one man on it? A. That is all could be on it.

Q. No switchman; you were doing the switching? A. Yes.

Q. You were then in charge of this car, weren't you? A. Yes, charge of the whole business.

20 Q. What was the next thing that you knew after you saw Healey one hundred and fifty feet away and the car coming through the switch, what was the next thing you knew? A. Next thing I seen was Mr. Healey being dragged up by this other train moving east on the south lead.

Q. Dragged up by the other train that was moving east on the south lead? A. South lead.

30 Q. So that before your car reached the switch or at the time it reached it you saw him one hundred and fifty feet away looking southwest and the next you saw he was being dragged by another train? A. Yes.

Q. The train that was dragging him, was it on the track next to the track upon which this car went? A. Yes.

Q. How far did this car go before it stopped after you sent it over the switch? A. Well, it must have went pretty near two hundred feet.

40 Q. Did this car that you were in charge of take—when it took the switch what track did you say it went into? A. Went on the eastbound freight track.

Dennis Regan—Direct.

Q. Was that its destination or was it still going further on? A. That was the lead to its destination.

Q. Where was it going after that? A. F-5.

Q. F-5. Who was there assisting you in this movement besides yourself, anybody? A. Charles W. Weil.

Q. What did you do after you saw Healey's body being dragged by the train on the next track? A. I pulled him clear and run for a stretcher. 10

Q. Where were you when you pulled him clear, at the switch? A. No, sir; I had run from the switch.

Q. How far? A. Maybe a hundred feet—sixty feet, something like that. A hundred feet, I should judge.

Q. Was he dead when you got to him? A. No, sir. 20

Q. What? A. No, sir.

Q. Did he say anything? A. No, sir.

Q. How many tracks are there at this place? A. At this place there is about six.

Q. How many tracks did this switch lead into that you were turning? A. This switch I ran into and the crossover, three others.

Q. It entered into three tracks, then? A. Yes, it was a crossover. 30

Q. Did it enter into the track—the other track—where Healey was standing, as well as the eastbound track? A. No, sir.

Q. Did not enter into that track at all? A. No, sir.

Q. What tracks did it enter into? A. It did not enter into any track with the eastbound freight track; that is the car—the switch was on a crossover the other way. 40

Q. Could you get into any other tracks from

Dennis Regan—Cross.

this switch besides the eastbound track? A. Yes, sir.

Q. What tracks could you get into? A. G yard lead.

Q. Was that to the right or left of the track on which the car went? A. That was to the left.

Q. Left of it? A. Yes.

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CROSS EXAMINATION BY MR. HOBART:

Q. What time of day did this happen? A. About 5 P. M.—5 P. M.—5.05.

Q. Clear day? A. Clear day, yes, sir.

Q. How long had you been working in the yard that day? A. I worked in the yard from 6 A. M.

20 Q. Did you work in the same part of the yard all day? A. No, not exactly the same part, no, different parts of the yard.

Q. Had you made other movements like this one that same day, with other cars? A. Yes. Certain work that we had to do we made that kind of movements.

Q. Common movement in that part of the yard? A. Yes.

30 Q. Do you remember what kind of a car this was that struck Healey? A. Well, I don't know which car struck Healey.

Q. You didn't see him struck? A. That car obstructed my view. I did not see Healey get struck.

Q. Well, the car that was attached to this engine, was that what is called a refrigerator car? A. Yes.

Q. You were sending that on to what track? A. Towards F-5.

40 Q. What were you sending it there for? A. Supposed to go to Jersey City local for Swift & Company.

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Q. Did you send other cars on that same track that day? A. No, not as I remember, no.

Q. On other days, did you? A. Oh, yes, yes.

Q. Send them the same way you were sending this one? A. Every time, mostly, yes.

Q. Do you know how long Healey had worked in that part of the yard? A. Oh, he has been around there for quite some time. He has been to Weehawken, but he has been back there again for a year and a half I should think, or more. 10

Q. About a year and a half he had been back in this same yard? A. This same place.

Q. He was your superior, wasn't he? A. Yes.

Q. What was he called, the yardmaster? A. Yardmaster.

Q. You were what was called one of the yard conductors? A. Yes, sir.

Q. And you had had other cars for Swift & Company on other days, had you not? A. Yes, other days. 20

Q. Mr. Healey had been working there? A. Yes.

Q. Those cars were handled in the same way as this one? A. Same manner, yes, sir.

Q. That is, with a brakeman in charge of the car and then drop or block, or whatever it is called? A. Yes; when we do such work as that you first want to know that you have a brake. 30

Q. Now on this occasion where did the car, the refrigerator car, start from? A. From a track known as the spur.

Q. How far away was that from the point where the accident happened? A. Maybe two hundred and fifty or three hundred feet, something like that.

Q. When the car started and from that point two hundred and fifty or three hundred feet away, where were you? A. I was standing at the switch 40

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which leads from the spur or a continuation of the eastbound freight track to the crossover.

Q. Was that the switch that you afterwards threw? A. Yes.

Q. To allow the car to go into the other track?
A. After I allowed the engine to go by.

10 Q. Allowed to go by and after the engine went by you threw the switch to change the movement of the car? A. Yes.

Q. How fast was that car moving as it approached this switch? A. Well, I should say about five miles an hour, maybe less, I couldn't exactly swear to that, it is my belief.

Q. At the rate they usually make such movements in the yard? A. Yes, sometimes more and sometimes less.

20 Q. In which direction was this car moving, eastbound or westbound? A. Westbound.

Q. It was moving westbound on the eastbound freight track; is that right? A. Yes.

Q. Did you have any practice or custom about moving trains in any particular direction or moving cars in any particular direction on that track?
A. No, sir; you go each way, east or west.

Q. Is that also true as to the other yards—the other tracks in that yard? A. Yes.

30 Q. Move trains or cars in either direction? A. Either direction.

Q. How close was Healey to the switch that you pulled when you first saw him? A. I should say a hundred and fifty or one hundred and sixty feet.

Q. You could see him plainly from where you stood? A. Before the car passed me I could, yes.

Q. That is what I mean, before the car passed you? A. Yes.

40 Q. Was there anything to prevent his seeing the car as it approached him?

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MR. SIMPSON: I object. That question is for the jury and not for this witness; he can describe the location.

A. There was no obstruction. No obstruction.

Q. Just wait a minute, until the Judge rules.

THE COURT: I suppose it is very broad as to whether he could see it. I suppose you can ask him whether there was anything between him and the freight car. 10

Q. Was there anything between Healey and the moving car that would prevent Healey from seeing the car as it moved? A. No, sir.

Q. Was the track at that point straight? A. Yes, sir.

Q. When the car started to move how far away then, at the time it started, was it from Healey? 20

A. When it first started? Must be over three hundred feet.

Q. Was there anything in that space of three hundred feet to obstruct the view or prevent his seeing the car? A. No, sir; any more than the engine that made this draw.

Q. The engine was fastened to the car at first? A. Yes.

Q. Was it fastened at the front of the car?

A. At the west end of the car, yes. 30

Q. The west end of the car, and the car was moving which way? A. West.

Q. Now when you first saw Healey you have told us that he was standing still? A. Yes.

Q. That is right, is it? A. Yes.

Q. You have also told us the direction that he was facing? A. To the best of my memory, yes.

Q. I think you said west or southwest? A. Southwest.

Q. Was that in the direction from which this car and engine came, or was it— A. No. 40

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Q. —the opposite direction? A. Opposite direction.

Q. Do you know whether he kept on standing that same position all the time? A. I couldn't say that, sir.

Q. Don't know it? A. No, sir.

10 Q. Do you know whether he was struck by the refrigerator car or by this other train? A. I don't know.

Q. Now you called this a train; what was it; how many cars were there in it? A. Which one?

Q. The one that came on the adjoining track? A. That was going east on the southbound?

Q. Yes. A. That I call a train, yes.

Q. Was it a regular train or a yard train? A. No, yard train.

20 Q. Making a yard movement? A. Making a yard movement, yes.

Q. How fast was that going? A. That wasn't going over three or four miles per hour.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

Q. If you had not turned this switch where would this car have gone? A. Followed the engine.

30 Q. What? A. Followed the engine on the crossover.

Q. Was the engine in front of the car? A. Yes.

Q. Oh, I see; the engine came first and you let that through? A. Letting the engine go on across.

Q. Then you turned the switch and let the car through. If you had not turned the switch the car would have followed the engine right on what track? A. On the crossover.

40 Q. How far was there between the engine and the car when you turned the switch? A. There

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must be fifteen or twenty feet or more or I couldn't have turned the switch.

Q. Did you see Healey before the engine crossed over the switch or after? A. After the engine had made the transfer and crossed over the switch and before also.

Q. I am not asking you about before. The last time you saw Healey he was a hundred and fifty or one hundred and sixty feet away from you looking away from the direction the engine and car were coming, you say? That is what you testified to under oath? A. Yes. 10

Q. At that time, that last time, had the engine crossed the switch? A. The engine had crossed it.

Q. The car had not yet crossed? A. Had not yet come.

Q. After you looked at Healey you then threw the switch and turned the car in on to a different track than the engine was going; is that right? A. Yes, sir. 20

Q. You did nothing more? A. That was all.

Q. Until you saw Healey under the other train? A. Yes.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. Was there anything about the appearance of this car to indicate where it was going? 30

(Objected to. Question withdrawn.)

Q. Was this a refrigerator car? A. Yes.

THE COURT: He said so.

Q. How was that different from an ordinary freight car? A. Well, those refrigerator cars has ice tanks.

Q. Yes; was it marked Swift & Company? A. Yes, sir; it was carded to that track. 40

Q. Was it loaded? A. Yes.

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Q. Was it the custom in that yard to have loaded cars for Swift & Company placed on the track where this car was in fact placed? A. Yes, sir; they can be placed there—would be placed there and then be put away afterwards.

Q. By being put away afterwards you mean they are taken away afterwards by some other engine? A. Some other engine, yes.

10 Q. This was the place then for such cars to be switched, was it? A. Well, it wasn't exactly the place. Any car might be placed where this was placed and afterwards put away, as time will permit.

Q. Well, had you placed other cars for Swift & Company on this same switch in this same manner at other times? A. We have—I have not done it.

20 Q. You have seen that done? A. Yes, I have seen it done, yes.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

Q. One question in direct. Is there any written rule of the Erie Railroad Company which you are positive of, governing you in your duties such as you were doing this day with reference to warning people around the tracks when you were turning the engine into one track and the car into another at a switch? A. Well, as far as you possibly can, yes.

30 Q. What would you have to do?

(Question repeated by stenographer.)

Q. Do you understand the question? A. Not very clear.

Q. I will withdraw it. You know what you were doing this day, you were switching an engine? A. Switching an engine one way and the car the other.

40

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Q. When you were doing that kind of work, that is when you sent an engine on one track and then cut a car off and shoot it into another track, when you are doing that kind of work and you see anybody around in the position of danger, is there any printed rule of the Erie Railroad Company telling you what to do? A. Well, you are supposed to warn them as far as possible, yes. 10

Q. How would you warn them? A. Holler at them or for a man on the car—

MR. HOBART: I object to this as calling for the contents of something in writing. Of course he cannot give it.

THE COURT: As I recall the question it was whether there was any rule of the Erie Railroad.

MR. HOBART: Any written rule. 20

MR. SIMPSON: I struck out the word written. Any rule, so I think the answer is responsive.

MR. HOBART: Is that allowed to stand as it is?

THE COURT: I don't know what shape it is in.

Q. You said a minute ago that you are supposed to warn a man as far as you might be. Where did you get that supposition from? From a printed rule or from the custom of the yard? A. Custom of the yard. 30

Q. Not any written rule at all? A. Not that I saw.

Q. Not that you know of? A. No, sir.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. What do you know about any such custom, Mr. Regan? A. Well, if you are switching around and you see anybody in danger, why, you warn 40

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them to the best of your ability, holler at them or such like that.

Q. You were how far from Healey? A. About a hundred and sixty feet.

Q. Well, did you warn him? A. Well, he was hollered at. I didn't holler at him.

Q. Why didn't you? A. Well—

10

MR. SIMPSON: I object. His motive is of no essential value at all. It is irrelevant whether he did it or not. Whether he should have done it or not has nothing to do with why he didn't do it. He might not have done it because it was against his religious principles.

THE COURT: The answer may show there was—

20

MR. SIMPSON: It may not.

THE COURT: —a condition existing in which—

MR. SIMPSON: A question which may or may not bring out competent evidence is not good. Of what earthly use is evidence by motive.

THE COURT: I think I will overrule the objection.)

30

MR. SIMPSON: An exception in the nature of an objection.

(Question repeated.)

A. Well, it ain't well to have too much hollering; it is just as bad as none at all.

Q. Did the rule or custom require you to holler at him under such condition?

(Objected to on the ground that is for the jury to say. The Court overruled the objection.)

40

A. To the best of my belief, yes.

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Q. Now the question is, why didn't you? A. Well, there was others hollered at him.

Q. Did you hear the others holler? A. Yes, I heard the holler.

Q. Is that the reason you didn't holler at him? A. No, that is not the reason.

Q. What is the reason? A. I had this other work to atend to, this switch to throw. 10

Q. You heard the other man hollering? A. I did, yes.

Q. What did they holler? A. "Look out", or something like that.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

Q. How long was that after you had seen him and after the freight car had gone through the switch that you heard him holler, "Look out"? Wasn't that when the freight car was right on top of him? A. No, sir. 20

Q. How long before? A. A couple of seconds before it passed me.

Q. A couple of seconds before that car, the freight car, passed the switch? A. Yes.

Q. Who was it that hollered? A. Mike Molock.

Q. He is a Polack, isn't he, a Polish man? A. A Polish man, yes.

Q. Where was he standing? A. He was up the track further. 30

Q. Back of you or in front of you? A. Up the track, this way further, eastbound.

Q. You were busy taking care of your— A. Switch.

Q. —switch, so you didn't have any time to holler at him; is that right? A. Yes, sir.

RECESS.

George William Weil—Direct.

GEORGE WILLIAM WEIL, SWORN.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. Where do you live? A. I live 110 Lake Street, Jersey City.

Q. What is your business? A. Brakeman, Erie Railroad.

10 Q. Were you a brakeman on the afternoon that Mr. Healey was killed? A. Yes, sir.

Q. What work were you doing? A. I was switching cars around the yard.

Q. Where did you get this car that you were on? A. Got this car on the spur, as they call it.

Q. Where were you taking it? A. Going to take it and put it up in F-5.

20 Q. Who told you to put it up in F-5? A. Conductor.

Q. Did he tell you by word of mouth or give you written instructions? A. By mouth.

Q. Word of mouth. What did he tell you to do? What did he say? What were his exact words? A. "Take this car and make a drop of it and put it in F-5."

Q. Where were you when he told you that? A. I was on the engine.

30 Q. Where was the engine? A. Why, the engine was coming up from G yard towards the spur.

Q. With this car behind it? A. This car was not behind it. We had to go up and get it.

Q. What did you do after he told you to go up and get this car and take it down to F-5? What did you do? A. I got on the side of the car.

Q. Your car was not there yet. You say you got on the engine and you had no car? A. Yes.

40 Q. He told you to get this car and take it to F-5. What did you do? A. We backed up the engine up to the spur.

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Q. Then what did you do? A. Coupled on to the car.

Q. Coupled it on the car? A. Yes.

Q. What did you do? A. Waited for a signal from the conductor.

Q. Where were you then? A. I was on the side of the car.

Q. Did he give you the signal? A. Yes. 10

Q. What signal did he give you? A. Gave me signal to come ahead.

Q. What did you do then? A. I hung on the side of the car and he gave the engineer a signal to kind of stop and to cut the car, and he was to go ahead and cut the car off.

Q. What happened? A. Cut the car off and climbed up on the car to the brake.

Q. Did you do the cutting off? A. Yes.

Q. Where was the car when you cut it off, how near the switch? A. I should judge about twenty-five feet away from the switch. 20

Q. Was the conductor standing at the switch? A. Yes, sir.

Q. When you cut it off? A. Yes.

Q. After the car had been cut off you got up on top of the car again? A. Yes.

Q. What did you do before the car got to the switch, anything? A. Yes; I got the brake, that's all. 30

Q. Set the brake? A. Got up at the brake.

Q. At the brake. Which way were you looking? A. West.

Q. You had a clear view west? A. Yes.

Q. Within what distance could you stop it going as fast as it was? A. About a hundred feet.

Q. A hundred feet? A. Yes.

Q. Before you got to the switch at all had you seen Healey? A. No, sir.

Q. When you got through the switch, just over 40

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the switch, when you were at the brake did you see Healey? A. Yes.

Q. You did not see Healey until you got within four or five feet of him, did you? A. Well, that I couldn't—I couldn't see him good until I was within about six or eight feet.

10 Q. That is what I want to know. You did not see him? A. I didn't see him.

Q. Until you were within six feet of him? A. Yes.

Q. Where was he standing when he was within six feet of you? A. He was standing facing west on the left side of me.

Q. Was he in your track or only near the track? A. No, sir; he was near it.

Q. How near was he? A. About eighteen inches from the track.

20 Q. From the rail? A. Yes.

Q. When you saw him within six feet of you, which was the first time you saw him, you hollered, didn't you? A. Yes.

Q. That is the only thing you did in the way of warning him, isn't it? A. Yes.

Q. And what did you do with trying to stop the car? A. I tried to stop the car.

Q. But you didn't stop it, did you? A. I couldn't stop it.

30 Q. What was the next thing that you knew of the accident? A. Why, I didn't know that he had been hurt until I stopped the car and turned around and I seen Mr. Healey being picked up.

Q. Where was he being picked up from? A. Well, just—about forty feet away from the switch.

Q. How far away from the switch were you when you saw Healey? How far west of the switch? A. I was about twenty-five foot.

40 Q. Twenty-five feet? A. Yes, sir.

Q. So that if your car hit him at all it hit

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him about thirty-one feet from the switch, did it?

A. I couldn't say exactly. Probably thirty or forty feet.

Q. From the switch? A. Yes.

Q. How was he standing when you saw him? A. Was facing west.

Q. With his back to you? A. Towards me, yes. 10

Q. How high was this car in the air, the top that you were on; how high up in the air was it?

A. Oh, about fourteen feet, I should judge; I don't know exactly.

Q. How far behind the engine were you when you entered the switch? A. About twenty foot.

Q. The engine had gotten twenty feet away from you? A. Yes.

Q. So that as you went into the switch there was nothing preventing you seeing—how far in front of you? A. Why, I couldn't say exactly, because the engine blocked my view until it got where you can— 20

Q. The engine had got twenty feet away from the switch, you say, at the time you entered it? A. Yes.

Q. So there was nothing in front of you then as you entered the switch, was there? A. No.

Q. On E-5? E-5 was clear then? A. No, we did not put it in E-5. The freight track was clear. 30

Q. What track was it that the car was on when you saw him six feet in front of you? A. Freight track.

Q. It was not E-5? A. No.

Q. The freight track? A. Yes.

Q. What is the freight track? A. The freight track is the track used by freight cars.

Q. Passage of freight cars? A. Yes.

Q. Is not used for storage at all? A. No, sir. 40

Q. There was nothing then in your way in the

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freight track? There was nothing in front of you between you and Healey on the freight track? A. No, sir.

Q. As you entered the track? Who was engineer, could you say, of this engine that was pulling you? A. Mr. Welsh or Walsh, I don't know which way you pronounce it.

10 Q. As you entered this switch, how did you stand on the car? A. I stood at the brake, facing west.

Q. Were you on the front of the car or side of the car, or how were you? A. At the west end of the car, at the brake.

Q. But facing the brake? A. Facing the brake.

Q. You were looking east then? A. No, I was looking west.

20 Q. How could you? You were standing on top? A. On top of the car.

Q. Facing the brake, the brake in front of you? A. Brake in front of me.

Q. And the track in front? A. Yes.

Q. You did not see this man until he was within six feet of the car? A. No, I did not.

CROSS EXAMINATION BY MR. HOBART:

30 Q. Which way was the engine headed before you cut the car off? A. West.

Q. You were moving west? A. West.

Q. So the engine of course passed over the switch first? A. First, yes.

Q. And the conductor was at that point prepared to turn the switch after the engine had passed, so as to let your car go on another track? A. Yes.

40 Q. You spoke of a track E-5. To get to that track did you have to pass over this freight track? A. Yes.

Q. So that running your car into the freight

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track was a part of the regular course that you would follow to get to the point where it was finally to go to be made up into a train later on?
A. Yes.

Q. Right? How close was the engine to the switch before you cut it off, before you cut the car off? A. I should judge about twenty-five foot. 10

Q. You were facing west, were you? A. Yes.

Q. Of course when you cut the car off you were down at the coupling pin, I suppose, were you? A. Yes, on the side.

Q. Riding on the car? A. Yes.

Q. Between the car and the engine tank? A. No; I was riding on the side of the car.

Q. Then you reached in and released the pin?
A. Yes. 20

Q. Do you remember which side of the car you were on? A. I was on the right side of the car.

Q. That is the right side in which it was moving? A. Yes, facing west,

Q. Is that the side of the car where Mr. Healey was standing as you afterwards found, or was he on the other side? A. On the other side.

Q. On the other side? Well, of course, when you were picking the coupling pin loose, you could not see Healey then? A. No, I could not. 30

Q. Why not? A. The engine obstructed my view.

Q. Up to that time you had been riding on the side of the car? A. Yes, sir.

Q. With your foot on the step, or how? A. I was hanging on with my hand and my foot on the step.

Q. This is a large refrigerator car, I believe, was it? A. Yes.

Q. Of course you could not see through the car? A. No, sir. 40

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Q. After you had released the coupling pin did the engine move on ahead? A. Moved on ahead of us.

Q. I suppose it moved a little faster, started up a little faster than the car? A. Yes, sir.

Q. So as to clear the switch. After you had done this what did you next do? A. I climbed
10 up the side of the car to the brake.

Q. Did you go fast or slow? A. Well, we usually climb fast to get hold of the brake.

Q. What did you do this time, did you go right up? A. Yes.

Q. Without any delay? A. Yes.

Q. Or loafing? A. Yes.

Q. Which end of the car was the brake on?
A. West end of the car.

Q. That was the direction in which it was going?
20 A. Yes.

Q. How soon after you got to the top of the car did you first notice Mr. Healey? A. I just got on top of the car when I noticed Mr. Healey.

Q. At that time how far was the engine clear of your car? A. About twenty feet, I guess.

Q. When you noticed Mr. Healey you were then quite close to him? A. Yes.

Q. That is the first you had seen him? A.
30 Yes, sir.

Q. Why hadn't you seen him before?

Objected to as calling for a conclusion.

Question withdrawn.

Q. Up to the time that you had released the coupling pin so as to cut the engine off, was the engine between you and where Mr. Healey was standing? A. Yes.

Q. And while the engine was moving away
40 from you and separating itself from the car I

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suppose the distance gradually increased as the car moved ahead faster, did it not? A. Yes.

Q. While the engine was moving ahead was it still between you and Mr. Healey? A. No, sir.

Q. Well, how far did the engine get away from the car before you caught sight of Healey, that is what I want to know about? A. Well, the engine got away a good deal further than I did from Mr. Healey. 10

Q. Yes, I know, but how far did the engine have to get away from the car before you saw Mr. Healey? A. About twenty-five feet.

Q. When the engine was that distance away, by that time you had climbed up on top of the car, had you? A. Yes, sir.

Q. Then that brought you how close to Healey? A. About eight foot. 20

Q. You said you called to him or said something; what did you call? A. I hollered, "Look out, Mr. Healey."

Q. He was the yardmaster, I believe, wasn't he? A. Yes.

Q. As such was he the superior of you and the other members of your crew? A. Yes.

Q. Conductor Regan, I think—Regan was your conductor? A. Yes.

Q. He was over your crew? A. Yes. 30

Q. And also over the other yard crews working? A. Yes, sir.

Q. Now when you called to Mr. Healey did he make any move? A. Yes; it appeared to me as if he moved to get out of the way, that is all I could see.

Q. What kind of a move did he make? A. He turned to the right.

Q. When you called to him which way was he facing? A. He was facing west. 40

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Q. That is the same direction your car was moving? A. Yes.

Q. After you called to him did he change his posture, his position, in any way? A. Yes, he turned right around away from us.

10 Q. Well, can you describe it a little more clearly. When you say he turned right around away from you what do you mean? A. Well, he turned—we were going this way and he turned around this way (indicating).

Q. Did he turn in such position as to have his face turned towards your car? A. No, sir.

Q. But he did move? A. He did.

Q. How far did he move? A. Well, I couldn't see any more.

20 Q. Why couldn't you see him any further after that? A. The car obstructed my view.

Q. That is the same car you were on? A. Yes.

Q. Which side of the car was your brake? A. On the west end of the car.

Q. Which side of the car; was it the middle of the car or—A. Right. Well, not exactly the middle; it is a little to the right.

Q. It would be the side away from where he was standing? A. Yes.

30 Q. So as the car got up closer to Healey the body of the car kept you from seeing him, did it? A. Yes.

Q. You did not actually see him hit then, did you? A. No, sir.

Q. Did you notice how far he moved when you called to him? A. No, sir.

40 Q. He turned his body in the manner you have described. What was the next you knew that anything had happened? A. When I stopped the car I got to get down off the car and I seen the men going over toward this other train on the

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south lead and I seen Mr. Healey laying there.

Q. You don't know whether he was hit by your car or not? A. No, sir.

Q. Now you spoke of bringing your car to a stop. How far did it go after you saw Healey before it stopped? A. About a hundred feet.

Q. How did you stop it? A. With a hand brake. 10

Q. Was the brake all right? A. Brake all right.

Q. How fast was the car moving that you were riding on top of? A. Five or six miles an hour.

Q. Is that the usual rate of a movement of that kind? A. Yes, sir.

Q. Had other cars been taken into that track E-5 before this one? A. Yes, sir.

Q. Were they moved in the same way? A. No, not all. 20

Q. Well, were some of them? A. Occasionally move them that way, yes.

Q. You were putting this car on that track in order to let it be made up into another train, were you? A. Yes.

Q. And then be transferred to the Jersey City station? A. Yes.

Q. This accident happened at what is called Croxton, didn't it? A. Yes. 30

Q. That is a mile or two from the Jersey City station? A. Yes.

Q. Did you notice where this other train was that came along on the next track? A. Yes, sir.

Q. Where was it when you first caught sight of Healey? Had it got as far as Healey? A. Yes, that had passed—not all—seven or eight cars or nine cars had passed him.

Q. Had already passed him before you reached the point where Healey had been? A. Yes, sir. 40

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Q. Which way was that train moving? A. That was moving east.

Q. That is a yard train, I understand? A. Yes.

Q. How fast was it moving? A. Well, about three or four miles an hour.

10 Q. Now how far away from the place where you saw Healey did your car start? A. About two hundred and fifty or three hundred feet.

Q. Was it moving at about the same rate of speed all the time from the time they started up to the time you got past the switch point? A. Yes, sir.

Q. Was there any other car or anything in the way to prevent Healey from seeing your engine and car as it moved along? A. No, sir.

20 Q. Well, that track was clear then, was it? A. Yes, sir.

Q. There were no curves or anything of that sort to keep him from seeing as you approached? A. No, sir.

Q. Do you know how long Mr. Healey had worked in that yard? A. No, sir.

Q. Well, had you seen him working there before this day? A. Ever since I have been there.

30 Q. How long was that? A. That was six months at that time.

Q. While he was working there had other movements been made that you knew of similar to this? A. Yes, sir.

Q. You have referred to one of those tracks I think as a freight track? A. Yes.

Q. I am not sure whether you called it eastbound track or not? A. Yes.

Q. It was the eastbound track? A. Yes.

40 Q. Did the cars all move east on that track? A. No, sir.

George William Weil—Cross.

Q. Were there any other rules about which way they would move? A. No, sir.

Q. Might they move both ways? A. Yes, both ways.

Q. Did they move both ways during the time you were there? A. Yes, sir.

Q. This car that you were riding has been called a refrigerator car; was there any name on it or anything to describe it? A. Yes, it was a New York Central lines car. 10

Q. Do you know whether or not other cars of that kind had come into the car while you were working there and which were handled in that way? A. Yes.

Q. Is that a Swift & Company car, I think you said or somebody said? A. Yes.

Q. Were the Swift & Company cars, when they came in loaded, handled in that way? A. Well, not all. 20

Q. Well, some? A. Some handled that way.

Q. What was Mr. Healey doing when you saw him? A. Well, it appeared to me as if he was checking numbers or checking up the other train.

Q. That is the other train? A. That was coming east.

Q. That was going by on the next track? A. Yes. 30

Q. Do you know whether Mr. Healey had given orders to you or your crew about the movement of this particular car that day? A. No, sir.

Q. You don't know about that. All right. You call this a Swift & Company car; did it have that name marked on it? A. No, it was carded; a small ticket tacked on.

Q. That simply meant it was going to Swift & Company? A. Yes, sir.

Q. Is that right? A. Yes. 40

George William Weil—Re-Direct.

Q. A refrigerator car is different in appearance from other cars? A. Yes.

Q. What is the difference, just generally? A. They have end ice tanks and they have swinging doors such as—on both sides of the car.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

10

Q. This is the eastbound track; was that the name of it? A. Yes, that is the name of that track. That was in the—they got the name from when the passenger trains was running through the yard they call that the eastbound freight track. That used to be used by freight cars only.

Q. Going which way, east or west? A. East or west.

20 Q. Why do they call it east bound if they go east or west? A. I don't know the reason.

Q. You don't know that? A. Yes.

Q. You say this movement was an occasional movement you were making, switching in with the engine ahead. Do you mean that was a rare movement or general movement? A. No; we don't do it all the time. It is according to where the car is standing at the time.

Q. Is it an unusual movement? A. No, it is not.

30

Q. You do not use it generally? A. Well, we do it—if we have to get hold of the car in that manner, why, we do that way.

Q. What did you rely on if you could not see by reason of the fact that you were down on the side of your car when you entered the switch and knew your car had been cut off from the engine and was in motion and you were in control of it—what did you rely on to know that you had a clear track? A. I didn't rely on anything.

40

Q. Take a chance? A. No, we don't take a chance.

George William Weil—Re-Direct.

Q. Then what did you rely on? You could not see, you say? A. No.

Q. You unhooked your car from the engine at the switch when you were down, you climbed up, and you couldn't see until you got on top, until you got some twenty-five or thirty feet in on this track before you had a chance to look. Now before you had a chance to look what did you rely on for a clear track? A. Why, don't rely on anything in particular. While walking around there we generally walk around there with our eyes open to see what is going on. 10

Q. I am not asking you what you do about your eyes open; I asked you about a clear track, not men. I am not asking about men—a clear track. Trains on the track, cars or anything. A. I know the track was clear. 20

Q. How did you know that? A. When we went down there after one car.

Q. You could not see? A. When we went after this car.

Q. As a matter of fact this was a track for both east and west bound? A. Yes.

Q. Manifestly you could not see as you have described it when you entered the track. You could not see. What did you rely on to know that that track was clear? A. I could see the track was clear while on the side of the car. 30

Q. You could only see that one side? A. I could see that side ahead.

Q. You could see the whole track there ahead? A. Yes.

Q. Then why didn't you see Healey? A. I couldn't see on the other side.

Q. You saw the track ahead of you? A. I saw the track ahead.

Q. And suppose Healey was a hundred and fifty 40

George William Weil—Re-Direct.

feet ahead of the switch, could you have seen him from that side? A. Yes, I could have seen him.

Q. You could have seen him? A. Yes, I could.

Q. Then you had a full look up the track from the side of your car for how far? A. Well, over a thousand feet.

10 Q. At that time you did not see Healey, did you? A. No, sir.

Q. You climbed up on the car? A. Yes.

Q. When you got up on the car your car was then within six feet of Healey? A. Yes.

Q. Then you saw him for the first time; is that right? A. Yes, he was—

Q. Did you see him for the first time? A. Yes.

20 Q. Was he close enough to have been struck by a car if he had not moved? A. If he had not moved, yes.

Q. You hollered, "Look out, Mr. Healey"? A. Yes.

Q. And the last you saw of him you thought he was going out of the way, didn't you? A. Yes, I seen him turn.

Q. Whether he got out of the way of your car you don't know? A. I don't know.

30 Q. Do you know of any printed rule of the company which guides you as to how you should protect people walking around the track? A. No, sir.

Q. You do not know of any such rule? A. No, sir.

Q. And you say you think that he was taking numbers of the other cars on the other track? A. Yes, sir.

Q. Which way were those cars going? A. They were going the opposite way, east.

Q. From you? A. Yes.

40 Q. Do you know how many of those cars had

George William Weil—Re-Cross.

passed him before you saw him? A. I should judge about eight or nine cars.

Q. Did he seem to be writing? A. I don't know whether he was writing or not; it appeared to me that way.

Q. You say he was taking the numbers. Then if he was not writing what do you mean by that?

A. He was standing alongside looking them over. 10

Q. As they went by? A. As they went by.

Q. He could not pay attention to you and them at the same time? A. Well, I don't know.

Q. How far do you say this car went after you saw Mr. Healey before you stopped? A. About a hundred feet.

Q. A hundred feet? A. Yes.

Q. How fast was it going? A. About five or six miles an hour. 20

Q. Going at that speed within what distance could you stop it by a quick application of the brake? A. Oh, about a hundred feet, I should judge.

Q. Couldn't you stop it within twenty-five feet? A. Well, I don't know.

Q. Didn't you so testify in your direct examination, that you could stop within twenty-five or thirty feet? A. No, sir.

Q. You did not say that? A. No, sir. 30

RE-CROSS EXAMINATION BY MR. HOBART:

Q. You don't know how Mr. Healey came to the point where he was when you first saw him?

A. No, sir.

Q. You don't know how long he had been there? A. Why, he was there about I should judge, about ten minutes.

Q. Well, standing still in the same position or moving around? A. No, he was moving around. 40

George William Weil—Re-Direct.

Q. Well, how long before the time when you saw him just prior to the accident,—how long before that time had you seen Mr. Healey? A. About fifteen minutes ago.

Q. Where was he then? A. Why, he was standing talking to a conductor on the engine.

Q. To your conductor? A. No, sir.

10 Q. To a conductor of another yard engine? A. Yes.

Q. How far was he away from the point where he was when you next saw him just before the accident? A. Well, I didn't see him from the time he left that conductor until the time we made the switch of the car.

Q. You did not see him in between that time? A. No, sir.

20 Q. How far away was he the first time you saw him from the point where he was the second time you saw him? A. About a hundred and fifty feet, I guess.

Q. So during that interval he had moved away from the place where you first saw him? A. Yes.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

30 Q. And you say, as I understand you, there was no rule in that yard, printed rule or custom, that you knew about, to keep a lookout for people or warn them if they were in danger by reason of your car? A. No; only that if we seen them, to holler to them, that is the only—

Q. If you saw them? How would you see them unless you kept a lookout for them? A. That is what we do, if we could see them.

Q. You keep a lookout and if you see them you holler to them? A. Sure, we holler to them.

40 Q. That is the way they operated down there, is it? A. Yes.

George William Weil—Re-Cross.
Michael Nolock—Direct.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. Did you have the number of that car? A. No, sir, I don't know.

Q. Was it L. S. & M. S. car? A. Yes.

Q. Lake Shore & Michigan Southern? A. Yes.

Q. Part of the New York Central system? A. Yes. 10

MICHAEL NOLOCK, sworn.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. You are not a Polish man? A. Well, that is—my name is Normakoski, but I make a short name.

Q. Where do you live, Mr. Nolock? A. I live 20
81 Van Winkle Avenue.

Q. What is your business? A. Track foreman on the Erie Railroad.

Q. Were you track foreman on the 16th of April? A. Yes.

Q. Did you know Mr. Healey? A. Yes.

Q. Did you see Mr. Weil there on top of the freight car? A. No, sir.

Q. Did not see Weil? A. No, sir.

Q. You did not see this freight car that hit Healey? A. I seen freight car, but I didn't see— 30

Q. Did not see Weil; don't know who was on the car? A. I don't know.

Q. Did you see one car coming on the east-bound track? A. Yes, sir.

Q. Did you see it hit Healey? A. Yes, sir.

Q. What did it do to him after it hit him? A. Well, I working there—

Q. No, no, no long speech. What did this one car do to the man when it hit him—knock him into the other car? A. Knocked him on the S. O. lead. 40

Michael Nolock—Direct.

Q. On the south lead? How far was he from the switch when he was hit? A. About four or five from the stand.

Q. From the switch? A. From the switch—The switch stand there.

Q. Switch stand. Four or five feet from the switch stand? A. Yes.

10 Q. When he was hit? A. Yes, sir.

Q. How near were you to him? A. I was a hundred and fifty feet east.

Q. Did you see the engine as it came up to the switch? A. I seen the engine pass me, you know, and I hollered to Mr. Healey to look out.

Q. You can tell that afterwards. Did you see the engine come up to the switch? A. Yes, sir.

Q. Did you see the engine go over the switch? A. Yes.

20 Q. Did you see Regan throw the switch? A. I don't see Regan, no.

Q. Did you see Regan at the switch? A. I seen after come, yes.

Q. You didn't see him before the accident? A. No, sir.

Q. Did you see this car come in the switch then? A. Yes, sir.

Q. It came in on a different track than the engine went? A. Different track, yes.

Q. How near to the track was Healey standing when he was hit? A. Why, eight feet.

Q. Eight feet from the track? A. Oh, from the rail when he got hit, about twenty inches from the rail.

Q. About twenty inches? A. Yes, sir.

Q. What part of the car hit him? A. Refrigerator car hit him.

Q. What part of the car? A. Oh, what kind, part?

40

Michael Nolock—Direct.

Q. What part of the car? A. The car going west, it hit him on the left hand side car, and Mr. Healey stay facing west and the car going west and the car hit Mr. Healey on the right shoulder.

Q. On the right shoulder? A. On the right shoulder, and knocked him on the S. O. lead train. 10

Q. Under the other train? A. Yes.

Q. You say this all happened four feet in from the switch? A. Yes.

Q. That is the car had only got four feet in on the eastbound track when it hit him? A. I don't know—four foot west—Mr. Healey standing there west—four feet west of that switch.

Q. Had this car only got four feet in on the eastbound track through the switch when it hit him? Understand what I mean? A. I don't understand. 20

Q. And the engine went one way, didn't it? A. Yes.

Q. And the car went another way? A. Yes.

Q. Through a switch? A. Yes.

Q. Did that car go only four feet in past the switch when it hit Healey? A. Oh, no, no, no.

Q. That is what I want to know. How long? A. About six feet from the point. 30

Q. How many feet from the switch, a hundred, a thousand, two hundred, two hundred and fifty, how far was it? A. How far that car go?

Q. Yes. A. Oh, I don't measure how far the car going, as soon as I see—

THE COURT: He don't understand.

MR. SIMPSON: You have that map? Where is that map,—unless you don't want to use it. 40

Michael Nolock—Cross.

Q. Do you know what I mean by switch? A. Yes.

Q. What do you call this switch you came through on the eastbound track? A. I call switch on eastbound freight track and what you call G-R lead.

10 Q. What do you call the switch? What is the name of the switch? A. What kind of switch?

Q. The name of it? What do you call it in the yard? Has it got any name? A. Going to number two.

Q. Number 2 switch? How far was Mr. Healey from number 2 switch—how far east from number 2 switch was he when he was hit? A. About four feet.

Q. Four feet? A. Yes, sir.

20

CROSS EXAMINATION BY MR. HOBART:

Q. Did the car that hit Mr. Healey go past you before it hit him? A. What, the car?

Q. The car that hit Healey, did it go by you? A. Yes.

Q. How far away were you from Healey? A. A hundred and fifty feet I was from Mr. Healey.

30 Q. What did you say when you hollered? A. Why, I seen Mr. Healey staying pretty close to the freight track and I holler to him, I don't call Mr. Healey, I say, "Lookout, John," and he turned around east and I just watched him, you know, and he turned back again west and that car go on and hit him on the right shoulder and knock him down on the S. O. lead train.

Q. When you hollered to him? A. I hollered at him.

40 Q. Did you holler to him the way you just hollered now? A. No.

Michael Nolock—Cross.

Q. You have got a pretty good voice, have you?
A. Yes.

Q. Was there any other car around there except this train on the next track? A. No, except that S. O. lead train, that is all; it was all clear on the right hand side.

Q. Then when you hollered he turned, did he?
A. Oh, he turned, yes. He hollered—he turned. 10

Q. Which way did he turn? A. He turned east.

Q. Is that the direction from which this car was coming? A. Yes.

Q. Was the car in sight at that time so that when he turned he could see it? A. Why, I don't know whether he seen that car or not. It seems to me he go on across.

Q. Was there anything to keep him from seeing the engine? Was it all clear? A. Yes. 20

Q. After he turned to the east what did he do next? A. He turned around west and take the number off of car on the south lead.

Q. Number of this car on the other train? A. Yes.

Q. How fast was the car going that hit Healey?
A. I don't know; probably four or five miles an hour, didn't go very fast.

Q. How far did this car that hit him—how far did that go beyond the switch before it hit him? 30

A. Why, I can't tell you how far because—as soon as the car—as soon as I seen Mr. Healey got hit I started running, you know, to help him up, you know, and before I got to him Mr. Regan got Mr. Healey, before I came, you know, and I never watched the car.

Q. Was it a clear day? Was the weather clear? A. Oh, it is clear, yes.

Q. How far was the engine from Healey when 40

Michael Nolock—Re-Direct.

he turned east, as you have told us? A. I can't tell you that. I never watch engine. I just watch Mr. Healey, you know, and after he got hit I was kind of busy.

Q. Can't you give us some idea how close the engine was when you called to him? A. No, I couldn't.

- 10 Q. Was the engine right on top of him or was it further away? A. No engine on the cross over, you know, and it was about—the engine from Mr. Healey was about fifty feet, I guess.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

Q. Was he standing close to the track that the engine was on? A. No.

- 20 Q. You don't know where this car was that hit him when you hollered to him, do you? A. I don't know? Sure, I know.

Q. How far away from him was it when you hollered; was it on top of him or where was it? A. Well—no, no. This car was crossing past me, you know, and I hollered to him.

Q. When it was crossing past you you hollered? A. I hollered at him.

Q. Was it right by you when you hollered? A. Yes.

- 30 Q. It made some noise, didn't it, when it went past you? A. Why—

Q. Did the car make any noise? A. Not much.

Q. It was a noiseless freight car? A. A car make no noise.

Q. The engine didn't make any noise? A. Engine make a noise, you know.

Q. How near were you to the engine when you hollered? A. I was about fifteen feet.

- 40 Q. From the engine? A. Yes.

Q. Was the engine between you and Healey? A. Yes.

Michael Nolock—Re-Direct.

Q. Was the car between you and Healey? A. Yes.

Q. Was the car that hit him between you and Healey when you hollered? A. Yes; I was same way.

Q. Was it between you and Healey when you hollered? A. Yes.

Q. How far away from you was it? A. Well, Healey? 10

Q. No, the car, the car. How far was the car past you when you hollered? A. Just cross me about two feet from me.

Q. Had it passed you? A. Yes.

Q. Had passed you two feet when you hollered? A. Yes.

Q. You hollered and you saw him turn to the east and turn to the west and then you saw him get struck; is that right? A. Why, I hollered and he turned east, and I stood there east, you know, and I hollered at him and he turned to the east. 20

Q. He turned east? A. Turned east.

Q. And then turned west? A. And then turned west and took the numbers.

Q. Before he got out of the way the car hit him, didn't it? A. Yes, because—

Q. Oh, because; I don't care for your because. A. He stand still. He was too close to the rail, you know, when I hollered at him. 30

Q. I ask to have that stricken out as not responsive.

THE COURT: It may be.

Q. You are still working for the Erie Railroad? You are still working for the Erie Railroad? A. Sure, I watch. I working thirty years with a gang. I have to watch him. 40

Michael Nolock—Re-Cross.

Q. I ask to have that stricken out as not responsive. I didn't ask him about watching.

THE COURT: The last part is not responsive to the question.

Q. Did you know which track that car was going in before they cut it off? A. No, I didn't
10 know what—

Q. You didn't know what track it was going in? A. No, sir.

Q. When it passed you did you know what track it was going in? A. Yes.

Q. How? A. I seen one of them switches had been turned.

Q. You saw the switch had been turned? A. Yes; from the way Mr. Healey stood.

Q. That is how you knew, you saw the switch
20 had been turned? A. Yes.

Q. That is the only way you knew, is it? That is all.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. How far was Mr. Healey from the switch that you saw turned? A. Well, about, from the switch—was about five feet from the switch, you
30 know, west.

Q. About five feet west of the switch? A. Yes.

Q. When he turned to the east could he see the switch near him?

MR. SIMPSON: I object.

A. I don't know he see the switch or not, you know.

Q. At any rate, am I right in understanding that the switch that you saw turned was about
40 five feet from where Healey stood? Is that right?
A. No, no. That is for going on the freight track and G-R lead. That was a hundred feet.

Michael Nolock—Re-Direct.

Q. We will start over again. You saw a switch that was turned. Who turned it? Regan? A. I seen switch was turned right where I stood.

Q. Now the switch that was turned was how far from Healey? A. About a hundred feet from Healey.

Q. How far? A. A hundred feet from Healey.

Q. Now which way was the switch; was it nearer the car or nearer Healey? A. Turned for the freight track, you know, so the engine go on freight track, and turned back, you know, as the car go on. 10

Q. Was that switch somewhere between the car and Healey? You said the switch was a hundred feet from Healey? A. Yes.

Q. Which way, east or west? A. East.

Q. Was that the switch which you saw Conductor Regan turn? A. Yes. 20

Q. And when you hollered to Healey how far at the time you hollered was he from the car? A. How far was that car?

Q. How far was the car from him when you hollered to him? A. Why, the car was down there about a hundred and sixty feet.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

Q. How far were you from the switch? How far were you from the switch? A. How far I was? 30

Q. That is what I asked you? A. I was about four feet from the switch.

Q. You were within four feet of the switch? A. I was between the eastbound freight track and the south lead.

Q. You were four feet east of the switch or west of the switch? A. East. 40

Mrs. Charlotte Healey—Direct.

MRS. CHARLOTTE HEALEY, SWORN.

MR. SIMPSON: He says her name is Charlotte. Florence I have it. I will ask to amend that. I do not know how that got in.

DIRECT EXAMINATION BY MR. SIMPSON:

- 10 Q. Where do you live Mrs. Healey? A. 980 West Side Avenue.
- Q. What was the name of your husband? A. John A. Healey.
- Q. How old was he when he was killed? A. Fifty-one.
- Q. How old are you? A. Forty-two.
- Q. Did he leave any children? A. Four children.
- 20 Q. What are their names and ages? A. Florence, age fifteen; John, fourteen; Harold, seven; Dorothy, three.
- Q. What wages did he earn? A. One hundred and fifty-five dollars a month.
- Q. How much? A. One hundred and fifty-five dollars a month.
- Q. Did he turn that over to you? A. Yes.
- Q. And you supported the household out of it? A. Yes.
- 30 Q. Gave him his clothes and his spending money, did you? A. Yes.
- Q. How much did it require of the one hundred and fifty-five dollars to maintain him, that is, to give him spending money and to give him clothes and his maintenance? A. He didn't have to pay no car fare or lunches. I don't know just how much.
- Q. Well, can't you estimate how much you gave him back out of the one hundred and fifty-
- 40 five; that is, how much did you and the children

Mrs. Charlotte Healey—Cross.

get out of this one hundred and fifty-five a month?

A. Well, we got about sixty-five dollars a month, but of course I paid no car fare, no rent or no coal or anything out of that.

Q. Where did you get the coal and the rent?

A. Well, we paid—put some money in the bank and paid by check.

Q. He paid for the coal and the rent and the family got about sixty dollars besides that a month? A. Yes. 10

Q. Is that right? A. Yes.

Q. How much was the rent? A. Twenty-five.

Q. How much coal? A. Oh, I don't know about that.

Q. How many tons? Have you any idea how many tons a month? A. About two or three tons a month—three tons. 20

Q. How much would it cost a ton? A. Oh, five dollars, I guess; I don't know.

Q. So fifteen dollars and twenty-five is forty, and sixty; you would get about a hundred dollars a month out of his salary then; is that it? A. Yes, sir.

Q. Was he brought home dead or did he die at home? A. Yes, sir.

Q. He was brought home dead? A. Yes.

Q. When did he die, the 16th of April? A. That night. 30

Q. What time? A. About twelve o'clock.

CROSS EXAMINATION BY MR. HOBART:

Q. You live in Jersey City, Mrs. Healy? A. Yes, sir.

Q. Whereabouts? A. 980 West Side Avenue.

Q. Did you burn three tons a month there? A. About that; we had a furnace.

Q. Kitchen fire, of course? A. Yes. 40

Mrs. Charlotte Healey—Cross.

Q. You did not burn that in the summer as well as winter? A. Year before last we burned ten tons in the winter.

Q. Well, three tons a month would make thirty-six tons a year. You did not use that much coal, did you? A. Well, we used quite a lot.

10 Q. Did you use as much as that? A. No, maybe not quite that much, but I know we used ten tons one winter before last.

Q. You used ten tons one winter? A. Yes.

Q. How much did you use in the summer? A. Oh, we used about a ton, maybe.

Q. A ton a month? A. Yes.

Q. During the summer months? A. Yes.

Q. Then you burned ten tons altogether during the winter? A. Yes.

20 Q. During the one winter that you know of? A. Yes.

Q. You paid rent for this house twenty-five dollars a month? A. Twenty-five dollars a month.

Q. How did you get your figure of sixty dollars a month of what was paid to you and the children? A. Why, I got that much—about thirty dollars every two weeks.

Q. He paid you that out of his salary, did he? A. Yes.

30 Q. Out of the money that he turned over to you, this thirty dollars every two tweeks, you ran the house, didn't you? A. Yes.

Q. He lived home, of course? A. Yes, sir.

Q. Out of the supplies that you bought with this sixty dollars a month you bought everything for the house, did you not? A. Yes, everything, paid for the running.

Q. That is all the living expenses? A. Yes.

Q. Of course he got his living out of that? A. Yes.

40 Q. Out of that allowance you bought the children's clothes, I suppose? A. Yes.

Mrs. Charlotte Healey—Cross.

Q. And paid all the running expenses of the household outside of the coal and the rent? A. Yes.

Q. You paid the light, for example, I suppose, out of that allowance, did you? A. Yes.

Q. All the other ordinary expenses of keeping a house? A. Yes.

Q. He came home regularly, I suppose, got his meals at home regularly? A. No; he took his lunch—his meals, but he took his lunch. 10

Q. He would take his lunch with him, but he would get his lunch at home before he left for work, I suppose? A. Yes, sir.

Q. And then the other meals of the day he would have at home? A. Yes.

Q. In other words he got his entire living out of this sixty dollars a month? A. Yes.

Q. How about his own personal expenses; were they paid for out of this sixty dollars a month, or don't you know that? A. No, sir. 20

Q. What's that? A. Sometimes, and sometimes he would draw a check—money in the bank on a check if he ran short he would take that.

Q. Out of this allowance he made for the household expenses did he use any of it for his own personal expenses, such as clothing? A. Sometimes.

Q. And cigars? A. Sometimes; sometimes he would not. 30

Q. Sometimes he would get that from you? A. Yes.

Q. Have you any idea how much that amounted? A. No, sir; I don't know anything about that.

Q. You have kept house for some time, of course? A. Sixteen years.

Q. How much was his living worth? A. What?

Q. How much was his living worth—I mean his board? Take the board of a man with a good 40

Mrs. Charlotte Healey—Re-Direct.

appetite like him, how much would it be worth?

A. Thirty dollars a month.

Q. Thirty dollars a month.

RE-DIRECT EXAMINATION BY MR. SIMPSON:

10 Q. Do you mean to say the only benefit you got out of your husband's wages was thirty dollars a month,—you and your children? A. Yes.

20 Q. That is what you said. You said all he gave you was sixty dollars; that out of that sixty you boarded him and that cost thirty, that leaves thirty, so according to what you say the only benefit you got out of your husband was thirty dollars a month and the coal and the rent. Do you mean to say that or don't you mean it? You see, Mr. Hobart is so nice you don't know what you are saying. (No answer.)

Q. Do you mean to say that, that that is all the benefit you got out of your husband, I mean money benefit, was thirty dollars a month? A. No; we got sixty dollars. I got sixty dollars, but I do not have to pay for any coal.

Q. I know, but you see out of sixty you boarded him and you say his board was worth thirty, so if he gave you sixty and took for board thirty—
A. I don't mean thirty alone for him.

30 BY THE COURT:

Q. What was his maintenance worth, the way you ran your house? A. About, I suppose, seven dollars a week, or twenty-eight dollars a month for a man.

MR. HOBART: That is what she said before.

MR. SIMPSON: That is what she said before.

Mrs. Charlotte Healey—Re-Direct.

BY MR. SIMPSON :

Q. Was that what you said, although your husband earned one hundred and fifty-five dollars a month, all you and your children got out of it was thirty-five dollars a month and your rent and coal? Is that what you mean? Didn't he give you any money or buy your clothes? A. Certainly, if I run short he would get a check and would get some money, that is all. 10

Q. Who bought your clothes? A. Well, I got it—he drew a check or wrote a check and I go to the bank and get some. He put something in the bank subject to check.

Q. This sixty dollars was only to run the house? A. Yes.

Q. The other things, clothes for children and your clothes, he paid for, did he? A. Why, yes. 20

Q. Do you know what that amounted to a year? A. No, I do not.

Q. Haven't got any idea how much money he spent for your clothes and your children's in a year? A. No.

Q. Do you know now what it cost to dress yourself and his children since he is gone? A. I don't know just exactly, I couldn't say, but—

Q. What did he do with the balance when he gave you sixty dollars out of the one hundred and fifty-five; what would he do with the ninety-five? A. He would put it in bank subject to check and pay the rent and pay for coal. 30

Q. Paid for your clothes out of it? A. Yes, sometimes.

Q. Gave you money out of it? A. Yes, sometimes, and if I run short he would write a check and we would go to the bank and get it.

Q. Can't you tell about how much money you got a month out of your husband's earnings for your own use and our children's use? Don't you 40

Mrs. Charlotte Healey—Re-Cross.

know how much money you got out of this one hundred and fifty-five dollars for your own use and our children's use? A. Why, I got—could have it all, only just what we paid for rent and the coal. I had the rest of it myself.

Q. What? A. I could have the rest of it myself.

10 Q. He would give it to you? A. Yes.

Q. Then you would give him back spending money when he wanted it? A. Yes, when he wanted it.

Q. How much would you give him back? How much would he spend a month? A. Not very much.

Q. Can't you tell us how much? A. No, I can't tell you how much, because he didn't have to pay car fare nor—

20 Q. Can't you tell us how much money he took back—you gave him back? So long that you can't— A. No, I don't know just exactly how much it was.

Q. You cannot estimate it? A. No, sir.

Q. Can't say whether it was ten dollars a month or twenty dollars or thirty dollars a month? A. Oh, it wasn't no—might be ten dollars a month.

RE-CROSS EXAMINATION BY MR. HOBART:

30 Q. When you said Mr. Healey gave you all his money, did you mean his entire check for one hundred and fifty-five dollars? A. Yes; I take the check and had it cashed.

Q. You kept a bank account? A. We just put it in subject to check.

Q. Whose name was the bank account in? A. In Mr. Healey's.

40 Q. Yes. Then he deposited the check, didn't he, or you deposited it for him? A. I deposited. I got it and deposited it for him.

Motion to Non-Suit.

Q. When you said he gave you the entire,—all the money—you meant he turned the check over to you and put it in the bank? A. Yes, I didn't put all—

Q. In his name? A. Yes.

Q. Then out of that he would allow you for living expenses this sixty dollars a month that you have already told us about? A. Yes. 10

Q. That is right? A. Yes.

 PLAINTIFF RESTS.

 MOTION TO NON-SUIT.

MR. HOBART: If your Honor please, I ask for a nonsuit on the ground that there is no evidence of negligence on the part of the defendant or any of its servants or employees; and on the further ground that it is clearly a case of assumption of risk under the Federal Statute, and it seems to me they have failed to prove my negligence here. There has been a suggestion about somebody—some conductor that should have warned him, but it appears there were two other men at least who did warn him, so he was in fact warned, therefore the question of warning has nothing to do with it, even if this particular man, the conductor, was under any duty to warn him under the circumstances, which I do not concede, but even if so, other men did warn him. It seems to me that this is a case where it has been merely a most unfortunate accident, possibly a momentary misjudgment on the part of the man who undoubtedly knew this car was coming; it was a similar movement, he says, that had been made under

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Motion to Non-Suit.

10 similar conditions. He had been there for many months, I think, at least I think one of them said over a year and a half. He was the yardmaster. He was boss of these very men. He was, indeed, so far as the record shows, in charge of these very men, and therefore at least presumed to know what movements were necessary and what movements were to be made, even if he had not given the order for this particular movement, although it does not appear either way; and it seems to me clearly a question of assumption of risk, under the doctrine of *Willover against D. L. & W.*, with which your Honor is familiar, although the Court of Errors and Appeals reversed that result on the ground there was

20 some violation of the order of the company, on which they said the decedent—happened to be a yardmaster or section man—in that case had a right to rely.

There is no evidence of any violation of any order in this case, and therefore the Will-over case is not controlling on that proposition.

(Mr. Simpson replies.)

THE COURT: I will decline to nonsuit.

30 MR. HOBART: Your Honor will note an exception.

THE COURT: Yes.

DEFENDANT'S TESTIMONY.

George W. Weil—Direct-Cross.

GEORGE W. WEIL, recalled.

DIRECT EXAMINATION BY MR. HOBART:

Q. I wish to show you a picture of a freight car which is marked on the outside L. S. & N. S., 142,021, New York Central Lines, Refrigerator. Can you tell me whether that shows the car you were riding on the occasion of this accident? A. Yes. 10

Q. Does that show the end of the car at which the brake was located? A. Yes, sir.

Q. Is that the right of the picture as you look at the picture? A. That is the right of the picture the way we look at it.

Q. When you spoke of the brake being on the right hand side of the car you meant on the right hand side of course, in the direction in which the car was moving? A. Yes, sir. 20

Q. And which side of the car with reference to that brake was Healey standing when you saw him? A. On the left hand side of the car.

MR. HOBART: I offer the picture.

MR. SIMPSON: No objection.

(Photograph marked Exhibit D-1.)

CROSS EXAMINATION BY MR. SIMPSON:

Q. You were standing on this ladder before you entered the switch? A. Yes. 30

Q. When you leaned over to uncouple? A. Yes.

Q. You had a clear view up the track then from your position on the ladder? A. On that side.

Q. What was to prevent you from seeing all the way up to the track? A. The engine was right ahead of it.

Q. When you came in the switch there was no engine ahead? A. No, but I was climbing up. 40

Q. Weren't you looking too? Didn't you pay

George W. Weil—Re-Direct.

any attention in front of you at all? A. No, sir.

Q. No attention at all? A. No, sir.

Q. Until you got within six feet of this man?

A. I didn't know there was anybody standing there.

Q. Until you got within six feet of this man you paid no attention, did you? A. Yes.

10

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. How long did it take you to climb up the side? A. Just a matter of a minute.

Q. While climbing up the side could you at the same time be looking ahead or in other directions, or would you have to watch what you are doing?

A. Why, I watched what I was doing.

BY THE COURT:

20

Q. This ladder is directly at the end of the car? A. Yes, sir.

MR. SIMPSON: Shown on the photograph.

MR. HOBART: It is on the side of the car.

THE WITNESS: Yes.

THE COURT: To the right of the brake?

THE WITNESS: Brake, yes.

30

BY MR. HOBART:

Q. The engine was attached to the car at the end of the car which we see in the picture as represented by the brake end? A. Yes.

Q. The end where the brake was located? A. Yes.

Q. That is where the engine was hitched on; is that right? A. Yes, sir.

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John J. Kelaher—Direct—Cross.

JOHN J. KELAHER, SWORN.

DIRECT EXAMINATION BY MR. HOBART:

Q. You made a map, did you, of the yard where this accident happened, Mr. Kelaher? A. I did.

Q. Is this a blue print of the map? A. Yes.

Q. You have the original, have you? Kindly refer to the original. There seems to be some pencil marks on this blue print, which I do not wish to use. This map was made when? A. April 27th, 1916. 10

Q. And the scale is what? A. One inch equals twenty feet.

Q. Does it correctly show what it purports to show, that is, drawn from scale? A. Drawn to scale and shows the tracks in the vicinity of the yardmaster's office at Croxton. 20

Q. But you have not given any name to these tracks, have you? A. No, sir.

Q. Except the so-called main line freight track? A. Yes, that is all.

Q. You have correctly indicated the way they lay on the ground? A. The way they were on the ground.

MR. HOBART: I offer the map.

MR. SIMPSON: No objection.

(Map marked Exhibit D-2.) 30

CROSS EXAMINATION BY MR. SIMPSON:

Q. You said main line—main freight tracks. Any distinction between those and yard tracks? A. Why, that is simply the name that was told to me what the tracks were out there. I had no way of finding out the numbers.

Q. Where are they? A. These tracks are right around where the old piers of the New York Central and Western Railroad are in the yards there. 40

Robert Barry—Direct.

Q. Do you call them main tracks? A. Main line freight tracks, I believe.

Q. Main line freight tracks? A. They make connections with the yards.

Q. Does that switch show on there that this car went through? A. Well, I don't know which switch.

10 Q. I see. What about the eastbound freight track. Can you show me that? A. Why, that would be, I imagine, this one. I am not sure. I could not say.

Q. All right. Main line freight track; does that mean these two at the top? A. These two here. These are switches coming off going to the different yards.

BY MR. HOBART:

20 Q. Of course you don't know what the tracks are used for or how they are used? A. No, I do not.

ROBERT BARRY, sworn.

DIRECT EXAMINATION BY MR. HOBART:

Q. You are one of the yard conductors, I believe, Mr. Barry? A. Yes, sir.

30 Q. Were you employed at Croxton when this accident happened? A. Yes.

Q. And what train were you in charge of, what engine? A. Engine 879.

Q. Is that a yard engine? A. Yard engine and call engine, both.

Q. Who was the boss of you? A. Yardmaster.

Q. Is that Mr. Healey? A. Yes.

Q. The gentleman who was killed that day? A. Yes, sir.

40 Q. Was he in charge of the entire yard? A. Well, not exactly. He was yardmaster around that part of the hill, yes. His orders was good.

Robert Barry—Direct.

Q. Did you see anything of the accident? A. No, sir.

Q. What was the first you knew it had happened? A. First I know my head brakeman told me—

MR. SIMPSON: I object.

Q. Never mind. The head brakeman called your attention to it? A. Yes. 10

Q. Just before the accident what had you been doing? A. Well, the train had twenty-five cars out of F yard down in J yard, twenty-five cars of provisions.

Q. Yes. A. In pulling on the south lead the engineer of the engine stopped about ten cars on the south lead.

Q. Where is that south lead with reference to the eastbound freight track; was it alongside of it? A. No; it is on the left hand side going east; and this car standing there on the right hand side. 20

Q. Did you see Mr. Healey at any time before the accident? A. No, sir.

Q. Had you seen him around the yard that day? A. Yes.

Q. What was the last that you saw of him before the accident happened? A. Oh, I couldn't exactly just say—any time at all. I seen him about two o'clock. 30

Q. Well, you didn't see him just a few minutes before the accident? A. No, sir.

Q. Didn't know where he was just before the accident? A. No, I did not.

Q. Did you see this refrigerator car being moved? A. No, sir.

Q. Where were you while that was being moved? A. The left side of the train.

Q. How far is that from where this refrigerator car was moving? A. About 40 cars probably. 40

John M. Wagner—Direct.

JOHN M. WAGNER, sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are a D. L. & W. brakeman? A. Yes.

Q. And on duty at the time of this accident?

A. Yes.

10 Q. Where were you just before this accident?

A. I was lining up the switches before the accident happened.

Q. Did you see the refrigerator car being manned? A. Yes.

Q. Where was that when you first saw it? A. on the spur.

Q. And how far away from the point of the accident? A. Oh, about 200 foot.

20 Q. And did you see that car being moved up?

A. I saw that car being moved up; yes, sir.

Q. Along the track. Which way did it come?

A. It went west.

Q. And did you see anything of Healey shortly before the accident? A. Yes.

Q. Where was he when you first saw him? A. Standing down below; about 100 foot away from the cross-over switches.

30 Q. Where had he been before that, if you had seen him before that? A. I don't know; I didn't see him.

Q. Did you see him standing all the time, or did he move around and go somewhere else? A. Well, I didn't see him moving around; I just seen him standing.

Q. You didn't see him hit, did you? A. No, sir.

Q. And the last you saw of him he was—A. Standing alongside of the track.

40 Q. You heard of the accident in some way and you got a stretcher? A. Well, I was right there.

John M. Wagner—Direct.

Q. Right where? A. Right standing at the switch.

Q. About how far from Healey at the time the accident happened? A. About 100 foot.

Q. Did you see it? A. No; I couldn't see it.

Q. Why not? A. The car went by and hid it.

Q. Did the car cut off your view? A. Yes, sir.

Q. Now, you found his body there, did you? **10**
A. Yes, sir.

Q. And at the point you found the body, was that at the same place you had seen him shortly before? A. Well, a few feet off; four or five feet.

Q. It was east, or west? A. West.

Q. Did you see the car moving in the direction of Healey? A. Yes, sir.

Q. Did you say anything? A. I hollered. I hollered "Look out, John." **20**

Q. How far away was he from you when you hollered? A. About 100 feet.

Q. How loud did you holler? A. As loud as I can holler.

Q. Did you holler any louder than you are talking now? A. Yes, sir.

Q. After you hollered did he do anything? A. Well, he kind of looked around; that was all.

Q. Which way did he look? A. Well, just turned his head; that was all I could see. **30**

Q. Which way did he turn it? A. Towards the west.

Q. Was that the direction from which this car was coming? A. Well—

Q. The car and the engine; did he look towards the car and the engine that was coming? A. No; looked the other way.

Q. Looked the other way; that would be away from the car? A. Towards the west; yes, sir.

Q. Well, this car and engine came from the east, did they? A. Yes, sir. **40**

John M. Wagner—Cross.

Q. Then what was the next that you saw of him? A. Laying alongside of the track.

Q. How fast was the car moving, the one that was passing the engine? I mean the refrigerator car? A. About five or six miles an hour.

Q. At the time you hollered and he turned away, was there a train on any other track? A.
10 Yes, sir.

Q. What track was that on? A. Alongside of it.

Q. Is that the train that Mr. Barry was the conductor of, the gentleman who was just here on the stand a moment ago? A. Yes, sir.

MR. HOBART: Cross-examine.

CROSS EXAMINATION BY MR. SIMPSON:

20 Q. Had this freight car passed you when you hollered "Look out, John"? Did it pass?

THE COURT: Had it passed you when you hollered?

A. Well, it was right in front of me.

Q. Had it passed you when you hollered "Look out, John"? A. No, sir.

Q. Was it past you when you hollered "Look
30 out, John"? A. Yes, sir.

Q. Is that all you hollered: "Look out, John"?
A. Yes.

Q. Just once? A. That is all I could holler.

Q. Why was that all you could holler? A.
Well, the car was gone then past me.

Q. You only had a chance to holler once before the accident? A. Yes.

Q. And then it was all over; is that right? A.
Yes, sir.

40

MR. SIMPSON: That is all.

John M. Wagner—Re-Direct.
Charles J. Choffey—Direct.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. How far away was the car from Healey at the time you hollered? A. About 100 foot.

Q. Then the car must just have been in the act of going by you? A. Yes, sir.

Q. Do you remember hearing anybody else holler? A. No, sir. 10

MR. HOBART: That is all.

RE-CROSS EXAMINATION BY MR. SIMPSON:

Q. You were right at the switch? A. Yes.

Q. And you heard no one else holler? A. No, sir.

MR. SIMPSON: That is all. 20

—•—
 WITNESS EXCUSED.
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CHARLES J. CHOFFEY, sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are a brakeman employed at Croxton yard and were so employed when this accident happened to Mr. Healey on April 19, 1916? A. Yes, sir. 30

Q. Where were you when the accident happened? A. We were on the cross-over switches.

Q. How far away from Healey? A. About 20 feet away from him.

Q. In which direction? East or west? A. West.

Q. Now, did you have anything to do with fixing switches for the train that engine 1879 40

Charles J. Choffey—Direct.

was pulling? A. Lining up the switches; pulled up the south lead.

Q. When you speak of lining up the switches what do you mean? A. I mean setting them.

Q. Did you see them from their train and make that movement? A. Yes.

10 Q. Now, did you see the other engine, 119, with the refrigerator car? A. Yes, sir.

Q. Where was that when you first saw it? A. Well, on the first spur.

Q. Did you see that engine and that car move? A. Yes, sir.

Q. How far was it from you when it started to move? A. About 100 foot away from me.

20 Q. Where was Mr. Healey at that time? A. Stood about 20 foot away from the switch; cross-over switch.

Q. How long had he been there? A. Just walked over there.

Q. He had just come there, had he? A. Just been there.

Q. Where had he been before that? A. Working around there, different things.

Q. Now, as Healey stood there was he facing the refrigerator car or not? A. No; his back was turned to the refrigerator.

30 Q. Did you hear anybody call? A. Yes, sir.

Q. What did you hear? A. I heard all kinds of warnings.

Q. Well, tell us. A. Hollering or shouting.

Q. Can you pick out any one man that you heard? A. The brakeman that was riding the car shouted at him.

Q. Anybody else? A. Two or three others standing around there.

Q. Did you holler at him? A. Yes, sir.

40 Q. What did you say? A. Look out, John.

Q. And how far away was John from you? A. 20 foot away from me.

Charles J. Choffey—Direct.

Q. Did he pay any attention to this caution? That is, did he move or do anything? A. No, sir.

Q. And what happened next? A. Why, the refrigerator hit him; hit him and threw him under the train that was passing up the south lead.

Q. Did you actually see that? A. Yes, sir.

Q. Saw him hit? A. I stood in a parallel line with him. **10**

Q. Did this car that hit him go by you? A. Yes, sir.

Q. How close did it go to you? A. Passed where I was standing right alongside of the freight track when it passed him.

Q. Now, how close were you standing to the track on which this refrigerator car was moving? A. Sir? **20**

Q. How close were you to the track? I mean the track on which the car was moving. A. 20 inches or so; just enough to clear it for myself.

Q. Were you on the same side of the track as Mr. Healey? A. Yes, sir; standing in between.

Q. And he was about twenty feet from you? A. Yes, sir.

Q. And in which direction? East or west? A. I was standing west of Mr. Healey.

Q. Then the car passed you first, did it? A. No; it passed Mr. Healey first; hit Mr. Healey first. **30**

Q. And then it passed you just after hitting him? A. Yes, sir.

Q. You saw the car coming all right, didn't you? A. Yes, sir.

Q. And it cleared you all right? A. No; it hit Mr. Healey before it passed me; it cleared me all right.

Q. It cleared you all right? A. Certainly. **40**

Charles J. Choffey—Cross.

CROSS EXAMINATION BY MR. SIMPSON:

Q. You are still working for the Erie Railroad? A. Yes, sir.

Q. What is your position? What do you do for them? A. Freight brakeman.

10 Q. How did you clear this car? A. I stepped aside for it.

Q. You had to step out of its way, did you? A. Yes, sir.

Q. How far from the car were you when you stepped out of its way? A. Just stepped out to clear eighteen or twenty inches.

Q. And how far were you away from the car when you stepped out of the way? A. When I stepped—oh, ten foot or so.

20 Q. It had hit Healey before that? You saw it hit Healey? A. I saw it hit Healey.

Q. And you stepped out of the way? A. Yes, sir.

Q. And it was ten feet from you then? A. Yes.

Q. And you didn't step out of the way until it was ten feet of you? A. Yes.

Q. How long did you have it in your vision? 100 feet? A. No; it was not that much.

30 Q. How much? A. 40 or 50 feet away from me.

Q. You did not see it come into the switch? A. Yes.

Q. The switch was 150 feet, some of these witnesses say, from where Healey was struck? A. Healey was standing 20 feet away from the switch, and I was standing 20 feet from Mr. Healey.

40 Q. Did you holler to him before the car came through the switch? A. No; after it came through the switch.

Charles J. Choffey—Re-Direct.

Q. Well, how near was it to him when you hollered? A. About six foot from him.

Q. Did you holler after the brakeman or before the brakeman? A. I guess we all hollered at about the same time.

Q. All the shouting was done at the same time and that was when the car was within six feet of him? A. Yes, sir. 10

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Is there more than one switch around there? A. Yes; several.

Q. What are those switches? I mean the switch stands. Do you know what I mean? A. Yes.

Q. How many are there right around near where you were? A. There is eight or ten 20 switches right there.

Q. Well, were you near one of them? A. No, sir; I stood about 20 foot away from the furthest switch, this switch that Mr. Healey was standing at—that Mr. Regan was standing at.

Q. That is conductor Regan who testified here? A. Yes, sir.

Q. You were about twenty feet from that; and how close was Healey to that switch? A. About 20 foot away from the switch. I stood about— 30 well, Mr. Healey stood at one switch there that leads up to the south lead.

Q. Yes; that is all.

MR. SIMPSON: That is all.

—●—
WITNESS EXCUSED.
—●—

William E. Murphy—Direct.

WILLIAM E. MURPHY, sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are employed by the Erie Railroad Company, Mr. Murphy? A. Yes, sir.

10 Q. Your position is what? A. Well, at that time of the accident I was assistant yardmaster.

Q. Under—A. Under Mr. Healey.

Q. —Mr. Healey? A. Yes, sir.

Q. Mr. Healey was the yardmaster in charge of the Croxton yard, wasn't he? A. Yes, sir.

Q. Was there a large number of men under him, different crews? A. Yes, sir.

20 Q. How many men, about, under him? A. Well, in the train service—that is in our shop—there would be about 30 men on the engines, besides our clerks. I don't remember just how many clerks exactly were working in the yard, but he had full charge of the yard.

Q. How long did he work there? A. Well, he must have come, to my estimation, down from West Mohawk about seven or eight years ago; but he worked at Weehawken and went from Weehawken back to Croxton.

30 Q. That is another terminal? A. That is another yard of the Erie Railroad; that is where they haul trains to Weehawken.

Q. How long had he worked in Croxton on this last occasion before the accident happened? I mean when he came back from Weehawken. A. Well, let's see. He got hurt in April—I think he worked about eight or nine months in this last trip, if I ain't mistaken. I ain't positive now.

40 Q. Well, it was several months? A. Yes, I think it was before the holidays.

William E. Murphy—Direct.

Q. Did he have to work daytime or nighttime?

A. Yes, from 6:00 a. m. to 6 p. m. at night.

Q. Did you see Mr. Healey on the day this accident happened? A. I saw him after the accident.

Q. Where did you find him? A. I found him by the south lead and east-bound freight track.

Q. Where was the last you had seen him just before the accident? A. I saw him standing at what they call G lead, waiting for that train to come out of F-12. 10

Q. Is that the train conductor Barry had charge of? A. Yes; coming out of F-12 in the south lead.

Q. Was that a freight train? A. Yes, sir.

Q. It was not a main line— A. No; just getting across to store away.

Q. And where was he when you saw him at that time? A. The time before the accident?

Q. Yes. A. Well, we call it G-2; that is alongside of the east-bound freight track also. 20

Q. What was he doing? A. It seemed to me he was waiting for those men to come out of that train; they went down to get some special cars.

Q. Did he stand still or move around? A. He was moving around, walking around, just watching, waiting for them to come up.

Q. Was the train moving at that time? This long train of several cars. A. No; it was not up out of the track when he was standing at the time. 30

Q. Did it afterwards come out while he was standing around there? A. Yes, it came up and he walked up towards what we call east-bound freight track, going up east, walking up east.

Q. How far did he go? A. Well, he went there, to that switch where he was struck.

Q. How long was that before the accident happened? A. Well, I don't think it was over ten or fifteen minutes; I don't think it was that. 40

William E. Murphy—Direct.

Q. You saw him then walking up to this switch?

A. Walking up this way (indicating), yes.

Q. You don't know what he did while he was there, do you? A. No, I do not; but from my estimation—

Q. Never mind. Only what you saw; that is all you can testify to. Well, did you see the accident? A. No, sir; I did not.

Q. How far away were you from the point where the accident happened? A. About three hundred feet east of where the accident happened.

Q. Did you see this refrigerator car? A. Yes, sir.

Q. Where did that start from? A. That started from what we call storehouse, where the wheat, grain is.

Q. That was west of you? A. East of me.

20 Q. How far east? A. From where I was standing I don't think it is over 60 feet.

Q. Did it go by you? A. It was standing still. When I say east, the engine had hold of it and it went by me west.

Q. It moved west and in so doing it went past you? A. It went past me all right.

Q. Did you see which way it went? A. The car went west, because I give orders to put that car away.

30 Q. Where were you going to put it? A. In F-5.

Q. It was— A. To line it up with the Jersey City cars for Swift & Company.

Q. Is that where you usually put the cars? A. That is where all the cars are put; that go down to what we call the local yard.

Q. Had anybody told you to put those cars there? A. I told the conductor myself where to put that car.

40 Q. That is, you told the conductor? A. Yes.

Q. Had anybody told you where to put it? A. No.

William E. Murphy—Direct.

Q. Did Healey say anything about it? A. No, Healey didn't say anything about it.

Q. Had he on other occasions? A. He has told me several times, given me orders to give the other men where the different cars to move.

Q. Well, did he ever give you orders to be passed along to the conductors, if you like, as to where to put cars for Swift & Company? A. Well, he never told me, not a car like that, exactly for Swift & Company. 10

Q. Well— A. He has told me sometimes to give orders to conductors to get cars out for space and line them up in a certain train.

Q. This car was a Swift & Company car? A. This car was a Swift & Company car.

Q. And it was placed upon a certain track? A. Yes.

Q. For Jersey City local delivery? A. Yes, sir. 20

Q. Now, what I want to know is had other cars been placed, at times while Healey worked there, for that delivery? A. Oh, yes; he had done the same thing.

Q. He gave orders about doing it that way, about placing cars on that track for Jersey City local? A. Well, we got out there what we call H track; it is classify—for certain cars to be put for these different points, as like for the north side of Jersey City, or Weehawken, or Delaware, or Pennsylvania. If you get a car of that kind for the local freight, we put it on F-5 to be lined up before the train will take these cars to that G yard. 30

Q. That is, to go where the refrigerator car was to be used. Is that a regular place— A. No; that is not a regular place; but it is a place where engines come from Weehawken with cars. If they get hurried we cut this car off. If we have an engine that is working in the yard we generally let them take this car away and line them up. 40

William E. Murphy—Cross.

Q. Had you put other cars on this same track for delivery? A. Yes, sir.

Q. Had you done it on that very day? A. I couldn't tell about that day at all.

Q. But you had on other occasions? A. Yes, sir.

Q. While Healey worked there? A. Yes, sir.

10 Q. Well, did he see them put there? A. I don't know about that. I could not swear that he saw them personally.

Q. How many tracks were there in that yard that Healey had charge of? A. At the time?

Q. Yes, at the time of the accident. A. Well, we have got 49—I couldn't just figure that out; it would take me time to figure it out.

20 Q. Well, estimate it. A. We have a place we call F yard; there is 49 tracks in that. We have J yard; that runs up to 19. There is E yard; they have 11 tracks. We have A yard; they have 20 tracks. We have track we call in D yard with 10.

Q. Over 100? A. Yes. In G yard we have 10.

Q. Is that the yard that Healey was the master of? A. Yes; that is the yard he had full charge of.

MR. HOBART: Cross-examine.

30 CROSS-EXAMINATION BY MR. SIMPSON:

Q. What is this east-bound freight track on the map? A. East-bound freight track?

Q. Yes. A. Well, we call east-bound freight track that we have engines that go up east-bound track to take cars to take to Jersey City and Weehawken, after they take in water.

Q. But here are a couple of tracks on here, "main freight tracks." What does that mean?

40 A. That is the "F" yard.

Q. I mean up here. A. There is the main

William E. Murphy—Re-Direct.

freight track, the west-bound freight track, and an east-bound freight track.

Q. What does that mean? Is that a track that they come right through on, or is it simply a switching track? A. Simply a switching track.

Q. It is not a main line track? A. No; main line runs altogether different. Now, there used to be what they call the east and the main-bound west tracks one time when they used to run the main tracks. The freight west used to use these tracks. 10

Q. They didn't use them at the time of the accident? A. Just as a switching track.

Q. Not as a main track? A. No, sir; just used it for switching purposes.

Q. Now, you didn't see the accident? A. No; I didn't see him get struck; no, sir.

Q. Don't know how it happened? A. No, sir. 20

Q. And you said this was not a regular place to store cars where this car was being put? A. No.

Q. Where was the regular place? A. Well, the regular place for that car as proper place was F-5.

Q. F-5? A. That is for the Jersey City local.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. You say F-5? A. Yes, sir; that is where that car was to go. 30

Q. That is where it was going, wasn't it? A. Yes, sir; that is where it was to go.

THE COURT: It was on its way to F-5?

THE WITNESS: Yes, sir; at the time the accident happened; that is where I gave orders to the conductor to put the car.

Q. The car had to pass over the various tracks in order to get to F track? A. It has, because the engine had, and this switch where Mr. Healey was struck is what we call the east-bound lead. 40

William E. Murphy—Re-Direct.

BY MR. SIMPSON:

Q. Was there any other way to put it in on F-5 except by this switch? A. No; you had to go up the east-bound track to get there.

Q. There was no other way to get into F-5? A. Not from this end of the yard.

10 Q. Was there any other way? A. If a man wanted to go up eight or nine miles and come in back the other way.

Q. Well, the east-bound track led into F-5? A. Yes.

Q. It had no other switch? A. No; that was the only way you could get in.

Q. Does F-5 show on this map? A. No.

20 Q. How far away was it from this track, from the east-bound? A. It must be a couple of thousand feet, that F-5 is, from where this car was standing; easily.

Q. How many switches would it have to go through after it got into the east-bound track? A. Well, the engine went over the cross-over and you come to a switch, going down to G yard; then there is another switch they call F-2—G-2, rather; excuse me; and when it goes there, as I say, it has to go a couple of thousand feet before it goes to F-2, F-3, F-4 and F-5.

30 Q. It was quite some distance from its destination? A. Yes, sir.

Q. How would it get down if it was cut away from its engine? A. The engine would come back and couple onto the east-bound end of that car and shove to F-5. The car was behind the engine. To get the car in F-5 they had to have the car ahead of the engine, shove the car up into F-5.

BY MR. HOBART:

40 Q. Were there some other cars to be put in F-5? A. Not at the time; that is the only car I had there at present to put there.

MR. HOBART: That is all.

Fred Wayne—Direct—Cross.

FRED WAYNE, sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You were the engineer in charge of engine 1879, Conductor Barry? A. Yes, sir.

Q. Now, did you see anything of Mr. Healey before the accident happened to him? A. He was standing along by the freight track when we were backing up by there. 10

Q. When you were backing up to get your train or after you had started? A. When we had hold of the cars, about 25.

Q. You had about 25 cars? A. Yes, sir.

Q. And how close did he stand to your train? A. Oh, about fifteen feet away.

Q. Did you see this other engine, 119, with the refrigerator car? A. Yes, sir. 20

Q. Where was that when you first saw it? A. She was standing on the east-bound freight track.

Q. Did you see it move? A. No, sir.

Q. You do not know what became of it after you passed by it? A. No, sir.

Q. Did you see Healey at any time after that before the accident? A. No, sir.

MR. HOBART: Cross-examine.

CROSS-EXAMINATION BY MR. SIMPSON: 30

Q. You didn't see the accident? A. No, sir.

Q. Don't know anything about the accident? A. No, sir; I did not.

DEFENDANT RESTS.

10 MR. HOBART: Before we proceed to sum up, I ask your Honor for a direction of verdict on behalf of the defendant, on the grounds previously stated. It seems to me it now clearly appears that this man had every warning that could possibly be given. We have simply increased the number of warnings that had been given to him. It seems to me that it is no question for the jury as to whether we were bound to give a warning under such conditions, and equally no question as to whether in fact a warning was given; and on the assumption of risk, it seems to me it is a little clearer than it was before. It now appears that this car was going to a track where other cars had been placed for similar delivery, and that this man had worked in all parts of the yard, was boss of the yard—a very large yard—and he, of all men, should have known the danger of movements back and forth. It seems to me the case calls for the application of the doctrine of assumption of risk for the reasons I have already presented to your Honor.

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THE COURT: I shall deny the motion.

MR. HOBART: Exception.

Mr. Hobart summed up to the jury.

Mr. Simpson summed up to the jury.

30 **Charge.**

Gentlemen of the jury:

This is an action by Charlotte Healey as administratrix of the estate of her deceased husband, John A. Healey, against the Erie Railroad Company, and is brought and maintained for the purpose of recovering damages resulting to Charlotte Healey as the widow and three children as next of kin of John A. Healey, because of his death, which it is alleged was caused, either in whole or in

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Charge.

part, by negligence chargeable or attributable to the defendant company.

The action is brought under what we know as the Federal Employers' Liability Act, or the Federal Employers' Act. It is admitted in the case that both parties, that is the defendant company as well as John A. Healey, at the time of the occurrence complained of, were engaged in interstate commerce. That being admitted it is therefore not a question with which you shall have to deal in this case. 10

The portion of the act which directly provides for matters of this character, and that portion thereof, partly in paraphrase, which applies, is Section 2, which I will read you as follows:

"Every common carrier engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employee, to his or her personal representatives for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." 20 30

In this case, gentlemen, as you will remember the facts, the occurrence took place in what I believe is known as the Croxton yards of the Erie Railroad Company, which are freight yards and freight distribution yards. As the pleadings upon the part of the plaintiff exist and as the case has been tried, it is not a case coming to you in this 40

Charge.

manner and upon this theory, that the defendant company was negligent because it did not promulgate or make or provide rules looking forward to the protection and safety of its employees. That is not the allegation of negligence contained in the pleadings of the plaintiff in this case, nor is it the theory upon which this case has been

10 tried. I want to make myself perfectly plain by what I say in that respect, so that you will not go astray. You are not concerned with the question as to whether or not the defendant company should have made rules for the protection and the safety of its employees in this yard. But the plaintiff says this, that there was a custom in use by the employees of the defendant company in this particular yard by and through which the employees were to keep a lookout for other em-

20 ployees engaged in the yard and to warn them of danger in and about the moving of trains or cars in the yard, and that in the movement of this particular car the employees in charge of that movement or its movement did not live up to that custom, and that their failure to do so is what brought about this occurrence and the resulting death of John A. Healey. Both of these matters are matters which the plaintiff must establish to your satisfaction by a fair preponderance of the evi-

30 dence.

Now, remember, gentlemen, I say that both of these allegations must be established by the plaintiff by a fair preponderance of the evidence in order to warrant a verdict under any circumstances for the plaintiff. The first thing that the plaintiff must establish is this, and establish to that manner and that degree which I have just indicated, that a custom to keep a lookout and warn employees in the yard existed. That any

40 such thing existed at all is the first thing that they must establish. If they have not established

Charge.

that by a fair preponderance of the evidence then you may stop right there. If they have, then you must go this much further, not only that such a custom or practice existed, but that it was so general and certain that employees of the defendant lawfully in the yard in question were warranted in relying upon and assuming that reasonable care would be taken by the employees in the control and management of the movement of cars and trains to keep a reasonable lookout and to give a reasonable warning of danger. I have said, gentlemen, the burden is upon the plaintiff to establish that by a fair preponderance of the evidence. If it has not been established in that manner then you may cease your deliberations, because then again an essential thing to be made out by the plaintiff has not been made out. If that has been established in that manner, then your attention must go to the second thing which I have already called your attention to, and that is, did the persons, did the servants and agents of the defendant company fail to keep a reasonable lookout and use reasonable care in respect to the giving of warnings, and if so, was such failure a proximate cause of the injury.

Now, understand me, gentlemen, these are the two things that the plaintiff must make out: First, that a custom to keep a lookout and to give warning by persons or servants of the defendant company in the control and management of the movement of trains and cars in that yard existed, and that it was so general and so certain as to warrant the employees of the company lawfully in the yard of the company to rely upon the observance of that custom; and, second, if that has been established, then has the plaintiff established by a fair preponderance of the evi-

Charge.

dence that this thing that happened to John A. Healey happened as the proximate, natural result of the failure of the employees, or some of the employees of the defendant company in the charge, management and control of this car, to use reasonable care to keep a reasonable lookout and to give reasonable warning under the circumstances. If

10 either one of those two things has not been established by a fair preponderance of the evidence upon the part of the plaintiff, then there cannot be a verdict in this case for the plaintiff, but the verdict must be for the defendant, because you see, gentlemen, those are the things that they are relying upon to have a verdict and if they have not made them out, and the duty and the liability and the responsibility is upon them to do so by a

20 fair preponderance of the evidence—if they have not done so, then they have not met that burden which the law puts upon them, and are not entitled to have a verdict. And remember, gentlemen—understand me—it is not enough if they make out either the one or the other of those two things; they must have made out both in order to be entitled to a verdict. If they have not, then your verdict must be for the defendant and you need not consider any other matter in the case.

If they have made them out, then it will be

30 necessary for you to consider other matters. I shall take these other matters—and they are principally two in number—I shall take them up in this manner, gentlemen, because it will be more advantageous for you to have them from me in this order. You may not, however, consider them in the order in which I give them to you; you will use your own good judgment and discretion as to the order in which you will consider them. The first is, that if the plaintiff is entitled to a

40 verdict, then what that verdict under the law

Charge.

may be for. This action, as I have said, is brought under the Federal Employers' Act, or under the Federal Act, and the quantity of the verdict and what it may be for is controlled by what we know as the Death Act in this State. The Death Act is the only act upon which and through which a verdict in case of death may be supported, and therefore you will understand, gentlemen, that you have no latitude, you have no right to go outside of what that act provides in determining what your verdict shall be for. In other words, you are absolutely limited, as is the court, in its charge to you, and its direction to you, in finding a verdict, if one is to be found, within the requirements and within the provisions of that statute. It is entirely immaterial to you, gentlemen, or to myself, as to whether or not we think that act is proper or improper. The fact that the act exists and it is the only act permitting a recovery and is the only act giving the measure of damages which will be represented in a verdict, is one is to be had, is the only concern you and I have before us, and our only concern is to follow the provisions of that statute.

The right of recovery is entirely a pecuniary or money right, and a recovery in an action of this kind, under the Death Act, may be for the present worth of the pecuniary loss which reasonably would fall on the widow and next of kin of the deceased party because of his death. There is nothing to be added to your verdict or considered in the determination of what the verdict shall be for grief or sorrow or loss of society or wounded feelings or anything of that character.

The situation is this—and the burden, of course, gentlemen, is upon the plaintiff to satisfy you of all those essential things necessary to give you a basis upon which your verdict may be properly

Charge.

predicated—the decedent, it is said, was fifty-one years of age at the time of his death. His widow was forty-two or is forty-two, I am not sure as to what the testimony is upon that point. The accident happened or the occurrence happened on April 15, 1916. There are, I believe, four children, their ages being fifteen, fourteen, seven and

10 three. The testimony is that the deceased party was earning at the time of his death one hundred and fifty-five dollars per month. There is some testimony which may go to the question as to what the decedent during his lifetime contributed for and towards the benefit of his family, then consisting of his wife and four children. What they are entitled to recover, if anything, is this, that sum of money which you may find from the

20 evidence it is reasonable to say that he would have contributed for and toward the benefit of his widow or his wife and children during the remainder of his life had he lived—that sum reduced to its present worth. The reason for requiring it to be reduced to its present worth is this: because had he lived he would have been contributing such sums, if any he contributed, from month to month or week to week and as he earned them, and therefore the wife and the children would have had the benefit and the use

30 thereof over the period of time which marked the balance of his term of life and ability to contribute, receiving those sums, you see, in those stated periods, or at those different times; and now by a verdict you see you are giving to them that which otherwise would have been spread over a period or term of years. So, therefore, they are not entitled to the gross sum that it may be found by you that if he had lived he would have contributed, but they are only entitled to the present

40 worth of what that sum would have been. Now in estimating and determining that, gentlemen,

Charge.

you are to take into consideration all the possibilities. It is said that this decedent was fifty-one years of age at the time of his death. You are to determine what in reasonable probability would have been the length of his life beyond that time had this thing not happened to him. Of course, you must also take into consideration, in considering that, the possibility that he might have died within a short time after this occurrence from other or natural causes. Of course, had that happened, his contributions would then, you see, have been cut off, and his family, that is, his wife or widow, and next of kin, would have been deprived from the use or from the benefit of such contributions. It might have been that had he lived he might have been taken ill or might have met with other causes which would have prevented him from earning, and then, of course, naturally, from contributing. That is another item which you must take into consideration. It might have been, had he lived, that he would have for other reasons met with financial reverses, such as would have prevented him from contributing to his family, and therefore, of course, they would not have had the benefit of those contributions. You must also take into consideration the fact that had he lived his widow might have died before he did, and therefore his contributions to her would have ceased. Again, you must take into consideration this circumstance, that there are four children. Some of them or all of them might have died, had he lived, before he did, and of course then these contributions to them would have ceased. You also have a right to take into consideration that these children, had they lived, might ultimately have arrived at that age, particularly the age of twenty-one, if not before, when they would have been self-sustaining, self-supporting, and his contributions, in the natural course of

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Charge.

events, to them would have ceased. Of course if they did, then they are not entitled to recover to that extent in a case of this character. There may be other circumstances, gentlemen, which I have not particularly named to you, but which may occur to you in your good judgment and your good reasoning, which are matters which you
10 feel that you should consider in determining the question of what the loss, if any, is or has been established under the rule which I have given you. And understand, that they are entitled only to just that sum, if any, which is the present worth or will be the present worth of that pecuniary loss which they have shown or may have shown they have met with or with in reasonable probability meet with, which is the deprivation of a reasonable expectation of contributions upon the part
20 of the deceased, Mr. Healey, had he not met with his death at the time he did. That, and that only, gentlemen, is the sum which may be represented by the verdict at your hands.

But against that there is this: There was a duty also resting upon Mr. Healey himself with respect to what he should do in protecting himself or saving himself from harm and injury. The duty that rested upon him was that he was required to use that which was reasonable care, such as a
30 reasonably prudent person would or should have used, considering the time, place, circumstances and conditions in which he then stood and was and was working at the time of this occurrence, so that he would not bring harm upon himself.

Now, mind you, gentlemen, I have said that he was required to use that care which a reasonably prudent person would or should have used, considering time, place, circumstances and conditions, so that he would not bring harm upon him-
40 self and you have a right, gentlemen, in determin-

Charge.

ing that question, as to whether or not he transgressed that rule, to take in consideration all of the circumstances, the fact of the nature of his employment, the position that he held in that particular yard—I think it has been stated by the witnesses that he was over all of the employees in that yard—what his ability was, what the position was that he was in to know of the risks and the dangers that he might expect to encounter there, and all of the conditions under which he could be said to have been then laboring and performing his work, and then apply the rule—did he act as a reasonably prudent person would have acted under the circumstances to protect himself from harm or injury. The burden of satisfying you as to whether he did or did not is upon the defendants. They must have satisfied you by a fair preponderance of the evidence. If they have, then he was guilty of contributory negligence. Now the reason I have brought that in in this order is because I thought it was easier for me to explain it to you by first giving you the rules under which a verdict, if a verdict is to be had, in the case, is to be measured, and then take up this question of contributory negligence. 10 20

Now that question has this bearing. If you find that the decedent was guilty of negligence which contributed to what happened to him, then that is to be employed in this manner. Section 3 of the Federal Act, under which this action is being prosecuted, says in part this, and I am reading just that part which is of consequence in this action: "That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have 30 40

Charge.

been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The term "employee" is used with relation to just such a person as Mr. Healey, the deceased party, was.

- 10 He was in just that position with regard to the defendant railroad company. He is such a person as is referred to as the employee.

Now it is important, gentlemen, that you should give this particular matter your very strict attention, because if it has been established that the plaintiff is entitled to have a verdict under the evidence and under the rules which I have given you, and it has also been established that the de-
 20 cedent, Mr. Healey, was guilty of contributory negligence, then it is very necessary that you should know just how to apply that question of contributory negligence with respect to any verdict which you otherwise would have found.

Now what our Federal courts have said with respect to this particular section, or part of that section which I have just read to you, is as I am now about to read to you—and with this reading, gentlemen, my charge to you will be concluded, and I wish to impress upon you the necessity of
 30 strict, careful attention to what I am about to read to you upon that subject. The court has said: "The statutory direction (that is the one I have just read you) that the diminution shall be in proportion to the amount of negligence attributable to such employee means that where the causal negligence is partly attributable to him (the employee) and partly to the carrier, he (the employee) shall not recover full damages, but only a proportional amount bearing the same relation to
 40 the full amount as the negligence attributable (or

Charge.

chargeable) to the carrier bears to the entire negligence attributable to both. The purpose being to abrogate the common law rule completely exonerating the carrier from liability in such cases, and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee."

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So that, gentlemen, in conclusion let me say this to you, that if under the evidence and if under the rules which I have given you you find that the plaintiff is entitled to recover and you also find that it has by the evidence and under the rules which I have given you been shown that the decedent, Mr. Healey, was himself also negligent and that that negligence contributed to what happened to him, then that verdict which the plaintiffs would otherwise have been entitled to shall be reduced by and under the rule which I have just read to you.

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With that, gentlemen, you may take the case.

DEFENDANT'S EXCEPTIONS:

MR. HOBART: On behalf of the defendant I respectfully request exceptions to the charge and desire objections to be noted to the same as follows:

1. As to that part of the charge wherein the court left it to the jury to determine whether or not there was any custom in the yard by which employees were to keep a lookout for other employees, and to warn them of the danger from moving cars. I may state in that connection that the point of that objection is that there was no question for the jury on that subject, and while I do not object to the precise language of the charge, if there is any question at all for the jury at all on that subject—

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Charge.

THE COURT: I thought there was. If there was not, then your exception is well taken.

MR. HOBART: Yes. I also ask in that connection an exception to that part of the charge which left it to the jury to determine whether or not the employees in charge did or did not live up to that custom, and whether their failure to do so was or
 10 was not the proximate cause of the accident.

That also being on the point that there was no question for the jury to consider with respect either as to whether or not there was a failure to give the warning and whether such warning was the proximate cause.

I also ask in connection with those parts of the charge to which I have called attention an exception because they were stated without reference to or without any statement of the doctrine of the
 20 assumption of risk, which under the circumstances of this case may have qualified the application of the legal rules that your Honor stated on those subjects.

I also ask an exception to the subsequent part of your Honor's charge where you permitted the jury to take into consideration the question of whether the servants of the defendant did fail to keep a lookout, but failed to use reasonable care to give warning. I desire to take an exception to
 30 all that your Honor said dealing with that subject.

Also to a subsequent part of the charge which left to the jury the question of whether the alleged failure to warn was the proximate cause. I desire to take an exception to all the parts of the charge upon that particular subject.

I also request an exception to that part of the charge which in dealing with the question of damages charged the jury that in determining that
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Charge.

question the law under which they were controlled was the Death Act of the State of New Jersey. I conceive that that act has nothing to do with the case brought under this statute.

Mr. Hobart later asked the court if his exceptions had been allowed.

THE COURT: I will allow them as far as I can legally allow them. I put it that way with reference to the general exception taken by plaintiff's counsel, which I do not think can be allowed. 10

MR. HOBART: I asked your Honor the question. I think it is necessary to have it appear upon the record that the exception was made, not necessarily that the point of the objection was well stated, although that is sometimes done as a matter of courtesy to the court. I think it is necessary to have it appear that the exception was in fact allowed by the trial judge in a civil case under the new Practice Act. 20

THE COURT: The defendant's objections, as stated in my presence, as far as I have power so to do, I allow them.

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T R A C K S To Jersey City →

E. B. Wood Engine # 119

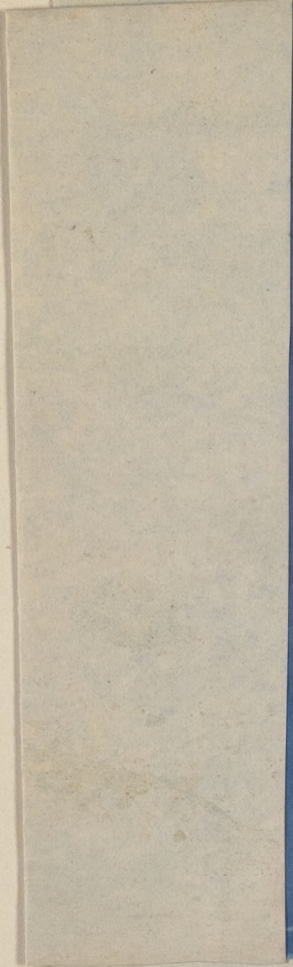
Car # 142021

* Spur

Track

* Where Track Foreman Nolack stood

→ → → → →



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Recovery

Court of Errors and Appeals.

CHARLOTTE HEALY, Admx.,
Plaintiff-Respondent,

vs.

ERIE RAILROAD COMPANY,
Defendant-Appellant.

BRIEF OF PLAINTIFF.

Facts.

This is an action under the act governing remedies of employees of common carriers by railroad engaged in interstate commerce.

The jury might have found the following facts:

The intestate of the plaintiff was the yardmaster of the Erie Railroad Company, in the yard at Jersey City. He was killed by a freight car which was making a flying switch on the 19th day of April, 1916. That it was the custom in the yard for employees in control of instrumentalities, likely to injure other persons unless due care was used, to keep a lookout for men in the vicinity and to give warning (Pl. p. 27, l. 10). The jury might have found that no adequate lookout was kept and no warning given of the approach of the freight car that killed him. There was testimony from which the jury might have said that the freight car which killed him was propelled along by an engine and both, to all appearances were going on to the same track, when suddenly the freight car was

switched from the engine and went on to a different track than that which an ordinary onlooker would assume it was going. The switch through which it passed before it killed the intestate of the plaintiff was estimated by witnesses to have been from 10 to 200 feet away from the point he was killed. If he was in either position and the car was propelled through the switch without giving him notice and without the existence of such facts which without notice, would warn him of the direction the car was about to take, then both the questions of negligence and risk were for the jury.

That it was evidence of negligence to propel the car without warning and without any system of rules for the protection of employees, or without any warning, it being the custom to give warning of the approach of the car; see

McNally v. P. R. R., 88 N. J. L.;

Smith v. Southern Rwy. Co., 205 Fed. Rep., 360;

Chicago R. R. v. Wright, 239 U. S. 548; 60 Law. Ed., 431;

Kanawha & M. R. R. v. Kerse, 239 U. S., 576; 60 Law. Ed., 443;

Murphy v. Atlantic & Charlotte Air Line Rwy. Co., 87 S. E. Rep., 310 (Sup. Court of So. Car. Nov., 1916).

2nd Syllabus.

“Where a yard conductor delivered the switch list to his subordinate to continue the work of switching cars during his temporary and enforced absence and instructed him to shove cars onto track No. 2, and where the subordinate kicked such cars, into track No. 3, and in consequence the yard conductor was in-

jured while passing between what appeared to be dead cars on track No. 3, which cars were struck by those kicked onto the track, defendant (R. R.) was liable.”

Since the risk in such case was latent and not patent, the *yard conductor* did not assume the risk of injury from passing between the cars.

Blanchard v. D. L. & W. Railroad Co., 211 N. Y., 79, was the case of a foreman of Bridge painters whose duty, it was among other things to keep a lookout for his men. He himself was hurt, he was caught between a freight train and a delayed passenger train. There was a rule of the company's as follows: “On delayed regular trains and extra trains, keep a sharp lookout for track men and hand cars and sound the whistle signal when approaching points obscured to the view.” There was a curve and a cut commencing a trifle over 700 feet west of the bridge. The passenger train was 10 to 14 minutes late and there was smoke from the engine of the freight train and it was also a foggy day. Judge Miller delivering the unanimous opinion of the Court of Appeals of the State of New York, said:

“* * * The decision of this case turns on the point whether it was the defendant's duty to give the plaintiff seasonable warning of the approach of the passenger train. We are of the opinion that that question cannot be decided adversely to the plaintiff as matter of law. If one of the men under the plaintiff had been injured, the case would be plain. They could not do their work and be on the lookout constantly for trains. The plaintiff, while merely supervising the work at either

end of the bridge, might be expected to keep a lookout. Indeed it might be his duty to the men under him to do that or to provide for its being done, though the defendant does not appear to have given any instructions on the subject. But if, as occurred two trains met on the bridge while he was attempting to cross it, he was in great peril unless seasonably warned. If his duties required him to cross the bridge, he could not stand about waiting for a delayed train or until sure that no train would arrive while he was upon the bridge."

It is respectfully submitted to the court that there was proof in the case as pointed out in the statement of facts in this brief that the system of work in the ward included a custom to warn. Also from the proof the jury had the right to find no suitable warning was given. True there was proof that somebody hollered but this was not until the car was immediately on top of the plaintiff's intestate. Was such a warning a proper one? That was for the jury.

The Federal employers liability act makes the defendant responsible for the negligence of the acts of the conductor and brakemen although it might be held that the company was under no duty to prescribe rules yet if the conductor knowing the custom to warn did not warn or the brakeman did not keep a proper lookout, liability could be found by the jury.

There was a duty on the master to warn, *Williver v. D. L. W. R. R.*, 99 At., 321; *Young v. Lusk*, 187 S. W. Rep. 849, *L. & W. v. Boyd*, 73 So. Rep., 514, brakeman run down by engine *Walker v. Wabash*, 183 S. W. Rep., 636; *Norfolk & Western v. Shonts*, Court of Appeal, Kentucky, 1916.

Federal Law Governs:

The law as expounded by the federal court is the law governing *Grey v. Southern R. R.*, 241 U. S., 333.

Charge of Court.

No request was made to the Court to Charge an assumption of risk. It was not error therefore to fail to charge.

Ambrecht v. D. L. & W. R. R., June Term, 1917, Court of Appeals, and cases therein cited.

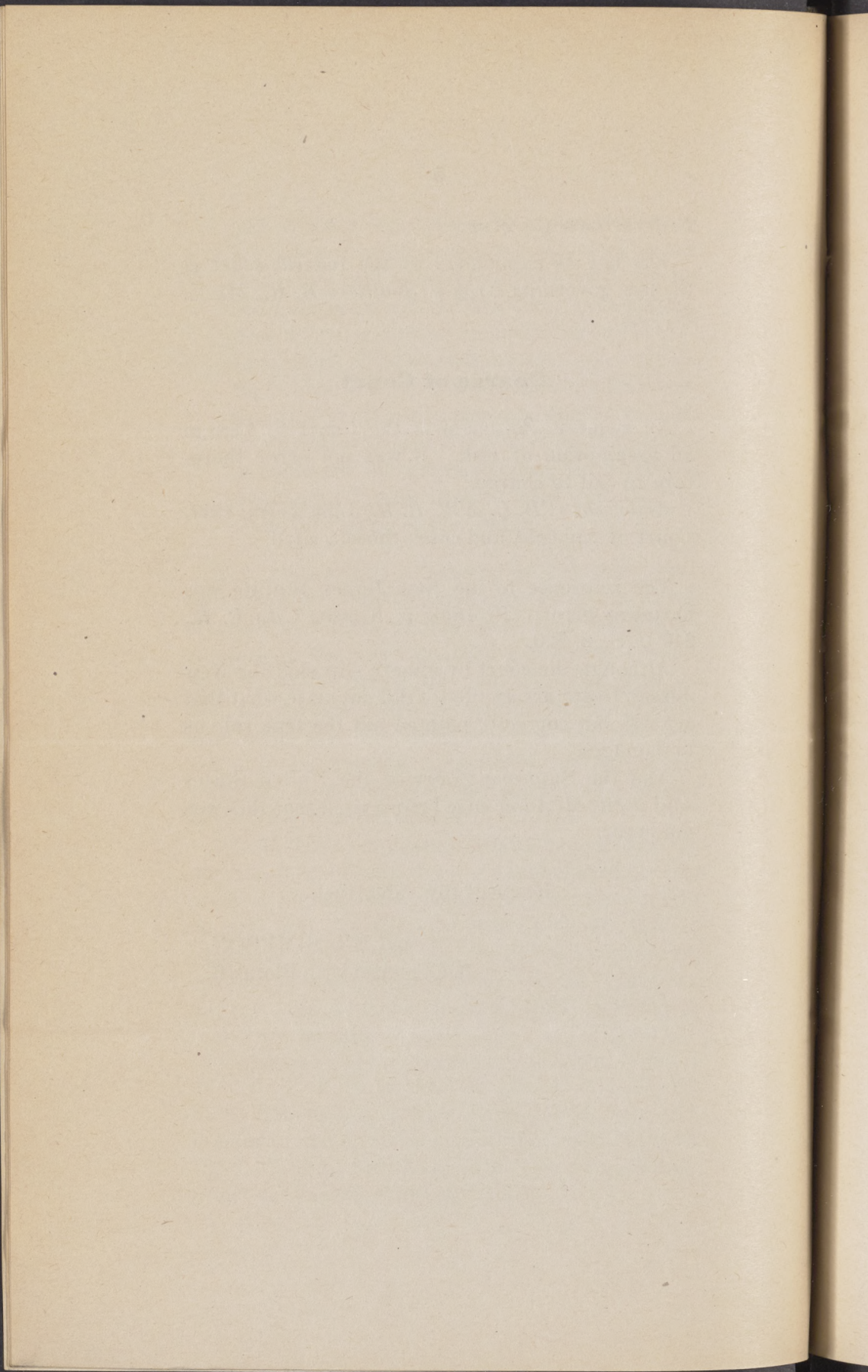
The reference to the New Jersey Statute was harmless error. *McAdow v. Kansas City R. R.*, 240 U. S., p. 520.

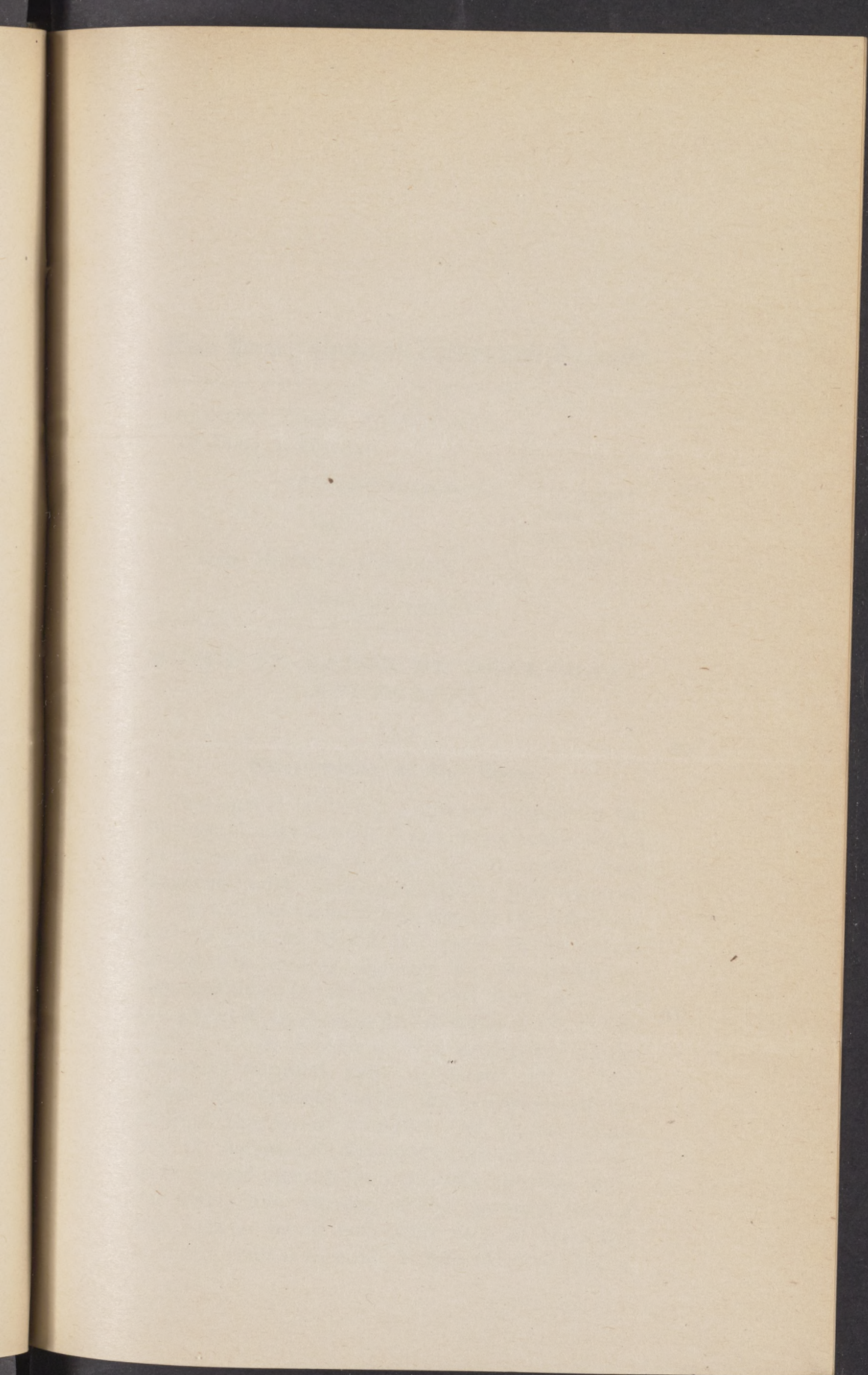
Although the court by a mere slip said the New Jersey Death act applied it did not state what that act was but correctly pointed out the true rule as to damages.

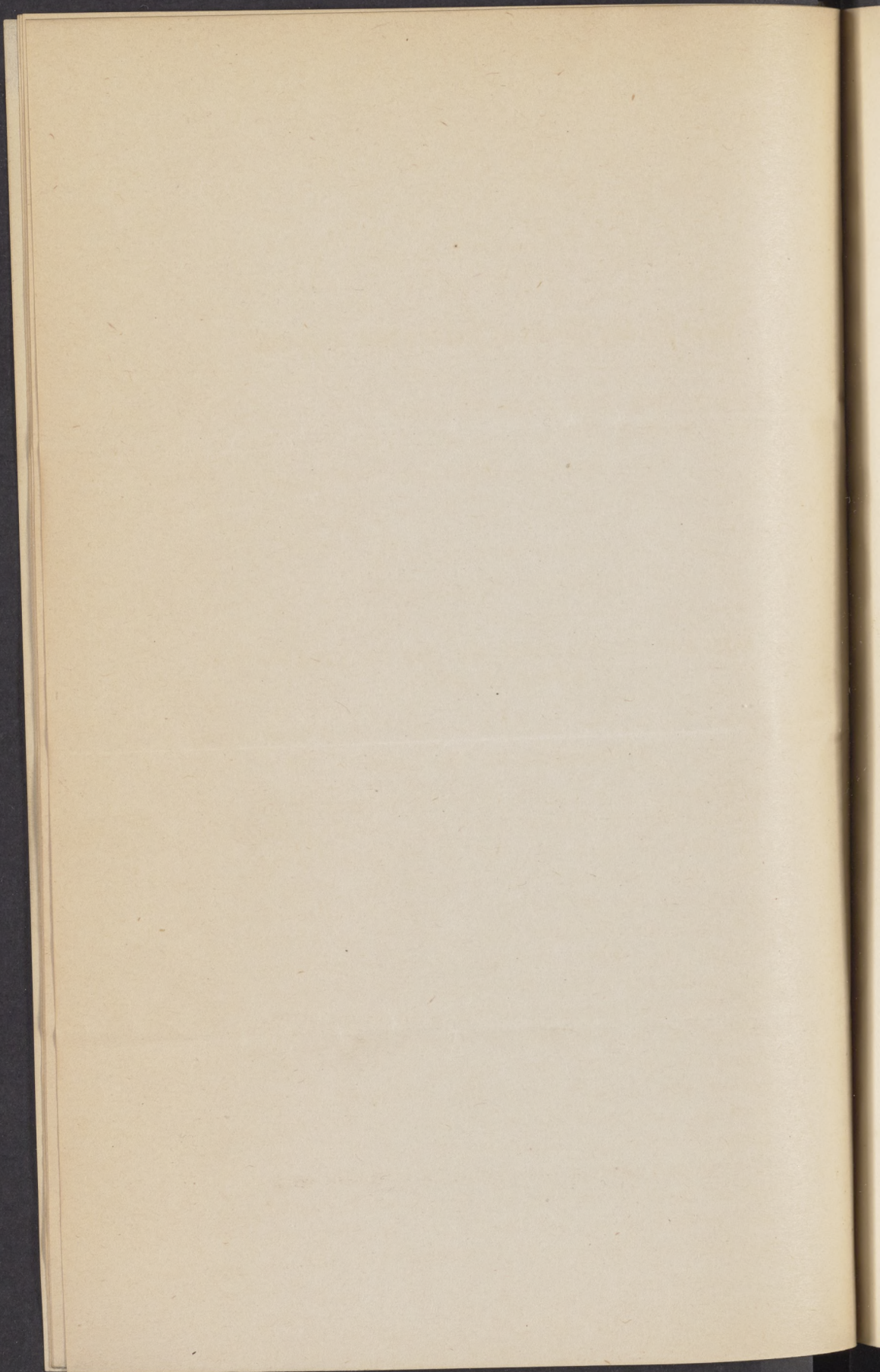
And the Supreme Court of the United States said in the *McAdow* case before cited that this was not error.

Respectfully submitted,

ALEX. SIMPSON,
Of Counsel with Plaintiff.







New Jersey Court of Errors and Appeals.

CHARLOTTE HEALY, Administratrix
of John A. Healy,

Plaintiff-Respondent,

vs.

ERIE RAILROAD COMPANY,

Defendant-Appellant.

On Appeal
from Hud-
son Circuit
Court.

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BRIEF IN FAVOR OF DEFENDANT- APPELLANT.

(1)

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Statement of the Case.

This appeal is from a judgment entered in the Hudson County Circuit Court (erroneously stated on cover of State of Case as an appeal from Supreme Court) on a verdict of the jury rendered in favor of the plaintiff and against the defendant for the sum of \$8,400 and costs, in an action brought to recover damages for the pecuniary loss sustained by the widow and next of kin of the plaintiff, by reason of his death while in the employ of the defendant as a yardmaster at defendant's terminal yard in Jersey City. The action was brought under the provisions of the Federal Employers' Liability Act on the claim that the defendant's servants caused a freight car to be moved against the plaintiff's intestate without giving him warning of the approach thereof and without using reasonable care to keep and maintain control thereof. It was admitted that at

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the time of the accident the defendant was engaging in interstate commerce and that the plaintiff's intestate was employed by it in such commerce. Motions for non-suit and direction of verdict, on the ground that there was no evidence of negligence on the part of the defendant or any of its servants and that the risk of injury was assumed by the plaintiff's intestate, were denied. The question of liability was submitted to the jury, with the result above stated.

(2)

Grounds of Appeal.

The following are the grounds of appeal upon which the defendant relies:

20 "1. The trial court refused to non-suit the plaintiff when thereunto moved, whereas non-suit should have been granted for one or more of the reasons urged in behalf thereof, to wit,

"(a) There was no evidence of negligence on the part of the defendant or any of its servants or employes.

"(b) The risk of injury was assumed.

"(c) The death of the plaintiff's intestate was the result of mere accident.

"(d) There was no evidence of violation of any order.

30 "2. The trial court refused to direct a verdict in favor of the defendant when thereunto moved, whereas the motion for direction of verdict should have been granted for one or more of the reasons urged in behalf thereof, to wit,

"(a) There was no evidence of negligence on the part of the defendant or any of its servants or employes.

"(b) The risk of injury was assumed.

"(c) The death of the plaintiff's intestate was the result of a mere accident.

"(d) There was no evidence of violation of any order.

40 "(e) Because it clearly appeared that the plaintiff's intestate was properly warned.

“(f) Because the plaintiff’s intestate knew or should have known of the danger of the movements of trains back and forth in the yard” (p. 1, l. 22, to p. 2, l. 18).

The defendant further urges as grounds of appeal certain errors in the charge which are specifically set forth in grounds of appeal Nos. 3, 4 and 5 (pp. 2 to 8 of State of Case).

(3)

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Brief of the Argument.**I.****There was no evidence of negligence on the part of the defendant or any of its servants.**

The allegation of negligence in the complaint is as follows:

“5. The negligence consisted in this, that the said defendant by its servants and agents caused to be propelled against the body of said John A. Healy, without giving him any warning of the approach thereof, and without using reasonable care to keep and maintain control of the same, and propelling the same improperly manned and with brakes in an improper condition on a freight car which struck him and threw him under another moving freight train and he was thereby killed” (p. 10, ll. 5-15).

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The proof showed that there was no basis for the claims that the defendant did not properly man the car by which the plaintiff’s intestate was struck or that the defendant’s servants did not use reasonable care to keep and maintain control of said car or that the brakes thereon were in an improper condition. The car in question was in charge of a brakeman (Weil), who was riding on the side of the car. He was not able to see the plaintiff’s intestate until the car was within five

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or six feet of him—this being due to the fact that the engine was between the brakeman and the intestate so that the brakeman's view was cut off (p. 32, ll. 1-10; p. 36, l. 30, to p. 37, l. 20). The brakeman then tried to stop the car (p. 32, ll. 20-30) and brought it to a standstill within about 100 feet—which was the distance within which it could be stopped by a quick application of the brake (p. 31, l. 35; p. 45, ll. 20-30). The brake was all right (p. 39, l. 10).

It appeared without dispute that there was no printed or written rule requiring warning of the movement of cars in this yard (testimony of Regan, conductor, p. 27, ll. 30-35; Weil, brakeman, p. 44, ll. 30-35). During the trial there was a suggestion by plaintiff's attorney that the company may have been negligent by reason of its failure to promulgate rules. As there was no allegation of negligence in the complaint covering this point, the trial judge properly eliminated it from the consideration of the jury, saying:

“You are not concerned with the question as to whether or not the defendant company should have made rules for the protection and safety of its employes in this yard” (p. 88, ll. 10-15).

This left for consideration the single claim that the car was propelled without warning the intestate of the approach thereof. In this connection it should first be observed that there are no facts stated in the complaint from which the conclusion might be drawn that there was any duty on the part of the defendant to warn the intestate of the approach of the car. The trial judge permitted the jury to consider whether there was a custom to warn employes of danger in the moving of cars and whether the employes in charge of the movement lived up to such custom. There being no allegation in the complaint of the existence

of such custom or of the failure to live up to same, this charge permitted the jury to find negligence on the part of the defendant with respect to an issue that was not pleaded. Aside from other considerations, it was therefore error to leave such a question to the jury as the basis of liability on the part of the defendant.

Excelsior Electric Co. v. Sweet, 59 N. J. L., 441;

Murphy v. North Jersey Street Ry. Co., 71 N. J. L., 5; 10

Merklinger v. Lambert, 76 N. J. L., 806, at p. 814;

Duel v. Mansfield Plumbing Co., 86 N. J. L., 582.

If, however, for the purpose of argument, we assume that it was permissible for the trial judge to leave to the jury questions of negligence which were not pleaded, then the further question is whether there was any evidence of such negligence. The charge of the trial judge on this point was as follows: 20

“But the plaintiff says this, that there was a custom in use by the employees of the defendant company in this particular yard by and through which the employees were to keep a lookout for other employees engaged in the yard and to warn them of danger in and about the moving of trains or cars in the yard, and that in the movement of this particular car the employees in charge of that movement or its movement did not live up to that custom, and that their failure to do so is what brought about this occurrence and the resulting death of John A. Healy. Both of these matters are matters which the plaintiff must establish to your satisfaction by a fair preponderance of the evidence” (p. 88, ll. 15-30). 30

So far as relates to the custom of warning, there was probably sufficient evidence to go to the 40

jury as to whether or not there was any such custom. Thus, Conductor Regan testified:

10 "Q. When you were doing that kind of work, that is, when you sent an engine on one track and then cut a car off and shoot it into another track, when you are doing that kind of work and you see anybody around in the position of danger, is there any printed rule of the Erie Railroad Company telling you what to do? A. Well, you are supposed to warn them as far as possible, yes.

"Q. How would you warn them? A. Holler at them or for a man on the car—

* * * * *

"Q. You said a minute ago that you are supposed to warn a man as far as you might be. Where did you get that supposition from? From a printed rule or from the custom of the yard? A. Custom of the yard.

"Q. Not any written rule at all? A. Not that I saw.

20 "Q. Not that you know of? A. No, sir.

"RE-CROSS EXAMINATION BY MR. HOBART:

"Q. What do you know about any such custom, Mr. Regan? A. Well, if you are switching around and you see anybody in danger, why, you warn them to the best of your ability, holler at them or such like that.

"Q. You were how far from Healey? A. About a hundred and sixty feet.

"Q. Well, did you warn him? A. Well, he was hollered at. I didn't holler at him.

30 "Q. Why didn't you? A. Well—

* * * * *

"A. Well, it ain't well to have too much hollering; it is just as bad as none at all.

"Q. Did the rule or custom require you to holler at him under such conditions?

* * * * *

"A. To the best of my belief, yes.

"Q. Now the question is, why didn't you? A. Well, there was others hollered at him.

"Q. Did you hear the others holler? A. Yes, I heard the holler.

40 "Q. Is that the reason you didn't holler at him? A. No, that is not the reason.

"Q. What is the reason? A. I had this other work to attend to, this switch to throw.

"Q. You heard the other man hollering? A. I did, yes.

"Q. What did they holler? A. 'Look out', or something like that" (p. 27, l. 1, to p. 29, l. 15).

Brakeman Weil testified:

"Q. Do you know of any printed rule of the company which guides you as to how you should protect people walking around the track? A. No, sir. 10

"Q. You do not know of any such rule? A. No, sir" (p. 44, ll. 28-33).

* * * * *

"Q. And you say, as I understand you, there was no rule in that yard, printed rule or custom, that you knew about, to keep a lookout for people or warn them if they were in danger by reason of your car. A. No; only that if we seen them, to holler to them, that is the only— 20

"Q. If you saw them? How would you see them unless you kept a lookout for them? A. That is what we do, if we could see them.

"Q. You keep a lookout and if you see them you holler to them? A. Sure, we holler to them.

"Q. That is the way they operated down there, is it? A. Yes" (p. 46, ll. 28-41).

It will be observed that the so-called "custom" was somewhat indefinite and did not require any specific employe to give warning. Any of the employes who were working in that part of the yard where the movement was to be made could give the warning. 30

The important question, therefore, on this feature of the case is, was there any question for the jury to consider on the point as to whether or not the employes, or any of them, gave the customary warning? Before calling attention to the evidence on this subject a short statement of the circum- 40

stances under which the accident happened will be helpful.

The plaintiff's intestate was fifty-one years of age and had been employed by the defendant railroad company as a yardmaster for many years—part of the time at defendant's yard in Weehawken and part of the time at defendant's so-called Croxton yard where this accident happened. Prior to this accident he had been working at the Croxton yard for several months. He was in full charge of this yard, with over one hundred tracks, with about thirty men working on the yard engines, besides a number of clerks (p. 78, ll. 1-40; p. 82, ll. 1-25). The map in evidence shows a small portion of this yard which is located near the yard office and forms a part of a subdivision of the Croxton yard.

In order to facilitate a clear understanding of the circumstances of the accident, we have reproduced as a part of this brief a copy of a map in evidence, on a reduced scale, to which we have added legends showing the tracks and the points referred to by the witnesses, indicating thereon the approximate location of the accident and of the places where the several witnesses stood as follows:

1. Spur track on which Engine 119, Car 142021, was moving west.
2. Cross over leading from spur track to old main tracks.
3. Point where Engine 119 stopped (approximate).
4. Point where Yardmaster Healy stood. Point of accident.
5. Point where Car 142021 stopped. Green shows course of Engine 1879 and 25 cars moving east. Yellow shows course of Car 142021. Red shows course of Engine 119.

A few minutes before the time of the accident a yard crew, under Conductor Regan, operating a

yard engine known as No. 119, was engaged in switching cars towards and into yard "F", at which point the cars were to be made up into a transfer train for the purpose of being moved to the Jersey City yard, located about 2 miles to the east of the Croxton yard. Engine 119 coupled on to refrigerator car No. 142021 (indicated on blue print by yellow dotted lines), was on a track described by the witnesses as the "spur" track (marked No. 1 and indicated by yellow solid lines). The purpose was to pull this car in a westerly direction along a track which was a continuation of the spur track, and described by the witnesses as "eastbound freight track", which in turn led to No. 5 track in "F" yard. The engine was headed west, and was attached to the west end of the car. (Directions given according to the statements of witnesses—east being in the direction of Jersey City and west away from Jersey City.) While this movement was being made Conductor Regan stood at or near the "head-on switch" connecting the eastbound freight track with the track known as "old eastbound main" (indicated by red lines). The engine with the car attached was started and the engine was then uncoupled from the car and ran away from it, continuing its course from the eastbound freight track by way of the cross-over (marked No. 2) to the track known as "old eastbound main", thus leaving an interval between the engine and the car; and the car continued in a westerly direction along the same track where it had originally started (indicated in yellow)—the purpose being to have the car continue towards track 5 of yard "F", while the engine crossed over to the track next adjoining on the north; the conductor stood at the switch in order that he might turn same after the engine had passed and before the car reached it.

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Plaintiff's intestate was standing, facing in a westerly direction, at a point between the east-bound freight track (indicated in yellow) and the track next adjoining it on the south known as the "southbound lead" (indicated in green). The approximate position where the plaintiff's intestate stood is indicated by No. 4 on blue print, and is about 150 feet west of where Conductor Regan stood at the switch (pp. 15-18). While

10 plaintiff's intestate was standing at that point a freight train, with 25 cars attached (p. 69, l. 15), was moving in an easterly direction at the rate of 3 or 4 miles an hour (p. 40, l. 8) along the southbound lead. This train was moving past Healy at the same time that car 142021 was moving past him in the opposite direction, eight or nine of the cars of the train having passed before car 142021 reached the point where Healy stood (p. 39, ll. 30-40)—the engine in the meantime having

20 crossed over to "old eastbound main" track. Car 142021 struck Healy and knocked him toward the southbound lead, on which the freight train was moving in an easterly direction, and threw him under the train (p. 47, l. 30, to p. 49, l. 10; p. 75, ll. 1-20). At the moment he was struck he was standing about 20 feet from the nearest switch with his back towards car 142021 (p. 74, ll. 20-30).

The facts as to the giving of the warning were undisputed. Conductor Regan says that he him-

30 self did not give warning, as he had to attend to the throwing of the switch, but he heard others holler "Look out". This call was a "couple of seconds" before the car passed the switch where Regan was standing (p. 29). Plaintiff's intestate was about 150 feet west of this switch (p. 16, l. 25).

Several other witnesses testified to the fact that the plaintiff's intestate received due warning.

40 Thus, BRAKEMAN WEIL, who was riding on the

side of the refrigerator car, says that after passing the switch, and when he was within 6 or 8 feet of the intestate, he saw him standing about 18 inches from the rail, facing west, with his back towards the car. The brakeman immediately tried to stop the car but could not do so in time (p. 32, l. 1 to p. 33, l. 10). The brakeman was climbing up to the top of the car to set the brake when he first noticed the intestate—the engine having obstructed his view up to that moment (p. 36, ll. 20-40). As soon as the brakeman saw the intestate he hollered "Look out, Mr. Healy." At that time Healy was facing west and when the brakeman called to him he moved as if to get out of the way, turning to the right, away from the approaching car (p. 37, l. 20 to p. 38, l. 20). At the time the brakeman called, Healy was standing close enough to the track to be struck if he had not moved (p. 44, ll. 15-20). As Healy stood there, he was apparently taking the numbers of the cars that were moving east on the adjoining track (p. 44, l. 20 to p. 45, l. 10).

NOLOCK, track foreman, saw Healy hit by the refrigerator car and knocked towards the south lead. Nolock was standing about 150 feet to the east; he saw the engine pass and hollered to Healy to look out (p. 48, ll. 1-20). At the time he was struck Healy was standing about twenty inches from the rail. He was facing west at the time and was struck on the right shoulder (p. 49, ll. 1-10). He further testified,

"Q. Did the car that hit Mr. Healy go past you before it hit him? A. What, the car?"

"Q. The car that hit Healy, did it go by you? A. Yes.

"Q. How far away were you from Healy? A. A hundred and fifty feet I was from Mr. Healy.

"Q. What did you say when you hollered? A. Why, I seen Mr. Healy staying pretty

close to the freight track and I holler to him, I don't call Mr. Healy, I say, 'Lookout, John,' and he turned around east and I just watched him, you know, and he turned back again west and that car go on and hit him on the right shoulder and knock him down on the S. O. lead train.

"Q. When you hollered to him? A. I hollered at him.

"Q. Did you holler to him the way you just hollered now? A. No.

10 "Q. You have got a pretty good voice, have you? A. Yes.

"Q. Was there any other car around there except this train on the next track? A. No, except that S. O. lead train, that is all; it was all clear on the right hand side.

"Q. Then when you hollered he turned, did he? A. Oh, he turned, yes. He hollered—he turned.

"Q. Which way did he turn? A. He turned east.

20 "Q. Is that the direction from which this car was coming? A. Yes.

"Q. Was the car in sight at that time so that when he turned he could see it? A. Why, I don't know whether he seen that car or not. It seems to me he go on across.

"Q. Was there anything to keep him from seeing the engine? Was it all clear? A. Yes.

"Q. After he turned to the east what did he do next? A. He turned around west and take the number off of car on the south lead.

30 "Q. Number of this car on the other train? A. Yes.

"Q. How fast was the car going that hit Healy? A. I don't know; probably four or five miles an hour, didn't go very fast" (p. 50, l. 22, p. 51, l. 28).

(NOTE: This is the man referred to by Conductor Regan when he says that he heard somebody holler—p. 29, l. 28).

40 At the time this witness called to Healy the car was about 160 feet away (p. 55, l. 25).

WAGNER, brakeman, was "lining up switches;" saw the car moving west and noticed Healy moving around the yard but did not see accident, as his view was cut off by the car. Was about 100 feet from Healy when the accident happened; saw the car moving towards him and hollered "Lookout John" as loud as he could. Healy "kind of looked around," turned his head west—the other way from the direction in which the car was coming (pp. 70-71). At the time he called to Healy the car was just about going past the witness and was about 100 feet from Healy (p. 72, l. 20 to p. 73, l. 10). 10

CHOFFEY, brakeman, was standing a short distance west of Healy and was lining up the switches for the south lead for the freight train that was moving on that track; saw engine 119 with the refrigerator car when it started from the spur track about 100 feet from the witness. Healy had just walked over to the switch and was standing with his back to the refrigerator car. 20

"Q. Did you hear anybody call? A. Yes, sir.

"Q. What did you hear? A. I heard all kinds of warnings.

"Q. Well, tell us. A. Hollering or shouting.

"Q. Can you pick out any one man that you heard? A. The brakeman that was riding the car shouted at him. 30

"Q. Anybody else? A. Two or three others standing around there.

"Q. Did you holler at him? A. Yes, sir.

"Q. What did you say? A. Look out, John.

"Q. And how far away was John from you? A. 20 foot away from me" (p. 74, ll. 30-42).

Car passed Healy and hit him and then passed by the witness. He, the witness, was standing about twenty inches from the track, just enough to clear 40

(p. 75, ll. 20-30). He stepped out of the way of it, saw it coming into the switch and strike Healy. Car was about six feet from Healy when he hollered (pp. 76-77).

It will be seen from the foregoing review of the testimony that while it is true that there was an employe who did not warn Healy, there were *four* other employes who did warn him, to wit, Brakeman Weil, who was riding on the car by which Healy was struck, Track Foreman Nolock who was about 150 feet from Healy, Brakeman Wagner who was about 100 feet from Healy, and Brakeman Choffey, who was within 20 feet of him. The last named was standing in the same relative position as Healy to the track on which the refrigerator car was coming. He stepped far enough away from the track to clear; apparently Healy intended to do likewise, as several witnesses say that Healy turned when the warnings were given. It may be that he miscalculated the overhang of the car or did not realize it was so close to him. In either event, the accident was the result of a failure of judgment on the part of an experienced employe rather than of negligence on the part of the defendant's servants. But however that may be, the fundamental question is, whether there was any failure on the part of the defendant's employes to give the customary warning. The only witnesses who testified on this subject say that the customary warning consisted in hollering at an employe who was in a position of apparent danger, and calling "Look out" or something like that. *This is precisely the kind of warning that was given in this case by four employes, and nobody denies the fact that such warning was given.* There is no evidence to show a custom of giving warning by any particular employe or by an employe holding any particular position. What difference could it make whether

Conductor Regan hollered or whether some other employe or employes—in this case four others—hollered?

The case is different from *Willever vs. Delaware etc. R. R. Co.*, 89 N. J. L. 697, 99 Atl. 321 (reversing 87 N. J. L. 348, 94 Atl. 595). In that case a section foreman was struck in a railroad yard by a train which was backing down the track; no warning was given him of its approach. The Supreme Court held that under these circumstances there was no duty to give warning and that therefore there was no negligence on the part of the company. The Court of Errors and Appeals (by a vote of 7 to 5) reversed this judgment, but did so solely on the ground that there was evidence of a rule of the company requiring warning to be given of a movement of the kind in question; that the decedent had a right to rely on such warning and that therefore the question of negligence by reason of the failure to give same was for the jury. The rule in question required an employe to take a position on the front of the head car when cars were being pushed and give signals to the engineer “in case of need.” In the present case there was no such rule and no such custom.

The case is also different from *McNally vs. Pennsylvania R. R. Co.*, 88 N. J. L. 277, 95 Atl. 975, where plaintiff (an employe of another company) was passing through the yard and was struck by a car which was moved without warning—it appearing that it was the practice to warn persons under such circumstances of the intended movement of trains, and the testimony as to whether or not such warning was given was contradictory.

The case is also different from *Grybrowski vs. Erie R. R.*, 88 N. J. L. 1, 95 Atl. 764 (affirmed 89 N. J. L. 361, 98 Atl. 1085). In that case there

was a disputed question of fact as to whether the customary signal of sounding the bell for an engine movement was given, and because of such dispute it was held that the question of negligence on the part of the employes in charge of the engine was for the jury.

Counsel for plaintiff may refer to the case of *Seaboard Air Line vs. Koennecke*, 239 U. S. 352, 60 L. ed. 324. In that case it was held that the
 10 question of negligence was for the jury when it appeared that a switchman was struck by a train that was backing on the main line; the movement was not a yard movement and there was no look-out of the end of the train, and no warning of its approach. The distinction between that case and the one now under consideration is obvious, but it may be observed that the court in its opinion took occasion to point out that "the case was not
 20 that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfestz vs. Humphreys*, 145 U. S. 418, 36 L. ed. 758, but one where the rules of the company and reasonable care required a lookout to be kept."

We therefore submit that the plaintiff's intestate received all due warning of the approach of the car by which he was struck, and that as there was no disputed question of fact as to
 30 whether or not such warning was given verdict should have been directed for the defendant.

Furthermore, the evidence shows that the *sole* proximate cause of the accident was not any negligence on the part of the defendant or its employes but the contributory negligence of plaintiff's intestate. We of course do not urge contributory negligence as a *bar* to the action provided there was evidence of negligence on the part of the company or its employes. Under
 40 section 3 of the Federal statute contributory neg-

ligence under such circumstances does not bar the action, but merely diminishes the damages. But when contributory negligence is the *sole* cause of the accident, then there can be no recovery.

The following are illustrations of the application of this principle:

In *Dodge vs. Chicago etc. R. Co.* 104 Ia. 627, 146 N. W. 14, held there could be no recovery in a case where a freight conductor after completing his trip had boarded the engine of another train and rode a short distance towards his home, was killed by the derailment of the engine when it struck a chain that he had insecurely fastened to the rear of his train and which fell across the rails when he placed his train on a siding. 10

In *Louisville & N. R. Co. vs. Heinig*, 162 Ky. 14, 171 S. W. 853, held that the plaintiff's intestate could not recover in a case where the intestate was an engineer who was killed by a collision with another train, it appearing that he had disregarded orders as to rate of speed and as to certain signals. 20

In *Pankey vs. Atchison etc. R. Co.*, 180 Mo. App. 125, 168 S. W. 274, held that the company was not answerable for the death of a brakeman who voluntarily went between moving freight cars and the platform of a freight house and was crushed, it appearing that the platform was constructed in the usual manner and that he was not required to go there in the discharge of his duties; it also appearing that he was warned by the conductor of the danger of the approaching train, and instead of stepping from the track to a place of safety he attempted to jump on to the platform. 30

In the present case the plaintiff's intestate was a man of many years' experience in this and other railroad yards. He had full supervision of this 40

yard in which there were located over 100 tracks wherein engines and trains were constantly moving back and forth. There was no particular rule or custom about moving engines or trains in any one direction on any particular track. A movement similar to the one that was being made at the time of this accident had been made on other occasions under like conditions (p. 22, ll. 20-30; p. 20, ll 20-30; pp. 81, 82). The decedent was

10 chargeable with knowledge that such a movement might be made, nevertheless he stood with his back towards the approaching car and gave no heed to it until several of the employes called to him, and then he "turned." There is some dispute as to whether he turned towards the approaching car or turned away from it. Track foreman Nolock said that decedent turned to the east (which was the direction from which the car was approaching) and then turned west to

20 take the number from a car on the train that was moving on the south lead. Brakeman Weil says that Healy turned to his right as if to get out of the way. Brakeman Wagner says that after he, Wagner, hollered decedent "kind of looked around" towards the west—away from the car (p. 71, ll. 25-40). Brakeman Choffey says that decedent had his back turned towards the car (p. 74, l. 28) and that when the warning was given he did not move or do anything (p. 75, ll. 1-5).

30 Whether or not he made any attempt to get out of the way of the approaching car it is obvious that he was careless either because he made no such attempt or because he failed to move far enough to clear the car. The accident happened in broad daylight on a clear day, about 5 P. M., April 15, 1916 (p. 20, l. 12). The car was moving slowly—not more than 5 miles an hour—the usual rate in that part of the yard (p. 22, ll. 10-20). There was nothing between the decedent

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and the approaching car that would prevent him from seeing it. The track was straight. The point at which it started was about 300 feet from the point of the accident (p. 22, l. 30 to p. 23, l. 25). If decedent had at any time looked in the direction of this car (with the engine attached to the head end thereof) he could not have failed to see its approach. It may be that if he had been an ignorant or inexperienced employe he could not be charged with contributory negligence, but in view of the fact of his familiarity with the yard and his long experience, we submit that he was chargeable with contributory negligence and that such negligence was the sole cause of the accident. 10

II.

The risk of injury was assumed by the plaintiff's intestate. 20

It is settled that in an action under the Federal statute assumption of risk remains as a defense in all cases except those where the violation by the carrier of any statute enacted for the safety of employes contributed to the injury or death of the employe, as specified in Section 4 of the Federal statute.

Seaboard Air Line Ry. v. Horton, 233 U. S., 492, 58 L. Ed., 1062. See also 239 U. S., 595, 60 L. Ed. 458; 30

Toledo etc. R. Co. v. Slavin, 236 U. S., 454, 59 L. Ed., 671;

Jacobs v. Southern Ry. Co., 241 U. S., 229, 60 L. Ed., 970;

Baughan v. New York etc. R. R., 241 U. S., 237, 60 L. Ed., 977;

Cetola v. Lehigh Valley R. R. Co., 89 N. J. L., 691, 99 Atl., 310. 40

In the last cited case this court stated the rule on this subject as follows:

10 "An employe assumes the risk of such dangers attending the prosecution of his work, as he would discover by the exercise of ordinary care for his personal safety, and that, for hurt happening to him from those dangers, the employer is not responsible. *Atha, &c. Co. v. Costello*, 63 N. J. L., 27. To the same effect, in this court, are the cases of *Dillenberger v. Weingartner*, 64 Id., 292; *Christensen v. Lambert*, 67 Id., 341. In those cases, the dangers were known to the employe, or he had become acquainted with them during the employment. 4 Thomp. Neg. (2d ed.), §4608 et seq."

20 In *Willever v. Delaware etc. R. R. Co.*, 89 N. J. L., 697, this court, although reversing the Supreme Court in the case of a yard accident to a foreman, did so only on the ground that the movement of the car by which the foreman was struck was not in accordance with the rules of the company. After quoting from the leading case of *Aerkfestz v. Humphreys*, 145 U. S., 418, this court said:

30 "This language, it seems to us, clearly indicates a material difference between the case *sub judice* and the case of 'drilling' yard work cases to which it applies. In the *Aerkfestz* case the deceased 'knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track where he was working.' He knew that he was in a place where they were 'drilling' cars in making up new trains, and that in that operation (under the system established for that purpose) cars were shunted back and forth, individually, and in groups without warning, and without lookouts being posted to see that employes were not in the way. In the present case, on the contrary, the deceased knew that

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he was in a place where 'drilling' was not carried on, where cars were not being shunted about in making up trains, and as to the quarter-of-a-mile-long train of empty freight cars standing on an incoming track, with no engine attached nor crew in charge, that he was protected by one of the rules forming a part of the system established by the defendant company for the 'movement of trains' which required that if that train were moved in his direction by being pushed from the other end, a man was required to first take 'a conspicuous position on the front end of the car' nearest to him 'to signal the engineman in case of need,' and that a man so placed would of course see him at his work on the track only two hundred feet in front and not give the signal to start backing without warning to him to get out of the way." 10

The legal principles being thus settled, the question for consideration is whether under the circumstances of any particular case the point as to assumption of risk is to be decided as a matter of law by the court or by the jury under appropriate instructions. In the present case we submit that the facts and the reasonable inferences therefrom being undisputed, the question of assumption of risk was one of law. 20

There is no doubt about the long experience of plaintiff's intestate in the very yard where this accident happened and in other similar railroad yards. The accident happened on a clear day and in daylight (p. 20, l. 15). The movement in question was common in that part of the yard (p. 20, ll. 20-30). Other cars were operated in the same way on the same track on other days (p. 21, ll. 1-10). Other cars which were destined for Swift & Co. in Jersey City were moved in the same way in this yard while Healy had been working there (p. 21, ll. 20-25; p. 41, ll. 20-40). The car was moving at the usual rate—five miles an hour more or less (p. 22, ll. 10-20; p. 39, l. 15). There was 30 40

no custom about moving the trains in any particular direction. They moved either way (p. 22, ll. 10-30; p. 41, ll. 1-10). There was nothing between Healy and the car that would prevent him from seeing its approach for a distance of over 300 feet from the point where it first started (p. 23, ll. 10-30; p. 40, ll. 15-25). The train on the south lead was also moving slowly—not over three or four miles per hour (p. 24, l. 25). Healy
10 was standing with his back towards the approaching car (p. 33, l. 10; p. 74, l. 28).

The car in question was “carded” for Swift & Co. and was being moved to another part of the yard for the purpose of being made up into a transfer train to go to Jersey City—about two miles distant (p. 39, ll. 20-30; p. 41, l. 35 to p. 42, l. 10).

At the time of the accident Healy was standing about 20 inches from the rail (p. 48, l. 35).

20 The yard where the accident happened was a very busy one with over 100 tracks and about 30 men working on engines, besides clerks. Healy had full charge of this (p. 82, ll. 10-25; p. 78, l. 20).

The foregoing facts were not disputed. There was no claim of any violation of any statute so as to bring the case within the exceptions specified in Section 4 of the Federal statute.

30 There was no proof in the present case that the car by which Healy was struck was operated in any way other than the customary way in that part of the yard. His long experience in and supervision of, this yard charged him with knowledge of the manner in which cars were to be moved. Under these circumstances we submit that the assumption of risk was so clear as to remove that question from the domain of fact and make it incumbent upon the trial court to hold that the
40 risk was assumed as a matter of law. Illustrations

of the application of the principle of assumption of risk to yard movements may be found in the following cases:

In *Boldt v. Penna. R. Co.*, 218 Fed., 367, a switchman who was working between two freight cars in a yard was held to have assumed the risk of injury from such cars being struck by other cars when run over a "hump" where such movements were of almost daily occurrence.

In *Ft. Worth etc. R. Co. v. Copeland*, 164 S. W., 857, a switchman who was injured by a cut of cars being shunted against a car on which he was adjusting a coupler was held to have assumed the risk where the shunted cars were moved in the customary manner. 10

Other cases to the same effect are:

Charleston & W. R. Co. v. Sylvester, 36 S. E., 275;

Swartwood v. Lehigh Valley R. Co., 169 App. Div., 759, 155 N. Y. Supp., 778. 20

III.

There was error in the charge in that the trial court failed to charge the jury on the question of assumption of risk.

The trial court, after charging the jury on the question of whether there was a custom to give warning, and if so, whether such custom was lived up to (pp. 87-89), then discussed the measure of damages. After charging the jury on that subject he then (in accordance with the Federal statute) directed the jury to consider whether any damages that they might find should be diminished by reason of the contributory negligence of the plaintiff's intestate (pp. 94-97). But at no point in the charge was the attention of the jury directed to the question of whether or not the plaintiff's intestate had assumed the risk. True, there 30 40

was no specific request submitted to the trial court to charge the jury on this particular subject. But the attention of the trial court was called to this omission immediately at the conclusion of the charge and an exception was asked to those parts of the charge that dealt with the defendant's negligence because of failure to qualify the application of the rules on that subject by reference to the doctrine of assumption of risk (p. 98, l. 20).

- 10 It being settled that assumption of risk is a defense (except in those cases where a statute has been violated as specified in Section 4 of the Federal statute) it was obviously the duty of the trial court to charge the jury on that question. We have urged under Point II that the trial court should have ruled, and that this court should now rule, that the plaintiff's action is barred by reason of the application of the doctrine of assumption
- 20 of risk. But if we are wrong on that point, then we submit the defendant was at least entitled to have the jury pass upon the question of whether or not the plaintiff's intestate had assumed the risk.

- As pointed out in some of the cases cited under Point II, there is a clear distinction between contributory negligence and assumption of risk, and hence a charge on the question of contributory negligence, no matter how accurate and complete
- 30 it might be on that subject, does not cover the point of assumption of risk. A convenient summary of the distinction between contributory negligence and assumption of risk, with citation of numerous authorities, will be found in the decision of *Barker v. Kansas City etc. R. Co.*, 88 Kansas, 767, 129 Pac., 1151, 43 L. R. A. (N. S.) 1121. This case held that when there was evidence to support the defense of assumption of risk, it was
- 40 error for the trial court to refuse to instruct the jury thereon.

IV.

It was error for the trial judge in charging the jury on the question of damages to direct the jury that the measure of damages was controlled by the Death Act of the State of New Jersey.

In charging the jury on the question of damages the trial court, after stating that the action was brought under the Federal Employers' Liability Act, said: 10

"This action, as I have said, is brought under the Federal Employers' Act, or under the Federal Act, and the quantity of the verdict and what it may be for is controlled by what we know as the Death Act in this State. The Death Act is the only act upon which and through which a verdict in case of death may be supported, and therefore you will understand, gentlemen, that you have no latitude, you have no right to go outside of what that act provides in determining what your verdict shall be for." In other words, you are absolutely limited, as is the court in its charge to you, and its direction to you, in finding a verdict, if one is to be found, within the requirements and within the provisions of that statute. It is entirely immaterial to you, gentlemen, or to myself, as to whether or not we think that act is proper or improper. The fact that the act exists and it is the only act permitting a recovery and is the only act giving the measure of damages which will be represented in a verdict, if one is to be had, is the only concern you and I have before us, and our only concern is to follow the provisions of that statute." 20
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Exception was taken to this part of the charge (p. 98, l. 38 to p. 99, l. 10; see Grounds of Appeal, No. 5, pp. 4-8).

We submit that this part of the charge is clearly wrong, as it is well settled that the Federal Act is exclusive of State statutes on the question of the measure of damages. In an action brought 40

under the Federal statute the damages must be measured by reference to the beneficiaries named in *that* statute, although the question of who are the "next of kin" is left to the State law, there being no definition of next of kin in the Federal statute.

- 10 *Louisville & N. R. Co. v. Stewart*, 241 U. S., 261, 60 L. Ed., 989;
Gulf etc. Ry. Co. v. McGinnis, 228 U. S., 173, 57 L. Ed., 785;
Central Vermont Ry. Co. v. White, 238 U. S., 507, 59 L. Ed., 1433;
Seaboard Air Line v. Kenney, 240 U. S., 489, 60 L. Ed., 762;
Chesapeake & O. Ry. Co. v. Kelly, 241 U. S., 485, 60 L. Ed., 1117;
Chesapeake & O. Ry. Co. v. Gainey, 241 U. S., 494; 60 L. Ed., 1124;
20 *Seaboard Air Line v. Koennecke*, 239 U. S., 352; 60 L. Ed., 324;
American R. R. Co. v. Birch, 224 U. S., 547, 56 L. Ed., 879;
Missouri etc. Ry. Co. v. Wulf, 226 U. S., 570, 57 L. Ed., 355;
Troxell v. Delaware etc. R. R. Co., 227 U. S., 434, 57 L. Ed., 586;
Winfree v. Northern P. R. Co., 227 U. S., 296, 57 L. Ed., 518;
30 *St. Louis etc. Ry. Co. v. Seale*, 229 U. S., 156, 57 L. Ed., 1129;
Pecos and Northern Ry. v. Rosenbloom, 240 U. S., 439, 60 L. Ed., 730.

V.

For these reasons the judgment of the Hudson County Circuit Court should be reversed and a new trial ordered.

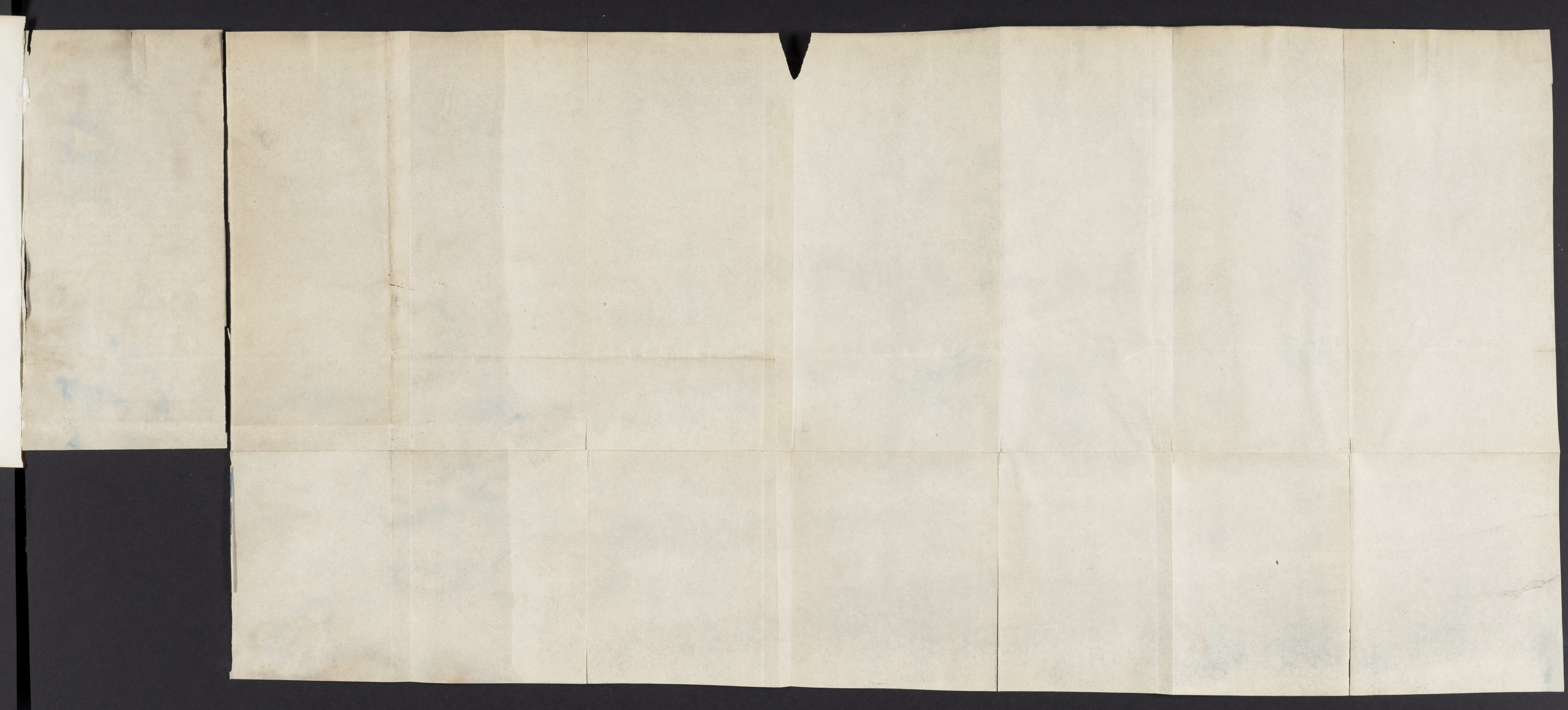
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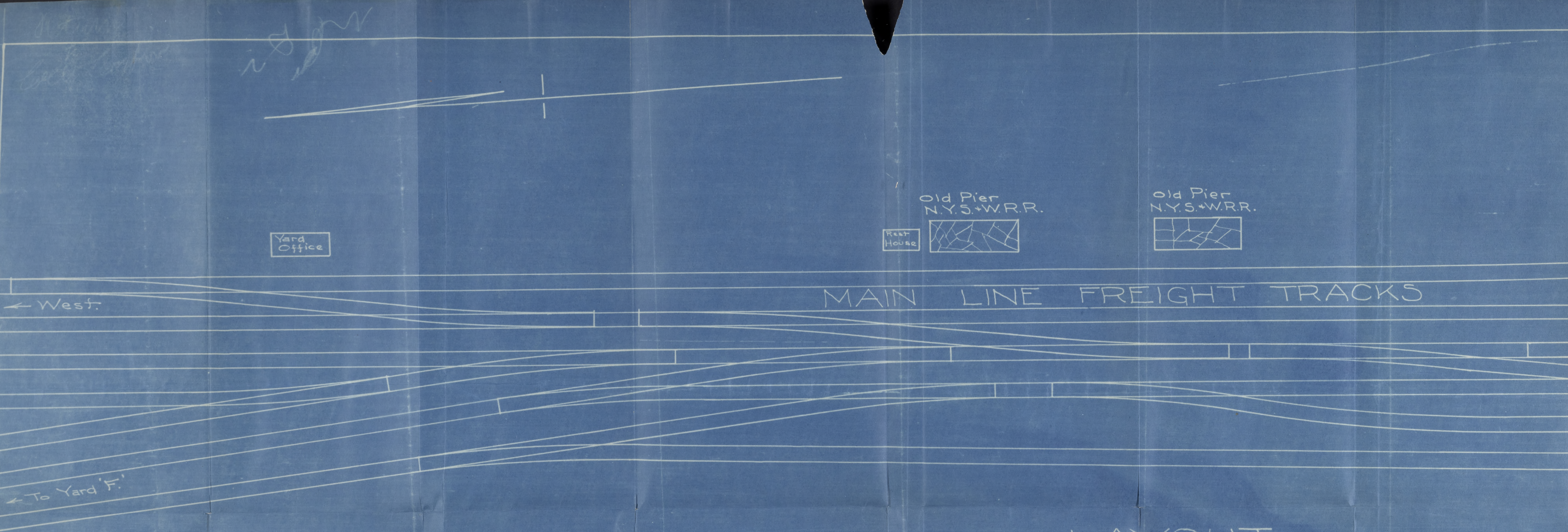
COLLINS & CORBIN,

Attorneys of Defendant-Appellant.

GEO. S. HOBART,

Of Counsel.





MAIN LINE FREIGHT TRACKS

← West.

← To Yard 'F.'

Yard Office

Rest House

Old Pier
N.Y.S.+W.R.R.

Old Pier
N.Y.S.+W.R.R.

LAYOUT
AT
YARD OFFICE-CROXTON, N.J.

April 27-1916

Scale 1"=20'

John F. Kalaher

F: 766.

Case of Healy, Jno. A. Negative No. 2733

Date of Taking APR 21 1916 Time 2-2:30 P. M

Place Jersey City, N. J. (No. side yard).

Weather Conditions Clear.

Camera Placed to show B end + left-hand side of L. S. + Mrs. Refrigerator Car No. 142021.

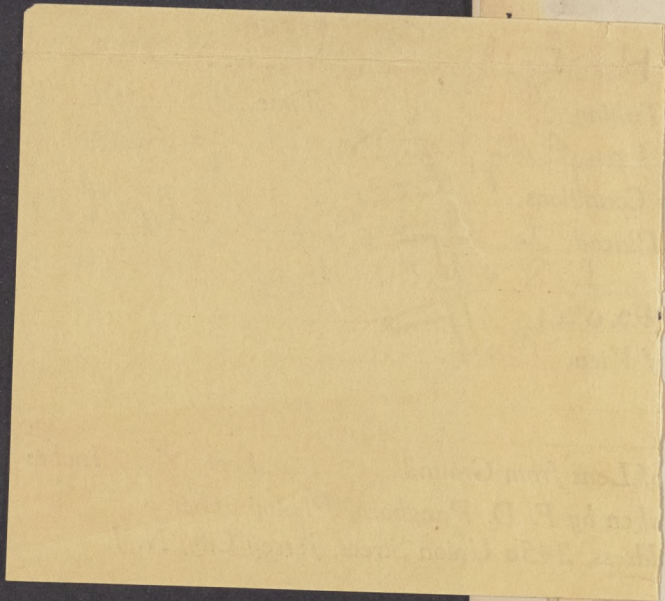
Extent of View Car.

Height of Lens from Ground 5 Feet 3 Inches

Views taken by F. D. Pangborn, Photographer

Address, 245a Union Street, Jersey City, N. J.

I
C
A
F



Return
to
Collin Stewart

F. D. PANGBORN
246-A UNION ST.
JERSEY CITY, N. J.

P. D.

