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New Jersey Supreme Court

STELLA HART, Petitioner-Appellee, <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent-Appellant.	ON PETITION FOR WORKMEN'S COMPENSATION. ON APPEAL.	10
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Notice and Grounds of Appeal.

(Filed Nov. 27th, 1929.)

To: HERSHENSTEIN & FINNERTY, ESQS., Attorneys for Petitioner-Appellee.	20
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Sirs:

PLEASE TAKE NOTICE that the respondent-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The New Jersey Supreme Court erred in affirming the judgments of the Workmen's Compensation Bureau and the Hudson County Court of Common Pleas whereas it should have reversed the same in favor of the respondent-appellant. 30

Dated: November 13, 1929.

Yours, &c.,

WM. A. BARKALOW,
Attorney for Respondent-Appellant.

Opinion.

NEW JERSEY SUPREME COURT.

No. 227, May Term 1929.

10

STELLA HART,
Respondent,

vs.

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Prosecutor.

Submitted May Term 1929.

Decided October 1929.

20

On Certiorari.

For the Prosecutor:

WILLIAM A. BARKALOW,
EDWIN F. SMITH, of Counsel.

For the Respondent:

HERSHENSTEIN & FINNERTY.

Before Justices TRENCHARD, LLOYD and CASE.

30

The opinion of the court was delivered by
LLOYD, J.

This is a workmen's compensation proceeding by the widow of Stanley Hart, a car inspector employed by the Central Railroad Company, who was killed while in the performance of his duty. The question in the case is whether there was adequate proof that at the time of his death he was in intra-state service. The case was heard by Commissioner Corbin who made an award in
40 favor of the widow. This was affirmed by Judge

Eagen in the Hudson Pleas and is here for review by certiorari.

We think the result reached below should not be disturbed. Hart was a car inspector employed by the prosecutor whose duty it was to inspect cars that came into the yard of the Central Railroad Company in Jersey City. When killed it could be inferred that he was inspecting, or was about to inspect, cars which came into the yard and which might be used in interstate or intrastate service or both. It was fairly inferable that he was killed by the movement of a string of empty baggage cars on track No. 2. On this track were cars of the Baltimore & Ohio Railroad Company, the Reading Railroad Company and of the Central Railroad Company. None of the cars was at the moment in actual service. One of them was marked a "crippled car" which meant that repairs had to be effected, and it was in the vicinity of this crippled car that the deceased was last seen with tools in his hands. Cars were placed on this track for a double purpose. First to be put in condition for service if out of order; and second, to await such service as they might be called into, whether in intrastate or interstate work.

The law is settled that the burden is on the petitioner to establish that the accident arose out of and in the course of his employment in intrastate service and was not in interstate service. It is also settled that movable rolling stock that is not in course of interstate service is not engaged in that service and the rights of the employees are in such case remitted to the workmen's compensation law of the state. As stated by the present chief justice in the recent case of *Lincks vs. Erie R. R.*, 91 N. J. L., 166, the rule is laid down thus:

"The fundamental question to be now decided therefore, is whether the engine upon

which the decedent had just finished his work, or that upon which he was about to commence his work, was, either of them, intended to be presently used in interstate or in intrastate commerce. If in the former, the carrier's liability is to be determined solely under the federal statute; if in the latter then the state statute applies."

10

The same rule is announced in the case of Minneapolis R. R. Co. vs. Winters, 242 U. S. 353. It is also to be extracted from the cases that an instrument of transportation which is permanently in interstate commerce such as stations, road beds bridges, &c., has that character affixed to it, and that it can never be alleged that it is not in such service. Rolling stock has no such character. It may at one moment be in interstate service and the next moment employed in a service wholly within the state. In the present case these cars were not in any actual service, nor were they in contemplation of actual service; none of them had been segregated for a service in either; none of them had been assigned to a train in contemplation of movement, though liable thereto, nor left off of a train, intending to complete later a journey already begun. We do not understand that mere liability of a car at rest to be called into either service is therefore impliedly in interstate commerce and if not it necessarily has only an intrastate relation to the workmen.

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It is urged by the railroad that in this instance the major part of these cars belonged to the Baltimore & Ohio Railroad and the Reading Railroad Companies, corporations of other states, and therefore were permanently devoted to interstate service. This result by no means follows. Foreign

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corporations, including railroads, do business in this state and when such business is not actually interstate, it must of necessity be of a state character and its employees come within the workmen's compensation law. Incidentally it may be stated that it does not appear by any evidence in the case that the two railroads were even engaged in interstate commerce though perhaps we can assume this to be true. It does not appear that they were not engaged in intrastate commerce. Indeed common knowledge is that they do both. Whether the cars in question or any of them should be called into one or the other of these services, was purely optional with the railroad employees. None had been so designated. 10

In addition it must be recognized that the present action is not against either of these foreign companies, but against the Central Railroad Company, a corporation of this state, by whom deceased was employed, and the cars in question were on its tracks. If the petitioner has shown, as we think she has, that the cars on these tracks were not in interstate operation, her rights under the compensation laws accrued and she was entitled to recover thereunder. 20

The judgment is affirmed.

30

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Rule of Affirmance of Judgment.
NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">STELLA HART, Respondent.</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Prosecutor.</p>	}	ON CERTIORARI.
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20 The above entitled matter having been submitted to the May Term, 1929, on a writ of certiorari directed to the Hudson County Court of Common Pleas, and this Court having considered the same and rendered its opinion affirming the order and judgment of the said Hudson County Court of Common Pleas,

It is therefore on this 21st day of November, 1929, ORDERED AND ADJUDGED that the order and judgment of the Hudson County Court of Common Pleas, made the 19th day of March, 1929, removed by writ of certiorari to this Court, be and the same is hereby affirmed.

30 IT IS FURTHER ORDERED that the record be re-mitted to the Hudson County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice in such case made and provided.

A true copy.

FRED L. BLOODGOOD,
Clerk.

40 Rule entered Nov. 21, 1929, upon motion of
HERSHENSTEIN & FINNERTY,
Attorneys for the Respondent in certiorari.

Writ of Certiorari.

Filed April 12th, 1929.

NEW JERSEY, ss.

THE STATE OF NEW JERSEY to the Court
 (SEAL) of Common Pleas, in and for the County
 of Hudson, and John J. McGovern, Clerk
 of said Court, and Stella Hart, GREETING: 10

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 19th day of March, Nineteen Hundred and Twenty-nine, by the Honorable Charles M. Egan, one of the Judges of the said Court of Common Pleas, in and for the said County of Hudson, in certain proceedings brought on behalf of Stella Hart, petitioner, against Central Railroad Company of New Jersey, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, Nineteen Hundred and Eleven, and the Acts amendatory thereof, and supplemental thereto, we command you that the said determination and judgment, together with all proceedings for the making of the same, and all things touching and concerning the same, as fully and entirely as before you they remain, or are in your custody and control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the 12th day of April, Nineteen Hundred and Twenty-nine, 20
 30
 40

Return.

that therein may be caused to be done what of right and according to law ought to be done.

10 WITNESS, the Honorable William S. Gummere,
Justice of our said Supreme Court, at Trenton,
this 8th day of April, Nineteen Hundred and
Twenty-nine.

FRED L. BLOODGOOD,
Clerk.

WILLIAM A. BARKALOW,
Attorney.

ENDORSED

This Writ is allowed; let it be sealed. April
2nd, 1929. To be argued at May Term 1929.

20

SAMUEL KALISCH,
Justice of Supreme Court.

Return.

30 The answer of Charles M. Egan, Judge of the
Court of Common Pleas in and for the said
County of Hudson, and John J. McGovern, Clerk
of said County and within named, the record and
Proceedings of the Plaint whereof mention is
within made with all things touching the same,
We certify and send to the Justices of our Su-
preme Court of Judicature at Trenton, N. J., at
the day and year within contained in a certain
schedule to this writ annexed as within we are
commanded.

CHARLES M. EGAN,
Judge.

Attest:

40 JOHN J. MCGOVERN
(Seal)

**Notice of Appeal to Hudson County Court
of Common Pleas.**

Filed Dec. 8th, 1928.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.

<p style="text-align: center;">STELLA HART, Petitioner, <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent.</p>	}	10
	}	ON PETITION FOR COMPENSATION.

NOTICE IS HEREBY GIVEN by The Central Railroad Company of New Jersey, the respondent in the above entitled cause, that it hereby appeals to the Hudson County Court of Common Pleas from the judgment rendered in said cause on November 8th, 1928, by Charles E. Corbin, Esq., Deputy Commissioner of the New Jersey Workmen's Compensation Bureau, and duly entered in and filed with said New Jersey Workmen's Compensation Bureau, which said judgment was entered in favor of Stella Hart, the petitioner in the said cause, and against the said respondent, The Central Railroad Company of New Jersey, at the rate of Seventeen dollars (\$17.00) per week for a period of three hundred weeks and additional payments under the provision of the Workmen's Compensation Act to children under age of sixteen; also counsel fee of Five Hundred Dollars (\$500.00) Two Hundred Fifty Dollars (\$250.00) to be paid by respondent.

WM. A. BARKALOW,
Attorney for Respondent. 40

Dated, December 3, 1928.

**Notice of Counter-Appeal to Hudson County
Court of Common Pleas.**

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.

10

STELLA HART,
Petitioner,

vs.

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Respondent.

ON PETITION FOR
COMPENSATION.

20

Notice is hereby given by Stella Hart, the petitioner in the above entitled cause, that she hereby appeals to the Hudson County Court of Common Pleas from so much of the judgment rendered in said cause on November 8, 1928, by Charles E. Corbin, Esquire, Deputy Commissioner of the New Jersey Workmen's Compensation Bureau and duly entered in and filed with said New Jersey Workmen's Compensation Bureau, which part of said judgment awarded to Messrs. Hershenstein & Finnerty, attorneys for petitioner, the sum of \$500.00 as an for their counsel fee in the said proceedings before said Deputy Commissioner, \$250.00 of which amount is to be assessed against the petitioner and \$250.00 against the respondent. And we will urge on this appeal that said counsel fee of \$500.00 so awarded is entirely inadequate in view of the services rendered by the attorneys for the petitioner, and we will urge on said appeal that a fee of at least \$1,500.00 would be fair and reasonable under the circumstances.

30

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HERSHENSTEIN & FINNERTY,
Attorneys for Petitioner.

Stipulation.NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.

STELLA HART, Petitioner, <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent.	}	ON PETITION FOR COMPENSATION.	10
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It is hereby stipulated by and between the respective parties hereto that on the counter-appeal taken by the petitioner to the Hudson County Court of Common Pleas, that it will not be necessary for said petitioner to file a transcript of the testimony as required by law, and the filing of said transcript by said petitioner is hereby waived in view of the fact that a transcript is being filed by The Central Railroad Company of New Jersey in connection with its appeal.

HERSHENSTEIN & FINNERTY,
 Attorneys for Petitioner, 30
 Stella Hart.

WM. A. BARKALOW,
 Attorney for Respondent,
 The Central Railroad
 Company of New Jersey.

Dated: December 6th, 1928.

Dependent's Claim Petition for Compensation.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.

Trenton, N. J.

10

Received at Trenton Sep. 8, '28.
Claim Petition No. 0913.
Date of Accident Dec. 13, 1927.

20

STELLA HART,	}
Petitioner,	
vs.	
THE CENTRAL RAILROAD COMPANY	}
OF NEW JERSEY,	
Respondent,	

Attorney for Petitioner,
Hershenstein & Finnerty,
921 Bergen Av.
Jersey City, N. J.

*To the Workmen's Compensation Bureau of
New Jersey:*

30

The claimant respectfully alleges the following facts:

1. What was the full name of the decedent?
Stanley Hart.

2. Where did decedent live? 344 Pavonia Avenue,
Jersey City, N. J.

3. Sex of decedent. Male.

40

4. Date of birth of decedent.

Dependent's Claim Petition for Compensation.

5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death:

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent	
Stella Hart	24	Dec. 12, 1903	Wife	10
Jennie Hart	6	Oct. 2, 1921	Daughter	
Sophie Hart	4	July 18, 1923	Daughter	
Jonas Hart	3	Mch. 23, 1925	Son	
John Hart	1	Mch. 6, 1927	Son	

6. By whom was decedent employed at the time of accident? (Give name and business address)
Central Railroad Company of New Jersey Terminal. Jersey City, N. J.

7. What was the business of the employer?
Railroad. 20

8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did he receive such notice from the employer? No.

10. Did the employer have knowledge of this accident? Yes.

11. Did you notify the employer of this accident? Yes. 30

12. If so, on what date?

13. Have you made claim to the employer for compensation? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Car Inspector, inspecting cars. 40

Dependent's Claim Petition for Compensation.

15. When did the accident happen? December 13, 1927 about 11:30 A. M.

16. Where did the accident happen? Foot Communipaw Av. Jersey City, N. J.

10 17. What was the nature of the accident, and how did it happen? Struck by moving car.

18. Did deceased work any after the accident?

19. If so, give date he was compelled to stop work.

20. Give date of death.

21. Were his wages fixed by piece work? No.

22. If so, what was his average weekly wage?

20 23. If wages were fixed by the hour, state rate per hour. 69¢ per hr.

24. Give number of hours in an ordinary working day. 8 hrs.

25. Give number of days in an ordinary working week. 7 days.

26. State the amount of weekly wages. \$38.

30 27. How much money have you received from the employer as compensation (not medical aid) since the accident? None.

28. Has the employer promised to pay you any compensation? No.

29. If so, how much?

30. Was medical aid required? No.

31. If so, was this service furnished by the employer?

Dependent's Claim Petition for Compensation.

32. What other sum did you expend for medical, surgical or hospital service?

33. Give name and address of physician and hospital.

34. What other facts are there which you believe important? 10

35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? No, because we have tried to settle by agreement, but respondent was unwilling to settle.

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper. 20 30

And your petitioner will ever pray, etc.

STELLA HART,
344 Pavonia Avenue,
Jersey City, N. J.

Dependent's Claim Petition for Compensation.

STATE OF NEW JERSEY, }
 County of Hudson, } ss.:

10 STELLA HART, of full age, being duly sworn according to law, on her oath deposes and says: That she is the petitioner named in the foregoing petition; that she has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of her knowledge and belief.

STELLA HART.

Subscribed and sworn to before me, this 7th day of August, 1928, at Jersey City, N. J.

20 E. BURKE FINNERTY
 Master in Chancery of New Jersey

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

TO THE RESPONDENT.

30 The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within ten days from the receipt of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

40 WORKMEN'S COMPENSATION BUREAU.
 W. E. Stubbs,
 Secretary.

**Respondent's Answer to Dependent's Claim
Petition.**

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.
Trenton, N. J.

Claims Petition No. 9013.

<p style="text-align: center;">STELLA HART, Petitioner, <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent.</p>	10
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<p>Attorney for Respondent, WM. A. BARKALOW, Rm. 36 Terminal Station, Jersey City, N. J.</p>	20
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In answer to Claim Petition filed in this cause:

1. What was decedent's name? Stanley Hart.
2. Where did decedent reside? 344 Pavonia Ave., Jersey City, N. J.
5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify. No knowledge sufficient to affirm or deny answer to question No. 5 of the claim petition. 30
6. Was the decedent in your employ at the time of the accident? Yes.
7. State your business. Railroad.
8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him? No. 40

*Respondent's Answer to Dependent's Claim
Petition.*

9. Did you give such notice to him? No.
10. When did you first have knowledge of this accident? Was advised shortly after death of decedent.
- 10 11. Did you receive notice of this accident from the Petitioner? No.
12. If so, on what date?
13. Has any claim for compensation been made? No.
14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Car inspector. Do not
- 20 know what he was doing at time of accident.
15. When did the accident happen? See answer to Question 17.
16. Where did the accident happen? See answer to Question 17.
17. What was the nature of the accident, and how did it happen? On December 13th, 1927, at about 11.35 A. M., decedent was found dead under car in respondent's Jersey City Passenger Yard, Jersey City, N. J.
- 30 18. Did the decedent work any after the accident? No.
19. If so, give date he stopped work.
20. Give date of death. December 13, 1927.
21. Were his wages fixed by piece-work? No.
22. If so, what was his average weekly wage?
- 40 23. If wages were fixed by the hour, state rate per hour. 69c. per hour.

*Respondent's Answer to Dependent's Claim
Petition.*

24. Give number of hours in an ordinary working day. 8.
25. Give number of days in an ordinary working week. 7.
26. State the amount of weekly wages. \$38.64. 10
27. How much have you paid as compensation (not medical aid) since the accident? Nothing.
28. Have you promised to pay compensation? No.
29. If so, how much?
30. Was medical aid required? No.
31. If so, did you furnish all the medical, surgical, or hospital services, or other expense of last sickness? 20
32. Between what dates was service rendered?
33. Give name and address of physician and hospital rendering service at your direction?
34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion. Respondent denies that compensation is payable because respondent has no knowledge or information sufficient to form a belief as to whether decedent's death was the result of an accident arising out of and in the course of his employment or as to whether at time he met his death decedent was engaged in an employment bringing him within the provisions of the New Jersey Workmen's Compensation Act. 30

C. R. R. OF N. J.

Respondent.

WM. A. BARKALOW, 40

Attorney.

*Respondent's Answer to Dependent's Claim
Petition.*

STATE OF NEW JERSEY, }
County of Hudson } ss.:

10 Wm. F. HANLON, of full age, being duly sworn according to law, on his oath deposes and says: That he is the attorney associated with attorney for respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

Wm. F. HANLON.

20 Subscribed and sworn to before me, this 29th day of September, 1928, at Jersey City, N. J.

JAMES INGLIS,
Attorney at Law of N. J.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to minister an oath.)

30

40

**Determination Statement of Facts and Rule for
Judgment.**

Filed Dec. 8, 1928.

**NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.**

<p style="text-align: center;">STELLA HART, Petitioner, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent.</p>	}	<p>ON PETITION FOR COMPENSATION.</p>	10
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For the petitioner, **HERSHENSTEIN & FINNERTY** 20
(by **E. BURKE FINNERTY**).

For the respondent, **WILLIAM A. BARKALOW** (by
EDWIN F. SMITH and **WM. F. HANLON**).

This is an action for compensation claimed by the petitioner, Stella Hart, the widow of Stanley Hart, deceased, for the death of said Stanley Hart as the result of an accident which he sustained while in the respondent's employ on December 13th, 1927.

30

I find as facts, the following:

Mr. Hart was employed by the railroad company in the capacity of car inspector in its yards at the terminal of the railroad in Jersey City. His duties were to inspect and repair cars, and this work necessitated his going around, between and under cars to be inspected and repaired. He had commenced work on the above day at 8:00 A. M. and had been about his duties in the yard

40

Determination Statement of Facts and Rule for Judgment.

10 until about 11:35 A. M. when his body was discovered underneath a string of empty baggage cars on Track No. 2 by a fellow worker, Joseph F. Coughlin. Coughlin had seen decedent about one minute before he discovered his body. Hart and Coughlin were walking towards each other by the side of Track No. 2. Hart carried in his hand the usual tools of a car inspector. There was a space of four or five feet between two cars on Track No. 2 and Coughlin last saw Hart about opposite this space. Coughlin happened to glance over his shoulder and when he looked ahead again, about
20 three seconds later, Hart was not in view. Coughlin continued walking and the cars on Track No. 2 were moved so that when Coughlin reached the point where he had seen the space between the cars, this space had been closed up by the car movement, and Hart's body was then discovered by him.

The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by an accident arising out of and in the course of his employment rests upon the petitioner. Bryan vs. Fissell, 84 N. J. L. 72; Dixon vs. Andrews, 91 Id. 373, affirmed in 92 Id. 512. I find from the
30 above facts that petitioner has fully sustained that burden.

I find as a fact that the decedent met his death in an accident arising out of and in the course of his employment. The facts shown, clearly indicate that decedent was struck by a train of cars on Track No. 2 which it was his duty to inspect. He was seen by a fellow employee about a minute
40 before he was killed walking alongside of the

*Determination Statement of Facts and Rule for
Judgment.*

cars on said Track No. 2 with the usual tools of a car inspector in his hands, and when his body was found immediately thereafter by this employee underneath the cars, the inference can clearly be drawn that he met his death in an accident arising out of and in the course of his employment, and I so find. De Fazios Estate vs. Goldschmidt Detinning Co., 88 Atl. 705; Muzik vs. Erie R. R. Co., 85 N. J. L. 129. 10

Moreover, the burden is also upon the widow petitioner in proceedings under the Workmen's Compensation Act for compensation for the death of her husband, a railroad servant, to prove a case within the New Jersey statute, and to show affirmatively that decedent was engaged in intrastate service not regulated by the Federal Employer's Liability Act. Lincks vs. Erie R. Co., 103 A. 176, 91 N. J. L. 166. 20

I find as a fact that the cars upon Track No. 2 were empty baggage cars belonging to at least three different railroad companies; that at least one of these cars on said tracks was marked "crippled" in white chalk, and it was in the vicinity of said "crippled" cars that the decedent was last seen with working tools in his hands; that the cars on this track were not in use at the time; that they were placed there for two purposes, first to be inspected and repaired by decedent if repairs were necessary, and secondly, to await being put into service as a conductor making up a train would require certain kinds of baggage cars for his train; that the yardmasters gave orders to conductors to make up certain trains and the conductors selected the baggage cars they required taking them from Track No. 2. 30 40

I find as a fact that the decedent at the time

*Determination Statement of Facts and Rule for
Judgment.*

10 of his fatal injuries was not engaged in interstate commerce, or in work so closely connected with it as to be considered a part of interstate commerce. I find as a fact that at the time, these baggage cars on Track No. 2 were not engaged in interstate commerce, were not in any train, were not in use, were not engaged in interstate transportation, were not specifically in any commerce, were not a part of a train which was interrupted in an interstate haul for the purpose of making temporary repairs and then continuing its interstate business, but were simply awaiting inspection repairs, and selection by conductors for the make up of trains.

20 I find as a fact that these cars were not specifically being made ready for departure to any particular destination. There was evidence that a train of the Baltimore & Ohio Railroad to Easton, Pennsylvania, would be made up shortly after the time of the accident, which would necessitate the taking of one of the baggage cars off Track No. 2, but the evidence further discloses, and I find as a fact, that no particular baggage car was designated or assigned for this train to Easton, and that it is optional with the conductor to select immediately prior to the making up of this train, any baggage car he may choose, and I therefore, further find as a fact that no car on Track No. 2 was engaged in interstate commerce or interstate transportation at the time of the accident. I do further find as a fact that none of the cars on Track No. 2 at the time of the accident were instrumentalities of interstate commerce.

40 I therefore, find and determine that the petitioner has sustained the burden of affirmatively

Determination Statement of Facts and Rule for Judgment.

proving that decedent was engaged at the time of his death in intrastate commerce and entitled to compensation under our statute. This is in line with the well settled rule as enunciated in Herzog vs. Hines, 95 N. J. L. 98; Price vs. The Central Railroad Co. of New Jersey, 99 Id. 425; Jayon vs. Pennsylvania Railroad Co., 101 Id. 159; Bissett vs. Lehigh Valley Railroad Co., 102 Id. 283, and Minneapolis &c. R. R. vs. Winters, 242 U. S. 353. 10

I also refer to the citations in the three cases decided by me, in which I have endeavored to distinguish between employment in interstate and intrastate commerce. These are Berry vs. The Central Railroad Company of N. J., 5 N. J. Adv. R. 454; McTigue vs. The Central Railroad Company of N. J., 5 Id. 793, and Lawrie vs. Atlantic City R. R. Co., 3 N. J. Misc. R. 267. 20

I find that decedent's wages were \$38.64 per week.

I find as a fact that decedent left dependent, his widow and four infant children, Jennie, Sophie, Henry and John. I find judgment in favor of petitioner and against the respondent, and award to the widow and children the amounts to which they are entitled under the act, namely: 30

605 Weeks at \$17.00 per week, amounting to.....	\$10,285.00
87 5/7 weeks at \$15.46 per week, amounting to	1,356.06
101 6/7 weeks at \$13.52 per week, amounting to	1,377.11

This makes a total compensation of.. \$13,018.17

*Determination Statement of Facts and Rule for
Judgment.*

I also award to the widow, Stella Hart, the sum of \$150.00 for funeral expenses.

10 I award to Messrs. Hershenstein and Finnerty, attorneys for petitioner, the sum of Five Hundred (\$500.00) Dollars as and for their counsel fee in this matter, \$250.00 of which amount is to be assessed against the petitioner and \$250.00 against the respondent, and I made this award of \$250.00 against respondent a part of the judgment against respondent.

CHARLES E. CORBIN,
Deputy Commissioner.

Dated Dec. 7, 1928.

20 I, William E. Stubbs, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the Determination filed in this cause.

W. E. STUBBS.

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**Finding of Facts, Determination and Judgment.
Conclusions.**

HUDSON COUNTY COURT OF COMMON
PLEAS.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.

Dated March 15, 1929. 10

<p style="text-align: center;">STELLA HART, Petitioner, <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent.</p>	}	<p>ON APPEAL FROM COMPENSATION AWARD.</p>	20
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For the Petitioner,
HERSHENSTEIN & FINNERTY (By E. BURKE
FINNERTY).

For the Respondent,
WILLIAM A. BARKALOW (By EDWIN F. SMITH
and WM. F. HANLON).

This is an appeal by the respondent, the Central Railroad Company of New Jersey, from a compensation award of the Deputy Commissioner of Compensation, and also a counter-appeal by the petitioner from the findings of the Deputy Commissioner upon the question of counsel fee allowed to the attorneys for the petitioner. 30

The petitioner is Stella Hart, the widow of Stanley Hart, who duly filed a petition for compensation in behalf of herself and her four infant

40

*Finding of Facts, Determination and Judgment.
Conclusions.*

children claiming compensation from the respondent, the Central Railroad Company of New Jersey, as the result of the death of her husband on December 13, 1927.

- 10 Mr. Stanley Hart was employed by the railroad company in the capacity of car inspector in its yards at the terminal of the railroad in Jersey City. His duties were to inspect and repair cars and this work necessitated his going around between and under cars to be inspected and repaired. He had commenced work upon the day that he sustained his fatal injuries at about 8:00 A. M. and had been about his duties in the yard
- 20 until approximately 11:35 A. M. when his body was discovered underneath a string of empty baggage cars on track No. 2 by a co-employee, Joseph F. Coughlin. Coughlin had seen decedent about one minute before he discovered his body. Hart and Coughlin were walking toward each other by the side of track No. 2. There were baggage cars standing upon tracks No. 2 and No. 3. Hart carried in his hands the usual tools of a car inspector. There was a space of four or five feet between two cars on track No. 2, and Coughlin last
- 30 saw Hart about opposite this space. Coughlin happened to glance over his shoulder and when he looked ahead again, about three seconds later, Hart was not in view. Coughlin continued walking and there was a car movement on track No. 2 so that when Coughlin reached the place where he had seen the space between the cars, this space had been closed up by this car movement and Hart's body was then discovered by him underneath one of the cars on track No. 2.
- 40 I find and determine from the above facts that the decedent met his death in an accident arising

*Finding of Facts, Determination and Judgment.
Conclusions.*

out of and in the course of his employment. The burden of furnishing evidence, from which the inference can be legitimately drawn that the death of an employee was caused by an accident arising out of and in the course of the employment, rests upon the petitioner. 10

Bryant vs. Fissel, 84 N. J. L. 72;
Dickson vs. Andrews, 91 Id. 373, affirmed
in 92 Id. 512.

I find from the above facts that the petitioner has fully sustained the burden of furnishing evidence from which the inference can be legitimately drawn that the death of her husband was caused by an accident arising out of and in the course of his employment. 20

The burden is also upon the widow petitioner in proceedings under the Workmen's Compensation Act for compensation for the death of her husband, a railroad servant, to prove a case within the New Jersey statute, and to show affirmatively that decedent was engaged in intrastate commerce not regulated by the Federal Employer's Liability Act.

Links vs. Erie R. R. Co., 103 A. 176, 91
N. J. L. 166. 30

I find as a fact that the cars upon track No. 2 were empty baggage cars belonging to at least three different railroad companies; that at least one of these cars on said track was marked "crippled" in white chalk, and it was in the vicinity of said "crippled" car that the decedent was last seen with working tools in his hands; that the 40

*Finding of Facts, Determination and Judgment.
Conclusions.*

cars on this track were not in use at the time; that they were placed there for two purposes, first, to be inspected and repaired by decedent if repairs were necessary, and secondly, to await being put into service as a conductor making up a train would require certain kinds of baggage cars for the train he was making up; that the yard master gave orders to conductors to make up certain trains, and the conductors selected the baggage cars they required taking them from track No. 2.

10 I find as a fact that the decedent at the time of sustaining his fatal injuries was not engaged in interstate commerce, or in work so closely connected with it as to be considered a part of interstate commerce. I find as a fact that the time
20 these baggage cars on track No. 2 were not engaged in interstate commerce, were not in any train, were not in use, were not engaged in interstate transportation, were not specifically in any commerce, were not a part of a train which was interrupted in an interstate haul for the purpose of making temporary repairs and then continue its interstate business, but these baggage cars
30 were upon said track No. 2 simply awaiting inspection, repairs and selection by conductors for the making up of trains.

I find as a fact that these cars upon track No. 2 were not specifically being made ready for departure to any particular destination. There was evidence that a train of the Baltimore & Ohio Railroad Company to Easton, Pennsylvania, would be made up shortly after the time of the accident, which would necessitate the taking of
40 one of the baggage cars off said track No. 2, but

*Finding of Facts, Determination and Judgment.
Conclusions.*

the evidence further discloses, and I find as a fact that no particular baggage car was designated or assigned from the cars on track No. 2 for this particular train to Easton, and I find as a fact that it was optional with the conductor making up the train to Easton to select immediately prior to the making up of this train, any baggage car he may choose, and I further find as a fact that no car on track No. 2 was engaged in interstate commerce or interstate transportation at the time of the accident. I do further find as a fact that none of the cars on track No. 2 at the time of the accident were instrumentalities of interstate commerce. 10

I further find and determine that the petitioner has sustained the burden of affirmatively proving that the decedent was engaged at the time of his death in intrastate commerce and entitled to compensation under our statute. This is in line with the well-settled rule as enunciated in the following cases: 20

Herzog vs. Hines, 95 N. J. L. 98;
Price vs. Central Railroad Company of
New Jersey, 99 Id. 425;
Jason vs. Pennsylvania Railroad Com- 30
pany, 101 Id. 159;
Bissett vs. Lehigh Valley Railroad Co.,
102 Id. 283.
Minneapolis &c. Railroad vs. Winters,
242 U. S. 353.

I find that decedent's wages were \$38.64 per week.

I find as a fact that decedent left dependent his widow and four infant children, Jennie, So- 40

*Finding of Facts, Determination and Judgment.
Conclusions.*

phie, Henry and John. I find judgment in favor of petitioner and against the respondent, and award to the widow and children the amounts to which they are entitled to under the act, namely:

10 605 weeks at \$17.00 per week, amounting to \$10,285.00.

87 $\frac{5}{7}$ weeks at \$15.46 per week, amounting to \$1,356.06

101 $\frac{6}{7}$ weeks at \$13.52 per week, amounting to \$1,377.11.

This makes a total compensation award of \$13,018.17.

20 I also award the widow, Stella Hart, the sum of \$150.00 for funeral expenses.

I find that the Compensation Board recommended to the Deputy Commissioner, before whom the compensation hearing was held, and awarded to Messrs. Hershenstein & Finnerty, attorneys for the petitioner, the sum of \$500.00 as and for their counsel fee in the proceedings before said Deputy Commissioner, \$250.00 of which amount to be assessed against the petitioner and \$250.00 against the respondent, making a total
30 counsel fee of \$500.00.

The attorneys for the petitioner have filed a counter-appeal claiming that said counsel fee so awarded by the Deputy Commissioner was inadequate in view of the services rendered and the amount recovered. Under Chapter 224 of the Laws of 1928, a counsel fee may be awarded to the attorneys for the petitioner in a sum not to exceed twenty percent (20%) of the judgment.

40 The counsel fee awarded may be very modest, but I will not reverse any of the findings of the

*Finding of Facts, Determination and Judgment.
Conclusions.*

Deputy Commissioner of Compensation and therefore sustain the award of \$500.00 as a counsel fee for the attorneys for the petitioner, and dismiss the counter-appeal of the petitioner.

As and for the counsel fee of Messrs. Hershenstein & Finnerty in these proceedings on appeal, I award the sum of \$1,000.00, to be paid by the respondent. 10

CHAS. M. EGAN,
Judge of the Hudson County
Court of Common Pleas.

Dated March 15, 1929.

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Rule for Judgment.

Entered March 19, 1929

HUDSON COUNTY COURT OF COMMON
PLEAS.

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STELLA HART,
Petitioner,

vs.

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Respondent.

ON APPEAL FROM
COMPENSATION
AWARD.

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The above matter having come on for hearing on appeal from award of Workmen's Compensation Bureau, and the Court having considered the testimony and the briefs of the attorneys for the respective parties, and having affirmed all of the findings of the Deputy Commissioner of said Workmen's Compensation Bureau, and having signed the findings of facts and determination on the 15th day of March, 1928, it is hereby on this 19th day of March, 1929, ORDERED,

30

That judgment final be entered in favor of petition and against respondent as follows:

605 weeks at \$17.00 per week, amounting to	\$10,285.00
87 5/7 weeks at \$15.46 per week, amounting to	1,356.06
101 677 week at \$13.52 per week, amounting to	1,377.11
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This makes a total compensation award of \$13,018.17

Rule for Judgment.

Also that judgment in the sum of \$150.00 be entered in favor of petitioner and against the respondent for funeral bill.

Also that judgment be entered in favor of Messrs. Hershenstein & Finnerty, attorneys for petitioner, and against the respondent in the sum of \$1,250.00, representing \$250.00 counsel fee awarded by the Deputy Commissioner of Compensation and affirmed by this judgment, and \$1,000.00 allowed by this Court as counsel fee for the prosecution of the appeal. 10

Let the above rule be entered.

CHAS. M. EGAN,
Judge of the Hudson County
Court of Common Pleas.

Rule actually entered March 19th, 1929. 20

HERSHENSTEIN & FINNERTY.
Attorneys for Petitioner.

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Transcript of Testimony.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU.

JERSEY CITY, HUDSON COUNTY DISTRICT.

10

STELLA HART,
Petitioner,

vs.

CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Respondent.

20

Transcript of the stenographic notes of the testimony taken in the above entitled matter before Hon. Charles E. Corbin, Deputy Compensation Commissioner, at the Department of Labor Building, 571 Jersey Avenue, Jersey City, New Jersey, on the 25th day of October, A. D. 1928, and the 7th day of November, A. D. 1928.

APPEARANCES:

30

E. BURT FINNERTY, Esq. (HERSHENSTEIN & FINNERTY, Esqs.), for the Petitioner.

EDWARD SMITH, Esq. (EDWARDS & SMITH, Esqs.)
for the Respondent.

40

Stella Hart, for Petitioner, Direct.

STELLA HART, the petitioner, being duly sworn upon her oath, testifies as follows:

Direct examination by Mr. Finnerty.

- Q. What is your name? A. Stella Hart.
- Q. Where do you live, Mrs. Hart? A. 344 Pavonia Avenue. 10
- Q. Pavonia Avenue, Jersey City? A. Yes, sir.
- Q. What was your husband's name? A. Stanley Hart.
- Q. Is he alive? A. No, he is dead.
- Q. When did he die? A. December 13, 1927.
- Q. Have you any children, Mrs. Hart? A. Four.
- Q. And what are their names? A. Jennie.
- Q. Jennie Hart? A. Jennie Hart.
- Q. What was her age on her last birthday? A. 20
She was seven years old the 2d of this month. She was seven years old the 2d of October.
- Q. The next child? A. Sophie, she was five last July.

The Court: What date?

- A. July 18th.
- Q. The next child? A. Henry, three, March 23rd.
- Q. How old, three years old on March 23rd, 1928? A. Right. 30
- Q. And the next child? A. John, he was a year old in March.
- Q. March 6, 1928? A. Right.
- Q. For whom was your husband working at the time of his death? A. The Central Railroad of New Jersey.
- Q. Did you live with your husband at the time of his death? A. Yes, sir. 40

Stella Hart, for Petitioner, Direct.

Q. Did the children live with your husband at the time of his death? A. Yes, sir.

Q. And did you all live together in the same house? A. Yes, sir.

10 Q. Did he support you and the children? A. Yes, sir.

Q. And they were all your children, Mrs. Hart? A. Yes, sir.

Q. And were you ever married before? A. No, sir.

Q. Or was your husband married before? A. No, sir.

Q. Were they all the children of Stanley Hart, your husband? A. Yes, sir.

20 Q. Now, for whom was your husband working at the time of his death? A. The Central Railroad of New Jersey.

Q. How long had he been working for the company? A. I guess about six years that I remember, I know it was in July, but it was six years or something like that, around six.

Q. What was his employment with that company? A. Car inspector.

Q. What were his wages? A. He used to bring between seventy-five and eighty every two weeks.

30 The Court: Can you agree on that?

Mrs. Smith: The wages were 69c. an hour, eight hours a day, seven days a week, thirty-eight, sixty-four.

Mr. Finnerty: I will say in the answer it is thirty-eight and counsel consents it is thirty-eight sixty-four.

40 Q. When did he go to work on the day of his death? A. Well, he usually left at seven o'clock in the morning.

Joseph Coughlin, for Petitioner, Direct.

Q. You don't know what happened to him? A. That I don't know, I wasn't there.

Mr. Finnerty: I guess that's all.

Mr. Smith: No questions.

10

JOSEPH COUGHLIN, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. Where do you live, Mr. Coughlin? A. 228 Whiton Street, Jersey City.

Q. What is your full name? A. Joseph Francis.

Q. Do you know Stanley Hart, the decedent? A. Yes, sir. 20

Q. Were you working for the Central Railroad Company of New Jersey on December 13th, 1928? A. Yes, sir.

Q. Or 1927? A. Yes, sir.

Q. What time did you go to work that morning? A. Eight o'clock.

Q. What was your work? A. Air brake inspector's helper.

Q. Did you see Stanley Hart that morning before his death? A. Yes, sir. 30

Q. You were speaking to him, weren't you? A. No, sir.

Q. You saw him working in the yard of the Central Railroad Company?

Mr. Smith: Just a minute now; ask him if he saw him, not whether he saw him working.

The Court: You are leading, Mr. Finnerty.

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Joseph Coughlin, for Petitioner, Direct.

Q. Did you see him in the yard of the Central Railroad Company of New Jersey that morning?

A. Yes, sir.

Q. What was he doing? A. He was just walking through the yard at the time I saw him.

10 Q. What part of the yard did you see him walking through? A. I saw him in the loaded express yard.

Q. How many times did you see him? A. Only once.

Q. And what place in the loaded express yard did you see him? A. It was almost exactly at the end of the yard.

20 Q. And the end of the yard is in what direction from the terminal? A. From the terminal it is the south end of the terminal.

Q. What time was it that you saw him that time? A. 9:30.

Mr. Smith: A. M.?

Q. 9:30 A. M.? A. Yes.

Q. Was he alone at that time? A. Yes, sir.

Q. Did you see whether or not he carried any tools? A. Yes, sir, he carried a hammer and a bar with him.

30 Q. Had you ever seen him working previous to this day?

Mr. Smith: I object—

The Court: Wait a minute.

A. Yes, sir.

Mr. Smith: Whether he had ever seen him do something, the question is what he was doing at this time.

40 The Court: How is that material.

Joseph Coughlin, for Petitioner, Direct.

Mr. Finnerty: I think it is very material to know what his duties were because it is necessary to show what his work consisted of.

The Court: I will allow it.

- Q. What did you see him do on prior occasions? 10
 A. I saw him put in different shoes, shoes on the cars.
- Q. You saw him adjusting shoes on the cars?
 A. Yes, sir.
- Q. When did you see him dong this work? A. I saw him almost every day except the day of the accident.
- Q. You were air brake inspector's helper? A. Yes, sir. 20
- Q. And your work as air brake inspector's helper took you to what part of the yard? A. Any part of the yard that there was baggage cars in.
- Q. What places did you see the decedent work prior to this last time that you saw him alive? In other words, where in the yard did you see him work? A. I saw him in the express yard, I saw him in D yard.
- Q. Did you know his occupation? A. Yes, sir.
- Q. What was that? A. He was a car inspector. 30
- Q. You are familiar with the work of a car inspector? A. No, sir.
- Q. Do you know what a car inspector has to do?
 A. Yes, sir.
- Q. Will you tell the Court what you have seen Mr. Stanley Hart doing on these previous occasions when you saw him working in the yard? A. Besides adjusting shoe brakes I saw him tighten up different bolts and nuts.
- Q. Where were those nuts and bolts that you 40

Joseph Coughlin, for Petitioner, Direct.

saw him tightening? A. All different parts of the cars.

Q. Different cars? A. Yes, sir, different baggage cars.

10 Q. Any other cars besides baggage cars? A. I never saw him working on any other car besides a baggage car.

Q. Do you know whether the duties of a car inspector necessitates his working on other cars besides baggage cars?

Mr. Smith: I object to that, this man never said he has been a car inspector.

Mr. Finnerty: He said he is familiar with the duties of a car inspector.

20 Mr. Smith: That doesn't mean anything, I will cross examine him. You never were a car inspector?

A. No, sir.

By Mr. Smith:

Q. You never had the duties of a car inspector to perform? A. No, sir.

30 Q. What you mean is you have seen men working around there, that's all you mean, isn't it? A. Yes, sir.

Mr. Smith: I submit he doesn't know what the duties of a car inspector are except what he saw them do.

40 Mr. Finnerty: I urge, if your Honor please, there is no better evidence of what a car inspector's duties consisted of than a co-worker, working around that section where the deceased worked and saw him doing his work.

Joseph Coughlin, for Petitioner, Direct.

The Court: Do you know what the car inspector's duties were?

A. I know they are supposed to look at the cars, inspect the cars, that's all I know.

Direct examination by Mr. Finnerty, resumed. 10

Q. You know, in other words, what a car inspector has to do? A. I know he has got to inspect the car, that's all.

Q. And in addition to inspecting the cars, what else does the car inspector do? A. I don't know of another thing that they do.

Q. Do they simply look at the cars? A. And they repair it.

Q. Very good. Now, going back over to the time previous to the last occasion when you saw the decedent alive and when you say you saw him working the cars, will you tell the Court exactly what you saw him do on those occasions? 20

Mr. Smith: He has already testified to that, putting in shoes.

The Court: I think he has testified to that, he has testified to putting in shoes and adjusting bolts and nuts. 30

Q. On this adjustment of shoes and on this tightening of bolts did you ever see the decedent—withdraw the question.

Q. Was there any other work besides tightening shoes and adjusting bolts that you saw the decedent do? A. No, sir.

Q. Did you know that the car inspectors do any other work besides fixing shoes and tightening bolts? A. I heard of them doing it but I 40

Joseph Coughlin, for Petitioner, Direct.

don't know if they do it or not, I never saw them do it.

Q. Did you ever see any other car inspectors of the Central Railroad Company working?

Mr. Smith: I object.

10 The Court: Objection sustained.

Mr. Finnerty: Exception.

Q. Are you familiar with the duties of car inspectors in the Central Railroad Company of New Jersey?

Mr. Smith: I object to that, you have asked that ten times.

20 Mr. Finnerty: I urge then that the last question is proper.

Mr. Smith: The witness says that the car inspector inspects cars and counsel went after him and then finally he said he saw this man inspect and repair. Now, that is all he knows apparently. He only saw him adjust shoes and bolts.

(Discussion between counsel.)

30 The Court: Ask him does he know of any further duties.

Q. Do you know of any further duties that a car inspector performs?

Mr. Smith: I object to the question. If he says as to any other duties that this man performed all right but there may be various branches of car inspector.

The Witness: That's right.

40 Mr. Finnerty: I urge I should not be

Joseph Coughlin, for Petitioner, Direct.

limited to the work of this particular decedent from what this man knows, this man is qualified as being familiar with the duties of other car inspectors.

The Court: What the duties of other car inspectors are is irrelevant. It is this man. 10

(Discussion between counsel.)

The Court: If he knows of any other duties this man had as car inspector.

Mr. Finnerty: Withdraw the question.

Q. Did the car inspectors of the Central Railroad Company of New Jersey do practically the same kind of work?

Mr. Smith: I object, if the Court please. 20
May I say this, it is not possible for this man to know, that is one thing, and in the second place there are various grades of car inspectors, there are car inspectors in the shop, car inspectors in the yard, there are freight car inspectors, there are passenger car inspectors. Here is nothing but a workman, he is not qualified as an expert, he says he has been in the yard and he seen this man do a certain kind of work. 30

The Court: He can testify as to the duties if he knows.

Mr. Smith: I haven't any objection to that, if he knows.

Mr. Finnerty: If your Honor please, I ask the objection of counsel stating what a car inspector does be stricken from the record unless Mr. Smith intends to take the stand as a witness, qualified to testify as to the duties of a car inspector. 40

Joseph Coughlin, for Petitioner, Direct.

The Court: It isn't on the record, it is simply a motion.

(Question repeated by the Reporter.)

Mr. Finnerty: I urge the question.

10 Mr. Smith: I object to the question.

Mr. Finnerty: I will withdraw the question.

Q. You say that you are familiar with the duties of car inspectors of the Central Railroad Company in the Jersey City Yard?

Mr. Smith: I object, he hasn't said that.

Mr. Finnerty: I will withdraw the question.

20 Q. Do you know whether or not there were any other car inspectors working for the Central Railroad Company of New Jersey on December 13th, 1927 besides the decedent, Stanley Hart? A. Yes, sir.

Q. You have seen these other car inspectors work in the yard of the Central Railroad Company of New Jersey? A. Yes, sir.

Q. And you have seen the kind of work that they do? A. Only for tightening bolts and inspecting cars.

30 Q. Just answer the question.

The Court: Yes or no.

A. Yes.

Q. These are other car inspectors besides Stanley Hart? A. Yes, sir.

Q. I ask you now if you have seen any of these other car inspectors doing any other work on the

40

Joseph Coughlin, for Petitioner, Direct.

cars in addition to fixing the shoes and tightening the bolts? A. No, sir.

Q. Now, inspecting the cars and tightening the bolts, you have seen these car inspectors around that part of the cars? A. I saw them near the trucks when they are adjusting the brake; the shoe brakes. I saw them tightening bolts on the truck around the trucks. 10

Q. What part of the cars are these men compelled to work on doing this particular work? A. Work on both sides of the car.

Q. Where else, if any place? A. I never saw them inspect any other part only on the side.

Q. Did you ever see them at the end of the cars? A. No, sir.

Q. Well, these bolts that you have seen them tightening, where were these bolts? A. Those were on the side of the car, on the truck. 20

Q. And the trucks are what part of the car? A. They are on each side of the car, on the side.

Q. What are the trucks, do you know? A. The trucks hold the car up, the wheels.

Q. And what bolts on those trucks have you seen the car inspector tightening? A. I saw them tightening the bolts to hold the shoe brakes up.

Q. Any other bolts? A. Not that I can remember. 30

Q. Do you know what the draw head of a car is? A. Yes, sir.

Q. Do you know what the brakerod of the car is? A. Yes, sir.

Q. Do you know what the brake chain is? A. Yes, sir.

Q. Do you know what the couplings consist of? A. Yes, sir. 40

Joseph Coughlin, for Petitioner, Direct.

Q. Do you know what the jaws of the couplings are? A. No, sir.

Q. Do you know what couplings are? A. Yes, sir.

10 Q. Are there any bolts in connection with any of those parts? A. Not that I have ever noticed.

Q. You are not sure though, are you? A. No, sir.

Q. There may be? A. Yes, sir.

Q. Well, as an air brake inspector's helper, is that what you were? A. Yes, sir.

Q. That work took you around where these car inspectors were working also, didn't it? A. Yes, sir.

20 Q. Did you see Stanley Hart after the occasion when you met him on the morning of December 13th? A. Only just before he got killed.

Q. And that was about how long before he was killed? A. About a minute.

Q. And then you saw him after he was killed? A. Yes, sir.

Q. Did you notice the movement of a drill engine before he was killed? A. No, sir.

Q. Do you know drill engine 91? A. Yes, sir.

30 Q. Did you see drill engine 91 on that job that morning? A. Yes, sir.

Q. Did you see the engineer in that drill engine? A. Yes, sir.

Q. Michael Malone? A. Yes, sir.

Q. Do you know Michael Malone? A. Yes, sir.

Q. And you saw the fireman in the drill engine? A. Yes, sir.

40 Q. His name is what, do you remember? A. I am pretty sure it is Archie, his first name is, I can't remember his last name, Archie or Oscar, I am not sure which one it is.

Joseph Coughlin, for Petitioner, Direct.

Q. Do you know his last name? A. No, sir.

Q. Do you know Victor George Dickenson? A. Yes, sir.

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

Q. You saw the decedent after he was killed, didn't you? A. Yes, sir.

Q. And where were you two minutes before the decedent was killed? A. Walking up the yard. 10

Q. And how were you walking, fast or slow? A. Well, I will say slow.

Q. And did you have any tools in your hands? A. I only had a pipe on my shoulders.

Q. Where were you three minutes before Hart was killed? A. I was in the shop.

Q. How far was the shop from the place where Hart was killed? A. It is about a four minutes' walk. 20

Q. And what track was Hart working on at the time that he was killed?

Mr. Smith: I object, wait a mainute.

The Court: Objection sustained.

Q. On what track did you find Hart?

Mr. Smith: I object, wait a minute. him on any track.

Mr. Finnerty: Withdraw the question. 30

Q. Now, when you saw Hart one minute before he was killed where was he? A. He was walking toward me.

Q. And you were walking toward him? A. Yes, sir.

Q. Did he have any tools in his hand? A. Yes, sir.

The Court: He already testified to that, he testified he had a hammer and a bar. 40

Joseph Coughlin, for Petitioner, Direct.

Q. I will ask him the question again, with your Honor's permission. What tools did he have at that time? A. A hammer and bar.

Q. Did you see him all the time that you were walking toward him? A. I took a look every now and then as I was going up and I saw him.

10 Q. You stated that he was walking toward you?
A. Yes, sir.

Q. And you were walking toward him? A. Yes, sir.

Q. What did you see him do, if anything? A. I only saw him walking toward me.

Q. And about how far away from from you was he when you first saw him walking toward you? A. About three car lengths.

20 Q. Was he walking directly toward you? A. Yes, sir.

Q. Were you walking directly toward him? A. Yes, sir.

Q. You were looking ahead as you walked, were you? A. Not all the time.

Q. Now, this shop that you say that you came from, in what direction was this shop from the place where you last saw Hart, the minute before he was killed? A. It was in the west end, the west

30 end from where he was.

Q. And you were walking toward him? A. Yes, sir.

Q. And he was walking toward you? A. Yes, sir.

Q. Did he have to cross any tracks as he was walking toward you? A. No, sir.

Q. Did you have to cross any tracks as you were walking towards him? A. No, sir.

40 Q. Did you see the body of Stanley Hart that day? A. Yes, sir.

Joseph Coughlin, for Petitioner, Direct.

Q. With reference to the time when you first— with reference to the time when you last saw him alive, how soon after you last saw him alive was it that you saw his body? A. In about a minute.

Q. And where was the place that you saw his body? A. I placed him outside the track.

Q. Where was the place that you saw his body first? A. In between the tracks. 10

Q. Do you mean between the rails? A. Yes, sir.

Q. Were you the first one to reach his body? A. Yes, sir.

Q. What did you do when you reached his body? A. I called them.

Q. Yes, and what did you do then, if anything? A. I took the pipe off my shoulder and I touched his body and he didn't move. 20

Q. Yes, and then what, if anything, did you do? A. I went right underneath the car and I dragged him out.

Q. You found his body underneath the car? A. Underneath the car.

Q. From the time that—withdraw that. Were you walking alongside of the tracks upon which you found his body? A. I was walking between two and three tracks and he was on two tracks.

Q. You were walking between two and three tracks? A. Yes, sir. 30

Q. And did you see any cars upon two track before you found Hart's body? A. Yes, sir.

The Court: Was the body on three track?

A. The body was on two track.

Q. Did you see any cars move on two track before you found Hart's body? A. No, sir.

Q. You were walking alongside of two track? A. Yes, sir. 40

Joseph Coughlin, for Petitioner, Direct.

Q. You were walking toward Stanley Hart? A. Yes, sir.

Q. And Stanley Hart was walking toward you? A. Yes, sir.

10 Q. At the side of number two track? A. Yes, sir.

Q. And you saw him a minute before he met his death? A. Yes, sir.

Mr. Smith: You are leading him right along.

Mr. Finnerty: Well, that is only what he has already testified to.

Mr. Smith: All right, but it is not right to do it.

20 Mr. Finnerty: Well. it is not new matter.

Q. As you saw the cars on number two track—

Mr. Smith: I object to the question, the question is directly leading the witness; ask the question right.

Mr. Finnerty: Withdraw the question.

Q. Did you see the cars upon number two track as you were walking toward Stanley Hart? A. Yes, sir.

30 Q. What kind of cars were they, do you know? A. I didn't notice.

Q. Did you see any space between any of these cars? A. Yes, sir.

Q. Between which cars did you see the space? A. Between 356 and I am not quite sure if it is 343.

Q. What kind of cars were they? A. Central Railroad of New Jersey cars.

40 Q. What class of cars were they? A. Baggage cars.

Joseph Coughlin, for Petitioner, Direct.

Q. Did you see any space between any other cars on that track? A. No, sir.

Q. Do you know where number two track leads off to? A. Off to track three.

Q. Do you know what they call lead track? A. Yes, sir.

Q. Did number two track come off the lead track? A. Yes, sir.

Q. The lead track runs east and west, does it not? A. Yes, sir.

Q. And number two track is the track which switches off the lead track, isn't it? A. Yes, sir.

Q. Now, you saw this number two track and the cars thereon that morning. A. Yes, sir.

Q. Do you know where number one track is? A. Yes, sir.

Q. That also comes off the lead track? A. Yes, sir.

Q. And you saw engine 91 in the yard that morning? A. Yes, sir.

Q. Now, about how many cars did you see upon number two track at the time that you were walking along toward Stanley Hart? A. About seven.

Q. And you saw a space between these two baggage cars of the Central Railroad that you have just testified to? A. Yes, sir.

Q. When you reached the body of Stanley Hart you found it under the car? A. Yes, sir.

Q. Under what car did you find it? A. I don't remember.

Q. Well, you remember the two baggage cars that you have just spoken of? A. Yes, sir.

Q. With reference to these two baggage cars, where was the body of Stanley Hart, if you know? A. About seven feet away from the space.

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The Court: The space between the cars?

A. Yes, sir.

Q. Seven feet east or west of the space? A. West.

10 Q. And when you dragged out the body—when you took out the body of Stanley Hart from under the car—withdraw that. You found the body of Stanley Hart about seven feet from the space? A. Yes, sir.

Q. And the space was between these two baggage cars? A. Yes, sir.

Mr. Smith: Now, wait a minute, all right, go ahead.

20 Q. Now, this space was between these two baggage cars? A. Yes, sir.

Q. And when you took out the body of Stanley Hart from under a car, what car was it that you took it out from under? A. I didn't notice.

Q. Did you notice the two baggage cars after you took out the body of Stanley Hart? A. No, sir.

Q. You saw Stanley Hart walking toward you? A. Yes, sir.

30 Q. Now, with reference to these two baggage cars, where was Stanley Hart at the time when you saw him as you say walking toward you a minute before his death? A. He was in the middle of the second car.

Q. You say the second car, you mean what? A. The second car was the second car coming east.

Q. The second car east from what? A. The second car east this way, nearer coming toward me.

40

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Q. The second car east from the end car? A. Of the train.

Q. And you say there were about how many cars in the train? A. About seven.

Q. About seven cars and these two baggage cars were located where in that train? A. On the west end of the train. 10

Q. Were they the last two cars or not? A. Yes, sir.

Q. They were the last two cars? A. Yes, sir.

Q. And there was a space of four feet between them? A. Yes, sir.

Q. And you saw Stanley Hart with reference to these cars, where? Just whereabouts did you see him? A. In the center of the car.

Q. In the center of the car? A. Yes, sir. 20

Q. In the center of which car? A. I don't remember the number.

Q. And you picked him up seven feet west of the space between these two cars? A. Yes, sir.

Q. But you first saw him in the center of the second car from the west end? A. Yes, sir.

Q. Did you see the cars moving in a westerly direction on the track before he was dead? A. No, sir.

Q. Did the cars move? A. Yes, sir. 30

Q. In a westerly direction? A. I don't know what direction.

Q. Well, did the cars move toward the end where those two baggage cars were? A. I didn't notice.

Q. But you know the cars moved? A. Yes, sir.

Q. And after the cars moved you found the body of Stanley Hart? A. Yes.

Q. And you found the body of Stanley Hart 40

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about seven feet west of the four foot opening between the two baggage cars, you found the body under the car? A. Yes, sir.

Q. Now, under which car did you find the body?

A. I don't remember.

10

Mr. Smith: He has asked that ten times.

Mr. Finnerty: I will ask it again.

Mr. Simth: I object. I don't think we should stay here all day long with the same question being asked. I submit to your Honor counsel has no right to ask the same question.

Mr. Finnerty: I will ask the same question as long as your Honor permits me to ask it.

The Court: I will stop you pretty quick. I don't think it is necessary to repeat.

20

Q. You say that you found this body seven feet from the space between the two cars? A. Yes, sir.

Q. Those two were the last two cars on the west end of that train? A. Yes, sir.

Q. You saw him the last time a minute before his death about the center of the second car? A. Yes, sir.

Q. Is that the center of the second baggage car?

30 A. Yes, sir.

Q. And then when you found his body you found it under the first car? A. I didn't notice what car it was.

Q. Well, you found it seven feet from the space between the two cars? A. Yes, sir.

Q. Now, I ask you in which direction the cars moved and you say they moved before he died. A. I didn't notice.

40

The Court: He said he didn't know.

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Q. But you know they did move? A. Yes, sir.

Q. Who else came up after you picked up the body of Stanley Hart?

(At this point the hearing was temporarily adjourned to permit another case to be presented for settlement.)

10

Q. Mr. Coughlin, I made here a little sketch. (Handing paper to witness.) A. Yes, sir.

Q. Through the center here are two lines, representing the lead track which you have testified to? A. Yes, sir.

Q. That runs east and west, doesn't it? A. Yes, sir.

Q. The east end is toward the Jersey City Terminal? A. Yes, sir.

20

Q. And the west end? A. Jersey Avenue.

The Court: Suppose you write a "W" on it.

Q. I will put a mark on the bottom to represent the east and a mark at the top to represent the west end. Now, I have drawn off from here three branches and I ask you if track one, leading off from this lead track, or I ask you if track one comes directly off the lead track or does it branch off track two? A. I couldn't say.

30

The Court: Maybe you would be willing to admit that.

Mr. Smith: I don't know myself.

Q. Do you know if track two leads off the lead track? A. Yes, sir.

Q. But you are not sure about track one? A. No, sir.

40

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Q. And track three, do you know if that leads off the lead track? A. Yes, sir.

Q. Now, with reference to track two in which direction was your shanty, you testified this morning that it was towards the south.

10 Mr. Smith: His shanty? The shop, you mean?

Q. The shop where you got this pipe. A. I got the pipe going up between two and three.

Q. Do you know whether track one runs parallel to track two? A. No, sir.

Mr. Smith: Does he know what parallel means?

20 A. Yes, sir.

Q. After track three comes off the lead does track two and three run parallel after they pass the switch curve? A. I don't know.

Q. Which direction was this shop, that you got this pipe, with reference to track two? A. It was on the north side.

30 Mr. Smith: North side would be toward Jersey City, wouldn't it? North is toward Jersey City and south is toward Bayonne?

Mr. Finnerty: I will mark south over on that side of the paper and north on the right side of the sheet.

Q. Now, can you tell from looking at that in the general direction in which the shop was in which you got this pipe? A. South direction.

40 Q. About how far from the point where track two comes off the lead was this shop? A. In what direction?

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Q. About how far, you say it is in the south direction, about how far in that direction is the shop from the point where track two joins the lead track, to your best estimation, is it a hundred feet, two hundred feet, three hundred feet, whatever you estimate that distance is? A. Two hundred feet. 10

Q. Two hundred feet to the south? A. Yes.

Q. Are there any other tracks between this lead track and the shop where you got this pipe? A. Yes, sir.

Q. About how many tracks are there? A. There is about five.

Q. Do you run parallel to the lead track? A. Yes, sir.

Q. So in coming from the shop over to this lead track you have to cross over about five tracks? A. Yes, sir. 20

Q. Now, when you come to the lead track you cross over the lead track? A. Yes, sir.

Q. And you pass over between track two and three? A. Yes.

Q. Where did you pass over the lead track, was it between the point where track two hits the lead and where track three hits the lead? A. Well, they both come together, between two and three tracks come to the lead together. 30

Q. Where did you pass over the lead track? A. I passed over the lead track between two and three.

Q. Then you passed up between track two and three? A. Yes, sir.

Q. And when you passed over the lead track you saw these cars upon track two? A. Yes, sir.

Q. They were stationary, standing still? A. Yes, sir. 40

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Q. And you saw there were about six cars on track two? A. Yes, sir.

Q. And about how close to the lead track was the car nearest to the lead track? A. I didn't notice.

10 Q. Well, would you say that it was a car length or two car lengths or close up to the tracks? A. I didn't take no notice at all, how close they were.

Q. Can you give the Court some idea of your best recollection of where this first car on this second track was with reference to the lead track? A. Well, a car length on the lead track, I will say.

Mr. Smith: On or away from the lead track?

20

A. On the lead track.

Q. The lead track was blocked by the first car? A. I didn't take notice to whether it was blocked, it wasn't blocked where I passed.

Q. A car length on the lead track, the first car was, is that right? A. Yes, sir.

30 Q. Now, this space between these two baggage cars that you testified to, when did you first notice that space? A. I noticed it when I was going down for the pipe.

The Court: When you were going down for the pipe?

A. Yes, sir.

Q. And you went down for the pipe and then came back with it, is that it? A. Yes, sir.

Q. When you were going down for the pipe did you notice the space? A. Yes, sir.

40 Q. Did you see Stanley Hart at that time? A. No, sir.

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Q. When you were going for the pipe? A. No, sir.

Q. Now, as you were going down toward the shop did you see drill engine No. 91? A. No, sir.

Q. After you got your pipe in the shop you came across these tracks over toward the lead track? 10

A. Yes, sir.

Q. And was there any cars on any of these other tracks that you crossed over? A. I didn't notice.

Q. See drill engine No. 91 that morning? A. Yes, sir.

Q. What was the drill engine doing, if anything? A. It was standing still.

Q. Where was it? A. In the express yard.

Q. How far from track two was that? A. About 20
five hundred feet.

Q. Did you see the crew on this drill engine? A. Yes, sir.

Q. How many times did you see the drill engine that morning? A. Quite a number of times

Q. Was it drilling cars in the yard? A. No, sir.

Mr. Smith: Now, I object, if the Court please, I understand all this has to do is whether or not this man is entitled to compensation arising out of an accident in the course of his employment. I think we have fished far enough to find out what the drill engine was doing and what cars were in the yard and so forth and so forth. I don't think it has anything to do with this issue, according to this boy this man was in the course of his employment, he had an accident and he was killed. I think that is enough. 30
40

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The Court: What are you leading to, Mr. Finnerty?

Mr. Finnerty: I am leading to the facts in this case. Counsel does not admit anything in the case.

10

(Discussion between counsel.)

The Court: Objection sustained, not material.

Mr. Finnerty: I ask the question be stricken from the record and the answer.

Q. As you approached track two coming back from the shop did you see this drill engine? A. No, sir.

20

Q. When was the last time you saw it? A. About ten A. M.

Q. Now, as you were walking along between tracks two and three, about what time of the day was it, was it a short time before lunch time? A. Yes, sir.

Q. And you usually knock off for lunch around noon time? A. Yes, sir.

Q. Did you pass Stanley Hart as you were walking along between tracks two and three? A. No, sir.

30

Q. Did Stanley Hart talk to you as you were walking along between tracks two and three? A. No, sir.

Q. Did you say anything to Stanley Hart— A. No, sir.

Q. Wait until I finish the question—and did you say anything to Stanley Hart about the time of day as you were passing along between tracks two and three? A. No, sir.

40

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Q. You were sure of that? A. Yes, sir.

Q. Where were you with reference to this space between these two cars when you first saw Stanley Hart? A. About a car and a half length away from him.

Q. And where was he when you first saw him with reference to this space between these two cars? A. He was in the center of the second car. 10

Q. The space was between which cars?

Mr. Smith: I object, he hasn't said this space was between any cars.

Mr. Finnerty: I said the space was between which cars? A. The space was between second and third car.

Q. The space was between the second and third cars? A. Yes, sir. 20

Q. And he was approaching this space between these two cars when you first saw him? A. Yes, sir.

Q. And you were also approaching this space between the two cars when you first saw him? A. Yes, sir.

Q. And was he walking toward this space between these two cars? A. He was walking along the side of the space. 30

Q. When you first saw him you say that you saw him about the middle of the second car and that the space was between the second and third car? I now ask you was he walking toward the space, namely the space between the second and third cars when you first saw him about the middle of the second car? A. Yes, sir.

Q. And when you arrived at the space—withdraw that. When you arrived at the space be- 40

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tween these two cars—withdraw that. You kept walking toward Hart all of the time? A. Yes, sir.

10 Q. And when you arrived at the space between these two cars where was Stanley Hart? A. Well, that is when he was killed, I couldn't arrive at the space, there was no space there when I got there.

Q. There was a space when you were a car length and a half away from the space? A. Yes, sir.

20 Q. And then when you got to this spot where this space was about how much of a space was between those two cars. You testified this morning to that, about how many feet was it? A. About four or five feet.

Q. Now, when you arrived at this place where the space between these two cars was, you say that there wasn't any space at that time? A. No, sir.

Q. Why? A. The cars already coupled.

Q. The cars that you were passing next to on track two moved as you were walking toward this space between the second and third cars, is that correct?

30 Mr. Smith: Just a moment, I object, he hasn't said that and it is directly leading.

The Court: Objection sustained.

Mr. Finnerty: I will withdraw the question.

40 Q. Did the cars on track two, next to which you were walking, move when you were a car length and a half away from the space between the second and third cars?

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Mr. Smith: I object, the witness already testified this morning he didn't see the cars move, it has been gone over a dozen times.

The Court: I will allow that question, I think he did say they moved later.

Mr. Smith: He said they moved but he hadn't seen them move, that is what he said. 10

(Question repeated by the reporter.)

A. They moved but I didn't see them.

Q. You were walking next to them? A. Yes, sir.

Q. And the second and third cars became coupled up? A. Yes, sir.

Q. Did you hear any noise as you were walking next to the cars on track two? A. Yes, sir. 20

Q. When you were a car length and a half away from the space between the cars two and three? A. Yes, sir.

Q. What noise did you hear, if any? A. I heard the noise of the coupling.

Q. Did you hear the noise of the moving of cars? A. No, sir.

Q. As you were walking toward this space between cars two and three you saw Stanley Hart? A. Between track two and three? 30

Q. As you were walking toward Stanley Hart did you say that you saw him first at a point about in the middle of the second car? A. Yes, sir.

Q. And when you saw him at this point about the middle of the second car he was walking toward you? A. Yes, sir.

Q. And there wasn't any obstruction between you and Stanley Hart as you were walking toward him? A. No, sir. 40

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Q. You had a clear vision? A. Yes, sir.

Q. It was day time? A. Yes, sir.

Q. And were you looking ahead as you were walking? A. Not all the time.

10 Q. Well, how much of the time were you not looking ahead from the time that you first saw Stanley Hart until you came to the point where you say there was a space between the second and third car when you were a car length and a half away from said space? A. I turned my head every now and then.

Q. You turned your head in which direction? A. In back of me, in the east end, east direction.

20 Q. How many times did you turn your head back of you in an easterly direction? A. Every once in a while.

Q. Well, about how many times did you turn it from the time when you first saw Stanley Hart and when you were a car length and a half away from this space until you arrived at the point where this space was? A. I haven't got no idea.

Q. Well, did you turn your head once? A. I was turning my head but I haven't got no idea, it wasn't once.

30 Q. I asked you did you turn your head once? You say you turned your head? A. I turned it more than once.

Q. Did you turn your head twice? A. I turned it more than twice but I don't know the number of times.

Q. Did you turn it three times? A. I don't know whether I did or not because I turned it so many times.

Q. Are you sure you turned your head twice? A. I am not saying whether I did or didn't.

40

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Q. You are not sure you turned it more than once? A. I turned it more than once.

Q. Did you turn twice? A. I don't know how many times I turned it.

Q. Well, you are not sure whether you turned it more than once or not? A. I am sure I did turn it more than once. 10

Q. Are you sure that you turned it twice? A. I don't know how many times I turned it, but I know I turned it more than once.

Q. Are you sure you turned it more than twice? A. I don't know how many times I turned it, but I know I turned it more than once.

Q. You are not sure if you turned it more than twice? A. I don't know how many times I turned it, I haven't any idea. 20

Q. Did you turn it more than fifteen times? A. I don't know.

Q. While you were walking this car length and a half how many times to your best recollection did you turn around and look to the east? A. I would say about eleven times.

Q. Eleven times? A. I will say eleven times, I am not sure.

Q. It might have been ten times, you are not sure about eleven times? A. No, sir. 30

Q. Now, when you turned your head during these eleven times would you say did you turn around to the right or turn around to the left? A. To my left.

Q. That is the direction on your left side and toward the side on which the cars were on this track? A. That is a mistake I made, then, it was to my right.

Q. Oh, it was to your right that you turned eleven times? A. Yes, sir. 40

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Q. Not to your left? A. No.

Q. You swear that you never turned once to your left but you recollect distinctly that you turned eleven times to your right? A. I turned my head to my right on track three—toward track three.

10 Q. You never turned your head to the left during that time? A. Not that I know of.

Q. Did you ever take a little glance toward the left as you were walking along at that time? Do you understand the question? A. Yes, sir.

Q. Just answer it.

20 Mr. Smith: Now, I submit, if the Court please, that I am a little bit tired of this. I submit the Court should have some control over a man like Mr. Finnerty. This boy isn't here to be hollered at and yelled at, there is only one question involved here before you and that is whether or not this man met his death in an accident arising out of and in the course of his employment. That is all; what difference does it make how many times this boy turned his head?

(Further discussion.)

30 Mr. Smith: I object to the question.

The Court: Objection sustained; it is not material.

Mr. Finnerty: I ask an exception.

Q. At any time that you were walking along toward this space did you at any time look toward the left?

Mr. Smith: I object to the question.

40 The Court: Objection sustained.

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Mr. Finnerty: I think, your Honor, that question certainly ought to be allowed.

The Court: Not material.

(Discussion between counsel.)

Q. How many times did you see Mr. Hart as you were walking toward this space between these cars? 10

Mr. Smith: I object to the question. It has been answered ten times already.

The Court: Objection sustained; not material.

Q. Did you see Stanley Hart after the time when you say that you first saw him at a point about in the middle of the second car? 20

Mr. Smith: I object to the question.

The Court: Objection sustained; already answered.

Mr. Finnerty: I ask an exception.

The Court: Let me ask this man one question. How is it you didn't see this man when he was injured? A. Well, I had my head turned, I wasn't looking in the direction when the cars moved.

The Court: The last you saw him was when he was in the middle of this car? 30

A. Yes, sir.

Mr. Finnerty: If your Honor please, that is not so, that he said was the first time he saw him, that is the question.

The Court: I am questioning him now.

Mr. Finnerty: I think that is so pertinent, 40

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I think counsel should ask the question and I object to your Honor asking the question.

The Court: You say you turned your head?

A. Yes, sir.

10 The Court: When you turned your head back again what did you see?

A. I didn't see him there.

The Court: Go ahead.

Q. How long did it take you to turn your head around? A. About three seconds or so.

Q. When you turned back in the third second Mr. Stanley Hart had disappeared from view?

20 A. Yes, sir.

Q. Three seconds before you saw him walking next to the car? A. Yes, sir.

Q. That is your testimony? A. Yes, sir.

Q. The next you saw him was when he was where? A. He was dead.

Q. I asked you how many times you saw him after you first saw him at this point about the middle of the second car?

30 Mr. Smith: I object to the question.

Mr. Finnerty: It is very, very important, your Honor.

The Court: I will allow it.

Mr. Smith: May I ask an exception?

Mr. Finnerty: I will take this case to the highest Court, your Honor, unless that question is allowed.

The Court: Are you threatening? I will sustain the objection then.

40 Mr. Finnerty: I ask an exception then.

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Q. Did you know Hart's foreman? A. Yes, sir.

Q. Bob Denniston? A. Yes, sir.

Q. Did you know the big boss, Mr. Coffey? A. Yes, sir.

Q. Now, did you see Bob Denniston that morning?

10

Mr. Smith: I object as absolutely incompetent, irrelevant and immaterial whether the witness saw Mr. Denniston.

The Court: I will allow it. I presume it is a part of the proof of notice of the accident.

Mr. Smith: I ask an exception.

Q. Did you see Bob Denniston? A. I don't remember.

Q. Now, you are air brake inspector's helper? A. Yes, sir.

20

Q. And you have to take care of the brake lines and whistle lines? A. Yes, sir.

Q. Make repairs to those? A. I am only the helper.

Q. Well, help make repairs to those? A. Yes, sir.

Q. Those repairs are made at the end of the cars sometimes? A. Sometimes.

Q. And you work, helping to make these repairs to the air lines at the end of the cars? A. Yes, sir.

30

Q. Now, when the repairs are made to these air lines at the end of the cars there is a space left between the cars, is there not?

Mr. Smith: Just a minute. I object.

The Court: Objection sustained.

Mr. Finnerty: I ask an exception.

Q. When you have made repairs to air lines at the end of cars have you ever noticed the space between the cars to allow this work to be done?

40

Joseph Coughlin, for Petitioner, Cross.

Mr. Smith: I object, we are not trying what this boy did.

The Court: Objection sustained.

10 Q. Did you ever see car inspectors make repairs to these drawhead of cars? A. No, sir.

Q. Do you know whether or not they do?

Mr. Smith: Well, he just said he never saw them; I object to it.

The Court: I will allow the question.

Mr. Finnerty: Well, he answered it before. That is all with this witness.

Cross examination by Mr. Smith.

20 Q. This place where these cars were, is that what you call a yard? A. Yes, sir.

Q. These tracks you call two, three, one, and so forth, are these tracks where all sorts of baggage cars were put, aren't they? A. Yes, sir.

Mr. Finnerty: I object to the question. The witness is not qualified to answer anything about cars in the yard.

30 Q. You are familiar with this yard, aren't you? A. Yes, sir.

Q. You are familiar with these tracks, two, three, one and so forth, and the lead track? A. Yes, sir, I am pretty familiar.

Q. It is true, isn't it, all those tracks are tracks upon which baggage cars are placed?

Mr. Finnerty: I object to the question.

The Court: I will allow the question.

Mr. Finnerty: I ask an exception.

40 A. Yes, sir.

Joseph Coughlin, for Petitioner, Cross.

Q. Those baggage cars are cars of all denominations? A. Yes, sir.

Q. There are some B. & O. cars, some Reading cars, some Central Railroad cars? A. Yes, sir.

Q. This Mr. Hart was what you call a car inspector? A. Yes, sir.

Q. He went all over the yard inspecting all sorts of cars, didn't he? A. Baggage cars. 10

Q. Baggage cars, that's all he did inspect, was these baggage cars? A. Yes, sir.

Q. And all he did was inspect cars? A. Yes, sir.

Q. But there weren't repairs made on all the cars you inspected? A. No, sir.

Q. They were looked over practically every time they came up and they were taken out? A. Yes, sir. 20

Q. The drill crew there practically took these cars out and put them into trains to take them out, isn't that so? A. Yes, sir.

Mr. Finnerty: I object.

The Court: Objection sustained, you are leading, you are putting the words in this man's mouth.

Q. Isn't that a fact that these cars on these tracks were what are known as baggage cars, on tracks two, three and one, and they were all baggage cars, weren't they? A. Yes, sir. 30

Q. These baggage cars, as I understand, are baggage cars, as you say, of the Baltimore and Ohio, Reading Railroad and Central Railroad? A. Yes, sir.

Q. And those baggage cars placed upon those tracks are taken immediately out and put in trains that are being formed, are they not? 40

Joseph Coughlin, for Petitioner, Cross.

Mr. Finnerty: I object; there is no evidence about the placement of cars to this witness on direct examination, I urge this question is not proper cross examination.

The Court: I will allow the question.

10 Mr. Finnerty: I ask an exception.

Q. That is a fact, isn't it, what I asked you is these baggage cars that are in there are being taken out all the time and placed in trains? A. Well, some of them are.

Q. That is what I mean, some of them, of course, not all of them; in other words, if there is a car that needs repairing that isn't put in a train, is it? A. No, sir.

20 Q. Now then, Mr. Hart was a car inspector, wasn't he? A. Yes, sir.

Q. Did I understand you to say that you had seen him inspecting cars? A. No, sir.

Q. You hadn't seen him inspecting cars? A. No, sir, not at the time.

Q. Not at that time, but at any time? A. I saw him inspecting cars, yes, sir.

Q. I mean at the time you knew he was employed there? A. Yes, sir.

30 Q. But on this day you hadn't seen him doing any work, had you? A. No, sir.

Q. But regularly, the day before, the week before, during that time you had seen him inspecting cars? A. Yes, sir.

Q. And he went all over this baggage yard? A. Yes, sir.

Q. Now, at this time, as I understand, you had come from the shop; now is the shop toward Johnson Avenue? A. Yes, sir.

40 Q. That is north, isn't it, that is on the north

Joseph Coughlin, for Petitioner, Cross.

side of the terminal? A. No, it is near tracks two and three.

Q. Let's say here is east, the way I am pointing now, Johnson Avenue is over here, isn't it?

A. Yes, sir.

Q. That is to the north and Black Tom Island is down this way toward the south, isn't it? A. 10
South, right here, well, that is Johnson Avenue.

Q. You think Johnson Avenue is toward the south?

Mr. Finnerty: I object. The witness has already testified Johnson Avenue is toward the south and has pointed to the map.

Q. Do you think Johnson Avenue is toward the south, toward Black Tom Island or toward north, 20
toward Jersey City? A. Toward the south.

Q. You think it is toward the south? A. Yes.

Q. Isn't the Lehigh Valley Railroad toward the north, do you know how Johnson Avenue runs into the terminal? A. Yes, sir.

Q. The terminal is on the river, isn't it, on the east, on the river? A. Yes, sir.

Q. Johnson Avenue runs east and west, doesn't it? A. Yes, sir.

Q. The ferry house is here, to the south, isn't 30
it? Yes, sir.

Q. And Black Tom Island is toward the south, toward Bayonne? A. Yes, sir.

Q. And Johnson Avenue is north of the ferry house, isn't it? A. Yes, sir.

Q. Am I not right? A. Yes, sir.

Q. Now, you say the lead track leads in toward the ferry? A. Yes, sir.

Q. Now, are the tracks two, three and one on 40

Joseph Coughlin, for Petitioner, Cross.

the right hand side or the left hand side as you go toward the ferry? A. Two and three are——

Q. As you are going toward the ferry. A. On your left hand side.

Q. On the left hand side of the road, are they? A. Yes, sir.

10 Q. Now, as I understand you, you had come from the shop as you call it, down here? A. Yes, sir.

Q. And you came up and you were walking down the lead, were you? A. Down the lead to two and three, yes, sir.

Q. And you saw the cars on these tracks? A. Yes, sir.

20 Q. Now, were any of the cars on the lead track or were they on the side track like two and three? A. I am not sure but I think there was one on the lead.

Q. You think there was one on the lead? A. About a car length on the lead.

Q. About a car length on the lead and then they were all sorts of baggage cars? A. Yes, sir.

Q. You were walking down there, you had this pipe on your shoulder? A. Yes, sir.

30 Q. And Hart was walking toward you? A. Yes, sir.

Q. As you walked toward him did he pass you? A. No, sir.

Q. You were walking with this pipe and every once in a while you say you turned around? A. Yes, sir.

Q. So the pipe hit the cars? A. Yes, sir, that's right. That is the reason I turned around.

40 Q. As I understand as you walked toward him every once in a while you looked back because the pipe hit the car? A. Yes, sir.

Joseph Coughlin, for Petitioner, Cross.

Q. And it was while you were looking back one of these times you say Mr. Hart disappeared?

A. Yes, sir.

Q. You could see a car length and a half ahead of you, you could see the space between two cars?

A. Yes, sir.

Q. You say it was a space between four and five feet? A. Yes, sir.

10

Q. And it was while you were looking away, looking probably towards your east, you heard this noise like couplings? A. Yes, sir.

Q. Then you looked back and Mr. Hart was gone? A. Yes, sir.

Q. Then you looked back and you saw him down underneath the car and you called to him and he didn't answer you? A. Yes, sir.

20

Q. You dropped your pipe off your shoulder to the ground, didn't you? A. No, sir.

Q. What did you do? A. I touched his body with the pipe.

Q. You touched his body with the pipe, did he answer you? A. No, sir.

Q. Then what did you do? A. I got underneath the car and took him out.

Q. You dropped the pipe first, didn't you? A. Yes, sir.

30

Q. Then you got underneath the car and got him and took him out? A. Yes, sir.

Q. Any of the time you saw Mr. Hart that day you didn't see him working at all, except at the time you saw him walking there? A. That's all.

Mr. Smith: I think that's all.

By Mr. Finnerty:

Q. As car inspector he made general repairs to these cars? A. I don't know.

40

Stephen Wisniewski, for Petitioner, Direct.

Q. Do they make general repairs to the cars?

A. Yes, sir.

Q. Looked at all parts of the cars? A. Yes, sir.

Mr. Finnerty: That's all.

10

STEPHEN WISNIEWSKI, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. Where do you live, Mr. Wisniewski? A. 235 Barrow Street.

Q. Jersey City? A. Jersey City.

Q. You are employed by the Central Railroad Company of New Jersey? A. Yes, sir.

20 Q. You knew Stanley Hart? A. Yes, sir.

Q. What was your occupation at that time? A. Air brake inspector.

Q. What is your occupation now? A. Same thing.

Q. You are familiar with the duties of air brake inspectors? A. To a certain extent.

Q. How long have you been an air brake inspector? A. Well, I am down there eighteen years and that is including car cleaning and all, and helping.

30

Q. Did you ever do any car inspecting? A. No, sir.

Q. Just air brake inspector? A. Yes, sir.

Q. How long have you been doing that air brake inspecting? A. Well, I would say about twelve or thirteen years.

Q. Your duties as air brake inspector consist of what? A. Baggage cars.

40

Stephen Wisniewski, for Petitioner, Direct.

Mr. Smith: I object, what difference does it make as to what his duties consist of?

The Court: Objection sustained.

Q. You have seen car inspectors working around the yard, Mr. Wisniewski? A. Yes, sir.

10

Q. You saw Stanley Hart working around the yard? A. Yes, sir.

Q. You are familiar with the work which car inspectors do, you know what kind of work they have to do? A. Well, I do and I don't, most of it I can pretty near tell.

Q. You have seen them working around the yard, around the cars, the same as you? A. Yes, sir.

Q. And for a number of years? A. Yes, sir.

20

Q. You have seen the work these car inspectors do? A. Yes, sir.

Q. What is that work?

Mr. Smith: I object to what the car inspectors do generally. It has nothing to do with this case, this is a man suing. If he says he knows what Stanley Hart had to do then I have no objection.

The Court: Objection sustained, bring it out as to this man, the deceased.

30

(Further discussion.)

The Court: You may answer the question. What are the duties of a car inspector such as the inspecting that the deceased did, but there are all sorts of car inspectors, there may be a car inspector down at the Ford plant which we would not be interested in.

40

Stephen Wisniewski, for Petitioner, Direct.

Q. Are you familiar with the duties of a car inspector?

Mr. Smith: I object to the question again.

The Court: Such as the work that the deceased did.

10

A. Well, he gauges wheels—

Q. Well, just answer the question. Are you familiar with the duties?

The Court: Yes or no.

A. To a certain extent.

Q. To what extent? A. Well, I don't understand all their work such as brake shoes—

Q. You mean you can't do the work? A. No, sir.

20

Q. But the question is, are you familiar with what kind of work a car inspector has to do, I am not asking you whether you could do that work. I am asking you whether you are familiar with the duties, that is the regular duties of a car inspector, do you know what the duties are he performs? A. No, sir.

Q. Did you see Stanley Hart that day? A. Yes, sir.

30

Q. About how many times? A. Once.

Q. Did you see him any other time before that? A. No, sir.

Q. During the eighteen years that you were with the company? A. Oh, you mean previous to that day?

Q. Yes, sir. A. Yes, every day.

Q. Every day, and you would see him a number of times a day, wouldn't you? A. Yes, sir.

40

Q. What would you see him doing? A. I would see him putting in shoes, I would see him tighten-

Stephen Wisniewski, for Petitioner, Direct.

ing up bolts, fixing grab irons, different things like that.

Q. You would see him doing the regular work of a car inspector, wouldn't you?

Mr. Smith: Just a minute. I object to that question.

10

The Court: Objection sustained.

Q. You would see him all around the cars, inspecting the cars, wouldn't you?

Mr. Smith: I object to that as directly leading and asking him to draw a conclusion.

The Court: You are leading, Mr. Finnerty.

Q. Would you see him working on all parts of the cars?

20

Mr. Smith: I object; that is too general.

The Court: Objection sustained.

Q. Would you ever see him working on the sides of the car? A. Yes.

Q. Would you ever see him working on the end of the cars? A. Yes, sir.

Q. Would you ever see him working under the car? A. Yes, sir.

30

Q. Would you ever see him working on top of the car? A. No, sir.

Mr. Finnerty: That's all.

Mr. Smith: That's all, no questions.

Mr. Finnerty: I would now ask for the witness subpoenaed from the Central Railroad with the records of the cars upon the tracks upon which the deceased was found dead.

40

William Lawton Westervelt, for Petitioner, Direct

WILLIAM LAWTON WESTERVELT, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. What is your duty, sir? A. Per-diem clerk.
10 Q. Have you the records called for in the subpoena? A. I have.

Q. Have you the record of the cars which were upon track two on December 13th, 1927? A. I have the record of the cars upon the track but I can't tell what they are because that is not my record.

Q. Well, you have a record of the cars on track two, haven't you? A. I have, if that is what it is meant to be.

20 Q. Well, don't ask me, I am asking you, you are here under subpoena to bring the records of the cars upon track No. 2 and I ask you now whether you have produced those records. A. I don't even know what these records are.

Mr. Smith: Here is the record, if the Court please, of a number of cars that were on track two but they contain simply numbers, they don't say what kind of cars they are. They don't say who they belong to. They simply say cars on track two.
30

Mr. Finnerty: I ask that the witness read the cars that were on track two on that day, by number.

Q. What do you know about these records? A. These records? I know nothing about these records, I haven't the records of the movements of these cars.

40 Mr. Finnerty: Well, suppose we call you after. That's all.

Chester Marketta, for Petitioner, Direct, Cross.

CHESTER MARKETTA, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. I show you these records and ask you if you have a record of the cars on track two on December 13th, 1927? A. December 13th, yes, sir. 10

Q. Did you make that record? A. Yes, sir.

Q. How many cars were on that track? A. About seventeen, track two.

Q. Have you two cars Nos. 346 and 356? A. Yes, sir.

Q. Do you know what these two cars were? A. Central cars.

Q. What kind of cars? A. Central baggage cars.

Mr. Finnerty: That's all. 20

Cross examination by Mr. Smith.

Q. What numbers were on this track that day, give me all the numbers. A. B&O 1887, 1843, 1702.

Q. Those are all B&O? A. Yes, sir.

Q. Go ahead. A. 1847, 1782, 572, Central 427, B&O 1698, Central 346, Central 356, B&O 1780, 1802.

Q. B&O what? A. 1802, 1730, Central 366, B&O 1893, 1825, P&R 1673. 30

Q. You made that record, you say? A. Yes, sir.

Q. What for? A. That is my duty, to make the route report out every morning.

Q. Make your report out and who do you give it to? A. One to the train master, one for our office.

Q. Who is the train master? A. There is the train master (indicating). 40

Chester Marketta, for Petitioner, Recalled, Direct

Mr. Finnerty: I object to any further examination along this line, I just asked the witness for the numbers of cars on that day.

Mr. Smith: I have a right to show what they were and how he does it.

10 The Court: I will allow the question.

Q. Who is the train master? A. Mr. Vanderhoff.

Mr. Finnerty: I object to further questions along this line as incompetent, irrelevant, and immaterial, I only asked for the train numbers on that particular track on that particular day.

20 Q. Do you know who the chief clerk for Mr. Vanderhoff is? A. Yes, sir, Mr. Burns.

Q. Is Mr. Burns here, do you know? A. Yes, sir.

Mr. Smith: That's all.

Mr. Finnerty: No questions.

(At this point the hearing was adjourned until November 8th, at 10 A. M.)

30 Trial resumed November 8th, 1928, at 10:30 A. M.

Appearances: Same as before.

CHESTER MARKETTA, a witness for the petitioner, recalled.

Direct examination by Mr. Finnerty.

Q. Mr. Marketta, is this a carbon copy of the report of the car numbers, made by you? A. Yes, sir.

40

Chester Marketta, for Petitioner, Recalled, Cross.

Q. On December 13th, 1927? A. Yes, sir.

Q. I point to this list of cars marked at the top "2" and ask you if those are the cars on track two? A. Track two, yard D.

Mr. Finnerty: I would like to offer this in evidence, your Honor. 10

The Court: Any objection?

Mr. Smith: What are you offering, just track two?

Mr. Finnerty: I offer the sheet that has track two on.

Mr. Smith: All right.

Mr. Finnerty: I offer in evidence this sheet upon which is numbered track two.

(Sheet above referred to entered in evidence and marked Exhibit P-1). 20

Q. Mr. Marketta, I ask you to look at this No. 346, what car is that, do you know? A. That is a Central Railroad baggage.

Q. What is 356? A. Same.

Q. What does the "X" mark after 346 designate? A. That was a crippled car, marked crippled.

Mr. Finnerty: That's all. 30

Cross examination by Mr. Smith.

Q. When you say that is marked crippled did you mark that on there? A. Huh?

Q. Did you mark that "X" on there? A. Yes, sir.

Q. When you say that is marked crippled you mean there is an "X" on the car? A. No, sir, that is just the card, on the car written out "crippled." 40

Chester Marketta, for Petitioner, Recalled, Cross.

Q. That's all you know about it? A. That's all I know about it.

Q. Now, this first sheet, is that a part of the same report you speak about?

10 Mr. Finnerty: I object to the question because the first sheet is not in evidence.

Mr. Smith: I ask if the first sheet is a part of the same report you spoke about?

Mr. Finnerty: I object to the question.

A. Yes, sir, that is separate.

The Court: I will allow the question. You marked them all in evidence?

20 Mr. Finnerty: Oh, no, I marked sheet two in evidence, Mr. Smith is questioning him about sheet No. 1.

The Court: Objection sustained, you will have to make him your own witness.

Mr. Smith: These papers you offered.

Mr. Finnerty: I didn't offer the papers, I offered just P-2. I asked to have sheet 2 separated from the other papers because sheet No. 2 is the only sheet I offered in evidence.

The Court: Objection sustained.

30 Q. In sheet No. 1 that you have on there a part of the same report on the same day, December 13th?

Mr. Finnerty: I object to any questions about sheet No. 1.

The Court: Objection sustained.

Mr. Smith: I ask an exception.

40 Q. All right, we will take sheet No. 2. Start at 1887, what car is that, who does it belong to? A. That is the B. & O. box car.

Chester Marketta, for Petitioner, Recalled, Cross.

- Q. Take the next number? A. That is a B. & O.
 Q. Take the next number? A. That is a B. & O.
 Q. Next number? A. Same.
 Q. Next number? A. Same.
 Q. When you say same do you mean the same box car or the same company? A. The same company. 10
 Q. Take the next number. A. The same.
 Mr. Finnerty: Is that 532?
 A. Yes.
 Q. 532. 427? A. Central Railroad, steel.
 Q. 1698? A. B. & O. box car.
 Q. 346? A. Central Railroad wood.
 Q. 356? A. Central Railroad wood.
 Q. 1780? A. B. & O. 20
 Q. 1802? A. B. & O.
 Q. 1730? A. B. & O.
 Q. 366? A. Central wood.
 Q. 1893? A. B. & O.
 Q. 1825? A. B. & O.
 Q. 1673? A. P. & R. steel.
 Q. Were those all on track two? A. Yes, sir.
 Q. What is this No. 3 up here? A. That is three in yard D, the next track.
 Q. That is number three in yard D, that is the next track? A. Yes, sir. 30
 Q. Were all these cars mentioned on there on track three? A. In that column, yes, sir.
 Q. Take the first column, what is that? A. That is the Valley connection.
 Q. What do you mean by Valley connection?
 A. That is the track about a half a mile over.
 Q. Tracks two and three are adjoining tracks, are they? A. Yes, sir.
 Q. Take track three and following the numbers 40

Edward W. Burns, for Petitioner, Direct.

along tell me what cars they were and what company they belonged to.

The Court; Just a minute; how do you tell us whether the car is a Central Railroad car or a B. & O. car?

10 A. Well, we all know the numbers.

The Court: You all know the numbers, I didn't know whether some were marked over them, or something like that.

A. No. The first car is a B. & O. box.

Q. Read the number. A. 1743, B. & O. box, 1773, B. & O. box, 343 Central, crippled, 1715 B. & O. box, 1749 B. & O. box, 1779 same, 1783 B. & O. box, 1744 B. & O., 1777 B. & O., 1704 B. & O., 1808 B. & O., 1857, 1791, 1746, B. & O.

Mr. Smith: That's all.

Mr. Finnerty: I will call Mr. Charles English, the superintendent of the Central division, of the Central Railroad of New Jersey.

The Court: Just a minute, what was the position of the last witness?

Mr. Marketta: Switchman.

The Court: What is the address?

30 Mr. Marketta: 397 Second Street, Jersey City.

EDWARD W. BURNS, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. What is your address, Mr. Burns? A. 4222 76th Street, Elmhurst, Long Island.

40 Q. What is your position with the Central

Edward W. Burns, for Petitioner, Direct.

Railroad, Mr. Burns? A. Chief Clerk of the passenger train master.

Q. Have you the records of the placing of the cars upon track No. 2 on December 13th, 1927?

A. No, sir, I have not.

Q. Does your office have those records? A. No, sir, they have not. 10

Q. Does your office have any record of the placing or moving of cars to certain tracks in the yard of the Central Railroad Company? A. We get a report every morning of the condition of the yard, that is, as to the number of available cars in the yard.

Q. On certain tracks? A. Well, it wouldn't be necessary to have the certain tracks but they show on which track they are, we use up the report each morning to determine just how many cars we have in the yard that are available for service that day and at the end of the day that report is disposed of because it served its purpose. We get one every morning. 20

Q. What office is your office, Mr. Burns? A. Passenger train master's office.

Q. Doesn't the train master's office direct the movement of the cars in the yard or does it? A. Well, just how do you mean that, in making up the train or special cars? The yard master directs movement of making up trains. 30

Q. So your office has no record of how certain cars got on track two on December 13th, 1927?

A. No, sir.

Q. Does your office have any record of the movement of the cars on track two? A. No.

Q. Which were on said track on December 13th, 1927? A. No.

Q. What does your office do with regard to 40

Edward W. Burns, for Petitioner, Cross.

10 the movement of cars, has it anything to do with the movement of cars in the yard? A. We order the cars out along the lines to different points. We would refer to that morning's report which would show, say twenty or twenty-five empty cars for instance. Then we would see what would be required for express specials and we might want an empty car up at Dunellen, then we would consult that report and say to the yard master to have so many empties sent to Dunellen.

Q. Then the train master would make the selection of the different cars he desires? A. Well, he might tell him whether it was to be a sixty or a seventy foot car, then he would make the selection.

20 Mr. Finnerty: That's all.

Cross examination by Mr. Smith.

Q. I show you this sheet two, that was offered in evidence as P-1 and call your attention to what is known as track two there, and ask you if this is one of the reports you speak of? A. This is one of the reports that come to us every morning.

30 Q. You get the original of that? A. We get the original.

Q. Are the cars on track two there what you call cars in active service? A. Why, some of them are not, no.

Q. What would you call are not, what do you mean? A. This "X" would appear on our form here, would denote to us the car was crippled and we wouldn't call on it to have it moved.

40

Edward W. Burns, for Petitioner, Redirect.

The Court: The other cars are available for service.

A. The other cars are available.

Mr. Smith: That's all.

10

Redirect examination by Mr. Finnerty.

Q. While those cars are on those tracks available for service, at that time that they are on that track they have no special designation, they are there awaiting selection by the yard master, isn't that so? A. I wouldn't say that, no.

Q. You say no. Haven't you just testified that all that you do is to tell the yard master to get a sixty or seventy foot car, if necessary? A. That would be in case, I told you, where a car was going out to an industrial plant, and I believe I mentioned Dunellen but in case of making up a B. & O. thirteen they would require twenty-five.

20

Q. Let me ask you a question. All of those cars on track two were baggage cars, weren't they? A. Well, I would have to go over this report to say.

Q. Well, are you familiar with the numbers of the cars? A. Some of them, not thoroughly, no.

30

Q. Weren't they all baggage cars on that track?

A. Yes, they are baggage cars.

Q. All that your office does with regard to the placing of these cars in operation is to tell the yard master to get out either a sixty of a seventy foot car for the particular train and then the yard master takes whatever car he desires, isn't that so? A. Providing it meets its requirements.

Q. And at the time that these cars were on

40

Edward W. Burns, for Petitioner, Recross.

track two there was a crippled car, there was a car marked crippled? A. Yes.

Q. Who marks that car crippled? A. Why, the inspectors mark it, I don't know who did it.

10 Q. What is the usual procedure? A. I don't know, I am not out there in the yard.

Q. When the yard master makes up a train, he can take any car that he desires from that track provided it corresponds with the orders he has received for either a sixty or a seventy foot baggage car. A. You mean whether or not a car is crippled?

Q. No, if a car is crippled is that car put into operation? A. Oh no.

Q. As long as it is crippled? A. No.

20 Q. Take the other cars that are not marked crippled, the yard master can collect from those cars any cars that are sixty or seventy foot cars? A. Yes, sir.

Mr. Finnerty: That's all—and at that time there were none of those cars in actual operation as far as you know?

A. No.

30 Mr. Finnerty: That's all.

Recross examination by Mr. Smith.

Q. Isn't it a fact that a car even if it is marked crippled there it is only what we call momentary repairs, it is considered in active service at the time, is that so? A. Oh yes, it would be taken out of service.

40 Q. That is what I meant to ask you. A. Oh yes, it would be taken out of service.

Edward W. Burns, for Petitioner, Redirect.

Q. It is in active service all the time? A. Oh, yes, it would be taken out of service.

Q. Track two an active service track? A. Absolutely.

Q. As I understand you that list comes to you shows you can take any car on there? A. They would be on active service. 10

Q. That is what I am asking you. A. Yes.

Mr. Smith: That's all.

Redirect examination by Mr. Finnerty.

Q. And this crippled car, that isn't in active service as long as it is crippled, is it? A. Why, it wouldn't be out of service.

Q. Would you say that this crippled car is in active service? A. Yes, when I take this report in the morning— 20

Q. Just answer the question. A. What is the question?

Q. You have already answered the question, yes. Now, when you say in active service you mean that a car is upon the tracks of the Central Railroad Company and maybe placed into a train, isn't that what you mean? A. Yes, surely.

Q. In other words the cars are available for selection to be placed into trains, isn't that so? A. That's right. 30

Q. And when you mention active service that is exactly what you mean by active service, isn't it? A. Yes.

Q. When they are on that track they are not actually running in a train, are they? A. Why—

Q. Just answer the question foolish as it may seem. A. No. 40

*Edward W. Burns, for Petitioner, Recross.
James Coffey, for Petitioner, Direct.*

Q. They are standing waiting on that track to be called or to be put into the yard, isn't that so? A. Correct.

10 Q. And when you speak of that being in active service that is what you mean? A. Yes, sir.

Mr. Finnerty: That's all.

Recross examination by Mr. Smith.

Q. They may be taken out any minute? A. Any minute.

Q. By any train? A. Any time.

Q. They are making up trains all day? A. Absolutely.

20 Q. These cars are being placed in the trains being made up all day long? A. Any time.

Mr. Finnerty: But at that time they were not in an actual train, were they?

A. No, not if they were standing on track two.

Mr. Finnerty: That's all.

Mr. Smith: That's all.

30

JAMES COFFEY, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. What is your address, Mr. Coffey? A. 328 Union Avenue, Roselle Park.

Q. What is your position with the Central Railroad? A. Foreman of the Passenger Equipment.

40 Q. General foreman? A. No, foreman of the Passenger Equipment.

James Coffey, for Petitioner, Direct.

Q. Foreman of Passenger Equipment, Mr. Coffey, you have under you car inspectors of the passenger equipment? A. Yes, sir.

Q. Have you an assistant by the name of Robert Dennison? A. Yes, sir.

Q. What is his position? A. He is assistant foreman of the Passenger Equipment. 10

Q. You are familiar with the duties of the car inspectors? A. Yes, sir.

Q. Mr. Coffey, when is a baggage car marked crippled? A. Well, when it is defective.

Q. After it is inspected by a car inspector? A. Yes, sir.

Q. Does the car inspector write with white chalk "crippled" on the car? A. Yes, sir.

Q. Then as long as that car is crippled it is not available for use in a train, is it? A. No, sir. 20

Q. Did you know Stanley Hart? A. Yes, sir.

Q. He was working as a car inspector, wasn't he? A. Yes, sir.

Q. And did he take his orders directly from you? A. No, sir.

Q. He was directly under Mr. Dennison? A. Yes, sir.

Q. And when a car is marked crippled and is placed upon the track it is the duty of the car inspector, is it not, to inspect and repair said car? A. That would all depend on the kind of defect. 30

Q. Well, have you any record of the defect in car No. 346 on December 13th, 1927? A. No, sir.

Q. Has Mr. Dennison? A. I don't know.

Q. Have you any record showing that Stanley Hart was ordered to make any repairs or inspec-

James Coffey, for Petitioner, Direct.

tion of cars upon track two which included car 346? A. No, sir.

Q. You were served with a subpoena—do you know how car 346 came up on track No. 2? A. No, sir.

10 Q. What is the practice with regards to the marking of cars crippled, are they marked crippled after they come in from a run or when? A. Sometimes they are after coming in off a run and sometimes after inspection in the yard.

Q. And with regard to this particular 346 car do you know who marked that crippled? A. No, sir.

Q. Or do you know when it was marked crippled? A. No, sir.

20 Q. Do you know any of the other cars on track 346 were crippled cars—

Mr. Smith: Track 346?

Q. Track two, besides 346, were crippled cars? A. No, sir.

Q. It is possible some of those cars might have been crippled cars? A. It is possible.

30 Q. In other words if the car inspector inspected them and found that they were in need of repair he could mark them crippled while they were on track No. 2? A. Yes, sir.

Q. And it was the duty of Stanley Hart to inspect the cars, such as cars upon track two? A. Yes, sir.

Q. On that particular day? A. Yes, sir.

Q. And in the inspection of the cars you were familiar with the operation of inspecting the cars? A. Yes, sir.

40 Q. The inspector has to look to all the working parts of the car, does he not? A. Yes, sir.

James Coffey, for Petitioner, Direct.

Q. That includes the truck and wheels? A. Yes, sir.

Q. And drawhead? A. Yes, sir.

Q. Brake rod? A. Yes, sir.

Q. And other parts of the car? A. Yes, sir.

Q. In fact, would you say all parts of the car? A. Yes, sir. 10

Q. The couplings? A. Yes, sir.

Q. And in this inspection it is necessary for him at times to get down under the cars, isn't that so? A. I wouldn't say so, no sir.

Q. Well, if two cars are coupled together and the car inspector was to examine the brake pin, wouldn't it be necessary for him to get down under the brake rod to look at that? A. No, sir.

Q. Wouldn't it be necessary for him to get in between the cars in order to look at that pin? A. No, sir. 20

Q. Could he see underneath the pin from a point outside of the cars? A. Yes, sir.

Q. If the car inspector wants to examine a lower part of the draw head, the under surface of the draw head, wouldn't he have to get down underneath the drawhead? A. He would have to look under the drawhead.

Q. Yes, and it would be necessary for his eye to see the undersurface of the drawhead, wouldn't it? A. Yes. 30

Q. And wouldn't it be necessary for him to get in between the cars in order to do that? A. Yes, sir.

Q. If he wanted to look at the parts, certain parts on the frame of the car, wouldn't it be necessary for him to get underneath to look at those?

James Coffey, for Petitioner, Cross.

In other words, doesn't the car inspector get around everywhere around the car? A. Yes, he does.

10 Q. Sometimes he has to climb in under the cars, I am not referring now to this particular case, but the car inspector's job is to climb in around and under the cars and look at all the working parts, isn't it? A. That isn't regular, occasionally it is necessary for the inspector to get under the car.

Q. That is in line with his duties? A. That is in line with his duties, when it is necessary.

Q. And it is in line with his duties to walk between two cars, if it is necessary to make an inspection? A. Yes, sir.

20 Q. Do you know what Stanley Hart was doing around these particular cars on this particular day? A. No, sir.

Q. Have you any records showing anything about the inspection or repair of these particular cars on this particular track in your office? A. No, sir.

Q. Don't you keep records of the inspection and repairs of the cars? A. Yes, sir.

30 Q. Have you got a record of the report on car 346? A. I have not.

Q. Well, has anybody in your office? A. I haven't, there is no record in my office covering the repair of that car, if any was made.

Mr. Finnerty: That's all.

Cross examination by Mr. Smith.

40 Q. When you call a car a crippled car on track two, that is a car which is what you call momen-

James Coffey, for Petitioner, Cross.

tary repairs, isn't it? A. Yes, it is a defect requiring what we call running repairs.

Q. What you call running repairs? A. Yes.

Q. So when you say a crippled car isn't available for use in the train you mean it is not available until that running repair is made? A. That's right. 10

Q. The running repair is what you call a momentary repair, isn't it? A. Yes, light repairs.

Q. And track two is the track on which running cars as you call them are placed, cars in active service? A. Yes, sir.

Q. Is it necessary if a man wants to look at a knuckle of a car to get down under the car? A. Not to look at a knuckle.

Q. Can he look at a knuckle from the outside of the track or does he have to go between the cars? A. To make an examination of a knuckle it would be necessary for him to go between. 20

Q. He doesn't go between the knuckles themselves, does he? The couplings themselves, or do you mean between the ends of the cars? A. Yes, between the ends of the cars.

Q. He has to go between the ends of the cars? A. Yes, sir.

Q. Did Mr. Hart, as inspector, require specific instructions every day or was he what is known as a freelance? A. He didn't require specific instructions every day, he was assigned to a territory that he was working in and his duties were to inspect all the cars in that territory. 30

Q. That included this yard D. A. Yes, sir.

Q. And yard D, as you say, is the yard where baggage cars are kept in active service? A. Yes, sir.

Mr. Smith: That's all. 40

*James Coffey, for Petitioner, Redirect.**Redirect examination by Mr. Finnerty.*

Q. And if he saw any cars that needed repair he would make those repairs? A. If they were light running repairs.

10 Q. And perhaps some of these cars on track two were cars that might require light running repairs? A. Yes, sir.

Q. In other words, these cars were put upon track two for the purpose of waiting to be called into service and for the purpose of being inspected so that they would be repaired, if necessary, isn't that so? A. Yes, sir.

20 Q. Now, Mr. Coffey, when you speak of running repairs, you don't mean that these cars or any one of these cars are taken out momentarily from the train for the purpose of having repairs made and then put back into that running train, do you, for instance, you don't speak of running repairs in a train that would come in from Cranford—withdraw the question.

Q. When you speak of running repairs you mean that these cars were available for a call, in other words, to get into a run, into a train, isn't that so? A. Yes.

30 Q. That doesn't mean they were temporarily withdrawn from a train for the purpose of being immediately put back into that same train again? A. No, sir.

Q. These cars weren't at the time they were on this track actually in service in any train, were they? A. Well, it would be my opinion they were not although I don't know.

Q. You don't know. Do you know what a train is? A. Yes, sir.

*James Coffey, for Petitioner, Recross.
Robert Denniston, for Petitioner, Direct.*

Q. What is a train? A. A train is an engine or an engine running with or without cars, displaying markers.

Q. There were no markers on any of these cars?

A. I don't know.

10

Mr. Finnerty: That's all.

Recross examination by Mr. Smith.

Q. As I understand you this yard is an active service yard, and any cars in it are available at any minute to be placed in a train which is made up in the yard? A. Yes, sir.

Q. And they are making trains all day long in this yard? A. Yes, sir.

20

The Court: Were all these cars empty?

The Court: Were all these cars empty?

Mr. Finnerty: That's all.

Mr. Smith: That's all.

ROBERT DENNISTON, a witness on behalf of the petitioner, sworn.

30

Direct examination by Mr. Finnerty.

Q. What is your address, Mr. Denniston? A. 320 Forrest Street.

Q. Where? A. Jersey City.

Q. Mr. Denniston, you are assistant to Mr. Coffey who was just on the stand? A. Yes, sir.

Q. Stanley Hart, the decedent worked und you, didn't he? A. Yes, sir.

Q. What was his job? A. Car inspector.

40

Robert Denniston, for Petitioner, Direct.

Q. Working inspecting cars he had to do what?

A. Slight repairs.

Q. What time did he go to work on this particular day, do you know, what was that shift, he was injured around 11:30 in the morning. A.

10 Eight o'clock he goes to work.

Q. And he would knock off when? A. 4:30.

Q. And go to lunch when? A. Twelve o'clock.

Q. Go to work at eight o'clock did you say?

A. Yes.

Q. Lunch at twelve o'clock? A. Yes.

Mr. Smith: And through when?

A. 4:30.

20 Q. Mr. Denniston, did you go to the scene of this accident after the accident? A. No, sir.

Q. Did you give any specific instructions to the deceased on December 13th, 1927? A. No, sir.

Q. Have you any record, did you keep a record of the crippled cars? A. I do, some of them.

Q. Have you any record of a crippled car 346 or any of the other cars on that track? A. No, sir.

Q. You haven't any record in your office with regard to any other cars on track two on December 13th? A. No, sir.

30 Q. You haven't a record of 346 being a crippled car? A. No.

Q. As far as you know you don't know whether 346 was crippled or not? A. No.

Q. They might have been crippled cars also? A. I don't know, I haven't any record of any.

Q. I say as far as you know there is no record of any of those cars being crippled cars? A. No.

Q. They might have all been crippled cars as far as your records in your office show? A. Yes.

40 Q. Mr. Hart's duties as car inspector mean he

Robert Denniston, for Petitioner, Cross.

had to inspect these cars on track two, didn't he?

A. Yes.

Q. That track was known as the crippled car track, wasn't it? A. No, sir.

Q. No? A. Number two track?

Q. Yes. A. No.

Q. Well, crippled cars were run on that track however? A. Sometimes, they may be drawn on there and may be crippled on there. 10

Q. And the car inspector would inspect the cars on each track? A. Yes, sir.

Q. Have you any record or records in your office showing whether any inspection or reports were made of any of the cars on that track? A. No.

Q. You have nothing to do with the movement of cars, have you? A. No, sir. 20

Q. Just inspection and repair A. That's all.

Mr. Finnerty: That's all.

Cross examination by Mr. Smith.

Q. All the tracks in yard D is where Mr. Hart was required to inspect the cars on? A. Yes, sir.

Q. And all baggage cars were on these tracks in yard D? A. Yes, sir. 30

Mr. Smith: That's all.

*William L. Westervelt, for Petitioner, Recalled,
Direct.*

WILLIAM L. WESTERVELT, recalled as a witness
for the petitioner.

Direct examination by Mr. Finnerty.

10 Q. What is your address, Mr. Westervelt? A.
Post Office address?

Q. Yes, your home address? A. Greenbrook
Road, Middlesex Borough, New Jersey.

The Court: What is your position?

A. Chief per diem clerk.

Q. Mr. Westervelt, have you the records of the
movements of the cars on track No. 2? A. No,
sir.

20 Q. Do you know who has the records of the
movements of those cars, if any? A. No, sir.

Q. You have certain records with you? A.
Yes, sir.

Q. What records have you? A. The records
into Jersey City and out of Jersey City.

Q. You mean the records of cars that were on
this track number two at this time? A. Well,
they are records of cars I presume were on that
track.

30 Q. Do you have the numbers that morning? A.
No, sir, I do not.

The Court: You mean you have records of
the cars coming into and out of New Jersey?

A. Yes.

Q. Have you a record of car 1887? A. 1887,
yes.

40 Q. You have a record of what? A. Moving from
B&O into Jersey City on December 12th.

*William L. Westervelt, for Petitioner, Recalled,
Direct.*

Q. On December 12th, and you have the record of all the other cars on track two? A. I presume that is what they are, yes, sir.

Q. Who makes up these records? A. The conductors of the trains.

Q. The conductor of the inbound trains to Jersey City makes up the report of what? A. Of all the cars of his train.

Q. Of all the cars of his train? A. Yes, sir.

Q. And he sent that to whom, he sends that record to whom? A. The record eventually gets to the superintendent of car service, I don't know who he sends it to previous to that.

Q. Well, we will confine ourselves to the baggage cars. The baggage cars are only used in connection with passenger service, aren't they? A. That is my understanding, yes, sir.

Q. And the conductors on the passenger trains, when they arrive at Jersey City Terminal make out a report of the cars by number that were in their train? A. Yes, sir.

Q. And then after they arrive at Jersey City the train is broken up, isn't it? A. I can't answer that.

Q. What record does your office have, that is, the record from the conductors of cars that come into Jersey City Terminal? A. Yes, sir.

Q. In other words, the conductor reports that he has just come in on train number so and so, is that right? A. No, he makes up a regular form, showing the numbers of the cars in the train.

Q. He makes up a regular form showing the numbers of the cars in the train and the number

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Charles F. McCann, for Petitioner, Direct.

of his train? A. Yes, sir, the number of his train.

Q. And then when that is done that report is filed in your office? A. Yes, sir.

10 Q. And when the train is made up in the yard by the conductor of the train after his train is made up then the cars which constitute and make up that train are also sent into your office? A. Not until after the train is moved out.

Q. And when the train is moved out, having been made up by the conductor of the outgoing train then the numbers of those cars is sent in a report to your office? A. Yes, sir.

20 Q. When these baggage cars come into Jersey City they may not go out again for several days, isn't that so? A. That is my understanding, yes.

Q. You simply have the records of the days that the cars come in and where they come from and the days when the cars leave and where they went to? A. Yes, sir.

Q. But as far as your records show you don't know anything more about that? A. Nothing whatever.

Mr. Finnerty: I won't offer them. That's all.

30 Mr. Smith: No questions.

CHARLES F. McCANN, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. Where do you live, Mr. McCann? A. 1041 Bond Street, Elizabeth, New Jersey.

40

Charles F. McCann, for Petitioner, Direct.

Q. What is your position with the Central Railroad? A. General passenger yard master.

Q. How long have you been with the road? A. Twenty-three years.

Q. You are familiar with railroading? A. Yes, sir.

Q. What other position have you held besides general yard master? A. Brakeman, station master. 10

Q. When the trains come into the terminal in Jersey City, which trains include in their makeup baggage cars, the conductor of that train makes a report, does he not, of the cars that make up his train? A. I don't know anything about what the conductor makes up, I have nothing to do with the conductors of the train. 20

Q. You don't know anything about that? A. No.

Q. And you are twenty-three years with the road? A. Yes, sir, you are talking about the road conductor now.

Q. I will ask you the question, sir. A. All right.

Q. When the train arrives at the terminal in Jersey City including in its makeup a baggage car or baggage cars, that train is then broken up, is it not? A. It backs into the yard and is then broken up. 30

Q. Eventually it is broken up? A. Yes.

Q. And the passenger cars are put off on certain tracks and the baggage cars on certain tracks? A. Not necessarily, no, sir.

Q. But sometimes? A. Yes, sir.

Q. And the yard master who is on duty at that time is in charge of the movement of the cars in the yard at that time? A. Absolutely. 40

Charles F. McCann, for Petitioner, Direct.

Q. And you are yard master? A. Yes.

Q. And isn't there also a yard master, John A. Enright? And Mr. Frank McEvoy? A. Yes, sir.

10 Q. And from the time that the train arrives in the terminal until it goes out of the terminal again, during that time the cars when moved around the yard are moved under the direction and orders of the yard master? A. In charge of the particular yards.

Q. At that time? A. Of the particular yard, yes.

Q. How many yards are down at the Central Terminal? A. There are one, two, three, four, five yards.

20 Q. Then you are familiar with the duties of the yard masters? A. Yes, sir.

Q. Have you any record showing the movements of the cars which were upon track two on December 13th, 1927, showing the movement of track two and the movement to track two and the movement from track two? A. No, only what the yard check showed in the morning, the condition of track two in the morning.

30 The Court: Is that the yard check?
(Indicating Exhibit P-1.)

A. That is it, a copy of the yard check, yes, sir.

Q. In other words this yard check is made up by a checker? A. Yes, sir.

Q. He reports the numbers of the different cars upon the different tracks? A. Exactly, as he finds them.

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Charles F. McCann, for Petitioner, Direct.

Q. Now, Mr. McCann, if a train is to be made up we will say to go to Cranford, New Jersey, or Easton, Pennsylvania, or any point along the Central line, that train is made up by the conductor, is it not? A. Yes, sir.

Q. And he is the one who originally and in the first instance gives the orders for the making up of any train leaving Jersey City? A. In the first place the change of every time table, there is a schedule drawn showing the consist of each and every train. 10

Q. All right, if any one of the trains are, or take any trains, and from the time—who is it who orders the make up, in other words, who is that originally orders the train to be made up? A. That is what I was trying to give you, the consist comes out with the change time table and when the change is made is to either take away or add to, that is done by the train masters themselves. 20

Q. That is in regards to the number of cars in a train? A. Exactly.

Q. The ordinary consist consists of a list of trains by number and what they consist of? A. Exactly.

Q. In other words, a train that will run from Jersey City to Point Pleasant on the Central, train No. 536 say, which leaves at 5:30 in the evening, during the running of the schedule, will be made up of a baggage car and six day coaches and will continue to be made up of a baggage car and six day coaches until further orders, isn't that what you mean? A. Exactly. 30

Q. And the orders to make up the train come to the yard master, do they not? A. Yes, sir.

Charles F. McCann, for Petitioner, Direct.

Q. And the man who actually gets together and makes up the train is the conductor, isn't that so? A. From the instruction of the yard master, yes, sir.

10 Q. Just answer the question, isn't it the conductor who makes up? A. Eventually, yes.

Q. And the conductor takes his instructions or orders to make up the train from the yard master? A. Yes, sir.

Q. And when the conductor gets the order from the yard master to make up a train the conductor makes up the train according to those instructions? A. Yes, sir.

20 Q. And those instructions to the conductor are to make up a train of a certain kind, is that not so, in other words make up a train consisting of four day coaches and a sixty foot baggage car? A. If that was the order, yes.

Q. Yes, well, we will just select that one, or make up a train consisting of two baggage cars, six day coaches and three Pullman? A. Yes, sir.

30 Q. Or whatever it may be, and when the conductor gets those orders from the yard master he is the one who makes up the train, in other words, he selects and picks out the cars that he wants to put into that train, isn't that so? A. Yes, unless it is a special train, then you will pick out the special cars to go on it.

Q. The yard master in certain instances is instructed for a special train? A. Yes, sir.

Q. And when he gives instruction for special trains he designates what cars he wants put into them? A. Yes, whether they are parlor cars or private cars.

40 Q. Does he designate the numbers of the pri-

Charles F. McCann, for Petitioner, Direct.

vate cars or the numbers of the parlor cars or leave that to the selection of the conductor? A. All depends on what the order calls for.

Q. Have you any record there was any special order given to the conductor to make up any special train from any of the cars on track two on December 13th? A. No, sir. 10

Q. As far as you know there are no special orders? A. No, sir.

Q. As far as you know one of the cars upon track two were used to make up trains, which cars were selected as desired by the conductors who made up those trains, isn't that so? A. It all depends on what kind of cars he wanted, what cars he was making up.

Mr. Finnerty: Repeat the question, please. 20

(Question repeated by the reporter.)

A. As far as I know all the cars on track No. 2 were serviceable cars.

Q. And they were pulled out by the conductors as the conductors desired? A. As they needed them, yes.

Q. You have nothing to do with regard to the inspection of the cars, have you? A. Absolutely nothing. 30

Q. You don't know whether the cars needed inspection or not? A. I do not.

Q. You don't know whether the cars needed repairs or not? A. I do not, that is not in my line.

Q. That is not your duty? A. No, sir.

Mr. Finnerty: That's all.

Chas. F. McCann, for Petitioner, Cross, Redirect.

Cross examination by Mr. Spitz.

Q. Do you know what time this accident occurred? A. I think, I wouldn't be positive, but I think it was around between 11:15 and 11:45, somewhere in that vicinity, I couldn't say actually.

10

Q. Do you know whether or not at that time they were making up any train right there that required cars from track two? A. At that time of the day the men handled the baggage cars were pretty active down there, he has to assemble his local cars, and he has to assemble his B. & O. cars, and those are all serviceable tracks there and all serviceable cars.

20

Q. What time does the B. & O. 5:13 go out? A. B. & O. 5:13 must be made up for inspection not later than 12:30 and placed on the track not later than 1:30 o'clock at the very latest.

Q. That contained just baggage cars? A. That contained just baggage cars, that's all; it is an express operation.

Mr. Smith: That's all.

Redirect examination by Mr. Finnerty.

30

Q. This express operation 5:13, is that a regular train or is that a special? A. It is a regular special train.

Q. And we will take B. & O. 5:13, that is a Baltimore and Ohio train No. 313? A. 513.

Q. That was to be made up? A. That is made up, assembled every day except Sundays.

Q. And at the time that this accident happened—what time did that train leave? A. What time did the train leave?

40

Charles F. McCann, for Petitioner, Redirect.

Q. Yes. A. Midnight.

Q. What time did 513 leave? A. A. 513 leaves anywhere between 10:45 and midnight.

Q. Is it not a regular run train? A. Yes.

Q. What is her regular time for leaving? A. She is due out at 10:45 but if the freight is late arriving from New York the train is held, but it has got to be out by midnight, or run extra. 10

Q. What time would that train have to be made up? A. It is spotted at the platform about half past one.

Q. That means it would have to be at the platform about one-thirty? A. Yes.

Q. The conductor would make up that train, wouldn't he? A. Yes.

Q. Made it up every day? A. Yes, sir. 20

Q. It ran on the B. & O.? A. Yes, sir.

Q. Was practically the same every day? A. It was practically the same every day.

Q. Consisting of the same make-up every day? A. Well, there may be a slight variation.

Q. For instance, every holiday, every Labor day they might put on a couple of extra cars? A. They would cut one, and the next day double the train up.

Q. And when the conductor would make that up he would go into the yard and collect the cars necessary to make it up? A. Oh, yes, there are regularly assigned cars to that train. 30

Q. There were? A. There are.

Q. In other words there are certain kinds of cars assigned to that? A. Yes, sir.

Q. They are certain kinds of cars, baggage cars and certain kinds of day coaches? A. No day coaches, no, sir, all baggage cars. 40

Charles F. McCann, for Petitioner, Redirect.

Q. Do you know what the contents of that car was? A. The contents of what car?

Q. Of this 513? A. That is a train.

Q. I mean the train, do you know what that train consisted of? A. Consisted of about twenty-

10 two cars.

Q. Twenty-two baggage cars? A. Yes, sir.

Q. And they left every day? A. Every night except Sundays and holidays.

Q. Where does that train go to? A. Where does she go to?

Q. Yes. A. She goes on the B. & O.

Q. To where? A. I don't know what her final destination is, she has cars for all over the B. & O.

20 Q. Well, the train 513, where does that run to? A. It runs, of course, as far as Philadelphia and then the B. & O. takes her at Philadelphia and I don't know where her final destination is, I suppose Chicago.

Q. These twenty odd cars that leave on this B. & O. train every day may be off for weeks before they come back to the Jersey City yard again?

A. They gradually return every three days,

30 Q. They may be gone, however, for longer times than that? A. Yes, sir.

Q. The baggage cars are sometimes put on the side tracks and into the yard awaiting the removal of the baggage? A. Yes, sir.

Q. Do you know whether there was any baggage in those particular cars on this particular day? A. I couldn't say that.

Q. They were empty? A. As far as I know they were empty cars.

Charles F. McCann, for Petitioner, Redirect.

Q. When this car 513 is made up by the conductor he selects any of the baggage cars that are necessary to make up this train, does he not?

A. Yes, sir.

Q. He selects twenty baggage cars if twenty cars are needed? A. Yes, sir.

Q. He selects any twenty? A. Twenty B. & O.

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Q. If they happen to be on track two he will take them off track two? A. Yes.

Q. If there happens to be any cars on another track he will take them off another track? A. Yes.

Q. He will take the cars which are the easiest to get at also, won't he? A. That all depends if they are the ones he wants, if not, he has to drill them out.

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Q. Taking the cars on track two, if the conductor making up the car 513 needs one extra baggage car and there happens to be a B. & O. baggage car adjacent to the lead and the first car off the lead it will be more convenient for him to take that car off track two, adjacent to the lead than to take it off track four which is also a B. & O. baggage car, if either of those cars would be of use to him? A. If the car stood on track two would be of use to him certainly he would take it but if the car on number two was no good and number four was the car he wanted he would have to go to number four and drill the car out of number four.

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Q. But if the car on number two was O. K. for use naturally he would take that? A. Absolutely.

Q. In other words he had the selection of any

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John Enright, for Petitioner, Direct.

of the baggage cars that were on track two? A. Yes, sir.

Mr. Finnerty: That's all.

Mr. Smith: No questions.

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JOHN ENRIGHT, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. Mr. Enright, have you any records of the orders issued by or through you for the placing of cars upon track two? A. No, sir.

Q. On this particular day? A. No, sir.

20 Q. Have you any record showing the movement of cars off track two? A. No, sir.

Q. You are what, Mr. Enright? A. Assistant general yard master.

Q. What is your address? A. 142 Jackson Avenue, Newark, New Jersey.

Q. Mr. Enright, you heard the last witness testify? A. Yes, sir.

Q. The orders are given by you to the conductor to make up the trains? A. Yes, sir.

30 Q. And the conductors go out and select the cars that they desire for the make up of their trains? A. Yes, sir.

Q. And the cars of track two could have been used by the conductors to make up the train? A. Yes, sir.

Q. They also could have been there for the purpose of repair, as far as you know? A. Certainly.

Q. And inspection? A. Yes, sir.

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John Enright, for Petitioner, Cross, Redirect.

Q. Those cars weren't assigned to any particular run at that time, were they? A. No, sir, they were the cars available for need.

Mr. Smith: In other words, those cars could be taken any minute?

A. They could.

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Cross examination by Mr. Smith.

Q. Track two is an active service track? A. Track two is an active service track.

Q. And the cars on that track even if marked crippled are in active service? A. Yes, sir, they would require only light repairs.

Q. There are other tracks are tracks for repair tracks, aren't there? A. Yes, there is a special track set aside for heavy repairs.

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Q. That track, Hart had nothing to do with that track? A. No.

Redirect examination by Mr. Finnerty.

Q. When you speak of running repairs you don't mean that any of these cars may have been undergoing repairs as a part of a train which was then in use, do you? A. No, sir.

Q. In other words, when you speak of running repairs you speak of running repairs in the sense that the cars could be run and could be put into trains, is that what you mean, and the repairs might have been made to them while on that track and then put into a run? A. They could have been repaired on that track if they were light running repairs, as far as I know, I don't know much about that end of it.

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Q. But as far as you know none of the cars

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Frank A. McEvoy, for Petitioner, Direct.

on that track were temporarily taken out of the train for the purpose of making running repairs and put back into a train that was actually in operation? A. I couldn't tell you.

10 Q. That isn't what you mean when you say running repairs? A. I don't know anything about that end of it, that isn't my business.

Q. Mr. Smith asked you if running repairs weren't that type. A. Running repairs are repairs can be made without putting the car on the crippled track.

Q. But you don't mean it is repairing of a car that is actually in transit somewhere? A. They have repair cars right in transit, ready to move.

20 Q. Certainly, a car may be taken out of a train for the purpose of making a temporary repair to some part of it, for instance, a coupling or some other part, and put back into the train again. A. That could be done.

Q. That could be done, but that was not done in any of the cars upon this track? A. No, not on this track.

Q. That is what these cars were on this track for, as far as you know? A. No, that isn't the repair track, it is the active track.

30 Mr. Finnerty: That's all.

FRANK A. McEVOY, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Finnerty.

Q. Where do you live? A. 285 Clifton Avenue, Newark.

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Frank A. McEvoy, for Petitioner, Direct.

Q. Mr. McEvoy, did you know the decedent, Stanley Hart? A. No, sir.

Q. You are familiar with railroading? A. Yes, sir.

Q. Do you know the duties of the car inspectors? A. Slightly.

Q. What jobs have you held with the company? 10

A. Yard master, brakeman, conductor.

Q. You are a practical railroader? A. Yes, sir.

Q. You now have the position of what? A. Assistant general yard master.

Q. And under you comes the movement of certain cars? A. Yes, sir.

Q. I mean the movement of the cars? A. Yes, sir. 20

Q. You heard the other witnesses testify? A. Yes, sir.

Q. Have you any record of the movements of any of these cars? A. No, sir.

Q. Either in or out? A. In or out.

Q. As far as you know the cars that were upon that track were used, that is, were taken out by conductors and put into trains as the conductors needed those cars? A. Yes, sir.

Q. As far as you know they might have needed repairs and might not? A. Yes, sir. 30

Q. And as far as you know Stanley Hart, the car inspector, had among his duties the job of inspecting these cars? A. Yes, sir.

Q. Well, you don't know about that, do you? A. If he was a car inspector it was his duty.

Q. If he was a car inspector then his duties would take in the care and repair of those cars?

A. Yes, sir. 40

Motion for Dismissal of Petition.

By Mr. Smith:

Q. When you say these cars do you mean the cars on this track or the cars in the yard? A. Any cars he was assigned to inspect.

10 Q. Well, on track three they had baggage cars, if his duties were to inspect baggage cars he would inspect all the cars on that track, wouldn't he? A. Yes, sir, if he was assigned to yard D to inspect it, everything in yard D, irrespective of whether they were coaches, baggage cars or what they were.

Q. How many tracks were there in yard D? A. Five.

Mr. Smith: That's all.

20 Mr. Finnerty: And you know that his duties as inspector might take him in and around and under any car?

A. Yes, sir.

Mr. Finnerty: That's all, that's our case, your Honor.

30 Mr. Smith: Now, if the Court please, I move for a dismissal of the petition on the ground that it was the duty of the petitioner to affirmatively prove in the first instance before you that the decedent was not engaged in interstate commerce. Your Honor will find that in the case of *Linx* against the Erie Railroad, 91 New Jersey Law, where the Court says this (reading citation): That case was followed by the case of *Carberry vs. D. L. & W. Railroad*, 93 N. J. L., and the case of *Jayson vs. Pennsylvania Railroad*. In this case, therefore, the presumption is that this

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Motion for Dismissal of Petition.

man was engaged in interstate commerce. The fact is that he must prove before you that he has a case coming under the Workmen's Compensation Act and you cannot presume the man was engaged in intra service. He must prove that he was. In this case there is no such proof, the only proof we find in the case is by this young man, I have forgotten his name, who saw this man at the time, he said he walked west and he saw the decedent walking east, that he had on his shoulder (the walker, not the deceased), a pipe that hit the cars every once in a while and he would turn and look and suddenly as he turned this way, just before he turned he saw the man walking to him and when he turned to see what his pipe had struck and then turned back the man had disappeared. He said there had been a movement of the cars which he did not see. That that was instantaneous. There wasn't any proof that this man was working at anything, he was walking down inspecting and his duties required him to inspect interstate cars. As a matter of fact the cars he inspected were B. & O. cars, Philadelphia and Reading cars and Central cars, there is not any proof that he was working in intrastate service and the rule is that if the man is working at work which is both interstate and intrastate then he comes under the interstate rule and not the intrastate rule, so I say in this case the petitioner has not made out a case before you which shows that the deceased at the time of his accident was engaged in intra service, that is intrastate service. Under such conditions it would

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Motion for Dismissal of Petition.

be presumed that he was working in interstate service and the petition should be dismissed.

(Discussion between counsel.)

The Court: I will deny your motion.

Mr. Smith: We will rest the case.

10 The Court: Do you submit the case?
(Both sides submit.)

The Court: I have carefully listened to the testimony presented in this case and I think there is no doubt in anyone's mind that the petitioner suffered an accident arising out of and in the course of his employment. The chief question at issue is whether the petitioner was in the course of interstate or intrastate commerce and whether I have jurisdiction in this case. I have heard several cases similar to this case and it is my opinion, and I have not yet been shown that I am wrong, I may be some day, that where the instrumentality such as a car used in railroad work, is out of service as it appears from the testimony in this case that these cars were out of service, and available to what service we do not know, they are intrastate commerce. I recently, not very recently either, heard a case in Phillipsbrug, the case of Berry vs. Central Railroad, that was a case in which the engine had been doing duty there either way but at the time of the accident the engine was out taking water and I held that case that it was intrastate commerce. Therefore, I find in this case that the decedent was in the course of intrastate commerce and he suffered an accident arising out of and in the course of his employment and therefore the petitioner, his widow, and children, have the right to compensation in accordance with the Compensation Act

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Motion for Dismissal of Petition.

and I do find and determine that compensation on the basis of 55 per cent of the wages of the decedent, which were stipulated, I believe as \$38.64, for three hundred weeks, as to the wife, the compensation then will continue on the basis of 50 per cent until the oldest child, Jennie, aged seven years, October 2nd, 1928, arrives at the age of sixteen. It will then continue at the rate of 45 per cent of the wages until Sophia, aged 5, July 18, 1928, arrives at the age of 16. Then it will continue at 40 per cent until Henry, aged 3, March 23rd, 1928, arrives at the age of sixteen. Then 35 per cent until John, aged 1, March 6th, 1928, arrives at the age of sixteen. The law, of course, states that the maximum compensation rate is \$17.00, therefore, if this percentage appears to be more than \$17.00 it will be \$17.00

(Discussion as to counsel fee.)

The Court: On the question of counsel fee I will leave you to the Board and will fix a date for hearing at this time of November 19th, at 9 Franklin Street, Newark, at 10:15 A. M.

(This matter was subsequently brought before the Board for hearing on application for counsel fee and Mr. Finnerty was allowed a counsel fee of \$500.00, one-half to be paid by each side.)

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Certification of Transcript of Testimony.

I hereby certify that the foregoing is a true and accurate transcript of the testimony taken in the above entitled matter by me stenographically at the time, place and date hereinbefore set forth.

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WILLIAM C. O'BRIEN,
Court Reporter.

I hereby certify that the foregoing is a true and accurate transcript of testimony in the above entitled matter as taken stenographically before me at the time, place and date hereinbefore set forth.

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CHARLES E. CORBIN,
Deputy Compensation Commissioner.

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Reasons.

NEW JERSEY SUPREME COURT

<p style="text-align: center;">STELLA HART, Petitioner and Defendant in Certiorari,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent and Prosecutor in Certiorari.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">ON CERTIORARI TO HUDSON COMMON PLEAS.</p>
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The prosecutor assigns the following reasons for the setting aside of the conclusions, order and judgment of the Court of Common Pleas of Hudson County, and the other proceedings in the said Court, brought up by writ of certiorari in the above entitled cause: 20

1. Because the Court of Common Pleas of Hudson County found that the petitioner was entitled to compensation under the terms and provisions of the act of the Legislature entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability, and compensation thereunder," approved April 4, 1911, together with the amendments thereof and the supplements thereto, commonly known as the New Jersey Workmen's Compensation Act. 30

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Reasons.

2. Because said Court held that the matters before it were subject to, and governed by, the provisions of the New Jersey Workmen's Compensation Act.
- 10 3. Because said Court should have found that the provisions of the New Jersey Workmen's Compensation Act did not apply and that the case was subject to, and exclusively governed by, the provisions of the Act of Congress of April 2, 1908, commonly known as the Employers' Liability Act.
4. Because said Court found that petitioner's decedent at the time of the accident from which he sustained his injuries, was engaged in intrastate commerce.
- 20 5. Because said Court should have found that petitioner's decedent, at the time of said accident, was engaged in interstate commerce.
6. Because said Court should have found that petitioner's decedent was not entitled to any compensation under the provisions of the New Jersey Workmen's Compensation Act.
- 30 7. Because said Court should have held that petitioner's sole remedy, if any, was under the provisions of the Federal Employers' Liability Act.
8. Because at the time of the accident which resulted in his injuries petitioner's decedent was not engaged in intrastate commerce.
9. Because the petitioner failed to establish that at the time of the accident resulting in the injuries to her decedent, said decedent was en-

Reasons.

gaged in wholly intrastate commerce within the State of New Jersey.

10. Because the petitioner failed to establish that at the time of the accident resulting in her decedent's death, decedent was engaged in a service which was not regulated by the provisions of the Federal Employers' Liability Act. 10

11. Because the Court of Common Pleas of Hudson County should have found that petitioner's decedent, at the time of the accident resulting in his injuries, was engaged in interstate commerce and that his sole remedy, if any, was under and by virtue of the provisions of the Federal Employers' Liability Act.

12. Because said Court should have found that at the time of said accident petitioner's decedent was engaged in interstate commerce; that, by reason thereof, the terms and provisions of the New Jersey Workmen's Compensation Act did not apply and that petitioner was not entitled to compensation thereunder. 20

13. Because said Court of Common Pleas affirmed the judgment directed entered by the Workmen's Compensation Bureau of New Jersey, allowing petitioner's petition for compensation under the provisions of the New Jersey Workmen's Compensation Act. 30

14. Because said Court should have held that petitioner failed to affirmatively prove that her decedent was engaged in work not governed by the provisions of the Federal Employers' Liability Act.

Reasons.

15. Because the conclusions, finding and determination of facts by said Court of Common Pleas of Hudson County and the entry of judgment thereon are in divers other respects unjust, illegal, erroneous and contrary to law.

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WM. A. BARKALOW,
Attorney for Prosecutor.

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New Jersey Court of Errors and Appeals

STELLA HART,
Petitioner-Appellee,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Respondent-Appellant.

BRIEF OF PETITIONER-APPELLEE.**Statement.**

Petitioner-appellee, Stella Hart, was awarded compensation by the Workmen's Compensation Bureau of the State of New Jersey for the death of her husband, Stanley Hart, a car inspector employed by the Central Railroad Company of New Jersey. The railroad company appealed the award to the Hudson County Court of Common Pleas, which Court by its judgment, duly entered, affirmed the award of the Workmen's Compensation Bureau. Thereupon the appellant procured a writ of certiorari from the Supreme Court directed to the Hudson County Court of Common Pleas to review the judgment of that Court in affirming the award. The Supreme Court affirmed the judgment of the Hudson County Court of Common Pleas, from which judgment the appellant now appeals to this Court.

Facts.

The Central Railroad Company of New Jersey is a company doing railroad business (Case, p.

17, line 35). It operated a passenger yard in Jersey City, New Jersey (Case, p. 18, line 28). Decedent, Stanley Hart, was in the employ of appellant as car inspector (Case, p. 18, line 18). He had been employed by appellant for six years (Case, p. 38, line 22). He went to work about 8:00 A. M. (Case, p. 102, line 9). He knocked off for lunch around noontime (Case, p. 62, line 26). On December 13, 1927, decedent was last seen alive a short time before lunch time (Case, p. 62, line 25), by Joseph Coughlin, a fellow worker (Case, p. 48, line 21). Coughlin saw him about a minute before he was killed (Case, p. 48, line 23). Coughlin was walking between tracks two and three in Yard D (Case, p. 51, line 30). Stanley Hart was walking toward Coughlin (Case, p. 50, line 10). Coughlin looked back over his shoulder once in a while as he walked toward Hart (Case, p. 76, line 38). While looking back on one of these occasions, Mr. Hart disappeared from Coughlin's view (Case, p. 77, line 1). There was a space of four or five feet between two cars on track two (Case, p. 77, line 10). This space was between two baggage cars of the Central Railroad Company (Case, p. 53, line 28). Coughlin last saw Stanley Hart near this space between these cars (Case, p. 53, line 40). Coughlin saw Hart walking along the side of the space (Case, p. 63, line 28). The cars on track two moved while Coughlin looked over his shoulder (Case, p. 53, line 36). When Coughlin arrived at the space between these two cars, there was no space when he got there (Case, p. 64, line 12). The reason that there was no space between these cars was that there had been a car movement and the cars had already coupled (Case, p. 64, line 25). After the cars moved, Coughlin found the body of Stanley Hart about seven feet west of the space (Case, p. 55, line 38). Coughlin found Hart's body on track two (Case,

p. 51, line 35). He found the body about seven feet west of the four foot opening between the two baggage cars (Case, p. 56, line 1), between the rails of track two (Case, p. 51, line 13). Coughlin was the first one to reach Hart's body (Case, p. 51, line 15). Coughlin dragged the body from underneath the car (Case, p. 51, line 23). All of the cars upon track two were baggage cars (Case, p. 72, line 35). These baggage cars belonged to three railroads, the Baltimore & Ohio Railroad, Reading Company, and Central Railroad Company of New Jersey (Case, p. 73, line 3). Hart in his duties as car inspector had to look to all of the working parts of the cars (Case, p. 96, line 40). It was in line with his duties to work between cars while making an inspection (Case, p. 97, line 35; also p. 98, line 17). Hart had the usual tools of a car inspector in his hands at the time that Coughlin last saw him (Case, p. 49, line 37; also p. 50, line 1). Chester Marketta, a switchman (Case, p. 88, line 28), took the records of the cars on track two on the morning of December 13, 1927 (Case, p. 83, line 8). It was his duty to make out a route report every morning (Case, p. 83, line 33). The route report of cars on track two on the morning of December 13, 1927, was offered in evidence by the petitioner-appellee (Case, p. 85, line 18). This report showed that there were seventeen cars on track two that morning (Case, p. 83, line 12). There were twelve B. & O. cars, four Central Railroad Company of New Jersey cars and one P. & R. car (Case, p. 83, lines 22 to 31). This report introduced in evidence showed that one of the cars listed on said report had an "X" mark placed after it on said report (Case, p. 85, line 26). This "X" mark on said report designated that said car was a crippled car (Case, p. 85, line 27). Marketta testified that he so designated a car in his route

report because the word "crippled" was written on the car. These 17 cars on track two at the time were not in an actual train (Case, p. 94, line 22). If Stanley Hart, while inspecting the cars upon said track two, found that they were in need of repair, he could mark them crippled while they were on said track two (Case, p. 96, line 27). It was Stanley Hart's duty to inspect the cars such as the cars upon track two (Case, p. 96, line 32). All of the cars upon track two were available for service (Case, p. 91, line 1) except the car No. 346 which was crippled (Case, p. 90, line 38). When a train is to be made up, the conductor takes his instructions or orders to make up the train from the yardmaster (Case, p. 110, line 11). Unless the conductor receives orders to make up a special train, he, the conductor, selects and picks out the cars that he wants to be put into that train (Case, p. 110, line 28). There was no record that there was any special order given to a conductor to make up any special train from any of the cars on track two on December 13, 1927 (Case, p. 111, line 10). The cars were pulled out by the conductors as the conductors desired them (Case, p. 111, line 25). At the time that Stanley Hart met with his fatal injuries, none of the cars on track two were actually in service in any train (Case, p. 100, line 37). There was evidence that a B. & O. train No. 513 was to be made up not later than 1:30 P. M. (Case, p. 112, line 20). This train consisted of about twenty-two cars (Case, p. 114, line 8). The conductor making up this train selects any twenty baggage cars if they are needed (Case, p. 115, line 8). If they happened to be on track two, he took them off track two (Case, p. 115, line 12). If they happened to be on another track, he took them off another track (Case, p. 115, line 14). If any of the cars the conductor needed were on track four, he selected

the cars from track four (Case, p. 115, line 27). None of the cars on track two at the time Stanley Hart sustained his fatal injuries were in an actual train (Case, p. 94, line 22).

Comment.

The record, contrary to the allegations as set out by the appellant in its statement of facts, fails to disclose any facts as to the character of commerce in which either the Central Railroad Company of New Jersey, the appellant, or the Baltimore & Ohio Railroad Company or the Philadelphia and Reading Company engages, nor is there any proof in this case that the latter two companies were engaged in interstate transportation in New Jersey, nor is there any evidence that any of the cars in the yard had been previously engaged in an interstate service. No testimony was produced upon these points by the appellant, and the statement in its brief concerning the character of their commerce cannot therefore be considered as having been proven as facts.

The record discloses that the cars on track two were not in service at the time of the accident. It is true that the cars could be called into service at any time, but there is no proof that any of the cars were specifically assigned or made ready for departure to any particular destination or were engaged in active service in interstate commerce.

Both the Workmen's Compensation Commissioner and the Judge of the Court of Common Pleas made findings of fact with regard to the cars in the yard based upon the record. The Deputy Commissioner determined from the facts that

“the cars on this track were not in use at the time; they were placed there for two pur-

poses, first, to be inspected and repaired by decedent, if repairs were necessary, and secondly, to await being put into service as a conductor making up a train would require certain kinds of baggage cars for his train" (Case, p. 23, lines 30-36).

The Court of Common Pleas found as follows:

"I find as a fact that these cars upon track No. 2 were not specifically being made ready for departure to any particular destination" (Case, p. 30, line 33).

Appellant, however, contends that both the Commissioner and the Court of Common Pleas found that the cars were "withdrawn from service". There was no such finding and the judgment was not based upon any such determination. The appellant cannot, therefore, successfully argue that the judgment in this case was predicated upon an erroneous determination of fact.

Even though we should agree with the appellant that the cars on track two were not "withdrawn from service", we respectfully disagree with its deduction that *the cars must therefore remain in active service in interstate commerce*. As we shall point out in our brief, where there has been no proof or findings as to the kind of commerce the cars were engaged in prior to their being stored upon the tracks in question, the mere fact that the cars were not withdrawn from service does not *ipso facto* make them instrumentalities of interstate commerce.

We will respectfully urge in this brief:

(1) The evidence discloses that the cars in the yard were not at the time of the accident engaged in interstate commerce.

(2) Petitioner-appellee did show affirmatively that her decedent was not engaged in

work regulated by the Federal Employer's Liability Act, and that he was engaged in intrastate work, and therefore her recovery is controlled by the Workmen's Compensation Act.

POINT I.

The evidence discloses that the cars in the yard were not at the time of the accident engaged in interstate commerce.

The law is well settled in our state that where a car, although it has lately been used in interstate commerce, is not at the time of an accident actually engaged in interstate commerce, an employee working thereon is not said to be engaged in interstate commerce but rather in intrastate commerce.

Herzog v. Hines, 95 N. J. L. 98;

Price v. Central Railroad of N. J., 99 N. J. L. 425;

Jayson v. Penn. R. R. Co., 101 N. J. L. 159;

Bissett v. Lehigh Valley Railroad Co., 102 N. J. L. 283;

Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353;

Berry v. Central Railroad Co. of N. J., 5 Misc. 793;

Lawrie v. Atlantic City R. R. Co., 3 N. J. Misc. 267.

The appellant concedes the accuracy of this statement of law, but argues that where a car is used exclusively in interstate commerce, it always retains its interstate character whether or not it is actually in use at the moment of the accident.

But irrespective of the soundness of that proposition of law, there is nothing in this case to prove that the cars in the yard where decedent met his death were at any time engaged in interstate commerce. There is nothing in the record, either by way of testimony or by way of exhibits introduced in evidence, which supports such a contention.

At the hearing before the Commissioner, the petitioner alone put in her case. Appellant offered no proof whatsoever. The petitioner proved that the cars on track two were not in any trains; were not in use at the time; and were simply on said tracks awaiting inspection and repairs, if repairs were necessary, and awaiting to be called into use and service as the conductors making up the trains required certain cars for their trains. There was evidence that none of the cars on said track were specifically assigned or allocated to any particular train.

Witness Burnes testified that he was the chief clerk of the passenger trainmaster; that his office orders cars out along the lines to different points; that they refer to reports showing the number of cars on the tracks and if certain cars were needed, he would direct the yardmaster to have the number of empties required sent to particular points (Case, p. 90, line 12). The testimony throughout shows that the trainmaster gives his orders to the yardmaster who, in turn, gives orders to the conductors to make up their trains, and the conductors select any cars they desire for the making up of their trains (Case, p. 110). If, however, the yardmaster receives instructions for a special train, then the yardmaster will designate what cars he wants put into those trains, namely, whether they are parlor cars, private cars or baggage cars (Case, p. 110). There was no testimony in the case that any special train was required to be made up of any of the cars on track two on the

date decedent met his death, to wit, December 13, 1927.

Witness Burnes further testified as follows (Case, p. 90, line 16):

“Q. Then the trainmaster would make the selection of the different cars he desires? A. Well, he might tell him (the yardmaster) whether it was to be a sixty or a seventy foot car, then he (the yardmaster) would make the selection.”

This testimony conclusively proves that the cars on track two may be called into use through order of the trainmaster who transmits the order to the yardmaster who, in turn, gives the orders to the conductor to make up a train and the conductor could select *any cars* he desired from track two or any other track unless in case of a special train. It is therefore apparent from this testimony that the cars on track two in the yard of the appellant were at no time specifically assigned or designated to any particular train and therefore were not engaged in any interstate movement or commerce at the time of the accident; they were available to be called into service but only in the manner above described, and until the cars were actually called into service and made up as part of the interstate movement, such cars cannot be said to possess the character of interstate commerce.

The appellant raises the point that there is testimony in the case that a Baltimore & Ohio train was to be made up the day of the accident and that the cars on track two at the time of the accident may have been designated for that train and therefore acquired their character as interstate commerce cars. But the testimony on that point fails to prove any such contention.

Charles F. McCann, general passenger yardmaster, testified concerning the making up of train

No. 513, which was a Baltimore & Ohio train, and states that he selects any twenty baggage cars, if twenty are needed, irrespective of where they happen to be. His testimony is as follows (Case, p. 115):

“Q. He (referring to the conductor making up train 513, which it is admitted is a B. & O. train), selects twenty baggage cars if twenty are needed? A. Yes, sir.

Q. He selects any twenty? A. Twenty B. & O.

Q. If they happen to be on track two, he will take them off track two? A. Yes.

Q. If there happens to be any cars on another track, he will take them off another track? A. Yes.”

So also, John Enright, the yardmaster, testified as follows (Case, p. 117):

“Q. Those cars (referring to the cars on track 2) weren't assigned to any particular run at that time, were they? A. No, sir, they were the cars available for need.”

The testimony of these witnesses demonstrates that no cars on track two were specifically assigned to this train. The conductor making up train No. 513 could take cars from track two or from any other tracks and in the absence of any proof that the yardmaster did take any cars from track two for use in train No. 513, that fact cannot be assumed. The appellant had its opportunity to prove any such fact, if it really did exist, but did not do so. It cannot, therefore, be assumed as a fact that any of the cars on track two were definitely assigned to the making up of train No. 513.

Only one conclusion can be drawn from the testimony and that conclusion is similar to the findings of fact both of the Deputy Commissioner and

the Judge of the Court of Common Pleas, namely, that the cars on track two were not in use at the time of the accident; were not part of any train; were not at the time engaged in any commerce; were not specifically made ready for departure to any particular destination, nor were they engaged in interstate commerce. But the facts do disclose that the cars were standing on the track awaiting inspection and repairs, if repairs were necessary, and awaiting selection by conductors for the making up of trains.

The Supreme Court affirmed the conclusions of the Deputy Commissioner and the Judge of the Court of Common Pleas, and conclusively answers the erroneous position appellant endeavors to sustain, namely, that the baggage cars in the yard were permanently devoted to interstate service. The Supreme Court (Case, pp. 4 and 5) holds:

“It is urged by the railroad that in this instance the major part of these cars belonged to the Baltimore & Ohio Railroad and the Reading Railroad Companies, corporations of other states, and therefore were permanently devoted to interstate service. This result by no means follows. Foreign corporations, including railroads, do business in this state and when such business is not actually interstate, it must of necessity be of a state character and its employees come within the workmen’s compensation law. Incidentally it may be stated that it does not appear by any evidence in the case that the two railroads were even engaged in interstate commerce though perhaps we can assume this to be true. It does not appear that they were not engaged in intrastate commerce. Indeed common knowledge is that they do both. Whether the cars in question or any of them should be called into one or the other of these services, was purely optional with the railroad employees. None had been so designated.

In addition it must be recognized that the present action is not against either of these foreign companies, but against the Central Railroad Company, a corporation of this state, by whom deceased was employed, and the cars in question were on its tracks. If the petitioner has shown, as we think she has, that the cars on these tracks were not in interstate operation, her rights under the compensation laws accrued and she was entitled to recover thereunder.”

The rule of law which the appellant invokes in Point II of its brief that where an instrumentality is used exclusively in interstate commerce it always retains its interstate character, whether or not it is actually in use at the moment, is sound law. We recognize this rule, *but respectfully allege that there is no evidence in this case that the cars on track two or any one of them were instrumentalities used exclusively and permanently in interstate commerce.* Interstate commerce is not to be presumed; it must be proven. A statement by counsel for the appellant in its brief that the Baltimore & Ohio Railroad and the Reading Railroad operate interstate trains over a portion of the roadbed of the Central Railroad Company is not evidence in the case. The record is barren of any such proof. There is no testimony to substantiate the appellant's contention that these cars standing in the terminal in Jersey City were instrumentalities used exclusively and permanently in interstate commerce or that they retained their character while lying idle in the yard of the Central Railroad Company.

The case cited by appellant of *Johnson v. Southern Pacific Co.*, 196 U. S. 1, is clearly distinguishable from the facts in the case *sub judice*. The dining car in that case was admittedly a dining car which had just been dropped off from an interstate train; in our case there is no evidence as

to what commerce the cars on track two were last used in. Again, in the *Johnson* case the dining car was dropped off from an eastbound interstate train because the train was late and the diner was to await the approach of the westbound interstate train and be picked up by that westbound train. It was while the diner was being turned around so that it could be coupled up to the westbound train that the plaintiff in that case was injured. But the diner was actually allocated to a particular interstate train and was actually engaged in interstate commerce at the time of the accident, although it was not actually coupled to the westbound interstate train.

That situation differs materially from the facts in the case *sub judice* in that no car on track two was actually waiting to be coupled to or put into any particular interstate train; in that no car on track two was actually allocated to any particular interstate train; and in that no car on track two was actually in use at the time. The *Johnson* case, therefore, has no relevancy to the facts at issue in this case.

Counsel for appellant also quotes Roberts' "Federal Liability of Carriers" and that author's discussion of the case of *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 Law Ed. 358.

Our Chief Justice in the case of *Herzog v. Hines*, 95 Law 98, at page 100, discusses the same case. Let us quote from the Chief Justice's opinion:

"In *Minneapolis, &c. Railroad Co. v. Winters*, 242 U. S. 353, the injury occurred while the plaintiff was repairing a locomotive engine. The engine had been used in interstate commerce before the accident happened, and was so used afterward. There was nothing, however, to show that it was permanently devoted to such commerce. *It was held that the facts did not present a case*

within the federal act, the court saying: 'It is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events'."

As the Chief Justice states in the *Herzog* case "there was nothing to show that it (the locomotive) was permanently devoted to interstate commerce", so also we say that there was nothing in this case to show that the cars on track two, or any one of them, were permanently devoted to interstate commerce. And we go a step further and respectfully allege that *there is absolutely nothing in this case to show what the cars upon track two were engaged in before the accident and what they were to be engaged in after the accident.* It cannot be presumed in the absence of any such proof that the cars on track two, or any one of them, were devoted exclusively and permanently to interstate commerce. But the contrary must be determined as a fact in this case, for the evidence discloses that the cars in the yard were not at the time of the accident engaged in interstate commerce.

It is argued by the appellant that the "crippled" car may have been a car temporarily withdrawn for running repairs, and that therefore such a car is not taken out of active service. But here again

the appellant overlooks the fact that there is nothing in this record to prove that only running repairs were to be made to that car. We respectfully repeat with regard to this proof that the appellant had an opportunity to present any proof it may have had to show the character or nature of the repairs which were to be made, but it failed to avail itself of any such opportunity. But we also respectfully contend in this connection that even though it did appear that a car marked "crippled" was only temporarily out of service, it would not aid the appellant, because the appellant failed to prove the character of the service of these cars before they came into the yard, and having failed to prove that they were instrumentalities devoted exclusively to interstate commerce, it cannot now be claimed that simply because they were withdrawn for temporary repairs, the baggage cars were still instrumentalities devoted in this case to interstate commerce. From the facts in this case, therefore, it cannot be contended that the decedent was engaged in a service regulated by the federal statute. The contrary has been established, to wit, that the decedent was employed in the yard where there were cars which had not been allocated to any particular service; they were not part of any trains nor assigned to any movement or particular service. We can best quote from the opinion of the Supreme Court which held as follows (Case, p. 4, lines 22-33):

"In the present case these cars were not in any actual service, nor were they in contemplation of actual service; none of them had been segregated for a service in either; none of them had been assigned to a train in contemplation of movement, though liable thereto, nor left off of a train, intending to complete later a journey already begun. We do not

understand that mere liability of a car at rest to be called into either service is therefore impliedly in interstate commerce and if not it necessarily has only an intrastate relation to the workmen."

POINT II.

Petitioner-Appellee did show affirmatively that her decedent was not engaged in work regulated by the Federal Employer's Liability Act, and that he was engaged in intrastate work, and therefore her recovery is controlled by the Workmen's Compensation Act.

There is no question but that the petitioner in seeking compensation under the New Jersey Workmen's Compensation Act must in the first instance prove her right to recover under said act. That is to say, *she must affirmatively prove that the plaintiff's decedent was engaged in service which was not regulated by federal statute.* We respectfully submit that the petitioner has fully sustained that burden. The decedent was employed by the appellant in the capacity of a car inspector. During working hours he was last seen walking in yard D where he was employed. He had the usual tools of a car inspector in his hands. He was seen a few seconds before his death walking between two tracks in yard D upon which there were cars. One of these cars was marked "crippled" in white chalk. It was in the vicinity of this crippled car that he was last seen alive. There was a space between this crippled car and another car. His fellow workman, Joseph F. Coughlin, happened to turn his head for about three seconds and when he looked again, decedent had disappeared. There was a car movement just at that time. Coughlin ran and found decedent's body

about seven feet west of this opening or space between the car. It was testified to by numerous witnesses that the duties of a car inspector were to inspect all working parts of cars and these duties took decedent to all sides of the cars, between cars and even under cars. She did not actually prove how he was killed, but that is not essential in proceedings of this nature.

Numerous decisions in our state follow the rule that where there is only proof of death and of the dangerous environment of the deceased, which furnishes presumptive or substantial testimony of the manner of death by a legal process of rational deduction based upon human experience from which reasonable inference of the statutory requirement is deductible, then the death arose out of and in the course of the employment. A conclusion by the Trial Court based upon such rational inference is tantamount to such legal proof of facts.

Manziano v. Public Service Gas Co., 92
N. J. L. 322.

The Supreme Court in that case, at page 324, states the following humane rule of law:

“The argument obviously is, and the brief so declares, that ‘the evidence must give a substantial support to the finding’. If by this be meant that there must be direct *viva voce* testimony, tending to show the manner in which the deceased met his death, and that a rational inference cannot be drawn from proved facts and circumstances, the contention runs counter to the general rules of evidence, and to the doctrine established by the adjudged cases in this jurisdiction. Circumstantial or presumptive evidence has always presented a basis for deductive reasoning in philosophy, and in every walk of life, as well as in the determination of legal questions, both civil and criminal.”

The Commissioner, the Judge of the Court of Common Pleas and the Supreme Court did, and this Court can readily draw their inference from the facts in this case that Stanley Hart, the decedent, met his death in an accident arising out of and in the course of his employment, and if the Court determines that the cars upon track two were not instrumentalities permanently and exclusively devoted to interstate commerce, then the accident did not arise out of and in the course of employment in interstate commerce. But the contrary, therefore, is true that the accident arose out of work in intrastate commerce and the widow by her proof has sustained her right to recover under the Workmen's Compensation Act.

Appellant denies that petitioner has proved the intrastate character of decedent's employment and cites the case of *Lincks v. Erie Railroad Company*, 91 N. J. L. 166, as being on all fours with the case at bar. We respectfully submit, however, that although the facts in that case are entirely distinguishable from those in the present case, the law as enunciated in the *Lincks* case is especially applicable to the case at bar. In the *Lincks* case the Court found that there was nothing in the record to show whether the engine upon which decedent had completed his work or the engine to which he was going was engaged in interstate or intrastate commerce. The Chief Justice at pages 168 and 169 lays down the following test in a determination as to whether a petitioner is entitled to recover:

“The test is whether the particular work upon which the employee was engaged at the very time of the accident was a part of the interstate commerce in which the carrier was engaged. The fundamental question to be now decided, therefore, is whether the engine upon which the decedent had just finished his

work, or that upon which he was about to commence his work, was, either of them, intended to be presently used in interstate or in intrastate commerce. If in the former, the carrier's liability is to be determined solely under the federal statute; if in the latter, then the state statute applies. As we have already pointed out, there is absolutely no testimony whatever upon this vital point. This being so, neither the judgment of the Common Pleas nor that of the Supreme Court has any foundation of fact upon which to rest. The burden was upon the petitioner in the court of first instance to prove a case within the state statute—that is, to show, affirmatively, that the plaintiff's decedent was engaged in a service which was not regulated by the federal statute, for that fact is not to be presumed in the absence of proof."

The burden which petitioner has is to show affirmatively that plaintiff's decedent was engaged in a service *which was not regulated* by the federal statute. This burden petitioner has sustained. She has proved that none of the cars on track two were engaged in interstate commerce at the time of the accident. She has proved that they had not been assigned to any interstate duty nor allocated to any interstate movement. She proved that the cars were in a yard where decedent made his inspections in order to determine which cars needed repairs. One of the cars upon track two was marked "crippled", indicating that it was out of service until repaired. These facts, therefore, establish a *prima facie* case for the petitioner that her decedent was working upon cars which did not possess any interstate character. Such evidence also affirmatively proves that the decedent was not engaged in a service regulated by the federal statute and such evidence when offered excludes the application of the Federal Act. Appellant could have overcome this affirma-

tive proof if it could have proved that the cars on track two or in any part of yard D were instrumentalities permanently and exclusively devoted to interstate commerce. This, however, they failed to do. Decedent must, therefore, be held to have been employed in intrastate commerce and his employment controlled by the provisions of the New Jersey Workmen's Compensation Act.

We respectfully submit that the judgment of the Supreme Court affirming the judgment of the Hudson County Court of Common Pleas, which in turn affirmed the award made by the Workmen's Compensation Bureau, should be affirmed.

Respectfully submitted,

CHARLES HERSHENSTEIN and
E. BURKE FINNERTY,
Of Counsel.

New Jersey Court of Errors and Appeals

<p style="text-align: center;">STELLA HART, Petitioner-Appellee,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Respondent-Appellant.</p>	}	<p>On Appeal from the Judgment of the Supreme Court</p>
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BRIEF OF RESPONDENT-APPELLANT, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Statement

This is an appeal from the judgment of the New Jersey Supreme Court affirming the judgment of the Hudson County Court of Common Pleas which, in turn, affirmed an award made by the Workmen's Compensation Bureau to the petitioner-appellee, Stella Hart, against the respondent-appellant herein, The Central Railroad Company of New Jersey.

Facts

The Central Railroad Company of New Jersey is a common carrier by railroad. It operates ferries from New York (at Liberty Street and 23rd Street) to Communipaw, at Jersey City, and from Communipaw, at Jersey City, the railroad runs to Easton, Pennsylvania, and other points outside of the State of New Jersey.

The Baltimore & Ohio Railroad Company is a common carrier by railroad, and is engaged in commerce between the States of New York, New Jersey and Pennsylvania.

The Reading Railroad Company, (sometimes called the Philadelphia & Reading Railroad Company), is a common carrier by railroad, and operates railroad trains for the transportation of passengers and freight between New York, New Jersey and Pennsylvania.

Both the Baltimore & Ohio Railroad Company and the Reading Railroad Company operate interstate trains over a portion of the road bed of the Central Railroad, especially running into and out of the terminal at Communipaw, Jersey City, from which point passengers, freight and baggage destined for New York are transported to New York by ferry or lighters.

Passengers, freight and baggage from New York, destined to points on said Baltimore & Ohio Railroad and Reading Railroad and said defendant, Central Railroad, are taken by ferry or light-erage from New York to the terminal of defendant, Central Railroad, at Communipaw, Jersey City.

Baggage cars of the Baltimore & Ohio Railroad and of the Reading Railroad arriving in trains of said Companies at Communipaw, Jersey City, from other States, remain in the yard hereinafter mentioned as Yard D until they are placed in interstate trains of those Companies which depart from the terminal at Communipaw bound west (pp. 73, 74).

There was no proof adduced that they or any of them were ever used in intrastate transportation.

The decedent in these proceedings was in the employ of the Central Railroad Company of New Jersey. His position was that of a "car inspector." His duties were particularly confined to

baggage cars (pp. 73, 99). It was his custom to report at the office of the Central Railroad Company in the morning and then go out in the yard "on his own" (p. 99).

On the day of the accident involved herein, to wit, December 13th, 1927, decedent was last seen walking between tracks Nos. 2 and 3 at the terminal of defendant at Communipaw, Jersey City. Yard D consists of several tracks running at each end into what is known as a lead track. These tracks are adjacent to what is known as the baggage platform of the Company at Yard D. On the tracks of Yard D were a large number of baggage cars, and on track 2 there were 17 cars, all of them cars of the Baltimore & Ohio Railroad Company and the Reading Railroad Company, except two cars which belonged to The Central Railroad Company of New Jersey (p. 87).

All cars in Yard D were known as cars in active service; that is, they were cars which at any moment might be picked up and placed in a train for interstate traffic.

On the day of this accident decedent was observed walking between tracks Nos. 2 and 3 carrying certain tools. The witness who saw him, one Coughlin, was walking toward decedent carrying a long pipe on his shoulder (pp. 40, 49, 50, 76). There were strings of cars on both tracks Nos. 2 and 3, and the space between such strings of cars was narrow (p. 52). When the witness Coughlin first saw the decedent they were approximately three car lengths apart (p. 50). As the two men approached each other and were approximately a car length and a half, not over 75 feet, apart (pp. 64, 66), the pipe on the shoulder of the witness

Coughlin struck a car behind him and he turned his head to see what had happened (pp. 70, 76). While his head was turned, he heard the sound of cars coming together (p. 77), looked back toward the place where he had last seen decedent, and discovered that he was missing (p. 77). He immediately ran to the point and found decedent lying under one of the cars. The coming together of the cars was occasioned by the fact that a crew were making up a Baltimore & Ohio train which was being made ready to proceed to Philadelphia and points beyond (p. 114), which crew were going to take one or more Baltimore & Ohio baggage cars from track 2 and place it in the train they were then making up (pp. 113, 114).

The foregoing was the only proof adduced at the trial as to the conduct of decedent at the time of the accident.

On this testimony the respondent (The Central Railroad Company of New Jersey) moved to dismiss the petition upon the ground that the petitioner had not proven affirmatively that the decedent was engaged in intrastate commerce at the time of the accident in which he was injured.

The Commissioner denied the motion to dismiss and made an award to the petitioner.

Comment

The Workmen's Compensation Commissioner made his award and based his finding on the ground that the cars in Yard D were cars *withdrawn from service*; that is, they were not at the time actually engaged in interstate commerce; and cites as his authority the following cases:

Herzog vs. Hines, 95 N. J. L. 98.

Price vs. Central Railroad Co. of N. J.,
99 N. J. L. 425.

- Jason vs. Penn. R. R. Co., 101 N. J. L.
159.
- Bissett vs. Lehigh Valley Co., 102 N. J.
L. 283.
- Minneapolis, etc., R. R. Co. vs. Winters,
242 U. S. 353.
- Berry vs. Central Railroad Co., 5 N. J.
Rep. 454.
- McTigue vs. Central Railroad Co., 5 N.
J. Rep. 793.
- Lawrie vs. Atlantic City R. R. Co., 3
N. J. Misc. 267.

The Court of Common Pleas affirmed the award of the Commissioner.

Certiorari was then issued from the Supreme Court to the Court of Common Pleas, and the Supreme Court affirmed the judgment of the Court of Common Pleas.

We submit that the award of the Commissioner was erroneous, and the judgment of the Court of Common Pleas likewise erroneous, and the judgment of the Supreme Court also erroneous.

ARGUMENT

POINT I

In order to recover under the State Act, petitioner was bound to show affirmatively that her decedent was not engaged in work regulated by the Federal Employers' Liability Act.

The decedent at the time of the accident was employed by a common carrier of passengers and freight by railroad, admittedly engaged in interstate commerce.

The Supreme Court, in its opinion in the instant case, admits the rule of law stated in the above caption, but states it thus:

“It is clear that * * * the burden is on the petitioner to establish that the accident arose out of and in the course of his employment in intrastate commerce and not in interstate commerce.” See opinion of Supreme Court.

In the case of P. & R. R. Co. vs. Polk, 256 U. S. 332, reversing an award under the Workmen’s Compensation Act of Pennsylvania, the United States Supreme Court held:

“It would seem indisputable, therefore, if there be an assertion of the claim or remedy growing out of an occurrence in which there are constituents of interstate commerce, the burden of explanation and avoidance is on him who asserts the claim or remedy, not on the railway company to which it is directed, and there is nothing in Osborne vs. Gray, 241 U. S. 16, in opposition. Indeed, the Court was asked in that case to do what the Referee and the Supreme Court in this case have done, that is, to assume to know things of which there is no evidence.

“We cannot accede to the view that there is a presumption that duties performed on a train constituted of interstate and intrastate commerce was performed in the latter commerce. The presumption, indeed, might be the other way. It is to be remembered that it is the declaration of the cases that if there is an element of interstate commerce in a traffic or employment it determines the remedy of the employe; Second Employers’ Liability Cases, 223 U. S. 1; New York Central Railroad Company vs. Winfield, 244 U. S. 147.”

In a case on all fours with the case at bar, *Lincks vs. Erie R. R. Co.*, 91 N. J. L. 166, in which the facts were as follows:

“Deceased was employed by the railroad company in its yard at Jersey City. His principal duty was to take care of the cab lights upon the various engines which came into the yard and keep them in proper condition for use. Some of these engines were used in interstate commerce and others in intrastate commerce. It may be inferred from the testimony that the decedent was run down and killed while crossing one of the yard tracks on his way from an engine, the lamps of which he had been putting in order, to another, the lamps of which needed care” (page 167),

the Court of Errors and Appeals at page 169 said:

“The burden is upon the petitioner in the court of first instance, to prove the case within the State Statute—that is, to show affirmatively that the plaintiff’s decedent was engaged in service which was not regulated by the Federal Statute, for that fact is not to be presumed in the absence of proof.”

And again at page 167 of the same case:

“There is absolutely nothing in the testimony, however, to show whether the engine upon which he had just completed his work or the engine to which he was going was engaged in interstate or intrastate commerce. It is true that the yard was devoted to both kinds of commerce, but that fact is immaterial.”

In much the same language, this case was followed in *Carberry vs. D. L. & W. R. R. Co.*, 93 N. J. L. 414, and in *Jayson vs. P. R. R.*, 101 N. J. L. 159.

There is nothing whatever in the testimony in the instant case to show what the decedent was actually doing at the time of the accident, other than walking down between two tracks, having with him at the time his regular car inspector's tools.

There was no proof adduced at the hearing that decedent at the time of the accident was engaged in examining, inspecting or repairing any particular car (p. 74). He may have been simply on his way down the aisle between tracks 2 and 3 to examine, inspect or repair a car at some distant point; he may have been going down this aisle for the purpose of examining a Baltimore & Ohio car further down the aisle in the direction in which he was walking; he may have been going down said aisle for the purpose of examining a Philadelphia & Reading car further down the aisle; he may have been simply walking down the aisle to get to some other part of the yard for some purpose which is not disclosed. **There is no proof as to just what he was doing except walking along the aisle.**

It is manifest that he could not have been engaged in any particular work because the time elapsing between the last glimpse witness Coughlin had of decedent and the coming together of the cars was only sufficient time for the witness to turn his head to the rear and look back again, and that upon glancing back decedent was lost to view. Such would only be a fractional part of a second; so, as we have stated, it is manifest that decedent could not have been engaged in any particular work at the time of the accident. In all probability, the coming together of the cars, occasioned by the train crew, either startled decedent as he walked along, causing him to come in

contact with one of the cars, or he was walking close enough to the cars as to be struck when they came together; or, he may have in the fractional part of a second, during which time he was lost to the view of the witness Coughlin, stepped between the cars for the purpose of passing beyond the track to the next aisle.

POINT II

Railroad cars regularly used in interstate commerce are engaged in such commerce while standing in the yard between trips.

The award of the Commissioner and the judgments of the Court of Common Pleas and of the Supreme Court are based upon the idea that "movable rolling stock that is not in course of interstate service is not engaged in that service and the rights of the employes are in such case remitted to the Workmen's Compensation Law of the State." See opinion of Supreme Court.

We recognize the existence of the rule holding that where a railroad car, although it has been used in interstate commerce, is not at the time of the accident actually engaged in interstate commerce, one working thereon may be said not to be engaged in interstate commerce, but rather, in intrastate commerce. This is the reasoning of the cases cited by the Commissioner, *supra*.

But, we also recognize the further rule, to wit, that where an instrumentality is used *exclusively in interstate commerce*, it always retains its interstate commerce character whether actually in use at the moment or whether not actually in use at the moment.

In the case of *Johnson vs. Southern Pacific Co.*, 196 U. S. 1, a dining car used in interstate com-

merce had completed its trip and was placed on a side track, empty, waiting to be picked up and again placed in service. While the car was standing idle on the side track an accident happened, resulting in injury to the plaintiff, a brakeman employed by the defendant. Suit was instituted in the Circuit Court of the United States under the Federal Employers' Liability Act, and at the trial of the case, after the plaintiff had rested, the Judge directed a verdict in favor of the defendant upon the ground that the dining car was not then engaged in interstate commerce and the plaintiff was not engaged in interstate commerce, and his action was affirmed by the Circuit Court of Appeals.

One of the grounds on which the decision of the Circuit Court of Appeals was rested was:

“That as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic” (page 21).

The United States Supreme Court, reversing the Circuit Court of appeals, held that the car was an instrument of interstate commerce at the time of the accident, saying:

“Confessedly, this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip” (page 22).

In Roberts' "Federal Liability of Carriers", Volume 1, pages 844, 847 and 849, Sections 488, 490, 491 and 492, the author devotes considerable space to a discussion of the case of Minneapolis & St. L. R. Co. vs. Winters, 242 U. S. 353, 61 Law Ed. 358, wherein the United States Supreme Court held that an employe repairing an engine

when not used in pulling trains, is not within the purview of the Federal Statute *unless* the engine being repaired is *exclusively devoted and assigned to the movement of interstate traffic*. (Italics ours.)

The author discussing the case thoroughly at page 847, states:

“Section 490. Differentiating Factors Between Rulings in Winters and Pederson Cases. A comparison of the ruling of the national Supreme Court in the Winters case, *supra*, and the doctrine of that Court as announced in the Pederson case, well illustrates the demarcation between interstate and intrastate employment. The distinction made in holding that Winters was not engaged in interstate commerce when repairing an engine which had been pulling interstate trains and which was afterwards used for the same purpose, and that Pederson, while carrying a bolt to repair a railroad bridge, was employed in interstate, seems, at first blush, elusive and subtle. But there are, nevertheless, sound differentiating factors between the two cases, though both are close to the border line of state and federal jurisdiction. A bridge, composing a part of a line of an interstate railroad, is an instrumentality which necessarily is permanently devoted and assigned to interstate transportation, and, hence, the work of repairing such a structure constitutes employment under federal control. However, the engine while being repaired by Winters, was not then used in interstate transportation at the time of the injury so that an employe in repairing it could also be said to be engaged in that commerce. The engine was used in both kinds of commerce and not definitely assigned or devoted to either, though it so happened that it pulled an interstate train on its last trip and was, thereafter, used in like employment. *Had this engine been definitely*

assigned to pulling interstate trains, Winters would have been engaged in federal commerce within the doctrine of the Pederson case. The engine would have then been used in interstate commerce as much so as the dining car in Johnson vs. Southern Pac. Co." (Italics ours.)

The author, at page 849, Section 592, goes on as follows:

"Repairing cars and engines used exclusively in interstate commerce. Notwithstanding the limitation placed upon the interstate status of car and engine repairers in the decision of the national Supreme Court in the Winters case, employes engaged in the repair of cars used solely in interstate commerce are governed by the Federal Act and not by State laws. Smiegil v. Great Northern R. Co., 160 N. W. 1057, 165 Wis. 57; Kuchenmeister v. Los Angeles & St. L. R. R. Co. (Utah), 172 Pac. 725. An employe while working in a round house and repairing an engine used exclusively in hauling interstate passenger trains between Caliente, Nev., and Milford, Utah, was engaged in interstate commerce within the meaning of the Federal Act."

We submit that the Commissioner and the Court of Common Pleas mistake the evidence. The proof was that all tracks in Yard D were known as active service tracks (p. 99); that all cars in Yard D were in active service (p. 99). These cars were placed in Yard D, not in storage, not to lie idle for any particular length of time, but to await being picked up by trains being constantly made up in the yard to depart on journeys. The Baltimore & Ohio cars were cars which had come into the Terminal at Communipaw from another State, and were in Yard D awaiting the coming of the yard crew to place them in trains to be sent again from the Communipaw Terminal

to the State from whence they came. This also applies to the Philadelphia & Reading cars (pp. 73, 87).

They were not in any sense withdrawn from service. They were in service.

We refer to the language of the Court in *Baltimore & Ohio Railroad Company vs. Kast*, 299 Fed. 419, where the Court, in speaking of the interstate character of an engine which had been sent to the round house for light running repairs, said "the engine had merely completed its usual interstate traffic and was making its usual lay-over before beginning its next trip, which it was then known would be in interstate commerce. During this usual lay-over, the employes were engaged in making the usual running repairs, such as can be made upon a side track, or in a round house, and such as are usually made during the lay-over. The work in question was the legal equivalent of inspecting, oiling, firing and preparing an engine and getting it ready for an intended trip as in the *Zachary* case, or the replacement of broken draw bar, so that the car should assume its interstate journey as in the *Walsh* case."

So, in the instant case, *the Baltimore & Ohio and Philadelphia & Reading baggage cars had completed their immediate interstate journeys and were making the usual lay-over before beginning their return trips.*

In the cases cited by the Commissioner and by the Supreme Court, the cars upon which the injured men were working were cars which were undergoing heavy repairs, *not light running repairs*, but repairs which required them to be taken out of service. As we hereafter show, the making

of light running repairs to cars does not take them out of service.

We submit that the foregoing disposes of the contention that the decedent was engaged in intrastate commerce because the cars on track No. 2 or in Yard D generally were lying idle and had not already entered upon a trip, or were not moving interstate traffic.

That the Baltimore & Ohio Railroad and the Reading Railroad are engaged in interstate commerce must be assumed. The fact that they are so engaged is so widely known, and the fact that they run into the Central Railroad Terminal at Communipaw, Jersey City, is likewise so widely known, that the Courts of New Jersey would take judicial knowledge thereof. That all railroad companies running into Jersey City transport passengers, freight and baggage to New York City is also so widely known that the Courts would take judicial knowledge thereof. See 23 C. J. 89.

In fact, the Supreme Court in its opinion says, "Incidentally, it may be stated that it does not appear by any evidence in the case that the two railroads were even engaged in interstate commerce, *though perhaps we can assume this to be true.*" (Italics ours.)

The baggage cars of the Baltimore & Ohio Railroad Company and the Reading Railroad Company were cars owned by such companies and presumably used by them, *and them alone*, in the transportation of baggage from the State of Pennsylvania and elsewhere to Communipaw Terminal, destined for New York, and to be used for baggage to be transported from New York to the Central Railroad Terminal at Communipaw, Jersey City, and placed in such cars and thence transported to the State of Pennsylvania and elsewhere.

There could be no presumption that cars of these companies were used in intrastate traffic. There was no proof that either the Baltimore & Ohio Railroad Company or the Reading Railroad Company was engaged in intrastate traffic, but rather, the presumption would be that they were engaged solely in interstate traffic. Nor could there be any presumption that any other railroad company, including the Central Railroad Company of New Jersey, used the cars of the Baltimore & Ohio Railroad Company and/or the Reading Railroad Company either in interstate traffic or intrastate traffic.

As a matter of fact, the testimony shows that the Baltimore & Ohio Railroad Company cars that have come into the Terminal on interstate trains and have gone out again on westward trips, would actually return to the yard every three days or so (p. 114). In fact, the Baltimore & Ohio train which caused the accident in which decedent was injured would take out 22 of these baggage cars then in the yard on that day, and, in fact, every day would take practically the same number from the Terminal at Communipaw to Philadelphia and other points. This was train known as Baltimore & Ohio Train 513 (pp. 112-115).

There was no proof that any of these cars were ever engaged in intrastate commerce.

The Baltimore & Ohio cars, and the Reading cars, were instruments devoted exclusively to interstate commerce.

POINT III

If the decedent was inspecting or repairing or working, or on his way to inspect, repair or work, upon one or more of the Baltimore & Ohio Company cars or the Reading Company cars, he was engaged in interstate commerce.

If we are correct, and we submit we are, that the cars of the Baltimore & Ohio Railroad and the Reading Railroad Company are cars used regularly and exclusively in interstate commerce, they are then instrumentalities of interstate commerce and anyone performing any duties in relation thereto is engaged in interstate commerce.

As we have above shown, there is no proof that these baggage cars of these railroads were ever used in intrastate commerce, but on the contrary, the proof is that these cars come into the terminal yard of the Central Railroad on Communipaw Avenue, Jersey City, and are taken out again in trains of the Baltimore & Ohio Railroad Company and the Reading Railroad Company respectively, each taking its own cars, and that they return again to the terminal yard above mentioned in three or four days or thereabouts.

PONT IV

Central Railroad Company being a common carrier by railroad between different States, the provisions of the Federal Employers' Liability Act applies to it and its employees engaged in such commerce.

There was no proof adduced at the trial that defendant, Central Railroad Company, ever engaged in intrastate traffic. There was no proof

adduced at the trial that the baggage cars of the Central Railroad Company were ever used in intrastate traffic. Being an interstate railroad, the presumption would be to the contrary. (See case P. & R. Co. vs. Polk, 256 U. S. 332, *supra*.)

In the absence of such proof, decedent, if working on a Central Railroad car, was engaged in interstate commerce.

There was no proof, however, that decedent was working, or about to work, upon a Central Railroad car.

The Supreme Court says, "It might be *inferred*" decedent was working, or about to work, upon a "crippled" car of Central Railroad upon track 2. But contrary inference might with equal justice be drawn.

The testimony showed that there were on track 2, two cars of the Central Railroad Company, one of them being a car marked "Crippled," referred to in the next following point. These two cars were in a line of 17 cars, 15 of which belonged to the Baltimore & Ohio Railroad and the Reading Railroad.

The Supreme Court in its opinion, said that inasmuch as decedent had with him his inspecting tools, and that there was this "Crippled" car upon Track 2, *it might be inferred* that he was about to repair such crippled car or on his way so to do. If there were no other inferences of equal weight to be drawn, this might be so. But the proof is that decedent inspected *all cars* in Yard D, the vast majority of which were Baltimore & Ohio cars and Reading cars, and it might just as well be inferred that he was inspecting or about to inspect a Baltimore & Ohio car or a Reading car, as that he was inspecting, repairing or about to inspect and repair a Central Railroad car; it might also be just as well inferred that he was on

his way to some other part of Yard D to inspect other cars.

It seems to us, therefore, that where more than one inference may be fairly drawn from facts presented, one or more of which inferences would relieve the company, while one of which inferences might place responsibility upon the company, the petitioner is bound to go forward with the proof and make the inference which places responsibility upon the company of greater weight and probability than the other, or others, which might with equal correctness be drawn. In this respect, we are reminded of the case of *Houston vs. Trap-hagen*, in 47 N. J. L. page 23, where the court held,

“When it is claimed that the fall produced or excited disease, it should appear, in order to recover damages for the results of the disease, not only that the fall was a possible cause of the disease, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause.”

And see also the case of *Stumpf vs. D. L. & W. R. R. Co.*, in 76 N. J. L. page 153, where the Court held,

“Where, in an action to recover damages for injuries alleged to have been caused by defendant’s negligence, it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if, under the testimony, it is just as probable that it was caused by the one as the other, he cannot recover.”

Surely, in the instant case, it is just as probable that decedent was inspecting or about to inspect a Baltimore & Ohio or a Reading car or cars as that he was about to inspect or repair a Central Railroad car, or the car marked "Crippled," hereinbefore mentioned. His duty required him to inspect the Baltimore & Ohio cars and the Reading cars as well as the Central Railroad cars, including the "Crippled" car (pp. 73, 74).

POINT V

The fact that the car marked "crippled" was on track 2, does not take it out of active service.

The proof in the case by all of the witnesses is that all cars in Yard D are in active service. In fact, the train which was being made up at the time, to wit, Baltimore & Ohio train No. 513, which evidently caused the injury to decedent, is a *regular* train made up every day, and takes out of Yard D *every day* 22 Baltimore & Ohio baggage cars, which cars are cars which have come into the yard from a trip eastwardly from points out of the State, terminating at the Communipaw yard, and are placed into Yard D awaiting the make-up of the trains to take them out on return trips (pp. 113-115).

The marking of the word "Crippled" on the car in Yard D does not mean that the car is so crippled as to take it out of active service. If this were so, this car would be in another portion of the yards of the Central Railroad where repairs are made. On the contrary, the proof is that this word "Crippled," upon a car in Yard D, meant that the car required what is known as "light running repairs," which can be made and are made while the car lies on the active service

track, to wit, Track 2 in Yard D, awaiting the making up of the train into which it is to be placed (p. 99).

Cars requiring light running repairs are not withdrawn from interstate commerce.

In the case of Industrial Commission of The State of California vs. Davis, as Agent, etc., of the Los Angeles and Salt Lake Railway Co., 259 U. S. 182, wherein a clear distinction is drawn between cars wholly withdrawn from service, and those, although requiring running repairs, not withdrawn from active service, at page 187 the Court *inter alia* says:

“We are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation, or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act. And there is a difference in the instrumentalities. In some, the tracks, bridges and road beds and equipment in actual use, may be said to have definite character and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character according to the circumstances, and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only placement on a side track or in a round house. An interruption of the actual use, and the return to it, being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations; the relations of a work shop, its employments and employees having cause in the movements that constitute commerce, but not being immediate to it.”

In the case of Baltimore & Ohio Railroad Company vs. Kast, 299 Fed. 419, decided by the Circuit Court of Appeals, Sixth Circuit, the facts were as follows:

Kast was employed by defendant as a machinist's helper in its round house and was injured while assisting to repair a passenger engine. The engine had brought an interstate train to Garrett and was detached and sent to the round house for running repairs. The engine in question was generally used in interstate commerce. In affirming judgment under the Federal Act, the Court quoted the following language of the trial court:

"The engine was placed in round house, and not sent to repair or construction shops. The engine was not really withdrawn from interstate commerce, in order to make the repairs in question. It had merely completed its usual interstate traffic and was making its usual lay-over before beginning its next trip, which it was then known would be in interstate commerce. During this usual lay-over, the employees were engaged in making the usual running repairs, such as can be made upon a side track, or in a round house, and such as are usually made during the lay-over. The work in question was the legal equivalent of inspecting, oiling, firing and preparing an engine and getting it ready for an intended trip as in the Zachary case, or the replacement of broken draw bar, so that the car should assume its interstate journey as in the Walsh case."

In the case of Southern Pacific Co. vs. Industrial Accident Commission, decided by the Supreme Court of California, in 175 Pac. 453, it appeared that decedent, a member of a repair gang, had to make light repairs on cars held on side track in a railroad yard. While crossing the yard

to further some light repair work on cars essential to the movement of intrastate as well as interstate commerce, decedent was run down and killed by the movement of a car which was struck by another car kicked by a switch engine.

The Court in the above case said:

“Such detention on said tracks was in part for the purpose of inspecting the cars to ascertain defects therein and to make such light repairs thereof as were thereby found necessary, in order that the cars might proceed to their destination. ‘Light repairs’ were made upon the cars without moving them from their position in the ‘cuts’ or ‘drags’ on the side tracks, but ‘heavy repairs’ were made by cutting out said cars and transferring them to tracks specially devoted to repair work. About 40 per cent of the business of the yard at that time was interstate business, the balance intrastate. The tracks upon which the cars repaired by the deceased and his fellow laborers were standing were part of the switching tracks in the freight yards essential to the movement of interstate as well as the intrastate commerce. The system of light repairs inaugurated in the yards in question was for the purpose of facilitating the movement of trains to and from the yard and was distinct from the heavy repair jobs which required the cars to be cut out of the ‘cuts’ or ‘drags’ and placed on special side tracks arranged for such repair work. During the day the light repair men doing light repairs would repair on an average 100 cars. Decedent’s duties required him to pass from one car to another and one track to another seeking out the cars which were tagged by the inspectors as requiring light repairs and finding them to make such repairs.”

Referring to the Federal Safety Appliance Acts as to the inspection and care of cars, the Court said:

“The inspection and repair service of the deceased was required by such statute and was, therefore, made an essential part of the movement of interstate commerce, and the decedent was engaged in performing this work upon cars brought to a standstill partly for that purpose.”

The facts show that one of the baggage cars in the case at bar was awaiting running repairs, and in view of the foregoing cases it did not lose its classification as an instrumentality of interstate commerce.

If decedent was working, or about to work, on the car marked “Crippled,” he would be engaged in interstate commerce.

Since we have shown that cars are now withdrawn from interstate commerce when they are placed on a side track for running repairs, so, also was the decedent engaged in interstate commerce when engaged in work on any of these cars.

In *Pedersen vs. D. L. & W. R. R. Co.*, 229 U. S. 146, the United States Supreme Court said, at page 151:

“Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and nature of the commerce depends in large measure upon this being done. The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. Of course, we are not here concerned with the construc-

tion of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In *North Carolina R. R. Co. vs. Zachary*, 232 U. S. 248, at page 260, the Court said:

"It is argued that because, so far as it appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in future. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstances that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pedersen vs. D. L. & W. R. R. Co.*, 229 U. S. 146, 151; *St. Louis & San Fran. Ry. vs. Seale*, 229 U. S. 156, 161."

In *Hines vs. Director General vs. Logan*, 269 Fed. 105, the facts were as follows:

"The decedent, John R. Logan, was an employee of the defendant engaged in inspecting and repairing cars in a railroad yard adjacent to the terminal station in Birmingham, Alabama. Cars used in both intrastate and interstate commerce were in the yard at the time of Logan's death, awaiting his attention. Some of them were to be made ready for journeys into several adjoining and nearby states. Logan was on duty, and, as he was in the act of passing through an open space, of three or four feet, between two cars on one of the railroad tracks, was killed by one of these cars, being forced against the other by the impact from a third car, which

though not coupled up to the car next to it, was being switched and being placed upon the same track" (page 106).

In this case, the Circuit Court of Appeals, Fifth Circuit, in holding the decedent to have been engaged in interstate commerce, said:

"We quote from *Pedersen vs. R. R. Co.*, 229 U. S. 146: 'Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?' In the later case of *Kinzell vs. Chic., etc., Ry. Co.*, 250 U. S. 130, the Supreme Court said: 'It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act'" (page 106).

Since it appears from the evidence that the decedent made repairs and inspections of all the baggage cars in Yard D, we feel that in view of the cases just cited, he was engaged while making inspections and repairs, in interstate commerce, and would necessarily come under the provisions of the Federal Employers' Liability Act.

POINT VI

Giving petitioner the benefit of the best evidence for her, however, the evidence did not show that the defendant was at work upon, or going to work upon, any particular car at the time of the accident. If it could be inferred that he was going to work upon an interstate car, he would be engaged in interstate commerce, and, on the contrary, if it could be inferred that he was going to work upon an intrastate car, he would be engaged in intrastate commerce. Inasmuch as his duties required him to perform work upon both interstate and intrastate cars, and petitioner did not show specifically which work he was going to perform, the federal or interstate color prevails.

In the case of *Erie R. R. vs. Winfield*, 244 U. S. 170, the injured man worked upon a switch engine in the yard of defendant company, which engine switched both interstate and intrastate cars. He had left his engine and was on his way out of the yard when he was struck by another train on one of the tracks.

The Court held, reversing the New Jersey Court of Errors and Appeals:

“In leaving the carrier’s yard at the close of his day’s work, the deceased was but discharging the duties of his employment. See *North Carolina R. R. Co. vs. Zachary*, 232 U. S. 248-260, 58 L. Ed. 591. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day’s work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day’s work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time

of the injury, his employment was in both. That he was employed in interstate commerce is, therefore, plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance."

As we have shown under other points, the only proof in the case is that decedent at the time of the injury was walking in the aisle between Tracks 2 and 3. He may have been about to work in interstate commerce, or in intrastate commerce, or he may have been simply going from one part of Yard D to another part of Yard D.

Under such circumstances, in view of the Winfield case, *supra*, it is clear that he was at the time of his injury engaged in interstate commerce.

Petitioner failed to show affirmatively that decedent, at the time of the accident, was engaged in intrastate commerce.

We submit, therefore, the award of the Commissioner, the judgment of the Court of Common Pleas, and the judgment of the Supreme Court, were erroneous and should be set aside.

Respectfully submitted,

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