INDEX.

TESTIMONY.

SUMMONS AND COMPLAINT.

Filed October 28, 1919.

THE STATE OF NEW JERSEY TO NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation.

YOU ARE SUMMONED to answer the annexed complaint of Frederick Herzog, in an action at law in the Supreme Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, Hon. William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 25th day of October, 1919.

ENOCH L. JOHNSON,
Clerk.

McCARTER & ENGLISH,
Attorneys.

COMPLAINT.

Plaintiff, residing at Dumont, Bergen County, New Jersey, says that:

1. On June 20, 1919, and for a long time prior thereto, defendant was and had been a common carrier by railroad engaged in commerce between certain of the several States, namely New Jersey and New York and other of the several States.

2. On June 20, 1919, and for a long time prior thereto plaintiff was and had been employed by defendant in such commerce at the New Durham yard of the defendant in Bergen county, as a car repairer.

3. While so employed by defendant in such commerce, at the said New Durham yard on June 20, 1919, plaintiff suffered injury from the negligence of the agents and employees of the defendant, by reason whereof a cause of action has accrued to the plaintiff under the Act of April 28, 1908, of the Congress of

the United States entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," and the Acts amendatory thereof and supplemental thereto.

4. The negligence of the agents and employees of the defendant consisted in this: the said New Durham yard of the defendant was composed of a large number of railroad tracks; in the performance of his duties it was necessary for plaintiff to crawl underneath cars standing on certain tracks in said yard known as "dead" tracks, on which cars were stored for repairs; before any cars on said "dead" tracks were moved, it was customary for certain agents and employees of the defendant, to wit, the conductor or assistant foreman to give notice of the moving of said cars and to warn any car repairers working or crawling under said cars, including the plaintiff; said car repairers including the plaintiff, were accustomed to rely on said notice and warning. On June 20, 1919, while plaintiff in the performance of his duties was in the act of crawling under certain cars standing on one of said "dead" tracks, said cars were, by the agents and employees of the defendant, without the giving by them of the customary notice and warning to the plaintiff, moved by means of a locomotive engine and the plaintiff was run over and dragged underneath said cars.

5. At the time of said injury plaintiff was employed by defendant in interstate commerce, in that he was discharging a duty of his employment in connection with the repair by him of a freight car of the defendant used in interstate commerce.

6. The injuries suffered by the plaintiff were as follows: he was dragged underneath the cars and bruised all over his body; his nervous system was shocked; his left leg was run over and amputated about half way between the ankle and knee; his left hand was run over and the index finger amputated, the three remaining fingers and thumb were injured, and the whole hand crippled; his right hand was run over, the third and fourth fingers amputated and the two remaining fingers and thumb were injured and the whole hand crippled; he suffered and continues to suffer great pain and will continue so to suffer in the future; he has been permanently injured and incapacitated from earning a livelihood.

7. At the time of suffering said injury, plaintiff was receiving $23.28 per week.

Order of Amendment.

8. As a result of his injuries plaintiff has been obliged to spend large sums of money for physicians and medicines and in the future will be compelled to so spend large sums of money in an effort to relieve and ameliorate his condition.

9. Plaintiff demands damages in the sum of $50,000.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

ORDER OF AMENDMENT.

Filed November 12, 1919.

It appearing that the defendant has been improperly named as New York Central & Hudson River Railroad Company, whereas the correct name of the said defendant is "The New York Central Railroad Company," and application being made, and counsel for defendant consenting,

It Is Ordered on this eleventh day of November, 1919, that the name New York Central & Hudson River Railroad Company wherever it appears in the summons and in the complaint filed in this action, be and it is amended so as to read "The New York Central Railroad Company."

Let this rule be entered.

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

Rule actually entered this 11th day of November, 1919, on motion of

McCarter & English,
Attorneys of Plaintiff.

We consent to the entry of the foregoing order.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

ORDER OF SUBSTITUTION.

Filed November 12, 1919.

On reading and filing the annexed General Order No. 50 of the Director General of Railroads, bearing date October 28, 1918, the stipulation hereto annexed, and on the pleadings and proceedings herein and on motion of Attorney for The New York Central Railroad Company (sued as New York Central & Hudson River Railroad Company) and for Walker D. Hines, Director General of Railroads, it is

ORDERED that Walker D. Hines, Director General of Railroads, be, and he hereby is, substituted as party defendant herein in the place and stead of The New York Central Railroad Company, with the same force and effect as if the said Walker D. Hines, Director General of Railroads, had originally been designated herein as sole party defendant; and it is further

ORDERED that all pleadings served or filed, and proceedings taken heretofore herein by or on behalf of The New York Central Railroad Company shall be deemed constructively amended as aforesaid, and shall remain and continue in full force and virtue as the pleadings and proceedings of said Walker D. Hines, Director General of Railroads.

The above entitled action being of the character described in the annexed General Order No. 50 of the Director General of Railroads, and the system of transportation of The New York Central Railroad Company having been taken possession of, and the control and operation thereof having been assumed by the United States Government pursuant to the proclamations of the President dated December 26, 1917, and April 11, 1918, the undersigned hereby consent to the entry of the foregoing order without further notice.

Dated November 11, 1919.

McCARTER & ENGLISH,
Attorneys for Plaintiff.

VREDENBURGH, WALL & CAREY,
Attorneys for New York Central Railroad Company and Walker D. Hines, Director General of Railroads.

Answer.

ANSWER.

Filed November 19, 1919.

The defendant WALKER D. HINES, as Director General of Railroads, substituted as defendant herein in place of the New York Central Railroad Company, answering the complaint herein, says that—

1. He denies paragraph 1, but says that on June 20th, 1919, and for some months prior thereto, as Director General of Railroads, he was in possession of and engaged in operating a certain railroad known as the West Shore Railroad, of which the original defendant, New York Central Railroad Company, is lessee. In operating said West Shore Railroad said defendant on said dates was engaged as such Director General in moving both interstate and intrastate traffic.

2. He admits that on June 20th and for some time prior thereto, plaintiff was and had been in the employ of defendant as such Director General as car repairer, and that as such he at times worked in the New Durham yard of the West Shore Railroad Company. He denies all other allegations of paragraph 2.

3. He is informed and believes it to be true that plaintiff suffered injury in said New Durham yard on June 20th, 1919. He denies all other allegations of paragraph 3.

4. He admits that there are a large number of railroad tracks in said New Durham yard. He is informed and believes it to be true that plaintiff was injured while in the act of crawling under certain cars standing on one of the tracks in said yard. He denies all other allegations of paragraph 4.

5. He denies paragraph 5.

6. He has no knowledge or information sufficient to form a belief as to the nature and extent of the injuries suffered by the plaintiff, but he denies that such injuries are correctly stated in paragraph 6 of the complaint.

7. He admits the 7th paragraph.

8. He has no knowledge or information sufficient to form a belief as to the amount expended by plaintiff or as to the amount, if any, he will be compelled to spend in the future for physicians and medicines.

Reply.

SECOND DEFENSE:

The injuries of plaintiff were caused by his negligence in that—

1. He attempted to crawl under a certain car or cars when he knew or should have known it was dangerous for him so to do.

2. He attempted to crawl under a certain car or cars when it was unnecessary for him in the performance of his duty so to do.

THIRD DEFENSE:

Plaintiff's injuries arose out of risks connected with his employment which were known to and appreciated by him, and which risks were assumed by him.

FOURTH DEFENSE:

1. Plaintiff was a trespasser at the place where his injuries were received.

2. Plaintiff was a mere licensee at the place where his injuries were received.

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

REPLY.

Filed November 21, 1919.

The reply of the plaintiff to the answer of the defendant says that:

1. Replying to the second defense set forth in defendant's answer, plaintiff denies the matters therein set forth.

2. Replying to the third defense set forth in defendant's answer, plaintiff denies the matters therein set forth.

3. Replying to the fourth defense set forth in defendant's answer, plaintiff denies the matters therein set forth.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

Judgment.

JUDGMENT.

This cause was tried before Judge Willard W. Cutler with a jury at the Bergen Circuit on January 21st and 22nd, 1920.

The evidence of the plaintiff having been presented, on motion of the defendant, the Court allowed a non-suit to be entered herein.

WILLARD W. CUTLER,
Judge, &c.

Costs, $87.10.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff his costs which have been taxed at the sum of eighty-seven dollars and ten cents.

Judgment entered January 31, 1920.

WM. S. GUMMERE,
C. J.

ORDER OF SUBSTITUTION OF ATTORNEYS.

Application being made and attorneys for the plaintiff consenting,

It is ordered on this 31st day of December, 1919, that Merritt Lane, Esq., be and he hereby is substituted as attorney of the plaintiff in the place and stead of Messrs. McCarter & English.

We consent to the entry of the foregoing order.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Rule actually entered this 31st day of December, 1919, on motion of

McCarter & English,
Attorneys of Plaintiff.

Judgment.

JUDGMENT.

This cause was tried before Judge Willard W. Cutler with a jury at the Bergen Circuit on January 21st and 22nd, 1920.

The evidence of the plaintiff having been presented, on motion of the defendant, the Court allowed a non-suit to be entered herein.

WILLARD W. CUTLER,
Judge, &c.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff his costs which have been taxed at the sum of eighty-seven dollars and ten cents.

Costs, $87.10.

Judgment entered January 31, 1920.

WM. S. GUMMERE,
C. J.

BERGEN COUNTY SUPREME COURT.

FREDERICK HERZOG, *Plaintiff,* vs. WALKER D. HINES, Director General of Railroads, *Defendant.*	*Action at Law.*

Hackensack, N. J., January 21, 1920.

BEFORE: HON. WILLARD W. CUTLER, Judge, and a Jury.

For the plaintiff, McCarter & English, Merritt Lane, Esq., of counsel.

For the defendant, Vredenburgh, Wall & Carey, Wm. H. Carey, Esq., of counsel.

The jury was empanelled, accepted and sworn.

Mr. Lane opened the case to the jury on behalf of the plaintiff.

Mr. Carey opened the case to the jury on behalf of the defendant.

Mr. Lane. I desire to offer, if your Honor please, interrogatories and answers thereto, as follows:

First, were certain tracks—these are interrogatories propounded by the plaintiff to the defendant and the answers of the defendant to them.

Were certain tracks in the New Durham yard of the West Shore Railroad Company known as live tracks and certain of said tracks known as dead tracks?

Answer: No. Certain tracks in the New Durham yard are known as yard tracks and certain tracks are known as dead head tracks.

Second: How many tracks were there in the said New Durham yard on June 20th, 1919? Answer: Sixty-two.

Third: What use was made of the said New Durham yard? Answer: The New Durham yard is used for making up west-

bound freight trains, both interstate and intrastate; for classifying eastbound freight, both interstate and intrastate; for storage of freight for export; also for repairing cars for use in both interstate and intrastate traffic.

Fourth: Wasn't a part of the traffic in said yard used for the storing and repairing of damaged freight cars? Answer: Yes.

Fifth: Wasn't that part of the yard known as the dead head freight yard? Answer: Yes.

Sixth: How many of said tracks were known as dead tracks? Answer: None. Six of the tracks are known as dead head tracks.

Seventh: What were the numbers of the tracks known as dead tracks? Answer: None of the tracks were known as dead tracks. Numbers 24, 25, 26, 27, 11 and 10 are known as dead head tracks.

Eighth: Weren't damaged freight cars stored on the so-called dead tracks for the purpose of being repaired? Answer: No, damaged freight cars were stored on the dead head tracks for the purpose of being repaired.

Tenth: Weren't the repairs to the damaged freight cars made by persons employed as car repairers?

Mr. Carey. Did you intend to leave out nine, Mr. Lane?

Mr. Lane. No, I did not. I beg your pardon, Mr. Carey.

Nine: Weren't said dead head tracks used indiscriminately for the storage of cars used in interstate and intrastate commerce? Answer: The dead head tracks were used indiscriminately for the storage and repairs of cars used in interstate and intrastate commerce.

Ten: Weren't the repairs to the damaged freight cars made by persons employed as car repairers? Answer: Yes.

Eleven: Who supervised the work of the car repairers? Answer: James O'Connell is the local supervisor. Under him are Assistant Foreman George A. Popp and Shop Inspector George A. Core.

Interrogatories and Answers.

Twelve: Was there not a system by which the work of car repairers was inspected by car inspectors? Answer: Yes.

Thirteen: What were the duties of the car inspectors with reference to the work of car repairers? Answer: On the arrival of a freight train a man known as a car inspector examined—

Mr. Carey. As a yard inspector.

Mr. Lane. —as a yard inspector examined the cars of the train for general defects and lists such as he sees on a card which he attaches to the car. This card is notice to the yard master that the car has to be sent to the dead head track for repair. On arrival at the dead head track the crippled car is re-inspected by the shop inspector who examines carefully for all defects and lists the defects on another card which he attaches to the car for the information of the car repairer. After the car has been repaired, the car inspector re-examines the car to ascertain whether the defects noted by him have been repaired.

Fourteen: Was it not customary for the car inspector to call the attention of a car repairer to any piece of repair done by him on a given car? Answer: Not unless the repairs were defectively done.

Fifteen: Give the names of the car inspectors who were employed at the New Durham yard on June 20, 1919. Answer: Vincent Conroy and Edward Reiser, who worked from midnight to eight A. M. John A. Coar, Thomas J. Fogarty and John Murray, who worked from eight A. M. to four P. M. Louigi Ciccirlle and Charles Berle, who worked from four P. M. to midnight of that date.

Sixteen: What was the number of the car on which the plaintiff had been working just prior to the accident complained of in the complaint? Answer: NYC X-1284.

Seventeen: What was the number of the track upon which said car was located? Answer: Track 27.

Eighteen: What warning sign or signal was given to show that the tracks upon which the cars were standing were dead tracks? The answer is—does the amended answer, Mr. Carey, take the place of the original answer?

Mr. Carey. Yes.

Mr. Lane. After cars have been spotted on the dead head tracks, that is, placed in position for the repairers to begin work on them, each double end dead head track is protected by a blue metal flag on each end by day, and a blue light on each end by night when men are working on these cars after dark. Single end dead head tracks are protected by a single blue metal flag by day and a single blue light by night, when men are working on these cars after dark, placed at the open end of the track. Dead head tracks are further protected by the use of locks on all dead head switches.

Nineteen: Whose duty was it to place a warning sign or signal to indicate that the tracks on which the cars were stored were dead tracks? The answer is: After cars have been spotted on the dead head tracks they are not moved, except on very rare occasions while the men are working on them except by the workmen themselves. In case of moving cars on these tracks by the workmen while working thereon, the workmen moving the cars give warning when warning is necessary to other workmen working on cars on the same track. When on very rare occasions it becomes necessary to take a car which has been repaired out of the dead head track while men are working on cars standing thereon, the men who are working on the track from which the car is to be taken, and men working on cars on adjacent dead head tracks on each side thereof, are told before the switch is unlocked that the cars are to be moved. When dead head tracks are to be filled with cars, the warning that the track is to be filled is customarily given to men working on adjacent dead head tracks, on each side of the track that is to be filled.

Twenty-one: Whose duty was it to give such warning—no, that was twenty.

Mr. Carey. You read 19 and read the answer to question twenty, didn't you, Mr. Lane?

Mr. Lane. Yes. Whose duty—number 19,— Whose duty was it to place a warning sign or signal to indicate that the tracks on which the cars were stored were dead tracks? The answer to that is: The shop inspector; and the answer I just read a moment ago is the answer to a question, After cars had

been placed on the dead head track, the answer to the question, What kind of warning was given to men working on dead tracks at the time of or just before cars were moved; and then the next question is, Twenty-one: Whose duty was it to give such warning, and the answer is: See answer to number 20, which, is that right, Mr. Carey? See answer to Number 20. Yes, that is right; I read that answer.

Twenty-two: What was the number of the track on which the cars were standing under which the plaintiff was crawling at the time of the accident complained of in the complaint? And the answer to that is: Track 25.

I do not offer 23, 24, 25 or 26. I do offer twenty-seven: What are the names of the train crew attached to the locomotive which moved the cars under which plaintiff was crawling at the time of the accident complained of in the complaint? And the answer is: John Shepard; brakeman, Peter Maley; conductor, William Wilm; engineer, George Hardick, and fireman, Robert Seibil.

Now, there are certain further interrogatories—

Mr. Carey. I think that the interrogatories which were omitted relate to the same subject matter as the other interrogatories which counsel has read, and therefore they should go in.

Mr. Lane. I think not, if your Honor please. Of course, if they do, they would go in under the rule; if they did not, they would not. All of the answers, all of the questions which have been asked and which were answered, your Honor will observe, referred to custom as to what was done or what was to be done or what should have been done; nothing as to what had actually been done.

Twenty-three is: Had any warning sign or signal been placed at the end of the track mentioned in the last preceding interrogatory prior to the movement of the cars at the time of the accident?

Twenty-four is: If so, who removed said warning sign or signal, and on whose authority?

Twenty-five is: Was any warning or signal given designed to warn men working or crawling under the cars the track mentioned in interrogatory twenty-two above just prior to the movement of the cars at the time of said accident?

Twenty-six: If so, by whom was said warning or signal given?

Your Honor will observe that those interrogatories are directed to what in fact had been done and constitute a series separate and distinct to what the custom was, and I do not offer them because they are not any part, they do not explain or elucidate what had gone before.

The Court. Why do you think they do? Why do you think they explain or in any way are connected with the other interrogatories?

Mr. Carey. The other interrogatories are dealing with the question of signals and warnings given to men working on the cars, and these relate also to the same subject matter, that is, signals warning men working on the cars, what had been done at that time.

The Court. Do any of them relate to what was done on that day?

Mr. Carey. Yes.

The Court. What one?

Mr. Lane. The preceding ones. No, Mr. Carey.

The Court. What one? I did not catch it. Of course, I only just heard them read now, but I did not gather as I heard them read that any of them referred to anything that took place on that day. As I understood them, they relate to the custom of the company in reference to the management of that track.

Mr. Carey. Yes, and they refer to the custom of the company and the presumption is, of course, that the custom of the company was followed on the day in question.

Mr. Lane. That is the question.

The Court. I do not think that makes the questions competent.

Mr. Carey. Suppose those questions had been asked, those questions in regard to the custom of the company, and what was ordinarily done on direct examination, and on cross examination these questions had also been asked, which Mr. Lane does not read? Wouldn't the Court say that I have a right to do that on cross examination, bring out those questions, because they are related to the very thing which he had been examining on before?

The Court. Well, that is not the question now. The question is whether they are so connected with the other interrogatories that they should be allowed to go in.

Mr. Lane. Well, if your Honor please, even if that were the question, if I put a witness on the stand here and confined my questions to what the general custom is, Mr. Carey couldn't cross examine and say what was done on this particular day without making him his own witness.

The Court. I shall not compel you to put them in.

Mr. Carey. I ask an objection be noted.

The Court. Yes, note your objection.

Mr. Lane. There were certain further interrogatories. Further interrogatory number one: What was the usual or customary warning given by defendant just prior to the movement of cars on any of the dead head tracks? Answer: After cars had been spotted on the dead head tracks, they are not moved except on very rare occasions, while the men are working on them, except by the workmen themselves. In case of moving cars on these tracks by the workmen while working thereon, the workmen moving the cars give warning when warning is necessary to other workmen working on cars on the same track.

When on very rare occasions it becomes necessary to take a car which has been repaired out of the dead head track while men are working on cars standing thereon, the men who are working on the track from which the car is to be taken and men working on cars on adjacent dead head tracks on each side thereof are told before the switch is unlocked that the cars are to be moved.

When dead head tracks are to be filled with cars, the warning that the track is to be filled is customarily given to men working on adjacent dead head tracks on each side of the track that is to be filled.

Interrogatory number two: Whose duty was it to see that such warning was given? The answer: When dead head tracks are to be filled, it is the duty of the man who unlocks the switches or opens the dead head track to see that the warning is given that the track is to be filled and to give it himself.

When a car which has been repaired is taken out of a dead head track while men are working on cars standing on that

track, it is the duty of the assistant foreman and the shop inspector to give warning that the car is to be taken out.

Interrogatory number three: Whose duty was it to actually give such warning? The answer is: See answer to number two.

Interrogatory number four is: Was car NYC X-1284 a car which was used in either interstate or intrastate commerce or both? And the answer is: Defendant is advised that additional interrogatory number four calls for a legal conclusion and that defendant is therefore not required to answer the same.

Interrogatory number five: How long had car NYC X-1284 been placed in the said New Durham yard for repair prior to June 20, 1919? And the answer is: The records of the company show that the car NYC X-1284 was placed on the dead head track for repairs on June 17, 1919, and that the repairs were completed and the car released for service June 28, 1919.

Interrogatory number six: Just prior to being placed in said New Durham yard for repair, had said car NYC X-1284 been used in interstate or intrastate commerce? The answer is: Just prior to being placed in the New Durham yard for repair, car NYC X-1284 had been used for hauling refuse from the Weehawken station to the dump at Little Ferry, N. J.

Interrogatory number seven: Following the repairs to said car NYC X-1284, was said car used in interstate or intrastate commerce? The answer is: Following the repairs to the car NYC X-1284, the car was next put in service for carrying refuse from the Weehawken station to the dump at Little Ferry, N. J.

The answer to the eighth additional interrogatory I do not offer.

Mr. Carey. I submit that that answer has a direct bearing upon the subject matter.

The Court. You may read the interrogatory.

Mr. Lane. The interrogatory is: Were the repairs which were made to said car NYC X-1284 at the New Durham yard designed to prepare the car for use in interstate commerce?

It has no connection whatever with the preceding interrogatories. The preceding interrogatories are confined to two things: One, to a custom with respect to whose duty it was, &c; the other subject, with respect to physical condition, how long car X-1284

had been in the yard and when it was repaired and when it left the yard, what particular service it had performed just prior to being repaired and what particular service it performed just after being repaired. Now, we introduce a different subject matter. What were the repairs that were made designed to fit the car for? It is entirely different subject matter and calls for a conclusion.

The Court. I will not compel you to read the answer. Take your exception.

Mr. Carey. Objection.

Mr. Lane. Counsel for the defendant and the plaintiff have stipulated, subject to materiality, relevancy and competency, and for the purposes of this trial only, as follows: First:—

Mr. Carey. I make objections to these as you go along before you read them. Not as to the facts stated, but as to the materiality and relevancy. Number one is objected to as being immaterial, irrelevant and incompetent, because it has no tendency to determine the issues in this case, viz., whether the plaintiff and the defendant were engaged in interstate commerce at the time, and whether or not there was negligence on the part of the defendant, or whether the injury was due to the negligence of the plaintiff. This relates—

The Court. I do not know what it is.

Mr. Lane. Well, the car number 88623, P. R. R. car number 88623, or the car which ran over the plaintiff, and in all of the cases that I can find the character of the car, whether inter or intrastate, or of a train which did the damage has always been admitted in evidence, and your Honor will find from a consideration of the cases in the Supreme Court of the United States that the judges in determining the cases and stating the facts, always state the character of the car which does the damage. It has a tendency at least to show that at the time—you see, two things must concur; first, the railroad itself must be engaged in interstate commerce; and, second, the employee must be engaged in interstate commerce. It has a tendency, at least, to show that the railroad itself was engaged in interstate commerce at the time the accident occurred.

Mr. Carey. The question of whether the railroad itself is engaged in interstate commerce is determined by whether or not the employee is engaged in interstate commerce. If the employee

is engaged in interstate commerce, the railroad company necessarily is. Of course, a railroad like the New York Central Railroad is always engaged in interstate commerce as a part of its duty, but the question with respect to any particular injury is to be determined by the fact as to what the employee is doing, so that whether this car was an interstate car or not, whether it was loaded with interstate freight or not, would have no bearing upon the question of whether this plaintiff was engaged in interstate commerce.

The Court. Do you admit in your pleadings that the railroad company was engaged in interstate commerce?

Mr. Carey. We admit that it was engaged in both kinds, sir. We said that it was engaged in both interstate and intrastate, which is the fact, that it has passenger trains which move only in the State of New Jersey; it has freight that moves only in the State of New Jersey; it has also its passenger trains which cross the state line, which do the same things.

The Court. Now, Mr. Lane, why do you consider it competent if it has been admitted?

Mr. Lane. Why, I think that it shows the nature of the work that was being done by the railroad company at the very time. This particular train or car which ran over the plaintiff was an interstate car. The plaintiff, or rather, the defendant railroad company was moving an interstate car at the time and was itself engaged in interstate commerce at that time. Now, I can only say that I can find, as I stated before, that in almost every case that is reported, your Honor will find that the courts refer to the nature of the train that did the damage. It is admitted whether it will go to the jury as being determinative or to be considered as to whether the employee at the time was engaged in interstate commerce is another thing, but it has always been admitted.

The Court. Suppose it was not an interstate commerce train, but the employee was engaged in interstate commerce? Would there not be liability?

Mr. Lane. I think there would.

The Court. What do you claim?

Mr. Carey. I haven't any doubt but what if the employee was engaged in the scope of his employment and was in interstate

commerce and was negligently—was injured by the negligence of the defendant, there would be liability.

The Court. Even if the train that did the injury was not an interstate commerce train?

Mr. Carey. Even though it were an intrastate movement.

The Court. I do not see how this can throw any light on the subject.

Mr. Lane. Then your Honor overrules—

The Court. Yes, I will overrule that and you may note your objection.

Mr. Lane. I note my objection.

The second. Now, Mr. Carey, you will probably object to that?

Mr. Carey. Yes, I think that this is subject to the same objection.

Mr. Lane. The second is designed to show that the cars standing on repair track number 27—now, wait a moment. There is a little bit different situation there. I submit that this one is proper, unquestionably. Your Honor will observe that track 27 is the one upon which this workman was working. The design of this interrogatory is to show that the cars standing on that track and of which this one car formed a part of the train, of the line, were indiscriminately interstate and intrastate cars, for the purpose of laying a basis of showing that this employee was assigned indiscriminately to interstate and intrastate traffic, or repairing cars designed indiscriminately for interstate and intrastate traffic.

The Court. I think I will admit that.

Mr. Carey. Objection noted.

The Court. Yes. You will have to show that he was, but that may be an element.

Mr. Lane. The cars standing on the repair track number 27 on June 20, 1919, with the exception of NYC-X cars were commercial cars which, after being repaired, were subject to orders for use in either intrastate or interstate commerce.

Now, the fourth.

Mr. Carey. I have no objection.

Mr. Lane. Fourth: While employed as a car repairer at the New Durham yards, plaintiff was assigned to repair cars which,

prior to being repaired, had been used in both interstate and intrastate commerce which, after being repaired, were subject to orders for use in either interstate or intrastate commerce.

The fifth.

Mr. Carey. That is objected to on the same ground as before.

Mr. Lane. Well, I submit that that is competent; that that is competent to go to a jury. This is the issue sought to be met by this interrogatory. Your Honor will observe that in answering the question as to what car number X-1284 was used for, the railroad company says it was used for the purpose of hauling refuse from Weehawken to Little Ferry. The answer to this interrogatory, or rather, this stipulation, is designed to bring out the nature of that refuse, whether it was the product of interstate or intrastate traffic or both, and the purpose for which that refuse was used, the theory being—upon the theory of the ash pits cases, the Peterson case was one of them—not the Peterson case, but I have forgotten the name of them—that it is for the jury to say whether the work which was performed by car NYC X-1284 was so closely connected with interstate traffic as that it was in fact an instrumentality of interstate traffic.

Now, it has been held, as your Honor will remember, that where there is an ash pit in which ashes are dumped, that a man removing those ashes which are the product of both interstate and intrastate traffic is engaged in interstate traffic within the meaning of the act. Now, in this particular case, the question is: Was NYC X-1284 an instrumentality of interstate commerce? If it was, then the repairs on it, or the man repairing it, was an employee in interstate commerce.

It seems to me that where refuse is gathered from interstate and from intrastate traffic indiscriminately in a terminal such as the Weehawken station, and then for the purpose of preparing the interstate traffic or the cars for interstate traffic; that refuse is removed in a car to a place where it is itself used, the refuse is used in interstate traffic, because it is used for filling for the main line, that that car was moving between Little Ferry and Weehawken in the ordinary course of business is an instrumentality of interstate commerce, and the car repairer is engaged in interstate commerce; at least, it is an element which goes to the jury, for the jury to determine whether he was

engaged, whether that is so closely connected with interstate commerce as to be a part of it within the meaning of the act.

The Court. Where is the distinction between the ash pit case and this question?

Mr. Carey. The distinction between this case and the ash pit case is a distinction of several degrees.

The Court. That is what I want to hear.

Mr. Carey. The first is that the ash pit case is a case where the ashes are emptied from an interstate engine, assigned to interstate work, as well as some others. Of course, if the interstate element enters in in connection with the use of the ash pit, why, that is—and they are mingled together, why it has been held, as I understand it, that that gives color to the work. Now, here is something which is going on in connection with interstate traffic, interstate transportation, and the word which we want to keep in mind in the discussion of interstate commerce as related to the application of this traffic is interstate transportation; not the broad general distinction of traffic, commerce, but as the Supreme Court of the United States has repeatedly held, interstate transportation is the meaning of the word or words so closely connected with the transportation, that is the movement of the thing which is moving in interstate commerce, unless it is so closely connected with the movement of that thing, that is, practically a part of it, it does not come within the purview of this statute. Now, the taking out of the ashes and the cleaning of the ash pit, and so forth, is directly connected with the engine itself; it is a part of the work in connection with the interstate engine and its movement. It would be perhaps somewhat analogous to the cleaning of these cars, not to the carting away of the refuse which has been stored until an accumulation sufficient to make a car load is gathered and then take them away, but it is the ash case directly with the movement. Now, cars come in and are swept, cleaned out. Now then, that act itself could be held to be a part of interstate transportation. It must be shown that those cars were being prepared for an interstate journey, to carry interstate traffic, and if they fail to do that, they fail to connect even the cleaning of the car. Now, that is the cleaning of the cars. The cleaning of the engine and the moving of the ashes stand practically on the same basis, I think. But we go farther than that. After they have been cleaned, the stuff is taken away from the car. Now then, there

is nothing—if there were nothing to show that those cars were being fitted for an interstate journey to which they had been assigned, the connection would fail. In other words, there must be an assignment to an interstate journey, not merely possibility of assignment to an interstate journey, but an actual assignment, so that this is in the course of preparation for that very assigned journey. Now, the stuff which is taken out of there is not goods or chattels or traffic at all, taken out and put in bags, ultimately goes into this car, it is not commerce at all, and the car takes it away. Now, that car moves within the state, not interstate; but we have to go one step farther before we come to what they claim here constitutes interstate commerce, and that is the repair of that car. Now, under all the cases, that is too remote altogether to connect it with interstate commerce. It has even been held by the Supreme Court of the United States that the repairing of an engine which had finished an interstate trip and which immediately after being repaired was put upon another interstate trip, does not constitute interstate commerce. They say an engine as an engine is not an instrumentality of interstate commerce and does not become so until it is assigned to a certain definite trip in interstate commerce. Now, under those cases, the admission as to what was in fact done, the work which was in fact done by this car, is entirely immaterial and does not tend to show—

The Court. I shall allow this. It may be connected up as an element that might be proper after a while.

Mr. Carey. Objection noted.

The Court. Yes, note your objection. I am not saying what the effect of it may be if it is not connected up, but I think it is proper in itself.

Mr. Lane. Well, by sitting silent, if your Honor please, I do not want to acquiesce—

The Court. I understand that.

Mr. Lane. —in Mr. Carey's statement of the law of the Supreme Court of the United States.

For several months prior to June 17, 1919, and for several months after June 28, 1919, car NYC X-1284 was used for transporting refuse from Weehawken, N. J., to Little Ferry, N. J. Said refuse consisted of sweepings from cars of both interstate and intrastate passenger trains operated over the West Shore

Railroad, of sweepings from the streets around the milk sheds at Weehawken, and refuse and sweepings from the Weehawken station. At Little Ferry this refuse was used for filling purposes or was burned.

Mr. Carey has, I think, agreed to amplify that stipulation by stating that that portion of it that was used for filling purposes was used by the railroad company for filling for new tracks on the right of way.

Mr. Carey. Some of it was used for that purpose, and some of it was, as I understand it—

Mr. Lane. Was burned.

Mr. Carey. And some of it was used for filling in the dump which was really outside of the main line stem of the railroad, and the part which was burned was the inflammable matter such as papers and things of that kind which were set fire to, I find, by something hot after dumped onto the dump.

Mr. Lane. Well, all I am interested in is that some part of it was used for the purpose of filling for the extension of the main line or the building of new tracks on the main line of the West Shore.

Mr. Carey. For making an embankment on which new tracks would ultimately be placed. That is the intention ultimately, to place new tracks on that fill. In order to be positive about that, I will have to ask Mr.—Mr. Totten tells me that it has been used not for filling in, in filling in on main line tracks, but is used for filling in on the meadows where they are constructing the new freight yard; that this freight yard will receive interstate and intrastate cars. Mr. Lane and I are agreed that we want to get at the true facts of the case.

Mr. Lane. I will call Mr. Herzog out of order, if counsel will permit, and the Court. I would like to call the doctor, who is here and wants to get away.

The Court. If there is no objection, that may be done.

Mr. Lane. Doctor Pitkin.

GEORGE P. PITKIN, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Lane.

Mr. Carey. I would like to ask if Doctor Sweeney is in court? (No response.) He has not arrived.

George P. Pitkin, direct.

Mr. Lane. Well, do you object to going on?

Mr. Carey. Why, I think not, Mr. Lane.

Q Doctor Pitkin, what is your profession? A Physician.

Q And where do you practice it? A Bergenfield, New Jersey.

Q And how long have you been practicing? A Ten—ten or eleven years.

Q Surgeon? A Yes, sir.

Q And general practice? A Yes, sir.

Q Do you know the plaintiff Herzog? A I do.

Q When did you first see him? A On August the 8th, 1919; no, August the 6th.

Q And did you examine him at that time? A I did.

Q What did you find to be his physical condition? A He was convalescing from the results of an injury and an operation. His left leg had been amputated at the junction of the upper and lower—the upper one-third of the lower two-thirds; that is, about four or five inches below the knee. The stump was covered with granulation tissue and scar tissue. By granulation tissue, I mean tissue that is not completely healed after an operation. That took about—about four weeks to have that granulation completely heal over and scar tissue form. On the left hand, the hand, that had an appearance of having the flesh crushed or stripped off of it, particularly the bottom of the hand. The forefinger—

Mr. Carey. You said, particularly something?

The Witness. I beg your pardon?

Mr. Lane. Particularly the bottom of the hand.

The Witness. Particularly the bottom of the hand.

Mr. Carey. Oh, yes.

A (Continuing.) The forefinger was missing, either been so badly injured at the time of the accident the doctor had seen fit to amputate it, or it had been taken off by the accident. The bottom of the hand, as I say, the appearance of being stripped, the flesh on it, and cicatricial tissue, keloid, had formed, which had drawn the hand up in a condition of this kind (indicating), known to medicine as a claw hand.

Q Is that condition permanent? A That condition will probably be permanent, and as age goes on and time goes on

this cicatricial tissue contracts, possibly it will pull the fingers into the palm of the hand. On the right hand the same appearance occurred in the palm of the hand; that is, the cicatricial tissue with the numerous scars going through the hand, and the fourth and fifth finger was missing, and a part of the thumb, just a tip. He had had scars on the head, which had been treated and healed. I had nothing to do with that.

Q Is that all the injury that he was suffering from at that time when you saw him? A That is all that I treated him for, was the hands and the leg.

Q How long did you treat him? A I treated him from the 6th of August until the 30th of August, and at that time he told me that Doctor Sweeney, the railroad physician, come to see him, and he wanted him to go back to the hospital to have the hand re-operated on and have hot-air treatment applied to try and loosen up the joints and cicatricial tissue.

Q Do you know whether he did go back to the hospital or not? A I think he did. I do not know. I did not see him after that.

Q You haven't examined him? A I didn't see him since.

Q When you discharged him on the 30th of August, what would you say as to the possibility or his probability of recovering to any greater extent than he had at that time recovered? A Well, in what way do you mean by that?

Q Would he get any better? Would he get any further use of his hands? A I doubt it very much.

Q Had he, when you first saw him on the 6th of August, entirely recovered from shock? A Yes, sir.

Mr. Lane. Cross examine.

Cross examination by Mr. Carey.

Q You say, Doctor, that nothing can be done to relieve the stiffness which you speak of? A Why, he possibly—other operations to get the cicatricial tissue out of the palm of his hand might relieve it; possibly baking might to a slight extent.

Q Was that what you understood Doctor Sweeney recommended? A Yes, sir.

Q And that remedy is often resorted to, is it not, for relieving stiffness of joints? A For relieving stiffness of joints, yes.

Q And also for the other stiffness that this man suffers from? A I do not think hot air would have much effect on keloids.

George P. Pitkin, re-direct.

Q Do you think that the stiffness of the joints might be broken up and relieved by proper treatment? A The stiffness of the joints might be relieved by proper treatment, but the keloid, the contracture, not the contraction, but the contracture of the scarred tissue, I doubt very much if it could be relieved.

Q What would be the process of relieving the stiffness of the joints? A The—I do not think that you just get my meaning right. The stiffness of the joints, the stiffness of the joints, perhaps, is not what is causing the trouble; it is the keloid that is causing the trouble, the contracture of this scarred tissue. It is not so much in the joint itself; the joint is, the keloid is holding the joint, whereas he has got a flexion this way (indicating); you get an extension. It would be quite impossible to get a full extension on account of the contracture from the scarred tissue, the scarred tissue, which is non-elastic. If it were not for the contracture which is caused by the scarred tissue, the joints would move.

Q With comparative freeness? A Yes.

Q Now, isn't massage frequently used for removing the effects of this scarred tissue? A With not any good results.

Q Never with any good results? A Very rarely; when you get a keloid, massage won't.

Q And is baking of the member afflicted in that way sometimes resorted to? A Resorted to for stiff joints.

Q Yes. And with success, frequently? A Very frequently with stiff joints, yes.

Q Did you advise against the treatment which you understood Doctor Sweeney suggested? A No, sir.

Q Did you give any advice on the subject at all? A I told him to go back and let them do what they could for him.

Q When is the best time to apply the remedy if an effort is to be made to benefit the condition of the hands? A After your healing has taken place; that is about the time it was applied to him.

Q Have you seen him since the 30th of August? A Just today; that was all.

Mr. Carey. That is all.

Re-direct examination by Mr. Lane.

Q What in your best judgment, Doctor, as to the ultimate success of any operation on these hands with reference to any

permanent relief? A Why, he is going to—there isn't any operation, I do not think, that can be performed that will give him full function of his hands.

Q What is your best judgment as to how much permanent relief could be given by an operation? A Well, he may get—
10 of course, overlooking the fingers that are missing, the remainder of the hand he could probably get seventy-five per cent. function.

Q Does this condition, if there was an operation to remove this, whatever it is, that is causing the contraction, is there a tendency for it to grow back? A There is; yes, sir.

Mr. Carey. Tendency to what?

Mr. Lane. To grow back or new to form, new tissue to form.

Q And, of course, the result of that growing would be to
20 bring back the old condition? A Yes.

Mr. Carey. Nothing further.

Mr. Lane. That is all, Doctor. Mr. Herzog.

FREDERICK HERZOG, the plaintiff, sworn as a witness in his own behalf, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Herzog, where do you live? A In Dumont.

Q And are you married? A Yes, sir.

30 Q How old are you? A 47.

Q Any children? A No, sir.

Q You were employed on June 20th at the New Durham yard of the West Shore Railroad? A Yes, sir.

Q As what? A As car repairer.

Q Speak out so that we can all hear you. How long had you been employed there? A Since the 25th of 1918, 25th of September, 1918.

Q What was your wages? A At that time four and a half cents—forty-eight and a half cents an hour.

40 Q And how often were you paid? A Twice a month.

Q What was your duties, what were your duties? A Repairing cars.

Q How were you assigned to work? How did you know what cars—what was the custom with respect to your being assigned

to work? A Working as partners, two men worked together, and each one has a number and one man's number got put on the car, and then we go right ahead and work.

Q Well, when did you get your orders? A Seven o'clock in the morning.

Q From whom? A From the assistant foreman; goes out and chalks the cars up.

Q And then, as I understand it, you saw your numbers up on certain cars? A Yes, sir.

Q And that is the way you knew which cars to go to? A Yes, sir.

Q Who was your immediate superior? Who was the man above you? A Above me?

The Court. Who was your boss?

Q Who was your boss? A Mr. O'Connell.

Q And what position did Mr. Popp hold? A Assistant foreman.

Q Assistant foreman? A Yes, sir.

Q Who was Mr. Fogarty? A Mr. Fogarty is yard inspector.

Q On the morning of June 20th, what time did you get to the yard? A Quarter to seven.

Q And did you go to work then? A Yes, sir.

Q What work did you go to do? A Undress. Light repairs; started on light repairs first.

Q On what track? A Track 25.

Q Which end of track 25? A The south end of the walk.

Q What was the nature of those repairs? A Well, as I remember, I put an end in on a box car.

Q With your helper or with your— A Yes, sir; with my helper.

Q —side partner? A Yes, sir.

Q What was his name? A Arthur Ernst.

Q How many cars were there at that time on track 25? A That I do not remember.

Q What time did you get through working on track 25? A It must have been around nine o'clock.

Q And then where did you go? A From there we went to track 27.

Q And what kind of work did you go on track 27 to do? A Put in new timbers.

Q In what kind of a car? A In a box car, New York Central.

Q That is New York Central X-1284? A Yes.

Q How long did you continue doing that work? A I think this was the second day we were at it.

Q I mean, how long that morning did you continue work on that car? A We were about it half an hour.

Q And then what happened? A And then I brought the timber to the carpenter shop, and when I came back, just kneeled down, Mr. Fogarty came and said, "Fred, come along; I want to see you."

Q Yes. What did you do? A Then I walked up the yard with Mr. Fogarty and we met Assistant Foreman Popp there and he called him too, and then we three went up to a car on track 21, and he showed me the car. He says, "Here is some of your work from yesterday," he said. I said, "What is that?" He said, "Never mind; you know what it is." He said, "Look at it." I said, "I didn't fix that car." He says, "Your number is on the car." I says, "I know," I said, "I didn't do the work; I was called away; I was called somewhere else."

Q Go on. Was Fogarty and Popp both standing there? A Yes, sir.

Q Yes. A Then Mr. Fogarty says, "How is that?" And Mr. Assistant Foreman Popp told him, he says, "Yes, Fred was somewhere else. I remember I called him away." He says, "I remember too now. You can go, Fred." From there I walked away and wanted to go back to my work again and the yard was very empty that morning. The live tracks. I walked right straight through off the 25 and that track—

Q You walked straight through from 21 to 25? A Yes, sir.

Q Did you pass 21, 23 and 24? A Yes, sir.

Q They were empty? A Yes.

Q Then you came to track 25; what did you find? A 25; I crawled through that.

Q When you got to 25, what did you find? A 25, that track was full of cars.

Q Well, what did you do? A And I crawled under there through to the other track. As soon as I got under the car, the car moved back about a foot forward and back over my

hands and foot and run over, and went the same amount back again; then it stopped.

Q Well, how did it hurt you? How did it hurt you? A I had my—this hand on that rail and the foot on the back rail, just my whole body was over the track.

Q Then what happened? A And then it was quiet for a while. The cars—nothing was moving there at all, and all of a sudden they started to pull again. Then I started to holler and the next man I seen was Mr. Hobbs, the blacksmith; then he pulled me out.

Q Now, when you came to track 25 before you started to go under the car, did you do anything? A I looked right and left; I didn't see anybody.

Q Well, when you say you looked right and left, what do you mean by that? To your right and your left would be which way? A North and south.

Q That is up and down the line? A The line of cars, yes.

Q Gangway between the two tracks? A Yes.

Q Could you see any engine up ahead? A No, sir; it is impossible there.

Q Were the cars or any of them moving? A No, they were quiet.

Q Did you see any men? A I didn't see anybody at all.

Q Either on the cars or along the cars? A Yes, sir.

Q What is the custom with respect to—how do workmen go from one part of the yard to the other, when they have got to go from one part of the yard to the other? A Anything at all. Crawl under, or walk over, or whatever it is, the nearest and the best.

Q Well, why do they do that? A Because we have cars marked up on all tracks from 24, 25, 26, 27; it might be right across over on 26 and 27. We cannot very well walk around four or five cars that way and come back again when your cars is right over on the opposite track.

Q Well, why should you go under a car? A That was common there; everybody done it.

Q For how long a time had they been doing it? A As long as I am there.

Q Was any objection ever made by any— A No, sir.

Q By any of the bosses? A No, sir; by nobody.

Frederick Herzog, direct.

Q Do you know of your own knowledge whether the bosses knew whether it was done that way? A Sure, the bosses knew it; they seen it.

Q How far were you at the time you crawled under this car from Fogarty and Popp? A Well, the width, from 25 to 21.

Q That is about 75 foot; no, less than that; about 25 feet, wouldn't it be? A About, yes. No, not that much. Track 22, 23, 24.

The Court. How wide is the track between the rails, do you know?

The Witness. No, not exactly.

Mr. Carey. Four feet, eight and a half.

Q Well, if this is drawn to an approximate scale, it would be about 60 foot.

Mr. Carey. We can have the measurement taken right now if you care to. It is drawn to a scale.

Mr. Lane. Yes, I say about 60 foot.

Mr. Carey. Mr. Garrison, have you a ruler?

The Court. Let him measure it and see what it is. Now, from what point to what point?

Mr. Lane. From where Fogarty was standing which was on the side of track 21; well, from where Fogarty was standing, which was on the side of track 21 to where this man went under the car which was on the same side of track 25 would be a distance of 70 feet and straight across the tracks would be a distance of 40 feet.

Q Was there anything between you and Popp and Fogarty? A No.

The Court. Read that question and answer again, Mr. Stenographer.

(Question and answer read by the stenographer).

Q What was the custom in the yard with respect to warnings when trains were moved or cars were moved on dead head tracks? A Whenever they brought in cars that were there, they made noise enough so everybody would know it, or those people that were working on the track they were told.

Frederick Herzog, cross.

Q Well, when you say they made noise enough, just tell us what they would do if they were going to fill— A Well, "Hello, there" and "look out." The crew and a couple of men did generally call—I do not know what his position is at present —and a few more fellows marked up the cars; they all holler: they come in on the first car, pushing in the last car, and hollering and warn everybody every time. That morning I didn't see anybody.

Mr. Carey. Won't you read that answer, please?

(Question and answer read by the stenographer.)

Q Was it a customary thing to move cars on these dead head tracks during the day time? A No, it was not. Lately it was done there, but they had hardly any cars in in the morning for the last couple of weeks, at that time they weren't pushed in the morning, and during the day they were pushed in.

Q Well, what was the general custom with respect to loading and unloading the tracks? A It was mostly done at night.

Q Did you hear any noise around track 25? A No, sir.

Q Before you crawled under? A No, sir.

Q Did you see any men guarding the track? A I didn't see nobody, not a soul.

Q Was there anything to indicate to you that those cars were going to be moved? A No, sir.

Q Why did you think the cars were not going to be moved? A Because of being a dead track.

Q And why did you think they were not going to be moved because they were on a dead track? A Well, if they were being moved, they would notify the people.

Q What are the numbers of the dead tracks? A From— from west to east, 24, 25, 26, 27, 11 and 10.

Mr. Lane. Cross examine.

Cross examination by Mr. Carey.

Q How old do you say you are, Mr.— A 47.

Q You say that each man has a number? A Yes, sir.

Q And his number is placed on the car? A On the cars with chalk.

Q And is that the way he knows what car he is to work on? A Yes, sir.

Frederick Herzog, cross.

Q That is after the car is placed on the dead head track, is it not? A Yes.

Q Who places the number on the cars? A Generally the—the assistant foreman.

Q Now, the cars are taken out of these dead head tracks almost always at night, are they not? A Yes, sir.

Q You never knew of their being taken out in the day time, did you? A Not taken out, not for that purpose; that they were finished.

Q No, they leave the cars on the dead head tracks until the whole string has been completed? A Yes, sir.

Q And then they pull out the string at night? A At nights.

Q It is very seldom that one car is taken out during the day time, isn't it? A Yes, sir.

Q Did you ever know of that being done? A Yes, I seen it happen, because if there was a car put in by mistake or a loaded car which they didn't want it there, but not otherwise.

Q Now, the cars are filled, the tracks are filled frequently in the day time, are they not? A The tracks?

Q The tracks, yes? A They are generally filled when we get there in the morning.

Q They are usually filled when you get there in the morning? A Yes, sir.

Q But they are also filled during the day time? A Yes, the day time.

Q Now, there is a lock which locks the switches that enter these dead head tracks, is there not? A Yes.

Q On each dead head track? A Yes, sir.

Q Is a locked switch—or, at least, there is a lock switch which prevents an engine from coming in onto the dead head track? A Not on each track.

Q Not on each track? A No, sir.

Q But one lock will sometimes control two or three tracks? A Four or five tracks; yes, sir.

Q The repair tracks or dead head tracks are entered from lead tracks, are they not? A Yes.

Q And those lead switches are locked, is that right? A Yes, sir.

Q Now, when a track is to be filled with cars, someone goes up along the track with the key to the switch and unlocks the

switch to let the cars in, is that right? A That I do not know. I never done it myself, so I cannot—

Q You never did it yourself? A No.

Q You have seen it done, haven't you? A No, I did not.

Q You never saw that done? A No. I don't know who is doing it at all.

Q What? A It isn't done from the car repairers. It must be somebody from the crew, I suppose, or from the office; I do not know.

Q And after the switches are opened, and a string of cars is backed in onto the track? A Yes.

Q And sometimes out of that string of cars they have to cut out a loaded car and place it on some other track, do they not? A Yes.

Q And then put the remainder of the string in on the repair track after they have taken out all the cars that they do not wish to go in? A Yes.

Q On the repair track, isn't that right? A Yes.

Q Now, after a string of cars has been put in on the repair track and they have placed as many cars as they intend to place on the repair track at one time, what is the next thing that the crew does? A I do not know.

Q You do not know that? A No. I ain't acquainted with the crew.

Q Now, when the string comes in there, the cars are all coupled together, are they not? A Yes.

Q Do the crew uncouple the cars at any place? A Yes.

Q Space them? A Sometimes; yes.

Q And about how many cars are there between spaces? A Well, I do not know. I seen as many as eight cars coupled together without a space.

Q Ordinarily there are how many, three or four? A Four, never less than four

Q Now, spacing the cars like that is called what, spotting them? A I guess so, yes.

Mr. Lane. Well, don't answer unless you know. Don't guess at anything.

Q Then after the cars have been spaced or spotted in that way, what does the switch engine and crew do? A I ain't acquainted with the yard people at all. What their business is during the day I do not know.

Frederick Herzog, cross.

Q No, no. But while they are still there on the repair track after the engine and crew have spaced the cars, then what do the engine and crew—what do the crew do with the engine? A Go up in the north yard.

Q They go out of the dead head track, do they not? A Yes.

Q And after the engine goes out of the dead head track, what is done with the switches? A I cannot tell you.

Q Or the switches which enters that track? A I cannot tell you; I do not know.

Q Well, you spoke about switches being locked? A Yes, but I never done it, and I never seen it done either.

Q I am not asking you if you did it; but don't you know what is done with the switch after the engine passes out of the dead head track? A (No response.)

Q Don't you know the switch is locked then? A Well, I suppose—I hope so, yes.

Q Well, you know that, as a matter of fact, it is locked after this has been done, don't you? A She should be locked; sure.

Q And then the blue sign is set up, is it not? A Yes.

Q Where is that put? A For engines not to come in there again.

Q Where is it put? A Way up on the end.

Q North end? A Yes, on the north end. Yes, sir.

Q And how far ahead of the head car is that sign placed? A Oh, I seen it ten feet away; I seen it twenty feet away from the last—from the end car.

Q Now, what does that blue sign mean? A For an engine not to come in there; there is people working on the track.

Q Well, the engine cannot come in there because the switch is locked, isn't that true? A Yes.

Q What? A That is the only sign—that is the only thing that it means, that people are working under the track; that is what the blue sign means.

Q The engine man does not have the key to the switch, does he? A No, sir; he does not leave the engine, I suppose.

Q No other one of the crew has the key to the switch; that is kept by the foreman or the assistant foreman, or somebody to whom he gives the key to unlock the switch, isn't it? A If I ain't mistaken, the key is up in the north yard with Mr. Fogarty.

Q With Mr. Fogarty? A Yes, I think so.

Frederick Herzog, cross.

Q Well, at any rate, somebody in the car repair department has charge of the key, hasn't he? A Yes.

Q And that someone is the one who unlocks the switch to let the engine in, or another person to whom he may give the key for that purpose? A Yes, sir.

Q And the train crew cannot come in with the engine after the switch has been locked until somebody from the car department, car repair department, has unlocked the switch for them, that's right, isn't it? A Well, I seen that done. Anybody can take the sign down and lay them down on the ground.

Q Well, that wouldn't let the engine in? A Oh, yes, when the lock on the switch is open.

Q Yes. But that is done by somebody from the car department? A Well, unlocking the switch, no, sir.

Q After the cars have been spaced and the switch has been locked, then the assistant foreman comes along and marks the numbers of the workmen on the different cars, doesn't he? A Yes, sir.

Q And it isn't until that is done that the workmen know which car he is to go on, is it? A Yes, sir; they know which car.

Q After that has been done? A Yes.

Q Then he knows what car he is to go to work on. Sometimes the assistant foreman directs the attention of the man to the car that he is to work on, doesn't he, in addition to putting his number on? A I don't quite get you.

Q I say, sometimes the assistant foreman directs the attention of the car repairer to the car that he is to work on, in addition to putting his number on it? A No.

Q In other words, Mr. Popp sometimes says, after he has put the repairer's number on a car, "Here is your car; you can go to work on that"? A Oh, yes; he said that, yes.

Q Men don't go to work on the cars until their numbers have been placed on the cars? A Yes, sir.

Q What? A Yes, sir.

Q You mean they do go to work before, or that they do not go to work before? A Well, when they generally start, one fellow follows the other up from eight to ten—

Q Just listen to the question. The workman does not go to work on the car until after his number has been put on it? A Yes, sir.

Q Is that right? A Yes, sir.

Q Now, on the morning of the 20th, you say that you did some work on some cars on track number 25? A Yes.

Q Are you sure about the track number? A I am positive.

Q Don't you know that there were no cars on track number 25 on that morning except some "X" cars that were way down south of that board crossing shown on the map there? A I was working south of the walk on that morning of the 20th.

Q Were you working on "X" cars down there? A No. On box cars; one was a coal car; I really don't know all the repairs what I done on it. In the box car, I put an end; that I know.

Q Have you ever examined the records of the company to see what cars were on that track that morning? A No, I did not. Why should I?

Q You know that the company keep a record, a book record of cars that are placed on the different tracks, don't you? A Oh, yes, sure they do that.

Q You have never examined the book records of the company to find whether there were cars on track 25 on that morning before these cars were pushed in there, have you? A No, sir.

Q Now, isn't it probable that you were working on some cars on truck 26 or 24 that morning instead of 25? A No, on 26 I dodn't work then; there could be on 24.

Q It could be on 24? A Yes. But it was the two first cars off the walk south.

Q Yes. A South, off the walk.

Q And you are not certain whether it was on 24 or 25? A I wouldn't swear to that.

Q Now, north of the walk which is shown on that map—

Mr. Carey. I suppose we had better have that marked down here, Mr. Lane?

Mr. Lane. Yes. I will mark it Exhibit A of the plaintiff if you want to.

Mr. Carey. All right. I suppose we may refer to it in that way.

(Map marked Exhibit A of the plaintiff.)

Q Now, on the morning of the 20th of June, 1919, track 25—when you first went to work, track 25 was clear all the way up north of this board walk shown on this map, is that right? A Yes, sir.

Frederick Herzog, cross.

Q Now, after you did the light repair work which you speak of early in the morning, how did you come to go to work on this X-1284 car? A As soon as we finished, we went over there to track 27.

Q You went over to track 27. Did anybody direct you to go over there? A No, sir; it is a custom.

Q How did you know that you were to go to work on X-1284? A Well, that is the rules there. When you are through with your light repairing, go on with your heavys.

Q You were doing heavy repairs on which track? A On 27.

Q On X-1284? A Yes, sir.

Q Now, where was X-1284 placed on track 27? I think you said it was on 27? A On 27.

Q Was it north of the board walk or south of the board walk? A North of the board walk.

Q Now, then, indicated here on this map, the position of that car right at this point, which is just a little north of the store room? A Yes, sir.

Q Is that right? A That's right.

Q Had you worked on that car before the morning of the 20th? A No, not—not on that day.

Q No. Had you on any day worked on it before that? A A little while on the 19th, on the evening of the 19th, about a half an hour.

Q Did you first begin working on it on the 19th? A Yes, sir.

Q That car had been in the yard and on the repair track for some little time, had it not? A Yes, sir.

Q About how long do you think? A Well, if I ain't mistaken, from four to five days.

Q Had any other workmen been working on the car? A No.

Q Before you went to work on it? A No, not before me; no, sir.

Q What was the nature of the repairs you were making to that car? A Putting in draft timbers, new draft timbers.

Q And the repairs were quite extensive repairs, were they not? A Yes, sir.

Q Now, on this morning, after you had been working there for a time, you were called by Mr. Fogarty, were you? A Yes, sir.

Q What did Fogarty say to you? A He says, "Fred, come on; come with me; I want to see you."

Frederick Herzog, cross.

Q Did he tell you what he wanted to see you for then? A No, sir.

Q Did he say anything about some work which you—which he supposed you had done? A Mr. Fogarty didn't spoke a word to me until we got up to the car.

Q He said nothing until you got up to the car? A Not a word.

Q Now, as you went up there, did you meet anybody on the way? A Assistant foreman.

Q The assistant foremain, that is Mr. Popp? A Yes, sir.

Q And where did you meet him? A Well, way up north; quite a ways up.

Q Well, do you know where track 26 ends? A Anyhow five or six cars more—further up than where car 21 was placed; he wanted to show me—we walked back again then.

Q Up along the track here was where you first met Mr. Popp, was it? A Yes, sir.

Q How did you get up there? A Walking up between 27 the first time, between 27, and we crossed over to 27 and 26, that is a wide space between them two tracks.

Q Yes. Now, were there cars on 27 and 26 that morning? A Yes, there was some cars on there.

Q A good many cars on 26? A I do not recollect how many was there.

Q Were the cars on 26 and 27 spaced that morning? A On 27, if I ain't mistaken, they were all old cars from days before.

Q Yes. A They were not moved at all.

Q And on 26, were the cars spaced on 26? A Well, not way up north.

Q Was 26 full of cars? A No, it was room for more.

Q Where were these cars that were on 26, on the northerly end, or— A Yes, up to the north.

Q All on the northerly end? A Yes.

Q Some of them were spaced, were they? A Yes, sir.

Q And when you went from 27 to 26 and over 26, did you walk through one of the spaces? A No, it was empty, the top end was empty altogether.

Q Oh, the top end was empty altogether? A Yes, sir; it was way up north where we went to.

Q But you did cross over track 26, did you? A (Nodding head.) Yes.

Frederick Herzog, cross.

Q Now, was Mr. Popp up near the head end of track 26? A Yes. No, I do not know what track he was sitting; he was sitting up on the rail.

Q What was he doing up there? A He was sitting on the ground up there. Mr. Fogarty told him—asked him to come along.

Q Do you know why he was up there, what he was doing? A No, I do not know.

Q Just simply sitting there? A Sitting there on the rail. I do not know. That is all I know.

Q He did not seem to be doing anything at all? A No.

Q Nothing going on around there? A Not a thing.

Q At that time were there any cars in on track 25? A I do not recollect.

Q You do not recall that? A No.

Q Now, as you got up here to the place where Mr. Popp was, what did Mr. Fogarty say to Mr. Popp? A He says, "Al, come on." He says, "What do you want?" "Well," he says, "come on with me. I am going to show you something."

Q Is that all he said? A Yes, sir.

Q What did Mr. Popp answer to that? A Mr. Popp went along.

Q Didn't he make any answer at all? A (No response.)

Q What? A I do not remember.

Q Don't you remember that he said that he couldn't go because they were filling track 25? A No, sir.

Q What? A No.

Q You say he didn't say that? A I didn't hear it.

Q Were you right close by Fogarty at the time Fogarty was talking with Popp? A I wasn't far away from him. Yes, sir.

Q You remember on one occasion in July that Mr. Babis of the railroad company and Mr. Mulcox, a stenographer, talked with you about this acicdent to find out how it happened? A Yes.

Q Who else was there beside those two men? A Nobody.

Q Was Doctor Sweeney there? A No, sir.

Q Was Doctor Sweeney ever there at a time when Mr. Babis and Mr. Mulcox were there? A No.

Q Mr. Babis asked you a good many questions about the accident, didn't he? A Yes.

Frederick Herzog, cross.

Q On that occasion. And Mr. Mulcox took down the questions and the answers, did he not? A I suppose he did, yes.

Q They told you so, did they not? A Yes.

Q Mr. Babis told you that he was from the railroad company and wanted to find out from you how the accident happened, didn't he? A Yes.

Q He told you that Mr. Mulcox was a stenographer and that he was going to take down your answers, didn't he? A Yes, sir.

Q Now, did you tell Mr. Mulcox and Mr. Babis at that time that Mr. Popp expected more cars to come in? A No, sir.

Q You didn't tell him that? A No, sir.

Q Were you asked this question? "Question: Didn't he say he couldn't go because they were going to fill track 25?" And did you answer this: "Answer: He didn't say that to me; he said something like that to Fogarty"? A No.

Q Do you swear that you didn't give that answer to that question? A Yes, sir; I can swear that.

Q Was this question asked you? "Who asked him"—referring to Mr. Popp—"to go over with you? Did you ask him to go along or did Fogarty?" And did you answer: "Fogarty told him to come along, he wanted to show me something"? A Yes.

Q That question and answer was given, was it? A (No response.)

Q Now, are you sure that you didn't say that—are you sure that the question was not asked: "Didn't he say he couldn't come because they were going to fill track 25?" And the answer: "He didn't say that to me; he said something like that to Fogarty"? A He might have asked me that, I don't recollect. But I didn't hear anything that Fogarty said—that Popp said anything to Fogarty like that.

Q Didn't you make an answer to that question: "He didn't say that to me; he said something like that to Fogarty"? A I do not remember that.

Q You do not remember that? A No.

Q And you won't say that you didn't make that answer? A No, I didn't say it.

Q What? A I didn't say it. How could I say it? I didn't hear that Popp said anything to Fogarty like that.

Q Well, the question is, did you say, when you were asked that question: "He didn't say that to me; he said something

like that to Fogarty''? A No, I did not. I could not have said that.

Q Well, did you say it? A No, sir.

Q Then do I understand you that Mr. Popp went right along when Fogarty asked him to go with you without saying a word, what? A What he said, he said, "What do you want," again, like that.

Q Yes, and what did Fogarty say? A "I want to show you something," he said.

Q And then what did Popp say? A Well, he come along.

Q He didn't say anything more than that? A No, not as I remember.

Q Not as you remember? A No.

Q Now, where did you cross over track 25 that morning? A to go back to my work, to 27.

Q No. When you were going to track 21 to see this car, where did you cross track 25? A Up north, further up north than the car 21 lays, laid then.

Q Did you cross track 25 up near the switch that comes into the— A Not far away.

Q Not far away? A No.

Q Were there any cars on track 25 where you crossed? A I think it was a few cars on 24, or they were on 23, I wouldn't swear to that.

Q Well, how about 25, were there any cars on 25 up at that place where you crossed— A Not—

Q Just wait until I get through. Were there any cars on track 25 where you crossed when you were going to track 21? A I do not recollect that.

Q You do not recollect about it? A No.

Q Were there cars up there on track 26? A Not way up north.

Q Were there cars up where Popp was—were there cars on 26 up where Popp was? A There was cars right in front of him. He was sitting alongside of a car.

Q And which side of the cars on track 26, on the east side or the west side? A Popp was sitting that way (indicating); he was facing the west.

Q He was facing the west? A Yes.

Frederick Herzog, cross.

Q That is, he was facing track 25, wasn't he? A Well, I really do not know what track he was sitting; I do not remember that.

Q Well, he was looking toward track 25? A Yes.

Q He wasn't west of track 25, was he? A On what track he was really sitting, I cannot swear to.

Q Well, was he west of track 25 or east of track 25? A Well, I do not know.

Q You do not recall that? A No.

Q After you had crossed track 25, you came—in going west, you came then to track 26, did you not? No, track 24? A 24.

Q Yes, that's right. In going west, after crossing 25, you came to track 24, and track 24 is a dead head track, is it not? A Yes, sir.

Q And were there cars on track 24? A Not at that place there, no, sir.

Q Were there cars further south on track 24? A Yes, sir.

Q Then you next came to track 23, did you not? A Yes, sir.

Q Is that also a dead head track? A That is a live track, the first live track.

Q Now, what do you mean by a live track? A Moving freight all day long.

Q Yes. That is what they call a yard track, isn't it? A A yard track, yes.

Q And cars are liable to move there at any time? A Yes, sir.

Q Were there cars on track 24? A No, not at that point. The yard was very empty that morning.

Q No cars on 23 at that point? A No, not at that end.

Q You are sure there was no cars on the upper end? A Yes, we were walking right straight through from there to track 21.

Q On track 23, and none on track 22? A None on track 22 at all.

Q And what was there on track 21? A Why, I didn't look around for that. He brought us right up there to that car on 21.

Q Well, were there a string of cars on 21? A No, it was not, but I saw a car there, that was all.

Q Was this Big Four coupled up to any other car? A I do not remember.

Q Or was it standing by itself? A I think she was standing there alone; I ain't sure.

Q Now, as soon as Mr. Popp said you did not do the repairs on the Big Four car, you were dismissed to go back to your work on— A 27.

Q —track 27, were you? Now, as you were coming back, Fogarty and Popp didn't come with you, did they? A No, sir.

Q Where did they go? A That man what done the repairing, he came there, and they were talking to him.

Q Yes. Mr. Fogarty called him over to him on—I do not know, he came right walking in, I do not know how he got there.

Q And Mr. Fogarty and Mr. Popp pointed out that that wasn't the proper way to repair the car? A Yes, sir.

Q And they reprimanded him severely for not repairing it properly, did they not? A (Nodding head.) Yes.

Q And then he went away? A I went away.

Q Well, did the other man go away, too? A No, the other man stayed there with them two.

Q Was he standing there with them when you left? A When I walked away, I was the only one went away.

Q Did you see any of them after that time? A No.

Q Until you were injured? A That was the last.

Q Now, as you came back, are you sure that there were no cars on 22 and 23 up in that vicinity? A 22 and 23 was empty. I walked right across, straight over.

Q And were there not cars on track 24? A On 24, might be a few, yes.

Q Yes. There were a number of cars on track 24, were there not? A Yes, sir.

Q And was there a space between the cars on track 24? A Yes.

Q And did you pass through that space? A Yes, sir.

Q And then you came to track 25? A 25.

Q When you came to track 25, did you know that was track 25? A Yes, sir.

Q And did you know that you were crawling under cars on track 25? A Yes, I knew.

Q When Mr. Babis and Mr. Mulcox interviewed you, was this question asked of you: "Did you forget that was track 25 you were going over?" And did you answer, "No, I didn't know

exactly which track it was"? A I do not know if I answered that question.

Q You do not know if you answered it in that way? A No.

Q Do you remember that question being asked you? A No.

Q Then were you asked this question: "You say that Fogarty had intimated that they were going to put cars on track 25?" Answer: "Not Fogarty, Popp." Was that question asked you, and did you answer it in that way? A No, sir.

Q What? A No, sir.

Q Now, on that occasion, were you asked this question: "Did you look either way before you went under? Answer: No, I did not." Was that question asked you, and did you answer it that way? A No, sir; I couldn't. I know I did look north and south. I didn't see a soul in that neighborhood there.

Q Well, how far could you see north? A We could see north four to five cars, six cars maybe, before the—

Q You could see way up beyond the end? A No, you cannot.

Q On track 25, couldn't you? A No, sir; there was a bend. Then there comes a bend.

Q Is the bend on track 25 or on the lead? A There is a bend on every car track.

Q Is there a bend in track 25 there? A Yes, sir.

Q Well, the principal part of the bend is on the lead, isn't it, that comes into 25? A (No response.)

Q Isn't that so? A I do not know where—but if they are coming in with cars, they are standing cars on that track, you couldn't see the last car if you stand about seven or eight cars towards—from the—towards south, it is impossible.

Q How many cars were there in that string on 25? A I haven't got no idea.

Q How many cars was it from the place where you were hurt to the south end of that string? A I can't—

Q You do not know? A No.

Q Didn't you look to see how many cars there were south of you on that track? A I didn't see no opening at all no place.

Q There was no opening between those cars on track 25? A No.

Q Was there? A No.

Q The track was perfectly straight from the place you were down beyond the board walk, wasn't it? A That I do not know. That is a quite a distance from there up to the board walk.

Frederick Herzog, cross.

Q Well, don't you know the track is straight from the board walk up to the place where you were hurt? A Yes, sir.

Q And you could see all the way down the board walk, couldn't you? A Yes, but nobody can tell after you pass two or three cars, you couldn't see whether they are spotted or not; it is impossible. There is only two foot space between two cars between either track to move around; two men can hardly pass between the track.

Q But I am asking you, as you stood between track 24 and track 25 here, all the way down to the board walk, you could see the board walk, but you couldn't see sideways, and if there were only six cars south of you, you could see down to the end of those cars all right, couldn't you? A To the end of six cars, oh, yes.

Q Now, when you went from track 27 with Fogarty, what did you take with you? A Nothing at all. I asked him should I take any tools along; he said no, it ain't necessary.

Q Yes. This board walk is always kept open, is it not? A Yes, sir.

Q And between track 24 and 25, there was an open way all the way down to the board walk, wasn't there? A I don't get you.

Q Between track 24 and 25 there was an open space all the way down? A A walk?

Q To the board walk? A Yes.

Q In other words, if you had turned south when you came to that string of cars on track 25, you could have walked in an open space from there all the way down to the board walk, couldn't you? A Yes.

Q Now, before the cars had been spaced on the repair tracks, they are liable to be moved by the engine at any time, are they not? A Yes.

Q And they are liable to be moved by the engine up until the time the engine moves out of the dead head track, are they not? A I don't get that.

Q They are liable to be moved by the engine at any time up to the time the engine moves out? A Yes.

Q And leaves the dead head track? A Yes.

Q Now, it isn't safe to go underneath cars that are liable to be moved, is it? A Oh, yes, it was, because they were dead tracks.

Frederick Herzog, cross.

Q No. I say, it isn't a safe thing to go under cars that are liable to be moved by an engine? A No, that isn't.

Q That is not safe. Now, have you ever seen pictures around the place there where you were working, around the office, or any such place, indicating things that are dangerous to do? A Yes.

Q Where are those pictures posted? A In the lunch car there.

Q In the lunch car? A Yes.

Q And at the office? A No, I seen them only in the lunch car.

Q Didn't you see them posted on the office bulletin board? A No.

Q You go into the office there every day to mark up your time, don't you? A Yes.

Q Have you ever seen any such picture as that posted up (showing paper to witness)? A No, sir.

Q You never saw that? A No, sir.

Q Don't you know that pictures of that kind are posted at the lunch car and also at the office? A Not before—before my accident it wasn't there.

Q You never saw any before your accident? A Not that kind, no.

Q You have seen other though? A Inside work from big shops, from carpenter shops and machine shops; there is a couple of them like that was in the car there, but not the outside work at all.

Q Well, outside work was the kind of work that was done in that section, wasn't it? A But there was one from a big carpenter shop and one from a big machine shop that was hanging in the lunch car there.

Q And pictures, warning pictures for inside work were posted up there, but warning pictures for outside work were not posted? A Never seen them there; never seen them.

Mr. Carey. I ask that this be marked for identification.

The Court. It may be marked for identification.

(Marked Exhibit A of Defendant for Identification.)

Q Don't you know, as a matter of fact, that from the point where you were injured to the southerly end of that string of

cars, there were only six cars? A From the place that I was injured up to the board walk?

Q No. From the place where you were injured down to the end of the string of cars on 25, I mean the southerly end, there were only six cars? A I do not know.

Q You do not know how many there were? A No, you couldn't see the end there. There must have been more cars—that track must have been full. I—there couldn't be only six cars.

Q You say that there must have been more than six cars? A Yes.

Q If there had been only six cars, you could have seen the end of the string? A Yes; there was no other cars in, there would have been a light there.

Q Now, on your direct examination you said that there was nothing between you, when you got to track 25 there was nothing between you and Popp and Fogarty in the way of cars or anything of that kind. Now, you say that there were some cars on track 24? A Yes, but there was a big opening.

Q How big was that opening between the cars on track 24? A Oh, maybe a car length; maybe more than that; I do not know.

Q And that was one of the spaces which had been made there when the cars were placed on track 24? A Yes

Q For the convenience of the men? A Yes.

The Court. We will take a recess at this point until 2:00 o'clock.

(Recess.)

After Recess. 2:00 o'clock P. M.

FREDERICK HERZOG, the plaintiff, recalled for further cross examination, testified as follows:

By Mr. Carey.

Q Mr. Herzog, there was no one working on the cars on track 25 when you were hurt, was there? A Not in that neighborhood there where I crawled through.

Q What do you mean by a dead track? A Dead head track is where the cars get repaired on.

Frederick Herzog, cross.

Q What is that? A Where the cars get repaired; that is a dead head track.

Q Well, you say you crawled under the car there, because that was a dead track? A Yes, sir.

Q There were no cars getting repaired in that vicinity where you were? A (No response.)

Q There were no cars getting repaired in that vicinity where you were? A No, not in that neighborhood I didn't see any.

Q And you saw no one around there at all, did you? A No, sir.

Q Now, a track is a dead track when the cars are not moved on it without warning being given to the men working on the cars, isn't it? A I don't get that.

Q A track is called a dead track when the cars are not to be moved on it? A Yes.

Q Unless the men have warning, that is, the men who are working on the cars, that is what you call a dead track, isn't it? A Yes, sir.

Q Now, these repair tracks are not dead tracks when they are being filled, are they? A Not at the same moment not, no.

Q And they are not dead tracks until the cars have been spaced and the engine has gone out and the switch locked? A Yes.

Q Are they? A No. As long as anything is moving, it cannot be a dead track, that is all.

Q So these repair tracks become dead tracks after the cars have been spotted on them and after the engine has gone out, the switch locked and the blue sign put up, then they become dead tracks? A Yes.

Q Is that right? A Yes.

Q It isn't the custom for men to crawl under cars on one of these repair tracks when the track is being filled with cars, is it? A No. If a man sees the car moving, he will certainly not crawl under the car.

Q And if the track is being filled, why, of course, the cars are liable to be moved at any time so long as the engine is on the track? A I shouldn't wonder.

Mr. Carey. I think that is all.

Frederick Herzog, cross.

By Mr. Lane.

Q Do you know that the cars on track 25 had not been spotted?

Mr. Carey. Oh, just one moment.

By Mr. Carey.

Q There was no blue sign up on track 25 when you crawled under there, was there? A I couldn't see it from that point.

Q And you didn't see any, did you? A No.

Q And the switch had not been locked at that time? A I can't tell you.

Q You couldn't see that it had been locked from where you were? A If you stand ten feet away from the switch, you don't know whether it was locked or not.

Q Could you see the head end of track 25 from the place where you were hurt? A No.

Q About how long does it take ordinarily to fill a track? A That is a question I cannot answer you.

Q You have seen the track filled a good many times, haven't you? A Yes.

Q What? A Yes.

Q You worked there at times, didn't you? A Yes, but if you don't watch—

Q Now, can you give me an estimate about how long it takes on an average to fill one of those tracks? A No, I cannot.

Q Half an hour? A (No response.)

Q Does it take as much as half an hour? A I cannot say or no to that.

Q Well, can they be filled in fifteen minutes? A It all depends on how many cars they have got, I suppose.

Q Well, if they put in, say twenty cars, how long does it ordinarily take to fill the track and space the cars? A That is a question I cannot answer.

Q Well, can't you give me any idea at all? A About a half an hour, I suppose.

Q Now, how long were you gone? How long after you started with Popp to go over to track 21 was it before you got back to track 25? A How long it was from that time I seen Popp?

Frederick Herzog, cross.

Q Yes; from the time you started with Popp to go over to track 21 until you got back to track 25. A Oh, a couple of minutes; that is all.

Q A very short time? A Yes; very short time.

Q You were only there at that Big Four car only a minute or so? A Yes; that's about all.

Q Then you turned right around and came back? A Yes.

Q The men who are working on the dead tracks or the repair tracks have to go under the cars, don't they? A Oh, yes.

Q To do their work. But they don't go under the cars until the blue sign is up and the switches are locked, do they? A Well, there is nobody walking up to the end to see that the blue sign is up.

Q How do they know when they can go under the cars safely? A As soon as the cars is marked up everybody is going to work.

Q But they don't go to work until the cars are marked up? A Yes.

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

Q Then when the foreman or assistant foreman marks up the cars, then they know it is time for them to go to work? A Yes, sir.

Q Were any of these cars on track 25 marked up at the time you crossed there? A That I cannot tell you, on the upper end.

Q You didn't see any of them marked up, did you? A No; I didn't look around after I got hurt.

Q Now, how long was it after you came through that space between the cars on track 24 before you started to crawl under the cars on track 25? A Right away.

Q What is it? A I went right ahead.

Q You went right ahead? A Yes, sir.

Q You didn't stop at all? A No, sir.

Q And you didn't stop under the car until the car moved, did you? A Yes.

Q You kept crawling right on? A Certainly; to get on the other side.

Q What part of the car did you crawl under? A Between the draw heads.

Q Between the draw heads? A Yes.

Q That would be between the two cars? A Yes.

Frederick Herzog, re-direct.

Q That was a good deal more dangerous place than crawling under the middle of the car, wasn't it? A Oh, I don't know. The opening is wide enough there.

Q The opening is just about wide enough for you to get through, isn't it? A Yes.

Q And the car is about how long? A Oh, there is cars from thirty-five feet; there is cars from forty feet and forty-two and forty-four.

Q Yes. So that there is a good deal more space under the middle of the car than there is underneath the draw head? A Not on them cars. They were coal cars; you cannot crawl through there very well.

Q Was this a coal car that you crawled under? A Yes, sir.

Q Sure about that? A Yes, sir.

Q And what was the car next to it to the south? A The same thing.

Q All coal cars? A Yes.

Q And were all the cars on the track there coal cars? A I do not know.

Q How many cars were coal cars? A I do not know; I cannot tell that.

Q You are sure there were two coal cars? A Yes.

Q Were there any more than two coal cars there? A I do not know.

Mr. Carey. That is all.

Re-direct examination by Mr. Lane.

Q Did you know that these cars on track 25 had not been spaced or spotted, so-called? A No.

Q At the time the railroad men came to see you at the hospital, when was that, do you recollect? A From the office?

Q Yes. A Well, it was at the beginning. I do not remember the date.

Q Well, do you know how many days it was after you were hurt? A Not many. I cannot tell you.

Q What physical condition were you in? A I wasn't very well at that time; very weak.

Q Had you been operated on? A Yes, sir; operated on the same day it happened.

Daniel C. Martin, direct.

Mr. Carey. Read that answer.

Mr. Lane. Operated on the same day it happened. That is all.

Re-cross examination by Mr. Carey.

Q Just one question. You say you didn't see whether the cars on 25 were spaced or spotted? A No.

Q You didn't look to see, did you? A Well, there was no opening in that neighborhood there.

Q You didn't look to see whether they were spotted or not, did you; just crawled right under there without looking to see whether they were spotted or not? A If there was an opening there I would have went through the opening without crawling under.

Q You didn't look to see whether they were spotted or not? A Yes.

Q What? A Sure, I looked.

Q All coupled together, were they? A Yes, sir.

Q How far? A I do not know how many.

Mr. Carey. That is all.

DANIEL C. MARTIN, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Martin, where do you live? A Dumont, New Jersey.

Q You were employed by the West Shore Railroad? A Yes, sir.

Q On the day of the accident? A Yes, sir.

Q How long had you been employed by the railroad? A Employed since December the 13th, 1918.

Q As a car repairer? A Yes, sir.

Q In these yards in New Durham? A Yes, sir.

Q Do you know there are certain tracks in the yard known as dead-head tracks? A Yes, sir.

Q What was the custom of the employees in the yard with respect to going from one place to the other in the yard? How would they go? A Well, if there was an opening, they would go through the opening. If there was no other way, they would crawl in under the cars.

Daniel C. Martin, direct.

Q And how long had that custom been in progress—how long had they been doing it that way? A As long as I been there.

Q Was there ever any objection made to that by anybody? A Not that I know of.

Q What was the custom with respect to the filling of tracks as to warning? A Well, the custom was to holler—pass the word along the line; one man holler up to the other end, and then it would come down along the line; anybody heard it would pass it on.

Q And was it the custom or wasn't it to have the train or the track that was being filled guarded? A Not that I know of; not to my knowledge.

Q Well, were there certain men sent out along the track? A Not to my knowledge.

Q Then the way that the warning was given was to shout the warning along? A Shout the warning along.

Q You didn't see this accident, did you? A No; I didn't see him going under the car; I seen him when they were taking him out from in under.

Q That was after the accident happened? A After the accident happened.

Q Did you see the car that did the damage? A Yes, sir.

Q What kind of a car was it? A Pennsylvania box car.

Q Pennsylvania box car? A Yes, sir; steel underframe.

Q Where were you just before the accident happened? A Walking up between 24 and 23. I seen Herzog and Popp and Fogarty. I had just come back from the hospital, or not from the hospital, from Doctor Sweeney's office, and I was looking for my partner to see where he was working, and I walked up—I walked up 25, where it was clear; then I crossed through 24, between 24 and 23, and walked up the outside of 24.

Q Well, did you— A I seen Popp and Fogarty and Herzog coming down from the north yard, coming down between 21 and 22, along there somewhere. It was all open. Then I went on up ahead and crossed through 25. There was a big space there. They were kicking cars around up on the head end, and I stood talking to Pete Maley, just at the opening, before I come through; I went through to the other side and come down between 26 and 25, and I got down by these cars like this from where he was hurt, and I heard him holler, and there was Dukes and McIntyre helping him out. They had him out, and McIntyre hollered to go get an ambulance right away.

Daniel C. Martin, cross.

Q Were there any men north of you between 25 and 24? A The only man I seen was Pete Maley, the brakeman.

Q And he was, you say, up to the head end? A He was on the head end of 26.

Q That is where 26 and 25 join the lead tracks, so-called? A Well, along there some place.

Q He was the only railroad man around there? A The only railroad man that I seen.

Mr. Lane. Cross examine.

Cross examination by Mr. Carey.

Q What was he doing? A He was just standing there, I guess, waiting for a signal to back; the engine was busy up on the head end.

Q The head end of what? A Of that dead-head, the trains that they were putting in.

Q On the head end of the train? A Up on the head end of that track of cars.

Q Yes. A They were cutting out some.

Q Was that string of cars all on track 25, or was it— A Well, they were along 25 and then out on the lead.

Q Out on the lead? A Yes, sir.

Q Now, which track extends farthest north, 25 or 26? A 26, or 25 extends the furthest north.

Q 25 extends farther north? A Yes, sir.

Q How much farther? A Well, I couldn't tell you exactly how much; maybe seven or eight car lengths.

Q And which side of 25 were you on? A I was on the east side of 25 coming down, and on the west side going up.

Q Now, when you were coming down, which direction were you going? A Going south.

Q And going up, you went up on the west side, didn't you? A I went up on the west side.

Q Between what two tracks? A Between 24 and 23.

Q And were there cars on 24 and 23? A There was cars on 24 and there was cars on 23, but they were quite a ways down; there was a big open space; 21, 22 and 23 had no cars on the head end.

Q Had no cars on the head end? A Between the lead and about half way down the track, there was cars from that on down.

Q How far up was the farthest car on 21? A On 21.

Q Yes. A I should judge about fifteen car lengths from the lead.

Q And how many from the board walk? A About the same; about ten or fifteen from the board walk.

Q How many cars were on 21? A I didn't stop to count them.

Q Well, can you give us any idea? A No idea at all.

Q You say there were cars on 23? A There was about the same; they were all about the same.

Q Yes. Well, what do you mean by all? A 23, 22 and 21, they all had some cars on them, but how many I do not know. It is none of my business to be out there counting them.

Q And the cars on 24 were spaced? A Yes, sir; they were working on them.

Q Is 24 the dead-head track farthest wets? A Yes, sir.

Q And 24 pretty well filled with cars? A Yes, sir.

Q And 25, what cars were on 25? A Well, there was some; there were a few there, and then they were kicking in some more dead-heads.

Q Where were you when you saw them kicking in cars on 25? A Why, on the head end of 24, walking up between the tracks.

Q About how many cars were in on 25? A How many cars were in from where I cut through—the point where I walked through?

Q No. How many cars were on 25? A I couldn't tell you.

Q Did you cross 25? A Yes, sir.

Q Where did you cross 25? A Right about where the lead—at the lead, at the head end of 25, maybe a car length.

Q Cars where you crossed? A Yes, sir; maybe a car length or two from the lead.

Q And how did you get through the cars? A Walked right through between the space; there was a space between ten and twelve foot; they hadn't coupled them up.

Q They were going to couple them up and push them in on the track? A I suppose they did. They did so after. That is where I seen—

Q And there you turned and— A I come down between 25 and 26.

Q And went over? A Between 25 and 26.

Daniel C. Martin, cross.

Q When you crossed 25, had you seen Popp and Herzog and Fogarty? A Not when I crossed 25. I seen them when I was going up 24.

Q But before you crossed 25? A Before I—

Q When you came down south, you crossed between what tracks? A When I was coming south, I was walking between 26 and 25.

Q Were you north or south of Herzog when he was hurt? A North of him.

Q There was an open space all the way from where Herzog got hurt between 24 and 25, all the way down to the board walk, wasn't there? A Yes, sir. Well, there was about six or seven cars beyond, below where Herzog got hurt.

Q About six or seven? A Yes, sir.

Q And what kind of cars were those? A Well, I didn't pay no attention to them.

Q You didn't see any coal cars? A Yes; there were a couple of coal cars in the train.

Q Where were they, north or south of where Herzog got hurt? A There was one south of him.

Q How many cars south? A Well, that I couldn't say.

Q Was it the next car south? A I couldn't say that neither.

Q And where did you see the other one? A What other one? In the train up along towards the lead?

Q Towards the lead? A Yes, sir.

Q Do you mean to say that it was customary for men to crawl under cars on a live track? A Well, not on that live track; we had no business out on the live tracks.

Q Yes. Do you mean to say that it was customary for men to crawl under cars on the dead-head tracks before the cars had been spotted, while the track was being filled? A While the track was being filled?

Q Yes. A No; they were in motion. A man couldn't crawl under them.

Q What? A They were in motion. A man couldn't crawl under them.

Q They weren't in motion all the time, were they? A Well, if you—a man sees him spotting cars and going that way, he isn't going to be foolish enough to crawl in under them, is he, I hope?

Daniel C. Martin, cross.

Q Well, I don't know what a man might do. It would be foolish, of course, for him to do it. But it isn't customary for the men to crawl under cars on the dead-head tracks until after the cars have been spotted? A Certainly not.

Q And are ready to go to work on them, is it? A No, sir.

Q What? A No, sir.

Q You never knew of anybody crawling under cars on the dead-head track until after they had been spotted and it was time for the men to go to work on them, did you? A No, sir; unless you come there, like in the morning at seven o'clock, you go out and work; you know—you think it is safe; there is cars standing there that is supposed to be safe; the foreman—where there is men to attend to the switches, you go under them. You don't know whether they are safe or not if you have no warning. You go out there in the morning—

Q If you go there at seven o'clock in the morning and find the cars spaced and numbers on them, then you consider it is safe for them to go to work on them? A Yes, sir.

Q But if they are not spaced and are not numbered, you do not consider it safe to crawl under them or go to work on them, do you? A No, sir.

Q Now, immediately after the cars are spaced and the switch engine goes out of the dead head track, then the switches are locked, aren't they? A Supposed to be.

Q And a blue sign is put up? A Supposed to be.

Q And from that time on it is presumed to be safe for the men to— A Yes, sir.

Q —go around the cars and go under them and do the necessary work. Now, didn't you ever hear men reproved for crawling under cars? A Not to my knowledge.

Q Never? A Never.

Q Didn't you ever see men crawling under cars when the cars had not been spaced and spotted for the men to work on them? A Yes, sir; not—I seen them crawling under them on the dead tracks, but not—not outside of the dead tracks.

Q But that was after they had been spaced and they were ready to go to work on them? A Yes, sir.

Q Now, the signals which were given that you spoke of were signals, warnings when the dead head tracks were about to fill with cars, is that right? A Yes, sir.

Daniel C. Martin, re-direct.

Q And then the man who opened the switch to let the cars in went up the track toward the switch and called the warning, didn't he? A Yes, sir.

Q And anybody else beside the man who went up the track call the warning? A Well, if there was men working along the next track to it and they heard the warning, they will holler down along the line.

Q And this warning is to prevent the men from—who are working on the tracks next adjoining on each side from getting in the way of these cars? A Yes, sir.

Q That are being pushed in on the track that is to be filled. And that is the only warning which is customarily given? A That is all.

Q In connection with filling the track, isn't it? What? A Yes, sir. It is a little different now there than what it was.

Q Well, that was the custom at the time of this accident? A At the time being; yes, sir.

Q When you went down 25, the cars were all coupled together on that track, weren't they, on that morning? A Well, I only just got a half a car length from where I walked through when I heard—when the bang come, and I heard the holler. At the time that I walked through 25, they weren't all coupled together, because I walked through a space ten foot wide.

Q Yes. But all south of you were coupled together? A Well, that I cannot say, all south of me. I didn't pay no attention.

Q You didn't see any spaces south of you? A No, I didn't take no particular notice at the time.

Q When you went down, you went down along the track, didn't you, later? A Yes, sir.

Q And you didn't see any spaces, did you? A Well, there couldn't have been any spaces after the accident, bumped into it.

Q You didn't see any spaces, did you? A No, sir.

Mr. Carey. That is all.

Re-direct examination by Mr. Lane.

Q When you go there in the morning at seven o'clock and go to work, the dead head tracks are supposed to be locked, are they not? A Yes, sir.

Henry Manson, direct.

Q Now, how did you feel with respect to being safe or unsafe in that dead head yard unless you are warned that something is going to happen there? A Well, you feel—

Mr. Carey. I object to that.

The Court. How is that competent?

Mr. Lane. Well, I do not suppose it is in exactly the form it was put.

The Court. In that form it is objectionable.

Mr. Lane. I withdraw it. That is all.

Mr. Carey. That is all.

HENRY MANSON, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Manson, where do you live? A Bergenfield, New Jersey.

Q And you are employed by the West Shore Railroad? A Yes, sir.

Q As what? A As a car repairer.

Q For how long before this accident? A How long before the accident?

Q Yes. A Well, I started there a year ago today, or a year ago this week, the 23rd of December, or January, at least.

Q Now, what is the custom in that yard with respect to men going from one part of the dead head yard to the other, in going underneath cars on dead head tracks? A What is the custom?

Q Yes. A Well, we—we generally go in through underneath the car to take the shortest way through to do our work in on the dead head.

Q And has that been the custom since you have been employed there? A That has been the custom since I have been employed there; yes, sir.

Q Did you ever hear anybody warned not to do that thing? A No, sir.

Q You didn't see this accident, did you? A No, sir.

Q Where were you when it happened? A I was in the shanty having a sandwich at the time; that is down on—between 10 and 11 we have a shanty there where we change our clothes,

and I was in there having a sandwich at the time, sitting there looking through the door, and I could see the head end of the train backing in there from where I was sitting, seen a brakeman sitting on top, coming down along the line coming south, and all of a sudden he motioned for the train to stop, and everybody run up the head end, and as I run up they started carrying Mr. Herzog out. I thought it was one of the helpers got caught, and I stood there until they carried him past the window.

Q Now, did you hear any warning that number 25 was going to be filled? A No, sir.

Q Were there any men sent along 25 that you saw to warn them? A No, sir.

Mr. Lane. Cross examine.

Cross examination by Mr. Carey.

Q You weren't working at the time, you were in the shanty? A That is when the accident happened?

Q That is what I say. A Yes, sir.

Q You were in a shanty eating? A Yes, sir.

Q And you weren't in any danger at all? A No, I wasn't in no danger; of course not.

Q You wouldn't say that there was warning given that 25 was going to be filled, would you? A Well, I was there when the first drill was shoved in.

Q What? A I was there when the first cars come in.

Q Where were you when the first cars were shoved in? A Working on 24, and I only left there ten minutes before the accident.

Q Working on 24? A Yes, sir.

Q And you didn't hear any warning? A No, sir.

Q Do you swear that no warning was given? A When that first drill was shoved in I will swear there was no warning given where I was; yes, sir.

Q No warning where you were? A Yes, sir.

Q Now, how long was that before the accident happened? A It wasn't over ten minutes.

Q How far were you from the place where the accident happened, at the time when you were working on 26? A Well, I do not think it was over a car's length; on 24 I was working; not on 26.

Q On 24? A Yes, sir.

Henry Manson, cross.

Q What were you doing? A Well, that I do not just remember what was to be done on that coupling; it was something on the coupling; whether it was—whether it was arm bolts or a coupling rivet, that I do not remember.

Q Did you see anybody go up along the track to open the switch on track 25? A No, sir; I did not.

Q You know somebody did up along there to open the—A Well, no doubt somebody must have opened it, or there would have been no cars come in.

Q Now, the warning that is given is a warning that the track is about to be filled, isn't it? A That is a warning that is supposed to be given; yes, sir.

Q Yes, that is the customary warning, isn't it? A Yes, sir.

Q When the track is about to be filled, the man who opens the switch goes up the track and calls out a warning that a certain track is to be filled? A Well, I do not know as he goes up the track; he may holler down the track, and a man that is working closer to it, he will send the word down along the line.

Q Yes. A One will get it from the other.

Q And that is for the benefit of the men who are working on cars on the adjoining tracks, is it? A Yes, sir.

Q So that they won't come out from under their cars or alongside their cars and get struck, or leave any tools or equipment out where it would be struck by the cars coming in, is that it? A That's right.

Q Now, you say it is custom to crawl under cars? A Yes, sir.

Q Just wait until I get the question asked, won't you; don't be so ready to answer. You say it is customary for men to crawl under the cars standing on the dead head tracks when going from one part of the dead head yard to the other, is that right? A That's right; yes, sir.

Q They do that after the cars have been placed on the tracks, do they not? A Well, they do it after the cars have been placed; yes, sir.

Q They don't do it while the cars are being placed on the track, do they? A While they are being placed, they cannot very well do it when they are placing the cars.

Q What? A We cannot do it when they are placing the cars.

Henry Manson, cross.

Q Now, when these cars are spotted on the dead head tracks, there is a space left between the cars over three or four car lengths, isn't there? A Yes, sir.

Q And men go through those spaces, don't they? A They do go through those spaces.

Q Yes. And isn't that the usual place where they go through even when the switches leading to those tracks have been locked? A No. There is lots of times that you have got to go through underneath a car.

Q Yes. A For your own convenience.

Q You have to work under a car, too? A Oh, yes.

Q Now, isn't it a fact that the men do not go under those cars until the cars have been properly spotted on the track and the switches locked, isn't that so? A In what way do you mean?

Q I mean that when the men go under the cars on those dead head tracks, they do not do it until the cars have been spotted on the track at that crossing and the switch that leads to that track has been locked? A Well, of course, there is lots of times that there is so many cars there that—

Q Now, you are not answering my question.

Mr. Lane. I think he is.

Mr. Carey. I do not think he is. Just read the question, won't you?

(Question read by the stenographer.)

A Well, we take it for granted that the switch is locked when we are working on the dead head.

Q Exactly. And a man wouldn't go under there, wouldn't go under a car on those dead head tracks unless he supposed that the switch was locked, would he? A No.

Q Now, what takes place first, the spotting of the cars and spacing them, or the locking of the switch? A Oh, the spacing of the car, of course.

Q Yes. You never knew any man to crawl under cars on one of those dead head tracks during the time when the track was being filled with cars, did you? A No.

Q That would be a very unsafe thing to do, wouldn't it? A It would be if they knew it.

Q Now, before a man crawls under a car on the dead head track, it is his business to know whether the track is being

filled, or whether the track has been filled and the track properly protected, isn't it? A Well, I do not know how it could be a man's business—

Q Isn't it his business to know? A Well, I don't see how it could be his business to know that.

Q Well, if the cars were not spaced or spotted, he would know that the track was not protected, wouldn't he? A Well, there was none of the men ever looked for the spacing of the car.

Q I am not asking you what the men looked for. I am asking you a question, and that is, if the cars were not spaced on the dead head track, he would know that the track was not protected by the switch being locked, wouldn't he? A Well, I never did in that way.

Q You never did? A No.

Q But you say that the cars were always spaced before the switch is locked? A Surely, the cars are always spaced before it is locked; yes, sir.

Q And the cars are spaced by the switch engine, are they not? A By the switch engine; yes, sir.

Q Yes. Now, if the cars had not been spaced, that would be warning to a man that the switch had not been locked, wouldn't it? A Well. if he knew they were coming in, yes.

Q Well, whether he knew they were coming in or not, if the cars were not spaced on one of those dead head tracks, that would be warning to a man that the switch had not yet been locked, wouldn't it? A That I cannot answer.

Q Why not? A Well, I gave you my answer and you contradicted that answer, so any other answer I do not know to give you.

Q Well, you have already said that the cars are spaced before the switch engine goes out of the track? A That is what I said; yes, sir.

Q Now then, if the cars have not been spaced, that would be an indication that the switch engine was not through with the cars yet, wouldn't it? A I told you if a man knew it, yes.

Q Well, wouldn't he know it from the very fact that the cars were not spaced? A No.

Q And yet the cars are spaced before the switch engine goes out of the track, aren't they? A The cars are spaced before the engine goes out; yes, sir.

Henry Manson, cross.

Q You say you could see the cars coming in on track 25 from the shanty? A I could; yes, sir.

Q And you did see them? A I did; yes, sir.

Q Did you see them coming in there before the accident happened? A No. No, I was on 24 when they come in before the accident happened.

Q Well, you stood down there in the shanty when the accident happened, didn't you? A That is when the second drill come in; yes, sir.

Q And while you were standing there, you saw the cars coming in on the head end of the track? A Yes, sir.

Q Now, did you see those cars coming in there as you were standing down at the shanty? A Yes, sir.

Q Or in the shanty? A Yes, sir.

Q Before the man was hurt? A I seen the cars coming in before he was hurt, yes, before.

Q Yes. A Then the man on top gave the signal to stop.

Q Now, where is that shanty? Won't you point it out on the map? A Yes, I can point it out on the map for you. If you could show me ten and eleven, I can show you about where the shanty is.

Q Here is ten and here is eleven (indicating). A Well, is this the north yard?

Q No. This is the north end of track 26 (indicating), there. A This is the south end (indicating).

Q Here is the south end and here is the board walk (indicating). A Down here (indicating) is Mr. O'Connell's shanty, we will say.

Q Well, I don't know; I don't see anything that is indicated down there. Here is the rest room (indicating). A Here is the shanty (indicating); here is where I was sitting looking out of the door, looking down this way (indicating).

Q That is what is called the rest room? A Yes, and next to it is the oil room, and there is O'Connell's office (indicating). This is the shanty I was in, and this was the oil room, and here is where a pipe fitter is, and here is Mr. O'Connell's room on the end.

Q Are you in the employ of the railroad company now? A Yes, sir. No, no, not since Saturday.

Henry Manson, re-direct.

Q Not since Saturday. Did you ever hear a man reproved for crawling under a car when the track was not protected? A Did I ever hear him what?

Q Reproved for crawling under a car when the track on which that car stood was not protected? A That I do not just get. What do you mean by reproved from crawling under the car?

Q Do you know what reprove means? A Well, reprove means whether he knew he was doing wrong or right, I suppose.

Q Did you ever hear a man's superior call him down for crawling under a car standing on a track that was not protected by a blue sign or a locked switch? A No.

Q You never heard that? A No, sir.

Q Did you ever know a man to crawl under a car that was not—where the track was not protected? A No.

Q There were no blue flag protections on this track 25 on that morning of the accident, were there? A That I didn't see.

Q You didn't see any? A No.

Q Of course, it is safe to crawl under the cars after the cars have been spotted and the tracks protected by the blue sign, because no engine can come in there and move those cars until the track is opened up, can they? A Well, of course, no engine can come through there, that is right enough, if the blue flag is up; but that we cannot see working on the dead head.

Q Now, if the blue flag is not up and if the engine is not out of the track, then, of course, that is a very dangerous thing for a man to crawl under the cars, isn't it? A Why, sure.

Q Did you ever see any pictures posted up like this picture marked Exhibit A of Defendant for Identification? A (Referring.) No, sir.

Q You never saw any? A No, sir.

Q Did you see pictures known as safety first pictures? A Yes, sir.

Q Posted up around there? A I seen a few of them safety first pictures since I have been there.

Q You never saw one like this (indicating)? A No, sir.

Mr. Carey. That is all.

Re-direct examination by Mr. Lane.

Q Do the men before they cross the track or before they walk under a track look to see whether the cars are spotted

Henry Manson, re-cross.

or spaced, so-called? A I never did. I don't know if anybody else does.

Mr. Lane. That is all.

Re-cross examination by Mr. Carey.

Q Did you ever crawl under a car standing on the track before the cars had been spaced on that track? A Before they had been spaced?

Q Yes. A Why, sometimes there was quite a number of cars there without any space in between them.

Mr. Carey. Won't you read the question again?

(Question read by the stenographer.)

A I don't think I did.

Q You wouldn't consider that a safe thing to do, would you? A Not if I knew it, no.

Q No. And did you ever crawl under cars standing on a track before those cars had been marked up with the numbers of the repairmen that were to do the work on them? A Of course, we always had our numbers on the cars to know that some of those cars we were supposed to work on them.

Q Exactly. And you wouldn't crawl under a car where it was one of a string of cars that hadn't been marked up with the number of the workman on it, would you? A Well, that I—we couldn't see the number from the side that Mr. Herzog crawled under.

Q Do you understand my question? A (No response.)

Q Do you understand my question?

The Court. Read it, Mr. Stenographer.

(Question read by the stenographer.)

A Not if I knew it, no.

Mr. Carey. That is all.

By Mr. Lane.

Q There are times, are there not, when the string of cars on that dead head track bear no numbers and are not spaced and still dead head? A Quite a list of them, yes, sir.

Q And would you know when it was dangerous to crawl underneath the cars? A I would I know.

Arthur Ernst, direct.

Q What warning would be given, if any? A Well, if I seen the cars on a dead head, I would think they were all right to go ahead and work on them.

Q Until what happened? A Until what happened? Which way do you mean?

Q Well, what kind of a warning would be given to indicate that they were not all right? A Well, if somebody told me not to work on them, that is the only warning that I could see.

Mr. Lane. That is all.

By Mr. Carey.

Q The only warning you would get that a track was being filled would be just before the switch was opened, wouldn't it? A The track was being filled, you say?

Q I say, the only warning that you would get that a track was to be filled would be just before the switch was opened? A That is all.

Q Yes.

Mr. Lane. Well, one other question, with your Honor's permission.

By Mr. Lane.

Q You stated that you were no longer an employee of the railroad, having left their employment last Saturday. Did you tell the same story that you are telling now on the stand to Mr. McLoughlin several months ago?

Mr. Carey. Objected to as incompetent and immaterial.

The Court. I sustain the objection.

Mr. Lane. All right. I withdraw the question under the objection. That is all.

ARTHUR ERNST, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Ernst, where do you live? A New Durham, New Jersey.

Q And you were at the time of this accident employed by the West Shore Railroad? A Yes, sir.

Q As a car repairer? A Yes, sir.

Q How long had you been employed by the railroad? A Oh, about ten months.

Q And were you the side partner of Herzog? A Yes, sir.

Q What time did you go to work that morning? A 7 o'clock.

Q And what work did you do first? A Well, we had two cars down the lower end of 24 the south side of the crossing.

Q And what was the nature of that work? A Well, one was busted in the end, the busted end, we repaired the end on that.

Q Do you know what the designation of that car was, what railroad it belonged to? A No, sir; I do not.

Q Do you know what the designation was of either of the two cars that you were working on prior to the NYC X-1284? A No, sir; I do not. I never make no particular notice of them.

Q Are you certain with respect to the track upon which the cars were standing? A Yes, sir.

Q It was on the lower end of 24? A 24.

Q Then when Herzog said that it was on 25, he is mistaken, is that right? A I think so, yes, sir; he is mistaken.

Q Then from that job—what time was it when you got through with the job on the lower end of 24? A Around, I should say, about 9:30, close onto ten o'clock.

Q And then where did you go? A To track 27.

Q To NYC X-1284? A As I understand, but I wouldn't swear to that.

Q Well, we will assume that was the number. A Yes, sir.

Q How long did you work there with Herzog? A Oh, I was only working there twenty minutes, half an hour, until he was called away.

Q Now, did you hear Fogarty tell him to go away, or not? A No, sir; I did not.

Q Did Herzog say anything to you before he went? A Yes, sir. I was in the car, and I asked him whether it was all right to send the batch down, and he said no, that Fogarty was calling him away.

Q When did you first hear anything about the accident? A The first I heard about the accident was when I seen him carried past there where I was working.

Q Now, what was the custom in that yard with respect to workmen going from one part of the dead head yard to the

other with respect to crawling under cars, and so forth? A Well, if there was an opening, they would go through the opening; otherwise, they would sometimes crawl underneath the cars.

Q If they were going to fill a track during the day time after the repairers went to work, what warning would be given? A Well, there is generally a man that has got a key to open the switch and let you know, and they would yell it along the track and shout it to one another.

Q Now, was there any warning shouted on this morning with respect to 25? A I couldn't say if it was; I couldn't hear.

Q You couldn't hear if it was given? A No, sir.

Mr. Lane. Cross examine.

Cross examination by Mr. Carey.

Q You are employed by the railroad company now? A Not just at present; no, sir.

Q How long have you been out of the employ? A Since Monday.

Q Since when? A Monday of this week.

Q Now, you speak about men crawling under cars on the dead head tracks. Is it customary for them to do that while the track is being filled? A No, sir; not while the track is being filled.

Q Even if the cars are standing still on the track and though the process of filling the track is going on, they do not crawl under the cars, do they? A No, sir.

Q You never knew of a case of that kind, did you? A No, sir; I did not.

Q That would be a most dangerous thing to do? A It certainly would.

Q Now, the cars, after being placed on the track are—or, rather, after being run in on the track, are spaced by the engine that runs them in? A Yes, sir.

Q About how many cars to a space? A Oh, that varies from two to eight, sometimes eight or more I have seen them.

Q And the cars are also marked up with the names of the men, I would say, with the numbers of the men who are going to work on them? A Which, these cars that are pulled in, you mean, or the others on the other tracks?

Q After they have been placed on the track? A After they have been placed; yes, sir.

Ralph Fopiano, direct.

Q When are they marked up? A Well, they usually get marked up the first thing in the morning.

Q Before or after they are put on the dead head track? A After they are put on the dead head track.

Q And is that marking done before or after the switch engine goes out? A It is done after the switch engine goes out.

Q If there were a string of cars on the dead head track that were not spaced, that would be an indication that the switch engine was not as yet through with the cars, wouldn't it? A Not always. Many a time—

Q But it would be an indication, wouldn't it? A Well, I don't see how it would.

Q Generally? A Many a times there is a string of cars on a track as high as ten or twelve that are not spaced and men working on them.

Q That are not spaced? A Yes, sir.

Q And men working on them? A Yes, sir.

Q And workmen's numbers on the cars? A Yes, sir.

Q If the workmen's numbers were not on the cars, that would be an indication that they were not to work on them? A Yes, sir.

Q And that would be an indication that it would be unsafe to go under the cars, wouldn't it? A It would, sir.

Q Yes. Do you know whether number 25 was clear that morning, or not, when you went to work? A Yes, when I seen it, it was clear, only about a few single cars down on the lower end, the south end of it.

Q That is some distance south of that board walk? A Yes, sir.

Q Shown on the plan there? A Yes, sir.

Q Otherwise than that, the track was all clear, was it? A I didn't see any cars otherwise, no, sir.

Mr. Carey. That is all.

RALPH FOPIANO, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Lane.

Q Where do you live? A On Main street, New Durham.

Q And were you employed on June 20th, 1919, by the West Shore Railroad? A What?

Ralph Fopiano, cross.

Q Were you employed by the railroad on June 20th? A Yes.

Q Last year? A Yes.

Q As a car repairer? A Car repairer.

Q And how long had you been employed? A About five years.

Q About a year? A Five.

Q Five years. Do you know there are certain tracks there known as dead head tracks? A Yes, dead head tracks.

Q What is the custom with respect to the men going from one place of the dead yard to the other as to crawling under cars? A If you can not go under the cars without being sure, and the man can go anywhere you like it. Sometime you go on top; sometime you go under the cars. Sometimes you go right through; otherwise not.

Mr. Carey. Will you read that answer, please?

(Answer read by the stenographer.)

Q When they are filling a track, a dead head track, do they give any warning that the track is going to be filled? A Well, they say this thing in the morning, the track was empty; they say, "Look out for that track," and the men know.

Q And did you see this accident? A No, I never.

Q Where were you working? A I was working 27 on a heavy job.

Q On 27 on a heavy job? A Yes.

Q Did you hear any warning that 25 was going to be filled that morning? A I never was out at all. I just went over on 27 and started working. That was put back the day before, see?

Mr. Lane. Cross examine.

Mr. Carey. Won't you read that last answer?

(Answer read by the stenographer.)

Cross examination by Mr. Carey.

Q You don't crawl under a car unless you are sure that the track is protected? A Why, sure.

Q By a blue sign, do you? A Well, as long as the car was on that dead head, it is supposed to be locked and stopped too.

Charles Trebosso, direct.

Q And when the track is being filled, then it is dangerous to crawl under the cars, isn't it? A Why, certainly it is dangerous.

Q And if the cars are standing still before the switch engine goes out of the track, it is dangerous to crawl under the cars, isn't it? A Why, nobody go to the car then if you know.

Q What? A If the man know you got an engine there, nobody go to the car.

Q Yes. The men do not crawl under the cars until the track has been filled and the engine has gone out and the switch locked, do they? A Why, sure they must be locked.

Q Yes. Have you seen any pictures like this Exhibit A of Defendant for Identification I show you? A (Referring.) No, I never see.

Q You never saw one like that? A No.

Mr. Carey. That is all.

CHARLES TREBOSSO, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Lane.

Q Where do you live? A West New York.

Q And were you employed by the West Shore Railroad? A Yes, sir.

Q At the time of this accident? A No.

Q How long had you been employed there? A About 10 years.

Q 10 years? A Yes.

Q As a car repairer? A Car repairer.

Q What was the custom of the workingmen in going from place to place in the dead head yard as to crawling underneath cars? A What they have in spots.

Q Did workmen in going from one place to the other in the yard crawl underneath cars on the dead head track?

Mr. Carey. Objected to as leading.

Mr. Lane. That is true.

A If you have one track.

Q How would you go? A Sometime you have a dead track, see? You work over on a two or three car in the morning and

that belong to you, see? You go on, you go through the heaviest spots.

Q Suppose you want to go from one track to the other, how do you go? A I go around what they have open.

Mr. Lane. Is the interpreter here, if your Honor please?

The Court. I think you need one for this witness.

The Witness. I cannot speak very well English.

(John Veluzzi, the Italian interpreter, sworn.)

The Court. Now, you had better go over those same questions again, I mean, on the same ground, so as to get it to the jury.

Mr. Lane. I think I can ask one question which will be almost all inclusive.

Q If a workman wants to go from one part of the dead head yard to the other, how does he go? A You go from the end of the car, or from the lower end. He would go where there would be space, where it is wide, wide apart.

Q Well, if he wanted to cross over a track where there was no space, how would he go?

Mr. Carey. I object to what he would do.

Q Well, what was the customary—

The Court. What was the custom? What did they do?

A I would go over the cars.

Q What does he mean by over the cars?

Mr. Carey. I ask that be stricken out as not responsive to the question. He is saying what he would do.

The Court. Yes, you may strike that out.

Q Well, what would the men generally do in going over a track if there was no space between the cars?

Mr. Carey. I object to that because the evidence is that the cars were not placed—

The Court. Proceed; ask the question.

A Go over the top of the cars.

Q Well, do they ever go under the car?

Charles Trebosso, cross.

Mr. Carey. I object to what they ever did. The question should be, what is the custom.

The Court. Yes—

A Why, sure, they go under—

Mr. Carey. Wait a moment.

The Court. I think the objection is well taken. The question is what the custom is in the yard.

Mr. Lane. Well, that is pretty hard, of course, to examine this witness.

The Court. Oh, I understand. I am allowing you every—

Q What I am trying to get at—before this accident happened, did the workmen—were they accustomed to go under the cars as well as over the car? A It all depends upon the person who go any way they choose.

Mr. Lane. You may cross examine.

Cross examination by Mr. Carey.

Q The men are required to work under the cars on the repair tracks, aren't they? A Yes.

Q And they work under the cars in repairing them after the switches have been locked so that the engine cannot get on there to move the cars? A Yes. In the morning when they close the switch, they work.

Q Yes. And they do not crawl under the cars until after the switches have been locked, do they? A The boss would tell you where to go. He would say you have to go to work at a certain track, and there is where we would have to go.

Q Yes, but the men do not crawl under the cars until after the switches have been locked, do they? A That is all up to the boss; the workingman doesn't know if the switches are locked.

Mr. Carey. That is all.

PLAINTIFF RESTS.

Motion for Non-Suit.

Mr. Carey. If your Honor please, I move for a non-suit on the grounds:

First: That the evidence does not show that the plaintiff or the defendant were at the time of the injury engaged in interstate commerce.

Second: That the evidence does not show any negligence on the part of the defendant.

Third: That the evidence does show that the injury was caused by the negligence of the plaintiff.

Fourth: That the evidence shows that any risk attending the act performed by the plaintiff which led to the injury was a risk assumed by the plaintiff in connection with his employment. It was a risk well known to him, patent, and it was, therefore, assumed.

Fifth: That at the time and place of the injury the plaintiff was without the scope of his employment and was where he had no right to be.

Sixth: That at the time and place of the injury the plaintiff was a trespasser.

Seventh: That at the time and place of the injury, the plaintiff was at best a mere licensee.

Eighth: That the plaintiff has not proved the negligence alleged in the complaint, and having failed to prove that negligence, even though the testimony may possibly be held to show negligence of some other character, the plaintiff is not entitled to recover. Of course, if the plaintiff has failed to show interstate commerce, he fails in this action, because it is based upon the Federal statute, and that is the only ground upon which a recovery may be had.

Now, what is the evidence with respect to interstate commerce? The evidence is that this man was working on a car known as NYC X-1284, which was a car that was used to transport garbage and refuse from Weehawken to Little Ferry, all within the State of New Jersey, and he was called from that car—right on that point, I should say that the evidence is, or the admission is that prior to the time of this accident, for several months it had been used for that purpose, and subsequent to the accident, when it was put back into service after being repaired, it was used for that purpose. That is the only evidence as to the use of this car which is in this case. The

other possible ground upon which plaintiff will urge that interstate commerce is shown is the fact that this man was called from his work on this car to go to track 21 to look at a piece of work which it was supposed he had done on a Big Four car which was defective. He went to look at that work, and it was discovered, when he arrived at that place, that he was not the one who had done that work and he was dismissed within a minute or so after he arrived there and was told to go back to his former work. Now, there is nothing in that evidence which gives any color of interstate commerce. The decisions of the Federal courts, the Supreme Court of the United States, of course, are the controlling decisions upon that subject, and those decisions are, I can see, without exception, against the interstate color, any interstate color to this work. The earliest decisions of the Supreme Court of the United States upon this subject were very seriously misconstrued by the State courts. After the case of—this man who was injured out on the Lackawanna Railroad Company—

Mr. Lane. Peterson.

Mr. Carey. Peterson case, there were a line of decisions in the State courts which embraced almost everything in the nature of transportation as coming within the Federal statute. The first case which began to point out the error of the State courts and which began to limit the effect of the Peterson case was the case of the Illinois Central Railroad Company vs. Behrens, reported in 233 U. S. at 473. (Quoting).

That was followed by the Shanks case. No, that was followed by the case of the D. L. & W. Railroad vs. Yurconis, 238 U. S. at 439. (Quoting.)

That case was followed by the case of Shanks vs. the D. L. & W. reported in 239 U. S. at page 556. That was coming a little closer to the rule as it is now established. (Quoting.)

The next case in the Supreme Court was the case of the Burlington Road vs. Harrington, reported in 241 U. S. at page 177. (Quoting.)

That was followed by the Barlow case in 244 U. S. (Citing Erie Company vs. Welch, 242 U. S., 303.)

Illinois Central R. R. Co. vs. Cousins, 241 U. S.

Nash vs. Railroad Co., 242 U. S.

Then comes a case which is on all fours with one of the—if not both of the grounds for interstate commerce, the claim

of interstate commerce in this case. I have gone over these cases to show the history of the definition of this word "interstate commerce" and the application of the statute and how it has developed from the Behrens case down to the Winters case. The Winters case is in 242 U. S., 353. (Quoting.)

Following that came the White case, New York Central vs. White, 243 U. S. The case of Baltimore & Ohio vs. Branson is a case on all fours with the present case, 242 U. S., page 624.

The case of Hanson vs. New York Central Ry. Co. is a State case decided by the Court of Appeals of this State, reported in 103 Atlantic, 200.

Parsons vs. Delaware & Hudson, Appellate Division of the Supreme Court of the State of New York.

Volmanns vs. New York Central, Court of Appeals of New York.

Pazlik case, 239 Federal, 713.

Haber vs. Jenkins, 72 N. J. Law, 171.

Harris vs. Steamship Company, 75 N. J. Law 862.

Mr. Lane. If your Honor please, I move at this time to amend the complaint by inserting an additional allegation of negligence as follows:

First, that the employees of the railroad company, the car repairers, were in the custom within knowledge of the railroad company of going from one part of the dead head yard to other parts of the dead head yard as occasion might require by crawling underneath cars standing upon dead head tracks.

Second, that it was the duty of the railroad company with knowledge of such custom to warn employees of the yard moving from one place in the yard to the other of any movement upon any dead head tracks which would endanger their safety.

Third, that the railroad company failed and neglected to give such warning. That is one count with respect to negligence. A second count with respect to negligence, repeating all of the allegations that I have just indicated, excepting the last, and the last, substituting for the last, rather, third, that the railroad company failed to make any provision for adequate warning to the plaintiff as it was its duty to do.

The Court. What do you say to that, Mr. Carey?

Mr. Carey. I object to the amendment being allowed. The case has been tried on the declaration or on the complaint as

stated, and there has been no intimation until this time that there was any such custom as that which was a ground of negligence. We were charged with failing to give the warning which is customarily given.

Now, in that connection, even if the amendment be allowed, what was the situation? Track 24 was filled with cars. This man says that he came through the openings of the cars standing on that track, and immediately got down and started to crawl under this track.

Now, the testimony is that it was not customary to patrol the sides of the track to keep the men from getting onto the track after warning had been given that the track was about to be filled, and that being the case, we would come clearly under the Haley case which was decided only a short time—Haley vs. The Erie Railroad Company, and is reported in a recent Atlantic Reporter, which is to the effect—I think that is the name of the case, Haley or Healey, something like that, in which the Court of Errors held that if the warning given was the customary warning and the employee had been employed there long enough to know what the customary warning was, that he was operating under the conditions which the company had prescribed for carrying on its business, and that that warning was sufficient for a man who had been there long enough to know what the warning was.

Now, according to the testimony in this case, unless a man from the company had been right there where this man walked through those car openings, he couldn't have ordered it. He comes through there and he immediately starts to crawl under the car. Of course, it cannot be expected that the railroad company is going to have a man at every car and it didn't do it; it didn't pretend to do it, and this man knew it after the period of eight or nine months working in that yard. So that if the amendment were made, it wouldn't be available to help the plaintiff under the circumstances.

The Court. I shall allow this amendment, but if you say you are not prepared to meet it, I will withdraw a juror and grant you further time. It makes an entirely new case.

Mr. Carey. I do not want to—

The Court. Well, it is entirely up to you as far as that goes. It is an entirely new situation. I think the plaintiff is entitled to come into court and present his case as it appears, but he

cannot do that with prejudice to the other side. It is an entirely different situation than as presented in the original pleading.

Mr. Carey. I would like to have the proposed amendment read again.

The Court. You may read it.

(Proposed amendment read by the stenographer.)

Mr. Carey. Of course, there are some situations which might develop in connection with that which I am not prepared to meet now, but I am very desirous of disposing of the case and I think I shall conclude to go on tomorrow morning, but I would like the opportunity of seeing what I can do to meet the new situation. If I can meet the new situation tomorrow with any degree of efficiency at all why, I am going on with the case. I do not want to stop now in the midst of the trial.

The Court. I understand that, and, of course, the Court won't compel the defendant to meet a new case if he says he cannot do so.

Mr. Lane. Well, the witnesses are all here. I do not suppose Mr. Carey has any witnesses upon the new issue that he wouldn't have upon the old issue. My witnesses are all here, and if Mr. Carey's cross examination has been limited by reason of the complaint, they are subject to be recalled. I do not know of any other witnesses that can be called on either side.

The Court. It is a matter for counsel and not for the Court.

Mr. Carey. I think that I would probably call a number of witnesses, a number of other witnesses than those that I have here. Some would be men who are responsible for the rules and regulations of the company, and I will do my best to put myself in shape to do that tomorrow morning.

The Court. Now, I will hear what you have to say as to the other proposition.

Of course, that disposes of the question of the negligence, as you have made another proposition now.

Mr. Lane. By dealing with the first question raised by Mr. Carey first, that is, whether this man is engaged in interstate commerce or not, it is always wise, it seems to me, to go back, in considering that subject, to the first case in which the matter was considered with any great degree of care by the Supreme Court of the United States, and that is the case of Peterson vs. The D. L. & W. Railroad Company, which has not, despite

counsel's assertion to the contrary, been modified to any extent whatever, but in a subsequent opinion of the Supreme Court of the United States they have distinguished the Peterson case and in every single case cited by Mr. Carey the Peterson case has been cited and approved, and here is what they say in the Peterson case,—that the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of the injury. 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? Now, there are the questions. Is the performance of the duty that the man was engaged in a matter of indifference with respect to interstate commerce, or was it so closely connected with it, or was it in the nature of a duty resting upon the carrier? If it was not indifferent to interstate commerce, but was a duty resting upon a carrier as an interstate carrier, then it was so closely connected with interstate commerce as to be a part of it, and the Supreme Court of the United States has intimated in most of these cases that ordinarily that is a question for a jury. The Court says tracks and bridges are as indispensible 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 efficiency of the commerce depends in large measure upon this being done. Indeed, the line now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct any defect or insufficiency in those cars, &c., used in interstate commerce; but independently of the statute we are of the opinion that the work of keeping such instrumentalities in the proper state of repair while thus used is so closely related to such commerce as to be in practice and legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole, but this is an erroneous assump-

tion. The true test always is, is the work in question a part of the interstate commerce in which the carrier is engaged? Now, the Supreme Court of the U. S. in connection with these cases cited by Mr. Carey has not modified that opinion nor has it modified the test to be applied. In the Shanks case cited they refer to the Peterson case with approval.

Now, one of the latest cases later than any of those cited by Mr. Carey is the Erie Railroad against Winfield.

The Court. That was a New Jersey case.

Mr. Lane. That was a New Jersey case later than any cited by Mr. Carey reported in 244 U. S. in 1917. There it appeared that the injured man was the engineer of a switch engine; that the switch engine was used during the day indiscriminately in interstate and intrastate traffic. There was no evidence before the court as to what cars the engine had been pulling just prior to the accident. The man's work was done, and he was leaving the premises of the railroad company. The Court said in leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment like his proceeding 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, and that is the question. It isn't a question as to whether a man at a particular moment was repairing an intrastate car or was repairing an interstate car. The question is, whether at the particular moment, notwithstanding the particular task that he was performing, was he engaged in interstate work? He might be repairing an intrastate car and yet be employed in interstate commerce, so that, although tests are applied, although evidence is adduced to show what particular work or what particular car the man was working on at the particular time of the accident to throw light upon the fact to what employment he was, that isn't the question; that is only evidence; the real question is, at the particular moment was he in the employ of the carrier in its interstate business, whether he was actually working on an interstate car or an intrastate car, or not working at all, as in the Winfield case where he had left his work, closed his work; there was no evidence that his engine on that particular

day had drawn an interstate car; no evidence before the Court at all. All the evidence that there was, was that he was the engineer of a switch engine, and that that switch engine might, during the course of a day, have drawn either inter-or intra-state or both, and because it was an engine which might have been used in the performance of either inter- or intra-state commerce, the man was, during the entire day, employed in interstate commerce within the meaning of the act. Your Honor will also find that in the Winfield case—that the Winfield case is an important case, not only upon the particular employment which the man at that time was in, but it is important as indicating the intent of the Supreme Court of the United States to extend the operation of the Federal employees act as far as by any stretch they can do it. Your Honor will recollect that that act was exclusive, that the State law with respect to workmen's compensation, in the absence of negligence, did not apply and was not operative, and that the intent of Congress in enacting that legislation was to cover all employees engaged by interstate or at work for interstate carriers as far as constitutionally they could.

Now, in the Third Circuit Court of Appeals, this question with respect to a man employed in repairing cars came up directly in Boyle vs. Pennsylvania Railroad Company, and in that case, the Third Circuit drew the distinction between—

Mr. Carey. Where is that?

Mr. Lane. That is 228 Federal, 266—drew the distinction between those cases which arise under the act where a man is injured while using an instrumentality of commerce, and those cases where he is injured while either making or repairing an instrumentality of commerce. In the first class of cases, that is, where the injury happens through the use of an instrumentality of commerce, it has been held that in the ordinary case the particular service, whether inter- or intrastate to which the instrumentality is being put at the time of the injury, they say that in the ordinary case that is determinative where the accident happened in the use of the instrumentality. But where the accident happens because of work upon the instrumentality, then the question isn't, is the thing being used at the time in interstate commerce, because it is not being used in anything, as a matter of fact, nor is it—will the thing immediately after it is being repaired or may be used in interstate commerce. The

question is, is it an instrumentality which may be used in interstate commerce, which is subject to use in interstate commerce.

The Court. Does it go as far as that?

Mr. Lane. The Third Circuit said yes.

The Court. Does it go as far as that without any limitations?

Mr. Lane. Yes, sir; I think so.

The Court. It might be almost any object then.

Mr. Lane. Precisely, almost any object unless it is segregated from—almost any object made for or work performed for an interstate carrier, of course.

Mr. Carey. What is the date of that?

Mr. Lane. That is 1915, and it is decided since the Behrens case.

Mr. Carey. Yes, since the Behrens, but not since the Winters.

Mr. Lane. And before the Winfield case, too.

The Court. Proceed.

Mr. Lane. The court said, the contention of the plaintiff in error is based on the admitted proposition that a car which has been and may again be used indiscriminately in intrastate and interstate commerce is an instrument of interstate commerce, citing the Northern Pacific Railroad case in 215 U. S. 352. Employment of such an instrument of commerce may be of two kinds: first, repairing or preparing it for use in commerce or both kinds; second, using it in commerce of one kind of the other. With respect to employment upon such an instrument of interstate commerce, the plaintiff cites and relies on several cases in which, &c. In this case, that is the Markoe case, referring to the Peterson case, in this case the Court held that a workman employed in the repair shops of a railroad company repairing a car having been used and intended to again be used in one or both kinds is employed in interstate commerce, and if injured when so employed, he is within the protection of the Federal liability act. It is to be noted that the work that Markoe was doing was not using an instrument of interstate commerce, but was preparing that instrument for use in commerce in either one kind or the other, and therefore for use in interstate commerce.

Motion for Non-Suit.

(Citing from opinion.)

Now, as I before indicated, it seems to me that the doctrine of the Third Circuit Court of Appeals in the Boyle case is, by inference, approved by the Supreme Court of the United States in Erie Railroad Co. vs. Winfield, when they went to the extent of holding that a man who was the engineer of a switch engine, after having left his work, in going away from the yard, although there is no evidence on that day even he had hauled an interstate shipment, because of the mere fact that his engine might be called upon to haul intrastate or interstate cars or either, was engaged in interstate commerce.

In the Peterson case, I think it was, or in one of the cases in the Supreme Court of the United States, the Court said this. Mr. Carey argued that the word "interstate commerce" must be strictly construed. The Supreme Court of the United States has held just contrary. It is said, having in mind the nature and the usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, whenever it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it? Now, and, of course, we have the ash pit case in our own Court of Appeals, Zabrowski vs. The Erie Railroad Company, in which the Court held that a man who was engaged in taking ashes from an ash pit was engaged in interstate commerce.

Now, if your Honor please, at the time this man was hurt, what was he doing? He had been called away from a job that he was working upon by the car inspector, who admittedly had authority to call him. He was accompanied by his assistant foreman, the immediate superior; instructed by them to go over to track 21 for the purpose of examining a car which it is conceded was used indiscriminately in intrastate or interstate traffic. The purpose of calling him over there was to ascertain why it was and how it was that repairs which it was thought he had done upon that car had been performed in a defective way. He was at the particular moment engaged on the master's business. He wasn't there as a trespasser or as a licensee; he was there doing his duty. The mere fact that it so happens that he

wasn't the man that made those repairs does not alter the situation. His boss thought that he had made the repairs. The car inspector thought that he had made the repairs. It was an interstate car, or a car used indiscriminately subject to orders indiscriminately in interstate or intrastate traffic.

Now, when that man, called over by that foreman, by the master's authority, goes there for the purpose of being called down, if you please, or what not, but for the purpose, at least, of finding out how it is that this car, this interstate car has been defectively fixed, defectively repaired, can it be said that he isn't at that particular moment engaged in a work so closely related to interstate commerce as to be a part of it? The car was a car to be used in interstate commerce. It was, as the Supreme Court of the U. S. said, the duty of the master, the railroad company, under the statute, to keep that car in repairs. The statute forces them to do it,—for the purpose of ascertaining why it was that that car hadn't been properly repaired; in other words, for the purpose of doing the master's duty under the statute and seeing that that master's duty is properly performed, this servant comes over upon the master's instructions. Now, if he wasn't engaged in interstate commerce at that time, or work so closely related to interstate commerce as to be a part of it, what was he engaged in? Was he engaged in intrastate commerce? He must have been engaged in either one or the other. It is inconceivable that it could be claimed, although I suppose it is claimed here, at least, but I can imagine that if I had taken proceedings under the Workmen's Compensation Act I would have been met as was counsel in the case of Winfield, the Erie Railroad Company against Winfield, and as I was met in a case that you had before me, or with me, and before Judge Salmon, in which the man was engaged in checking wheat that had come in in a warehouse; it would have been contended with all the vigor that counsel could contend that it could not be considered that the man was engaged in interstate commerce; he would be engaged in intrastate commerce, and his remedy would be under the Employers' Liability Act. So I say, leaving out of consideration all the other elements, that the work that this man, may it please your Honor, at the time was not going to do his work upon car X-1284. His work, as a matter of fact, at the time he was physically going to car X-1284, but he wasn't going to the work as a part of that work.

He had left that work at the command of the master and stopped it to proceed upon another work on track 21, the interstate work, and when he came back from 21 to NYC X-1284 he was still engaged in the work that he was called upon to do from car 1284 and he was engaged in that work until he had returned to the place from whence he had been called. As in the Winfield case, the man was engaged in the work until he had gotten home.

The Court. Suppose he had been called to look at a car and he found when he got over to it, it had been repaired. What would you say he was engaged in then?

Mr. Lane. I would say he was engaged, that he had been called away from the work for the purpose of examining a car.

The Court. No, he wasn't called away. Suppose, for instance, this car was an interstate car, and he had been called over there to repair it? When he got there, he found that somebody else had repaired it, and he was told to go back to his former work?

Mr. Lane. I would say he was engaged in interstate work; that was his work. The question is, when does work begin and when does work end? Your Honor must bear this into consideration: That man was a man employed by the defendant; he was paid, I think, by the month; his wages were fixed by the hour; he was, all of the time while he was in that railroad yard, all of the working hours, he was the master's servant, and he was on work of the master. He must have been doing something. Now, if it was a part of his duty to respond to a foreman's order to go over to a car for the purpose of repairing it and to look at it to see whether it was all right, the moment he starts to go to that car to repair it, to do the thing which the foreman has the power to compel him to do, he is engaged in that work, although, as a matter of fact, he may never put a nail in the car, but that is his particular work; that is the thing he is bound to.

The Court. Now, when the employer says go back, why doesn't the interstate commerce work cease?

Mr. Lane. Because, again, if your Honor please, there can be no time that he isn't doing something until he gets back to the work; he has been once to the work at X-1284; he has been there once in the morning; he is working on that; nothing connected with that work has caused him to walk away from it

and walk back to it. It would have been different if he had gone for a bolt to use in X-1284. If he had been sent—if he had found while he was working on X-1284 that he needed a bolt to use in X-1284, and he had gone 40 miles after that bolt and come back again, from the time he left that car to the time he got back to that car, he would have been employed in work on X-1284, no matter where he was, if he was 40 miles away, and if that was an intrastate car, it would have been intrastate, and if it was an interstate car, it would have been interstate work. But he didn't leave his work on X-1284 for any purpose connected with X-1284. He left it to commence a new task, to wit, to examine this other car, and he didn't end that new task until he had come back to X-1284, when he took up his old task that he had been performing. In other words, the coming back to X-1284 had no connection with the work on X-1284, but was tied up with the work on the Big Four car on track 21.

The Court. Do you find any cases that ever held that?

Mr. Lane. If your Honor please, your Honor won't find a single case in the books that is on all fours with this case. The nearest approach to the case that your Honor will find are those cases which do hold that a man's employment upon a particular task commences from the time—and then it is usually a question for the jury—from the time when he prepares for that task, when he starts in to go to the task, and ends when he has left the task. The question is, when does the task begin, and when does the task end, and that is usually a question for a jury. In the Winfield case, which was a day's work, the man employed by day's work, it was held that his task did not end until he was off the railroad property; that the task began when he left his boarding house. I think one of the cases holds that when he left his boarding house for the purpose of going to the railroad company's yard, that was the beginning of the task and the end of the task was when he had returned to his boarding house. It is a mixed question of law and fact usually. We seize upon the assumption that the man must all of the time be engaged in some task. Now, what was the task he was engaged on? Surely, in this case, when he was returning to X-1284 he certainly was not engaged in work on X-1284. He must have been engaged in the master's task on some particular job. What was it? Why, it was the work on the Big Four,

because he was still employed in that work. He had started from a particular point to do that master's work; he hadn't yet returned from the particular point to the point from which he had started to do that particular work, so that that certainly, as it were, is one particular task. When he comes to X-1284 he again picks up the work on X-1284 at the point he dropped it, when he dropped his tools and walked over on the other task.

The Court. Let me ask you another question. Suppose an engineer is running an engine and he is told by the foreman to take another engine which is engaged in interstate commerce, and gets part way there with that engine, and then is sent back again to his former engine? Where do you say he is then?

Mr. Lane. I should say from the time that he started to get his second engine until the time he is—there is another element in that I will give to your Honor after I answer this question—I should say that from the time that he started to go to his task of drawing the interstate engine to the time he went back to his intrastate engine, he was engaged in interstate traffic. The trouble is, as Mr. Carey will say, that the Supreme Court of the United States, or in the Wooley case has drawn that distinction between the use of an instrumentality of commerce and the repair of an instrumentality of commerce. As was said in the Third Circuit Court of Appeals, where the accident happens because of a—and I think it is a distinction without a difference and ought not to be made—but the Court has made it, that where the question is as to the use of an instrumentality of commerce, then it must appear that at the very time of the happening of the accident the man was in fact using that instrumentality, but that does not apply where the accident happens in the course of the repair of an instrumentality of interstate commerce. Now, I do not think that distinction is logical. I do not think it was intended by Congress, and I think it has nothing to support it; but, at the same time, they have drawn that distinction and they have said—and I do not think, may it please your Honor, that after the Winfield case, that when the matter next goes to the Supreme Court of the United States, I do not think will hold it there. I think the state courts have gone much further in misinterpretation of the supposed modifications of the Peterson case than they have or than they did in following the Peterson case wrongfully, as Mr. Carey says, because in that I cannot conceive how the Supreme Court of the

United States could have gone any further than they did in the Winfield case where they held—there was a case where the question was as to the use of an instrumentality of commerce. It was not repairing or preparing, it was actual use, and although the case was dearth of proof that this man during the day that he was hurt, that this man had switch engines—it is confined not only within a state, but within a little territory of a state—although there was no proof that that engine had drawn a single interstate car that day, notwithstanding that, and although the proceedings were under the state act, the Court of Appeals of this State held that an award was proper. The Supreme Court of the United States reversed the Court of Appeals of this State and held that the award was improper and that the Federal act applied, though the injury occurred after the man had left the railroad yards, as I recollect it.

Mr. Carey. In the yards.

Mr. Lane. Or, at least, was just in the act of leaving the railroad yards.

The Court. He was in the yards.

Mr. Lane. And because his engine might have been assigned to either interstate or intrastate, it was held he was an employee in interstate commerce. Now, that is upon the one branch, so that I say that the particular task at which this man was employed at the time of his injury was not work on X-1284; it was work connected with the Big Four car, which it is admitted was a car used indiscriminately in inter- and intrastate traffic, and that therefore it is at least for the jury to say whether his work was so closely connected with interstate commerce as to be a part of it; or, put it on the other side, whether the performance of that work was so indifferent to interstate commerce as not to be a part of it; and that is what the Supreme Court says, so indifferent to interstate commerce. Now, grant you it was the railroad's duty to repair this car; the statute compelled it to repair it, the safety appliance act. It was in connection with that statutory duty on this interstate car that this man was called over there and was working.

Now, isn't it a question, at least, for the jury to say whether the work at that time—or can you say as a matter of law, can you say that the work that that man was performing at that time was indifferent to interstate commerce? Wasn't it con-

nected with it in some way or other, and wasn't it not connected with it remotely, but wasn't it directly connected with it?

The Court. Do you think it makes any difference that this man was told by the employer, "I do not want you to do any work on this car; leave your tools behind. I want you to look at it"?

Mr. Lane. No, sir. I think if the employer had said to this man, "I do not want you to do a bit of work on this car; I just want you to come over here and look at the repairs which you have made on this car, and then I will tell you what I think about you," I think if the employer had started out with that statement to the servant, it wouldn't have made a particle of difference, because work doesn't necessarily consist of physical labor. It is a part of the master's, a part of the servant's work to do his work well; it is a part of the master's business to see that that work is done well. It is a part of his interstate business to see that his interstate cars are properly repaired, so that it is a part of the servant's work to go there and get lectured for the work that he had improperly done on an interstate car. The mere fact that he had not done the work, that it was all a mistake, does not make any difference, because he was on the master's work, on the master's duty. He certainly was not driving a spike nor driving a nail, but it was work connected with the repairs to that car in the attempt of the master to perform his duty under the statute which made it necessary for him to prepare that car, to put that car in good repair.

If I am retained for the purpose of preparing a case and I prepare a case, and I prepare a case improperly, and I am called to account for it, and my client asks me to go and consult with someone else to be told what ought to have been done, while I am there consulting, although my work is not constructive at all, I am on my client's business, upon business connected with that particular case.

Mr. Carey. Are you on interstate business?

Mr. Lane. If it is an interstate cause, yes.

The Court. Proceed.

Mr. Lane. Now, upon the second branch of the case, inasmuch as it is conceded that in these yards both interstate and intra-state cars are indiscriminately prepared, indiscriminately repaired, indiscriminately placed, there is no segregation of em-

ployees assigned to one class of traffic or assigned to the other; all of the work done in that yard is work which has a relation to interstate commerce. And inasmuch as it was the duty of this employee under his employment to go either to an interstate or an intra-state car as he might be assigned indiscriminately without regard to whether it was one or the other, that he comes within the theory of the Winfield case, being an employee not for a specific job, not for a specific time, not piece work, but employed generally as a car repairer, just as Winfield was employed generally as an engine driver, and that therefore all of the time that this man was employed in that yard, every employee of that yard, whether he was employed at the particular moment upon an intra-state or an interstate piece of work, was an employee of the master in his interstate business, and that is all that is required under the act, because his work, all of his work, had a connection with and a direct connection with the business of the master as an interstate carrier. That is the only theory, that is the only possible theory upon which the Supreme Court could have decided the Winfield case. It did not ask whether his engine was drawing an intra-state car; it only said it might have drawn either one or the other, and, therefore, it is interstate work. He might have been assigned one to the other, because he was an employee in interstate commerce. How can you distinguish between that and the car repairer who might have been assigned during the day to either intra-state or interstate cars or both, if the engine driver was engaged in interstate commerce and the car repairer in view of the distinction drawn between persons repairing instrumentalities and persons operating instrumentalities in the Boyle case?

Secondly, so that I say, considering this man as an employee by the day or the week or the month, at least, not by the piece, he was the employee of the master in interstate commerce, no matter what particular task he was performing at the particular time of the accident.

Thirdly, that the work he was performing on car number X-1284, assuming now that his work was actually connected with that car, that under the Peterson case and under the ash pit case in this State, at least, there is sufficient in the case to go to a jury as to whether that work was not work of an interstate nature.

Now, remembering again that the question is whether the work is indifferent to commerce or closely connected with it, whether it is the performance of a duty on the part of the railroad company with respect to interstate commerce, we will look at the facts. This car X-1284 had been regularly assigned, both before the accident and after the accident, to removing waste from the Weehawken station. It has been held—and that, of course, that waste is the product of both interstate and intra-state traffic. It is absolutely necessary, of course, for the refuse coming in in interstate commerce to be removed somewhere. The removal of that waste from the cars certainly is a part of interstate commerce, or, at least, closely connected with it as to be a part of it, because it is a necessary thing to be done in order to carry on that commerce. The maintenance of the terminal at Weehawken is a necessary thing to be done in order to accommodate interstate commerce. That waste cannot be dumped in the station in Weehawken; it cannot stay there; it has got to go somewhere else. Where does it cease to be—at what point does it cease to be interstate commerce or so closely connected with interstate commerce or a part thereof? I say this, that when that waste has arrived at a point where it may ultimately rest, then it has ceased to be a part of interstate commerce, but until it is taken by the railroad company to some place where it may rest, at least, for some time without interfering with interstate commerce, it is still being handled as a part of interstate commerce. Now, it cannot rest in the Weehawken station. You cannot throw that waste or that scrap and refuse out of the interstate cars onto the platforms in the station or into the body of the station and let it stay there. It isn't a siding as the coal cases. Of course, the theory of the coal cases is that when that coal is placed upon the siding, it has come to a point of rest; whatever else is done with it, it is a new act, it is a new thing; it may rest there indefinitely. But the waste taken out of the cars at the Weehakken station cannot stay there for any length of time without seriously interfering with interstate commerce. It has got to be gotten out of there. Now, what is done? It is loaded, taken out of the cars at the Weehawken station and is immediately transferred to car number X-1284, which takes it to its ultimate place of rest, and that ultimate place of rest is a dump out at Little Ferry. It is used there, part of it, at

any rate, is used for filling for the purpose of making filling for the yard which is going to be used for interstate commerce. Now, it doesn't make any difference to me, or rather, upon this branch of the argument, it seems to me it is immaterial what the waste is used for. My theory is that so long as that waste is being transported in the ordinary course of business to a place where it may ultimately rest, just so long is that an element of interstate commerce and is the removal of it a necessary incident to the doing of interstate commerce by the railroad company. If they had had in the Weehawken station a place like a coal siding or a dump there, even a temporary dump, a place where for some length of time they could have stored this waste, a different question would be presented, but they have no such place. As the cars come in the waste or the refuse is taken out and as a contiguous performance to clear the way for interstate traffic, this refuse is kept on wheels and the first place of rest that it gets is the dump at Little Ferry.

Now, up until the time, may it please the Court, that the waste is unloaded from these cars at Little Ferry, isn't every step a step that the railroad must take, duty imposed upon it in its operations as an interstate carrier? Isn't everything that it does dictated to it by the necessity for the performance and the keeping going of its interstate train, and if it is then, in the language of the Supreme Court in the Peterson case, it is work so closely connected with interstate commerce as to be a part of it, even as a matter of law, isn't it a question, isn't it a fair question to present to a jury as has been done in several of the cases?

Now, upon those three grounds—I have other cases here that I haven't read to your Honor that are along the lines of the cases that I have suggested upon the interstate commerce feature of the case. Upon the negligence it seems to me that the case is one clearly for the jury. The Federal Employers' Liability Act abolished the defense of fellow servant and modified the defense of contributory negligence. It appears in the case by the testimony that to the knowledge of everyone, these employees were accustomed to going from one point of the yard to the other and crawling under these cars which might be upon the dead head tracks. It was the custom not to move—according to the testimony—cars upon the dead head tracks

without a warning. The men assumed that they were safe in crossing dead head tracks. In this particular case the man had been called over by his own foreman; he had been directed to go back to the work; in the sight of his foreman, he goes back, and following the ordinary custom of the road, he crawls under the car, and without warning to him this car is moved. Now, it seems to me that it is a question for the jury as to whether that was negligence upon the part of the railroad company or not.

The Court. It is five o'clock. We will take a recess until tomorrow morning.

RECESS.

Hackensack, N. J., January 22, 1920.

10:00 o'clock A. M.

The Court. Anything further, Mr. Lane?

Mr. Lane. I desire, if the Court please, to withdraw a remark that I made yesterday with respect to what the position of the railroad company would be in case proceedings were started under a special act. That remark ought not to have been made under the circumstances of this case, and it is withdrawn.

There is one matter that I desire to bring to your Honor's attention that is suggested by a remark made by Mr. Carey to me as I walked down to the train yesterday afternoon. I do not desire your Honor to understand that I have taken the position that the employment of this man at the time this accident happened was solely with reference to box car—to the Big Four car. His employment, as I insist, was a joint employment; he was engaged in work both on the Big Four car on track 21, as well as on the car standing on 27, the N. Y. C. X-1284 car, and your Honor will find that the cases hold that a man may be at one time engaged in two employments exactly the same as if he had a bag of tools in one hand and a bag of tools in the other hand that he was going to use when he got to his work, first on one car intra-state, and second on one car interstate. If he has both of those bags of tools he is

engaged in both intra-state and interstate work, and my insistence is he was not engaged at that particular time on both the Big Four car and on N. Y. C. X-1284, and if in either case it was interstate commerce, it comes within the operation of the act.

The Court. Anything further, Mr. Carey?

Mr. Carey. If the Court please, Mr. Lane inadvertently, I am sure, gave a wrong interpretation to the basis of the decision in the Winfield case. He stated during his argument that the Winfield—in the Winfield case there was no evidence in the case that the switch engine on which he was employed had on the day of the accident handled any interstate traffic; that it was an engine which did handle both kinds of traffic, but that the evidence as to what it did that day did not show in which movement it was engaged. The Supreme Court, in stating the facts connected with the case, says the cars usually contain package freight and many were moved in the course of a day's work; in some the freight was interstate, in others intra-state, and in still others, it was of both classes. This was true of the cars moved on the day in question and the fact that he was moving a mixed traffic was the basis of the decision that his engine was then engaged in interstate commerce, and he was engaged in interstate commerce, and they speak of it again in the course of the opinion in the same way. And it was on that basis that the Court said that in leaving the yard, the course of his progress through the yard, having been engaged in intra-state traffic and the handling of interstate goods, he was still in that employment until he got off of the company's yard, and he had a right during the course of his employment to proceed on his way out of the yard.

Now, in the Boyle case, which was decided in the Third Circuit, U. S. District Court of Appeals in 1915, and has been directly overruled by the Winters case, by the Bronson case in the U. S. Supreme Court, and has also been disapproved in the Second Circuit in the Pazler case, where the case was that of repairing to a car which was a foreign car, and in all these cases the Supreme Court of the U. S. in the two cases, the U. S. Circuit Court of Appeals in the Second Circuit, have held that a car which is used indiscriminately in intra-state and interstate commerce, while laid off for repairs, while undergoing

repairs, has no color of classification at all, either as interstate or intra-state commerce.

Now, those cases remove all color of interstate commerce from this situation. It does not make any difference whether the N. Y. C. X car was ordinarily engaged in interstate traffic or not. It does not make any difference whether the Big Four car was ordinarily engaged in interstate traffic or not. It is solely dependent upon the question of what the car was employed in, what service it was connected with at the time.

Now, great stress was laid on the Peterson case, which was one of the first cases decided under this act, and that was a case in which the repairs were made to an interstate bridge, that is, a bridge used by an interstate railroad, so that every day and all the time during the day that bridge was subject to use for interstate traffic, and in deciding the Winters case there was a clear distinction drawn by the Court between those two propositions. The Court says in connection with this, and recalling to your Honor the fact in that case, that was the case where the engine had on its last trip drawn an interstate train, and on the next train succeeding those repairs had drawn an interstate train, and the Court, stating those facts, said, that is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs on 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 for anything more definite than such business as might be needed.

That was followed in the Bronson case by the U. S. Supreme Court and that states the law, I submit, upon this question of the status of a car which is undergoing repair such as these cars were, so that whether or not they were at times engaged in interstate commerce, whether engaged in interstate commerce either before or immediately after the repair, is a question of indiffrence. It is a question of what they were doing at the time. That is the determination of the Court of last resort on that question. So there is nothing left in this case to give it interstate color at all.

Now, Mr. Lane has very properly withdrawn the remark in regard to what would be the attitude of the railroad company in case of compensation. I will say this for him: that if he had been in the case during the entire time instead of being

recently substituted, he would have known facts which he was not cognizant of when he made the remark, because the railroad company has never disputed the matter of right of compensation under the compensation act of this State.

The Court. That wouldn't affect this case.

Mr. Carey. No, that wouldn't affect this case at all, and even if disposed to dispute the application of the compensation act after having defended in this court on the ground that it is not interstate commerce, of course, we would be absolutely precluded from raising the question in another proceeding.

Mr. Lane. I think the Supreme Court of Michigan held that the railroad was not precluded under those circumstances.

Mr. Carey. Well, the Supreme Court of Michigan was wrong according to the Court of Errors and Appeals of New Jersey. So the Winters case, which was, so-called, a metaphysical discussion by an able metaphysician—but it has passed over the dam and gone.

During the argument counsel for the plaintiff said this waste which was carried away by the New York Central X-car was used in filling in a freight yard which was ultimately to be used for interstate and intrastate. Now, unfortunately for that proposition, it is again spoiled by the decision of the U. S. Supreme Court and that ruling is in Raymond vs. the C. M. & St. P. Ry. Co. found in 243 U. S. at page 43. In that case the railroad company was constructing a tunnel for a cut-off on its main line and was constructing new tracks in connection with that tunnel. When put into use, it was to be the main line of the railroad and, of course, an interstate part of the road. The Supreme Court of the U. S., affirming the judgment of the lower court, held that at the time the plaintiff who was employed in connection with driving this tunnel and laying the track, he was not engaged in interstate commerce. The Court said, considering the suit as based upon the Federal Employers' Liability Act, it is certain under recent decisions of this Court, whatever thought may have existed in the minds of some at the time the judgment below was rendered, that under all the facts as alleged, Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. Citing the Yurconis case, the

Winters case and the Nash case, as authorities for this position. All of those were called to your Honor's attention yesterday, and were cases which lay down the principle for which I am now contending.

Now, the question of employment when going to and from the place, in this case it happens to be to and from the NYC-X car and the Big Four car. That also has been ruled upon by the U. S. Supreme Court. It was passed upon in the Walsh case which, fortunately, this book, this volume, happens to be a regular collection of cases on this subject. And your Honor will remember in the Walsh case that the plaintiff was an employee on a switch engine, that he had taken an interstate car to a point where it was to be hooked onto an interstate train; that he had then left a caboose at another point and was returning to the office for further orders and the further orders would have been orders to take up another interstate proposition, and it was held that although he was injured just as he was getting off at the office to receive his further orders which were waiting for him there, that neither the work which he had been doing nor the work which he was about to do was decisive, and that a ruling that he was not employed in interstate commerce was correct. A further ruling upon that subject was made by the U. S. Supreme Court in the Peerey case. That was a case in which the plaintiff was employed on a road which connected—really was in itself an interstate road, but the plaintiff's engine and the crew with which he was connected had their run entirely within the state. Their work was given interstate color, however, from the fact that they hauled interstate freight. Now, it happened that on this run in question they had taken out a train of interstate cars to a junction point; there they had been relieved and another engine crew had taken the train to go on. The Supreme Court held that that was interstate traffic, and that they were engaged in interstate commerce. On the return trip they picked up some freight, all of which was intrastate, and he was injured on the return trip. Now, the contention was on the part of the railroad company that he was engaged in interstate commerce; that the whole trip should be considered as one transaction. The award had been under the compensation act of the state. (Citing from opinion.)

And it was therefore held that he was not at that time engaged in interstate commerce and that the Federal act did not apply. So that, applying these two cases to the case at bar, neither the going to the Big Four car, if that was an interstate car, or the return from it to the NYC car would be an engagement in interstate commerce, the question being, as has been stated many times, what he was doing at the time. Was he in furtherance of interstate commerce? Justice Brandeis has used an expression which is quite apropos, drawing the distinction, being in interstate transportation, working in interstate transportation, and working for interstate transportation. Many of these men who were parties to the suit, to the actions the decisions of which have been quoted, were working for interstate commerce; the miner who was mining coal to be used on interstate engines was working for interstate commerce; but he wasn't in it at the time; the man who was repairing the spur, the siding, on which the interstate coal of the railway company was run to the pockets, was working for the purpose, and he was helping along the interstate commerce, but he wasn't in the actual movement. That is the determinative proposition.

Then Mr. Lane argues with his usual force and ingenuity that the sweeping, cleaning of the railway station there at Weehawken was for the purpose of making it fit for use in interstate commerce, for the accommodation of interstate passengers, and therefore that must be taken into account to determine whether this car which was used to carry off this waste was engaged in interstate commerce.

Now, that case, or substantially the same thing, was involved in the Volmers case which was decided by the Court of Appeals of the State of New York. Volmers was employed in inspecting and repairing plumbing in connection with a station used for interstate traffic, and the Appellate Division of the Supreme Court of the State of New York, there being a recovery in benefit of the plaintiff, sustained that recovery. It was, however, reversed by the Court of Appeals, and they reversed it on the authority of the Winters case.

So taking into account all of these cases which I have at length called to the attention of the Court and consumed a good deal of the time of the Court in that matter, we find that the rule simply now is that a car laid off undergoing repairs is

not an instrument at that time of interstate commerce. There are many cases following the Winters case in the different state courts which have followed that rule, and it has been applied to repairing cars in shops by the Kansas Supreme Court and held not to be interstate—engaged in interstate commerce, although the trips, as in the other cases, the last before and the next after were interstate, and by the Supreme Court of Alabama, where a car was repaired under similar circumstances, citing the Winters case as the authority; the Supreme Court of Oklahoma in the repairing of a locomotive engine where it was used indiscriminately in intrastate and interstate movement. Ebe against the Industrial Commission of Illinois, in which a man was employed as a janitor in shops where repairs were made and he was keeping the shop in order for the use of the men who were employed to repair rolling stock used in interstate commerce. Again the Supreme Court of Illinois—and these are all following the Winters case and cite the Winters case—the washer of locomotives in a roundhouse where the locomotives had not been actually assigned to an interstate trip and were liable to be put into service in either inter- or intra-state service, they held on the authority of the Winters case that that was not interstate commerce, and the list might be prolonged almost indefinitely. Those are cases which come, I think, the nearest to the case in question, and some of them absolutely in point with reference to the character of a car or a locomotive which may be used indifferently in intra and interstate commerce.

Now, the burden to show that these were assigned definitely and fixedly or particularly with reference to the next employment was to be in interstate commerce, is on the plaintiff and not on us, and if they fail to carry that burden then they have failed to sustain their pleading, which is to the effect that this was interstate commerce.

The Court. Anything further?

Mr. Lane. In the Winfield case referred to by Mr. Carey, there was no evidence that the engine had been used in interstate commerce on the particular day. The evidence was, and the citation of facts by the Supreme Court is not to the contrary, that usually the trains or the cars switched by the engine contained package freight, some of the cars or some of the trains package freight interstate; some of the trains package

freight intrastate, and some of the trains package freight mixed, and that upon the day in question when the man was injured, that had been the usual course. There was no evidence that just prior to his being hurt he was hauling an interstate shipment or a mixed shipment, or if he had been assigned to work the next morning, he would have hauled an interstate or an intrastate shipment or both.

Now, if Mr. Carey's insistence with respect to the effect of the Winters case is correct, it results in this, which can never have been contemplated by Congress; that no person employed by a railroad company in repair work of any kind, nature or description, except repair work upon the right of way, is under the protection of the act, because, according to his argument, whenever a car or an engine is laid up for repairs that engine ceases to become, or that car ceases to become an instrumentality either of intrastate or interstate traffic. It is a dead thing, and the man repairing it or the man working on it is not covered by the interstate—by the Employers' Liability Act, and that results, as I have said, in excluding from the protection of this act every employee of the railway except such as are actually employed upon the right of way.

There is one reference that I might make that Mr. Carey refers to as clearly distinguishable from the case at bar and clearly distinguishable from the ash pit case. In the coal case the man was cleaning up a station used solely for intrastate traffic. It wasn't an interstate traffic at all. It was sought to predicate liability under the Employers' Liability Act of Congress by saying that this coal was used after having been gathered up in interstate engines or engines engaged in interstate traffic. The Court said no, and for this reason: That the work upon which that man was engaged at that time was not getting coal together for use in interstate engines. It was cleaning this particular space of this coal which was devoted solely to intrastate traffic, and that the use of the coal after it was removed was incidental to his main work, his main work being connected with the cleaning up of the coal. It said in so many words that the situation would have been different had it been shown that the main purpose was to get the coal for the use in the interstate engines, and the incidental purpose the cleaning up of the intrastate platform. That is the distinction. Which

purpose or which work is the main work, and which work is the incidental work?

Now, in this case, the main work upon which X-1284 was engaged was in transporting the refuse from the Weehawken station and the main work of transporting that refuse was to clean that refuse out of the way of interstate work; that was the main thing, and I insist that that being the main purpose, the clearing away for interstate traffic is within the ash pit case, and the ash pit case does not stand alone in our state. There is one of the other states in the Court of Appeals had a case precisely the same and followed the ash pit case, since the Winters case held that a man who was engaged in removing ashes from an ash pit used by both intrastate and interstate traffic was within the protection of the act.

Now, I submit, your Honor will observe through all these cases that the Supreme Court of the United States has said, time over again, that at least there was evidence to go to a jury; it becomes a jury question; it is a mixed question of law and fact, when we remember that the test always is, is the work so closely conected with interstate commerce as to be a part of it. Now, that isn't a question of law; it is a mixed question of law and fact. It is for the jury to determine whether this work is so closely connected with the movement of interstate shipments as to be in the opinion of the jury a part of it. I submit the case is one for the jury.

The Court. I dislike very much to take the case from the jury, but I think in this case the plaintiff has failed to show that he was engaged in interstate commerce at the time of the accident, and, therefore, a non-suit must be allowed. You may note an objection to my ruling, because it is a very nice question, and you are entitled to have it reviewed, either by rule to show cause or by an appeal. I will grant you a rule to show cause if you desire it, or you may carry it up by an appeal. You may take your seats, gentlemen, in the audience.

Objection noted by plaintiff as ground of appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed February 5, 1920.

To:

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

SIRS:—

TAKE NOTICE that the plaintiff appeals from the whole of the judgment entered in this cause (judgment of non-suit) in the New Jersey Supreme Court, Bergen Circuit, to the Court of Errors and Appeals in the last resort in all causes on the following grounds:

1. That the evidence disclosed a cause of action and the Court erred in directing a non-suit.

2. That the evidence disclosed that at the time of the accident the plaintiff was employed by the defendant in interstate commerce to the extent necessary to bring him within the operation of the Employers' Act of Congress, and the Court erred in holding to the contrary.

3. That the evidence was sufficient to go to a jury upon the issue as to whether the plaintiff was employed at the time of the accident by the defendant in interstate transportation or in work so closely connected therewith as to be a part thereof, and the Court erred in withdrawing such question from the jury.

4. That the evidence was sufficient to go to the jury upon the issue as to whether the plaintiff assumed the risk, and occasioned, in whole or in part, from the negligence of any of the officers, agents or employees of defendant, and the Court erred in withdrawing the question from the jury.

5. That the evidence was sufficient to go to the jury upon the issure as to whether the plaintiff assumed the risk, and the Court erred in withdrawing the issue from the jury.

6. That the Court erred in refusing to admit in evidence a demand or stipulation of fact consented to by defendant as follows: "The cars standing on the repair track No. 27 on June 20, 1919, with the exception of the N.Y.C. X cars, were

commercial cars, which after being repaired were subject to orders for use in either intrastate or interstate commerce."

7. The Court erred in refusing to admit in evidence the demand or stipulation of fact consented to by defendant as follows: "1. PRR car No. 88623 was a commercial car and after being repaired at New Durham yards in June, 1919, was subject to orders for use in either intrastate or interstate commerce."

MERRITT LANE,
Attorney for Plaintiff.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FREDERICK HERZOG, *Plaintiff-Appellant,* *vs.* WALKER D. HINES, as Director-General in possession of and operating New York Central Railroad, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Supreme Court.*

Heard below before CUTLER, *J.*, and a Jury.

BRIEF FOR PLAINTIFF-APPELLANT.

Statement of the Case.

This action was brought to recover for injuries sustained by plaintiff on June 20, 1919, while employed as a car repairer by defendant at its New Durham yard. The action is based upon the Federal Employers' Liability Act, 8 Fed. Statutes (2nd Ed.) Annotated 1208.

The case was tried at the Bergen Circuit and resulted in a non-suit upon the ground that plaintiff had not proven that, at the time of the happening of the accident, he was engaged in interstate commerce.

The New Durham yard was used for making up westbound freight trains both interstate and intrastate; for classifying eastbound freight, both interstate and intrastate; for storage of freight for export; also for repairing cars for use in both interstate and intrastate traffic. Six of the tracks were known as dead-head tracks, Nos. 24, 25, 26, 27, 11 and 10. Damaged freight cars were stored on these dead tracks for the purpose of being repaired. The tracks were used indiscriminately for the storage and repair of cars used in interstate and intrastate commerce. After cars had been spotted on the dead-head tracks they were not moved, except on very rare occasions while the men were working on them except by the workmen themselves. In case of moving cars by the workmen while working thereon, the workmen moving the cars gave warning when warning was necessary to other workmen working on cars on the same track (pp. 9, 10 and 11). When a dead-head track was to be filled

with cars the warning that the track was to be filled was customarily given to men working on each side of the track that was to be filled. It was the duty of the man who unlocked the switches or opened the dead-head track to see that the warning was given, that the track was to be filled and to give it himself (p. 14). (The above from defendant's answers to interrogatories.)

Plaintiff had been employed as a car repairer from September 25, 1918, down to the date of the accident (p. 26). He got his orders about seven o'clock in the morning from the assistant foreman. He went to work at quarter to seven of June 20th starting on light repairs on track 25. He got through on track 25 about nine o'clock and then went to track 27 and started putting in new timbers on car N. Y. C. X-1284. He had worked on that car the day before. He had interrutped the work to do light work on track 25. He had been working on N. Y. C. X-1284 about half an hour when Fogarty, a car inspector, asked him to come along with him; he wanted to see him. He walked up the yard with Fogarty and then met the assistant foreman, his immediate superior, and the three went up to a car on track 21, a live track. Fogarty showed plaintiff the car and complained about the work. He said it had been defectively performed. Plaintiff stated that Fogarty was mistaken; that he had not performed the work. Fogarty said, "Your number is on the car" and the plaintiff replied, "I know, I didn't do the work; I was called away; I was called somewhere else" (p 28, l. 25). Then he was told to go back. He started to go back to his work on N. Y. C. X-1284. He walked straight over tracks 21, 23 and 24 which were empty (p. 28, l. 38). When he got near track 25, which was one of the dead-head tracks he found it full of cars; he crawled under to get through to the other track upon which he had been working, to wit, track 27. As soon as he got under the car the car moved about a foot forward and then back over his hands and foot and caused the injury for which he has sought to recover. He says (p. 29) that he looked right and left when he got to track 25 and saw no one (l. 20); that he could not see any engine at the head end of the track; that the cars were not moving; that it is the custom of the yard for workmen passing from one part of the yard to another (p. 29) to crawl under, or walk over, or whatever it is, the nearest and best. He says, "Because we have cars marked up all tracks from 24, 25, 26, 27; it might be right across over on 26 and 27. We cannot very well walk around four or five

cars that way and come back again when your cars is right over on the opposite track." Everyone did this. No one objected. Everyone knew it. The superiors knew it; they saw it being done. At the time he crawled under the car on track 25 he was about sixty feet away from Fogarty and the foreman. There was nothing between him and them. Plaintiff testified that whenever cars were moved on the dead-head tracks they made a noise so that everybody would know; that it was not a customary thing to move cars on the dead-head tracks during the day time; that it was mostly done at night; that it was the custom to warn by men coming down along the side of the cars when the cars were to be moved; that in this instance there were no men guarding the track and there was nothing to indicate to plaintiff that the cars were to be moved; that he did not think the cars were to be moved because they were on the dead-head track and that if they were going to be moved on the dead-head track there would have been notification.

Martin testified that he had been employed by the railroad as a car repairer from December 13, 1918, in the yards at New Durham; that it was the custom of the employees in going from one place to another to crawl under the cars, if there was no space between the cars (p. 52, l. 45); that this had been the custom since he was in the yard and long before; that it was the custom to holler—pass the word along the line when the tracks were to be filled; one man holler up to the other end, and then it would come down along the line (p. 53, l. 15). At the time the accident happened he was walking between tracks 24 and 23 (p. 53, l. 30). He was up at the head end of the yard and saw that they were kicking cars around at the head end (p. 53, l. 40). It was the custom when they were filling tracks to give warning by hollering (p. 58, l. 15).

Manson, another employee, testified (p. 59) that it was the custom of the yard to go from one place to the other the shortest way and to go underneath the cars and that he never heard anyone warned not to do it (p. 59); that he was, at the time of the accident, at the head end of the track and that no warning was given that track 25 was going to be filled and no man sent along 25 to warn (p. 60, l. 10; p. 60, l. 35).

Counsel for defendant endeavored to get this witness to testify that it was the business of the employee to know whether the track had been filled and was safe before going underneath the cars but the witness said on page 63 that it was not his

business; that he could not know; that he would not know whether the car were "spaced," so-called, or not. He saw the cars coming in on track 25 that did the injury (p. 64, l. 10).

The only warning customarily given (p. 67, l. 15) was given just before the cars were brought in.

Ernst, another employee, testified (p. 67) that he was the side partner of Herzog; that they started to work about seven o'clock in the morning and did some light repairing, and then went to heavy work on car N. Y. C. X-1284. They had been interrupted in this work to do light repairing. This car was on track 27 (p. 68). He had been working there with plaintiff for about twenty minutes when Fogarty, car inspector, came in and called plaintiff away. Plaintiff went with Fogarty. He said that the custom of the yard was that, when they were drawing in on the dead-head track, a man went along to open the switch and they would then shout along the track that the track was being filled (p. 69, l. 20). Counsel for defendant endeavored to get him to state that if there were a string of cars on the dead-head track that were not spaced, this would be an indication that the switch engine was not yet through with the cars. The witness said that this was not so (p. 70, l. 15); that many times there was a string of cars on a track, ten or twelve that were not spaced and yet men were working on them.

Fopiano, another employee, testified that it was the custom of the yard for the workmen to go under and over the cars on dead-head tracks at will (p. 71, l. 10); that it was the custom when they were filling the dead-head tracks to give warning to look out for the track or words to that effect (p. 71, l. 25).

Trebosso, another employee, (p. 72) testified that the men went from track to track under or over the cars at will.

The interrogatories and the answers thereto (p. 8, etc.) indicate that there were sixty-two tracks in the New Durham yard (p. 8, l. 40); that the yard was used for making up interstate and intrastate traffic and for repairing cars used in both interstate and intrastate traffic (p. 9, l. 10); that six of the tracks were known as dead-head tracks, among others, the track on which the accident happened (p. 9, l. 20); that these dead head tracks were used indiscriminately for the storage and repair of cars used in interstate and intrastate traffic (p. 90, l. 40); that it was the custom of the car inspector to call the attention of the car repairer to any piece of work done by him which was defective (p. 10, l. 25); that just before the happening of the accident plaintiff had been working on car N. Y. C. X-1284 on

track 27. On page 11, l. 20, in answer to interrogatory No. 19, it is stated that when it was necessary to take the car which had been repaired out of the dead head track while men were working on cars standing thereon the men who were working on the track from which the car was to be taken and men working on cars on adjacent dead head tracks were told before the switch was unlocked that the cars were to be moved. When dead head tracks were to be filled with cars the warning that the track was to be filled was customarily given to men working on adjacent dead head tracks, on each side of the track that was to be filled.

To the same effect is the answer to further interrogatory No. 1, p. 14, l. 20. Answer to further interrogatory No. 2, p. 14, l. 40, indicates that it was the duty of the man who unlocked the switches or opened the dead head track to see that the warning was given that the track was to be filled and to give it himself. Answer to interrogatory No. 5 is that car N. Y. C. X-1284 upon which plaintiff had been working before being called away was placed on the dead head track for repairs June 17, 1919, and that the repairs were completed and the car released for service June 28, 1919; that just prior to being placed in the New Durham yard for repairs the car had been used for hauling refuse from the Weehawken station to the dump at Little Ferry, N. J., and that following the repairs it was again put in service for carrying refuse from the Weehawken station to the dump at Little Ferry, N. J. The cars which were standing on track 27 with car N. Y. C. X-1284, except some N. Y. C. X. cars, were commercial cars subject to orders for use in either interstate or intrastate commerce (p. 18, l. 40). While employed as a car repairer at the New Durham yard the plaintiff was attending to repairing cars which, prior to being repaired, had been used in both interstate and intrastate commerce and which, after being repaired, were subject to orders for use in interstate and intrastate commerce (p. 18, l. 45). For several months prior to June 17, 1919, the car N. Y. C. X-1284 had been used for hauling refuse from Weehawken station to Little Ferry, N. J. The refuse consisted of sweepings from cars of both interstate and intrastate passenger trains operated over the West Shore Railroad, of sweepings from the streets around the milk sheds at Weehawken and refuse and sweepings from the Weehawken station. At Little Ferry this refuse was used for filling purposes or was burned. It was used for filling on which new tracks would ultimately be placed to be used as a yard devoted to both

interstate and intrastate traffic (p. 22, l. 20). The car which was standing on track 21 which plaintiff was asked to examine and to examine which he left his work on track 27 and went over to track 21 and in returning from which he was injured on his way back to track 25 was a Big Four car which, having been repaired, was subject to order for use in either interstate or intrastate commerce.

The plaintiff attempted to show that the cars which did the injury on track 25 were interstate cars. This attempt was overruled by the Court (p. 18, l. 15) and an objection noted for the plaintiff.

Plaintiff had been engaged for several months as a car repairer in a yard operated by defendant for the repairing of cars, indiscriminately used for both interstate and intrastate commerce and of cars used indiscriminately in interstate and intrastate commerce. The dead-head tracks upon which the cars were placed for repairing were used for storage of cars used indiscriminately for interstate and intrastate commerce. Plaintiff went, during the course of the day, from one car to another, for the purpose of repairing it; one car might be an interstate car, another an intrastate car and another a car used indiscriminately for interstate and intrastate traffic. On the day on which the accident happened the plaintiff first went to work on some light repairs on a car standing on the south end of track 25. He left that work about nine o'clock and went to track 27 and continued work, which had been interrupted, on N. Y. C. X-1284. He continued on that work for about half an hour and then Fogarty, a car inspector, who had authority to call the attention of car repairers to any alleged defective work, came to him and ordered him to go to track 21 where there was a car with defective work. He went with Fogarty, and assistant foreman Popp, the latter the immediate superior of plaintiff, to track 21 and Fogarty showed him the car and the defective work. It turned out that plaintiff had not performed the work and he was then ordered by the assistant foreman to return to his work on track 27 on N. Y. C. X-1284. It was while returning the shortest way to his work that, crossing track 25, the accident happened. The car which he was ordered to look at on track 21 was a Big Four car, that is a car of a foreign railroad used in interstate commerce. Car N. Y. C. X-1284 on which plaintiff was working at the time he was called to examine the Big Four car and to which he was returning for the purpose of resuming the work was used for transporting refuse from Weehawken to Little

Ferry. This refuse consisted of sweepings from cars, both interstate and intrastate passenger trains operated over the West Shore Railroad, and, at the dump in Little Ferry, part of the refuse was used for filling in the meadows in the construction of a new freight yard to be used indiscriminately for interstate and intrastate commerce. The other cars on track 27, with the exception of a few N. Y. C. X cars were commercial cars which after being repaired, were subject to orders for use in either interstate or intrastate commerce. The Court refused to permit plaintiff to show what kind of cars, whether interstate on intrastate, composed the train which caused the injury. The Court non-suited upon the ground that the plaintiff was not at the time of injury engaged in interstate commerce and that will be the first question argued.

I.

The plaintiff was engaged in interstate commerce, or it at least was a question for the jury whether he was so engaged.

The plaintiff's work during the day was indiscriminately on interstate and intrastate cars. At the very moment the accident happened a job which he was performing on N. Y. C. X-1284 had been interrupted and he had gone to inspect a Big Four car on another track and was returning from such inspection to his interrupted job on N. Y. C. X-1284. He was about half way between the two cars. At the moment the accident happened he might be said to be engaged in work appertaining to the N. Y. C. X-1284, the Big Four car and his general work of the day which was indiscriminately interstate and intrastate within the reasoning of *Erie R. R.* v. *Winfield,* 244 U. S. 170, 61 L. Ed. 1057. His work was on N. Y. C. X-1284 but his work was also on the Big Four car. It was his duty when directed by the car inspector and his foreman to go to the Big Four car to inspect it. The mere fact that it turned out that he had not actually performed the work on the Big Four car does not alter the situation.

In so far as his course was towards N. Y. C. X-1284 what he was doing at the time appertained to his work on N. Y. C. X-1284; in so far as his course was away from the Big Four car what he was doing at the time of the accident appertained to his work on the Big Four car. In so far as he was not actually engaged in any work on either car at the moment of accident

what he was doing appertained to his general work of the day which was indiscriminately interstate and intrastate. *Erie R. R.* v. *Winfield, supra.* He was, therefore, at the particular moment engaged in work on N. Y. C. X-1284, the Big Four car and in work which appertained to both cars, and to his general duties of the day.

The Supreme Court of the United States in *Pedersen* v. *D. L. & W. Railroad,* 229 U. S. 146, 57 L. Ed. 1125, laid down the test to be applied with respect to whether a person is employed in interstate commerce, as follows:

> "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?** The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroads 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 efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that 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. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

And further:

> "True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

The Supreme Court in *Shanks* v. *D. L. W. R. R.*, 239 U. S. 559, 60 L. Ed. 436, reaffirmed what it had said in *Pedersen* v. *D. L. & W. R. R.*, and said:

> "Coming to apply the test to the cases in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, *car or other instrument* then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop."

It further said:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is, *was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.*"

Citing *Walsh* v. *New York, New Haven and Hartford R. R.*, 223 U. S. 1;

Norfolk & Western Ry v. *Earnest*, 229 U. S. 114;

St. Louis, San Francisco & Texas Ry. v. *Seale*, 229 U. S. 156;

North Carolina R. R. v. *Zachary*, 232 U. S. 248;

New York Central R. R. v. *Carr*, 238 U. S. 260.

Erie Railroad v. *Welsh*, 242 U. S. 303, 61 L. Ed. 319, does not apply. In that case it was held that a yard conductor who had not been assigned to any work whatever could not be said to be employed in interstate commerce at the time of his injury. The duty of a conductor is essentially different from that of a car repairer. The car repairer in the case at bar was continuously engaged in a yard adapted to and used for the repair of cars used in both interstate and intrastate commerce and he worked on cars of both classes. Delay in the completion of the work on intrastate cars would delay the completion of work on interstate cars. At the time of the accident the plaintiff was actually at work. In the Welsh case plaintiff, as a car conductor, was specially assigned to either interstate or intrastate trains. At the time of the accident he was without assignment. He had completed all of his orders and was waiting for others. The Welsh case was one in which the plaintiff had recovered a judgment in the State court upon the theory that the Federal Employees' Liability Act did not apply and it was the railroad's appeal.

The case most strongly relied upon by the defendant-in-error in the court below is that of *Minneapolis & St. L. R. R. Co.* v. *Winters,* 242 U. S. 353, 61 L. Ed. 358.

In the Winters case there had been judgment in the court below against the carrier. The Court had instructed the jury that the action was tried under the law of the United States. Error was assigned upon the fact that the jury was instructed that they might find a less than unanimous verdict in a suit founded upon the Federal Employers' Liability Act. The Supreme Court speaking through Mr. Justice Holmes held that the defendant-in-error had not reserved the right to come to the Supreme Court upon the question as to whether the suit was under the Federal Employers' Liability Act. It held, however, that the railroad company had saved the questions concerning its right to a unanimous verdict and the assumption of risk under the act of Congress and also concerning the evidence of its negligence. The Supreme Court then held that it was necessary for it to determine whether the employee was actually engaged in interstate commerce to determine whether the railroad company had the right to bring the case to the Supreme Court. It determined that the employee was not engaged in interstate commerce and affirmed the judgment. It is another of those cases in which the validity of the judgment below rested upon the fact that the plaintiff was not engaged in interstate commerce and it is interesting to note that most of the cases which apparently circumscribe the meaning of being "engaged in interstate commerce" are cases which went to the Supreme Court from the judgments in favor of plaintiffs in common law actions or under State Liability Acts in the courts below, while the cases which extend or enlarge the meaning of the term "engaged in interstate commerce" are cases where the judgments below depended for their validity upon the fact that the plaintiff was engaged in interstate commerce.

In the Winters case the facts with respect to the employment were stipulated. The plaintiff was making repairs upon an engine. The engine had been "used in the hauling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18th, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train

out from the same place. The Court said, "That is all we have, and it is not sufficient to bring the case under the act. * * * 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 in commerce not upon remote probabilities or upon accidental later events." Neither the Pedersen case nor the Shanks case were referred to. The plaintiff was a machinist helper in a roundhouse. There was no evidence that the plaintiff was employed as a repairer indiscriminately working on interstate and intrastate cars or engines. There was no evidence that the engine was indiscriminately used or was intended to be indiscriminately used in interstate and intrastate commerce. In view of the prior and later cases the Supreme Court cannot be assumed to have intended to hold that an engine or car used indiscriminately in interstate or intrastate commerce is not an instrumentality of interstate commerce within the reasoning of the Pedersen case. But in any event an engine is different from a car. While an engine is an instrumentality of commerce it has a limited duty. A freight car, on the other hand, which may upon a particular occasion be used on an intrastate line to carry interstate goods, on another occasion used on an interstate line carrying intrastate goods, and sometimes carrying both classes of goods on both kinds of runs is, it is submitted, while used indiscriminately, an instrumentality of interstate commerce.

But the question for determination is not, after all, whether the car is an instrumentality of interstate commerce at the particular time. The real question is was the employee engaged in interstate commerce or on work so closely connected therewith as to be considered a part thereof. The Court determines, in the case of a car repairer, or any other person working about a car, whether the car is an instrumentality of interstate commerce for the purpose of finding evidence as to whether the employee was engaged in interstate commerce. It is an element that goes into the determination of the real question, but only an element. An employee may be working upon an intrastate

car. Nevertheless he may be engaged in interstate commerce as, for instance, there may be a train of cars, one of the cars may be filled with intrastate shipments and it may be intended that that car should be left off within the State. That car may break down, thus holding up the interstate train. It cannot be doubted but that a man engaged in repairing that car so that the interstate train may move forward is engaged in interstate commerce although the instrumentality upon which he is at the moment working may be an intrastate instrumentality, *Southern R. R. Co.* v. *Puchett,* 244 U. S. 571, 61 L. Ed. 1321. There are numerous instances which will come to mind. Cars employed in interstate commerce must be repaired. So also must cars engaged in intrastate commerce. A railroad engaged in intrastate and interstate commerce will maintain a yard, as the defendant-in-error in this case did, where cars devoted both to interstate and intrastate commerce are repaired. The work performed on intrastate cars in such a yard is so closely connected with interstate commerce as to be a part of it because the work on intrastate cars must be performed in order that the work on interstate cars may be performed.

The Supreme Court of Washington in *Horton* v. *Oregon,* 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, cited with approval in *Erie Railroad Company* v. *Collins,* 259 Fed. 152, held that an engineer at a station, engaged in pumping water to be used by either interstate or intrastate commerce, as the business exigencies of defendant required, was engaged in interstate commerce. The Court put this question, was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce?

Minneapolis & St. Louis Railroad Company v. *Nash,* referred to by the defendant-in-error, is a memorandum opinion, 242 U. S. 620, 61 L. Ed. 531, as is also *Baltimore & Ohio Railroad Company* v. *Branson,* 242 U. S. 624, 61 L. Ed. 534; *Raymond* v. *Chicago, M. & St. P. R. Co.,* 243 U. S. 44, 61 L. Ed. 583; *New York Central Railroad Company* v. *White,* 243 U. S. 191, 61 L. Ed. 667; *Lehigh Valley Railroad Company* v. *Barlow,* 244 U. S. 183, 61 L. Ed. 1070, cited by the defendant-in-error below have no application in the case at bar.

Nor has the case of *Illinois Central Railroad Co.* v. *Behrens,* 233 U. S. 473, 58 L. Ed. 1051. In the Behrens case the fireman on a switching engine, who was killed, was engaged at the time of injury, upon a particular piece of intrastate work.

In none of the cases, since the Pedersen case, has the Supreme Court departed from the test in the Pedersen case, to wit, was the 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?

Since the determination of the Winters case the Supreme Court of the United States has decided the case of *Erie Railroad Company* v. *Winfield,* 244 U. S. 170, 61 L. Ed. 1057. That case went to the Supreme Court from this court and the result was a reversal. It was claimed by the plaintiff-in-error in the Supreme Court that the employee was at the time of the accident engaged in interstate commerce. See his brief, 244 U. S. 170. It was claimed by the defendant-in-error that the employee was not engaged in interstate commerce. See his brief, 244 U. S. 171. The employee was in charge of a switching engine. The switching engine was used for switching freight cars about in the yard. The cars usually contained package freight and many were moved in the course of a day's work. In some the freight was interstate, in others intrastate, and in still others it was of both classes. This was true of the cars moved on the day in question. The employee having concluded his work for the day took his engine to the place where it was to remain for the night and started to leave the yard. His route lay across some of the tracks and while crossing over one he received injuries from which he died. The Court speaking through Mr. Justice Van Devanter, who had delivered the opinion in the Pedersen case, said:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See North Carolina R. Co. *v.* Zachary, 232 U. S. 248, 260, 58 L. Ed. 591, 596. 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."

It is submitted that the holding in the Winfield case logically follows the reasoning of the Pedersen case.

Applying the reasoning of the Winfield case to the case at bar, the plaintiff's work during the day, was, as was that of Winfield, indiscriminately on interstate and intrastate cars. He was not employed by the railroad for work specially upon either interstate or intrastate cars. The yard was not used, nor were any parts of it, specially for interstate or intrastate cars. During the course of the day the plaintiff went, as did Winfield, from car to car, some used in intrastate and some in interstate and some indiscriminately in both classes of commerce. At the very time of the accident he was not at work upon either N. Y. C. X-1284 or upon the Big Four car, just as in the Winfield case at the time of the accident Winfield was not at work upon any particular kind of commerce. Plaintiff in the case at bar at the very moment of the accident was returning from the Big Four car to N. Y. C. X-1284. He had left his work on the Big Four car and had not yet resumed his work on N. Y. C. X-1284. What he was doing at the particular moment may be said, as was said of what the plaintiff was doing in the Winfield case, to appertain to his general duties of the day, which were, as in the Winfield case, indiscriminately in interstate and intrastate commerce.

It is, therefore, submitted that upon the authority of the Winfield case the plaintiff was at the time of the happening of the accident engaged in interstate commerce. What he was doing at the particular time of the accident brings him within the Winfield and not the Winters case. The plaintiff in the Winters case was at the time of the accident actually engaged in work upon a particular engine and it could not be said that what he was doing at the particular time appertained to his general work of the day. I quote again what the Supreme Court said in the Winfield case: "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. 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 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."

There are cases which are directly in point in the case at bar.

In *Northern Pacific Ry. Co.* v. *Maerkl,* 198 Fed. 1 (C. C. A. 9th Cir.) plaintiff was injured while working on a refrigerator car used indiscriminately in interstate and intrastate commerce. He was working with other carpenters and, while underneath the car, one of the carpenters removed one of the end sills, resulting in its falling on Maerkl, and injuring him, resulting in his death. The Court held that he was engaged in interstate commerce "inasmuch as he was preparing a car for use indiscriminately in either interstate or intrastate commerce." The Court said (p. 5):

> "It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic."

This case was cited by the Supreme Court of the United States in the Pedersen case.

This case was followed by *Boyle* v. *Pennsylvania R. R. Co.,* 228 Fed. 266 (C. C. A. 3rd Circuit), in which the Court said (p. 268): "The contention of the plaintiff-in-error is based upon the admittedly correct proposition *that a car which has been and may again be used indiscriminately in intrastate and interstate commerce, is an instrument of interstate commerce. Northern Pacific Ry. Co.* v. *Maerkl,* 198 Fed. 1, 4, 117, C. C. A. 237; *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 270. Employment upon such an instrument of commerce may be of two kinds: first, repairing or preparing it for use in commerce of both kinds; second, using it in commerce of one kind or the other. With respect to employment upon such an instrument of interstate commerce, the plaintiff cites and relies upon several cases, of which the first is *Northern Pacific Ry. Co.* v. *Maerkl, supra,* cited by the Supreme Court in *Pedersen* v. *D. L. & W. R. R. Co., infra.* In this case, the Court held that a workman employed in the repair shops of a railroad company in repairing a car having been used and intended again to be used in commerce of both kinds, is employed in interstate commerce, and if injured when so employed, he is within the protection of the Federal Employers' Liability Act. It is to be noted that the work that Maerkl was doing was not using an instrument of commerce in interstate commerce but was preparing that instrument for use in commerce either of one kind or the other, and therefore, for use in interstate commerce.

In *North Carolina Ry. Co.* v. *Zachary,* 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, the employment of the injured employee was very similiar to that of Maerkl. In this case, the deceased was a fireman on a train about to move between interior points in the State of North Carolina. The train included two cars which had come from the State of Virginia. After preparing his engine to move the train and continue the transportation of the two cars in interstate commerce, though between intrastate points, the fireman was killed. The Court said that

> "his acts in inspecting, oiling, firing and preparing his engine for the trip" * * * "were acts performed as a part of interstate commerce. The deceased was employed in preparing an instrument for use in interstate commerce, and the fact that two of the cars of the train were carrying interstate freight though vigorously controverted, was the fact upon which the interstate character of the employment of the deceased was established. There is a distinction between employment in preparing an instrument of commerce for use, and employment in using such an instrument in commerce. **Preparation of an instrument for use in commerce of both kinds necessarily means preparation for use in commerce of either kind, and as one kind is interstate commerce, it follows logically that such preparation is for use in interstate commerce,** but employment connected with the actual use of such an instrument, is a part of intrastate or interstate commerce according as the instrument is in use in commerce of one kind or the other."

He then cited the Pedersen case and *P. B. & W. R. R. Co.* v. *McConnell,* 228 Fed. 263, and then said (p. 269):

> "It thus appears that in the Maerkl, Zachary, Pedersen and McConnell cases the employment related to the preparation of instrumentalities of commerce for use and not to the use of such instrumentalities.
>
> Throughout this line of cases, of which the few discussed are fair examples, there is the underlying idea that work upon instruments of interstate commerce and preparation for their use in interstate commerce, are so intimately and directly related to interstate commerce as to make such work or employment a part of it. There are other cases, however, which have to do, not with employment in preparing instrumentalities of commerce for use, but with employment connected with the actual use of such instrumentalities in commerce of one kind or the other. In such cases, the law does not hold employment upon an instrumentality to one kind of commerce, notwithstanding its double use, but distinguishes between its

use in intrastate and interstate commerce as of necessity it must, and the courts recognize and attempt to enforce the distinction."

Within the last few months and subsequent to the determination of the Supreme Court in the Winters and Winfield cases the Sixth Circuit Court of Appeals had before it the case of *Pittsburgh C. C. & St. L.* v. *Cole,* 260 Fed. 357. In that case plaintiff was a car repairer as a repairer of steel cars and worked with a pneumatic hammer. The particular work was patching a hopper car. It was considered without argument that this car repairer working upon a dismantled hopper car assigned neither to interstate or intrastate commerce so far as the case shows was engaged in interstate commerce. An application for certiorari was denied by the Supreme Court of the United States, 250 U. S. 671, 64 L. Ed. —.

Neither the Maerkl case nor the Boyle case has been expressly disapproved by the Supreme Court of the United States. The Maerkl case was cited in the Pedersen case and since the determination of the Winters case the Cole case was decided by the Circuit Court of Appeals for the Sixth Circuit and certiorari to the Supreme Court denied.

Considering the work upon which plaintiff was engaged at the time of the accident as appertaining to his general work of the day, this case is within the Winfield case, considering the work that he was engaged on at the time of the accident as appertaining to his work either on N. Y. C. X-1284 or the Big Four car, his work, if either of those cars were used indiscriminately in interstate and intrastate commerce, and it is conceded that the Big Four car was, the case is within the Maerkl, Boyle and Cole cases.

This is leaving out of consideration the fact that N. Y. C. X-1284 was a car especially assigned to interstate commerce as will be hereafter argued.

In *Erie Railroad Company* v. *Szary,* 259 Fed. 178, the Circuit Court of Appeals, 2nd Circuit, held that an employee of a railroad was employed in interstate commerce, whose work was to supply engines used in interstate and intrastate commerce with sand, and who carried ashes from the drying stove to the ash pit.

In *Erie Railroad* v. *Collins,* 259 Fed. 172, the same Court held that an employee in charge of a signal tower and water tanks, who was injured while operating a pump for pumping water

from a well into the tanks for supplying water to the locomotives of both interstate and intrastate transporation was engaged in interstate commerce. The Court said:

> "In order that interstate commerce might be carried on, it was necessary that there should be a water tank and that it should be kept supplied with water for interstate engines, and that there should be a pump house and a pump and a gasoline engine for the purpose of keeping the tank supplied with water without which the interstate engines could not continue their interstate functions. All these things were necessary incidents of the interstate commerce in which the defendant was engaged. The water tank, the pump house, the pump, and the gasoline engine, used for the purpose of keeping the water tank supplied with water were, under the circumstances, just as essential to the practical operation of the defendant's interstate commerce business, as the tracks over which its trains were propelled. In filling the water tank for the immediate use of the locomotives engaged in interstate commerce, the plaintiff was engaged in work so closely related to interstate commerce, as to be practically a part of it, and that is sufficient to bring the case within the terms of the Employers' Liability Act. Citing Shanks *v.* D. L. W., 239 U. S. 556, 60 L. Ed. 436, L. R. A. 1916 C. 797."

In *Raush* v. *B. & O.,* 243 Fed. 712, which is cited with approval in *Erie Railroad* v. *Collins,* it was held that an employee engaged in operating a pumping station furnishing water indiscriminately to locomotives engaged in interstate and intrastate commerce is within the Employer's Liability Act.

In the matter of Guida, 171 N. Y. Supp. 285, affirmed 224 N. Y. 174, 121 N. E. 871, cited with approval in *Erie Railroad* v. *Collins,* a laborer injured while removing soot from a boiler used in producing steam, necessary to operate electricity producing machinery from which power was supplied to both interstate and intrastate trains held employed in interstate traffic.

These cases all were determined after the Winters case.

The Supreme Court of the United States in *Southern Pacific Company* v. *Industrial Accident Commission, etc.,* January, 1920, U. S. Advance Sheets, February 1, 1920, No. 6, p. 154, held that an electric lineman in wiping insulators on one of the main electric cables of an interstate railway company which supplied power to motors of the carrier's cars engaged in both interstate

and intrastate commerce, was engaged in interstate commerce. The Court, speaking through Mr. Justice McReynolds, said:

> "Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be apart of it." Citing among others the Pedersen case.

This is a recognition by the Supreme Court, after the determination of the Winters case, of the test laid down in the Pedersen case, and indicates quite clearly that the Court in the Winters case did not intend to limit the application of the rule.

Considering the plaintiff's work as on N. Y. C. X-1284 he was engaged in interstate commerce within the meaning of the rule.

The car N. Y. C. X-1284 was used, prior to being put in the yard for repairs, for the purpose of hauling refuse from the Weehawken yards to the dump at Little Ferry. This refuse consisted of sweepings from interstate cars arriving at Weehawken. It is immaterial that it also consisted of sweepings from intrastate trains and from refuse left by passengers both interstate and intrastate. Its work was interrupted by need of repairs and as soon as it was released it was to go back on the same work. It was not a case of a car removed from service for the purpose of repairs without special assignment. The car was especially assigned to this work, and the work was merely interrupted so that repairs might be made. As a necessary incident to the operation of defendant's interstate trains the refuse left by passengers in the trains had to be removed. This refuse was not stored in Weehawken, nor left for any considerable space of time at Weehawken. As it was removed from the trains it was gathered together, loaded on the N. Y. C. X. cars and immediately transported to the dump at Little Ferry. The process of cleaning necessarily incident to the operation of interstate trains did not end until the refuse was deposited at the dump at Little Ferry. The refuse was merely transferred from the interstate trains to the N. Y. C. X cars, and retained its interstate character. It did not rest until the dump at Little Ferry had been reached. The cleaning of these cars and the removal of the refuse was as necessary to the operation of the interstate trains as was the supply of water to the boilers of the engine, the removal of ashes from the engine, the creation of power to be used both in interstate and intrastate commerce, the removal of

ashes from the ash pit where the ashes had been dumped indiscriminately by interstate and intrastate engines, and in each one of the foregoing cases it has been held that the employee engaged in such work was engaged in interstate commerce. The car N. Y. C. X-1284 was, therefore, an instrumentality of interstate commerce whose work in interstate commerce had been temporarily interrupted for the purpose of repairs, and it has been uniformally held that where either an engine or a car assigned to work in interstate commerce is temporarily interrupted in its work by need of repairs the car or engine does not lose its character as an instrumentality of interstate commerce and a person working thereon is engaged in interstate commerce.

In *Grybowski* v. *Erie Railroad Company,* 88 N. J. L. 1, affirmed by the Court of Errors and Appeals, 289 N. J. L. 361, the Supreme Court, speaking through Mr. Justice Gummere, said:

> "This action was based upon the federal statute. * * * The plaintiff's intestate, on January 11th, 1912, while in the employ of the railroad company at its ashpit, in its Jersey City terminal yard, was run over and killed by a locomotive engine. This ashpit was constructed between and underneath certain of the yard tracks, and incoming locomotives were moved over it so that the ashes were had accumulated during their trips might be dumped into it. The plaintiff's decedent was engaged in cleaning out the ashes therefrom, and was just coming out of the pit when the accident occurred which caused his death." * * * "The proofs show that the ashpit was a part of the plant of the defendant company, that it was a necessary part of that plant, and that it was used both in interstate and intrastate commerce. The keeping of it clean, and thereby maintaining its effectiveness, was required equally for both kinds of commerce, just as the keeping in repair of tracks or bridges which are used for both kinds of commerce is a necessary incident to each of them. In Pedersen *v.* Delaware, Lackawanna and Western Railroad Co., 229 U. S. 146, it was held that 'one engaged in the work of maintaining tracks and bridges in proper condition after they have become and during their use as instrumentalities of interstate commerce is engaged in interstate commerce, and this, even if those instrumentalities are used both in interstate and intrastate commerce;' and the application of this principle led the Court to hold that an employee who was injured while repairing a bridge which was so used, by being run down by an intrastate passenger train, was entitled to maintain an action under the federal statute." (It is to be observed that the syllabus of the cited case shows that the train which ran down the employee was an interstate train. The body of the opinion, however, page 150, shows this statement to be inaccurate, and that the train was an intrastate one.)

The decision in this case was cited with approval by the Circuit Court of Appeals for the Sixth Circuit in *Erie Railroad Company* v. *Szary,* 259 Fed. 178, and the language of the Chief Justice quoted. If a man engaged in removing ashes from an ashpit, where the ashes were dumped by engines engaged both in interstate and intrastate commerce was engaged in interstate commerce because the removal of these ashes is a necessity that interstate commerce may proceed, it logically follows that the removal of refuse from interstate trains is a necessary incident to interstate commerce and the instrumentalities used in removing the refuse are instrumentalities of interstate commerce and the character of the commerce does not cease to be interstate until the refuse is removed to such a point as that it will no longer interfere with the operation of interstate commerce. In the case at bar the refuse was immediately removed from the trains, placed upon the N. Y. C. X cars and did not come to a place where it no longer interfered with interstate commerce until it reached the dump at Little Ferry. It was as necessary to get it out of the station and yard which were used in interstate commerce as it was to get it out of the cars. The refuse was interstate in character.

It was argued in the court below that the case of the *Lehigh Valley Railroad Company* v. *Barlow,* 244 U. S. 183, 61 L. Ed. 1070, was opposed to the argument here made. In that case the Supreme Court in a short opinion held a member of a switching crew assisting in placing on an unloading trestle in the railway company's yards coal cars belonging to such company and loaded with supply coal for it, which, with their contents, had passed over its line from a point outside the state, and had remained in the yards upon sidings and switches for several days before removal to the trestle, was not then engaged in interstate commerce, but in that case it appeared that these cars had been received several days before they were switched. The coal belonged to the company and the cars had been stored in the yard. The interstate movement of the cars had terminated before they left the sidings, and while removing them the switching car was not employed in interstate commerce. That case is not an authority in the case at bar, where the N. Y. C. X cars were assigned especially for the removal of the sweepings from the interstate cars. The sweepings did not come to rest and were not stored until they were dumped at Little Ferry. In the operation of the company's interstate business it was not only necessary that the sweepings be removed, but that be continued on their journey to the dump.

It is, therefore, submitted that so far as plaintiff's work appertained to car N. Y. C. X-1284 he was engaged in interstate commerce.

In so far as plaintiff's work appertained to the Big Four car he was engaged in interstate commerce.

The Big Four car was a foreign car. It had been repaired and was ready to start out. It was a car used in interstate commerce. Plaintiff had been called over to inspect the car, it being charged that he had performed defective work on it, and he was injured while returning and while about half way between it and N. Y. C. X-1284 work upon which he was to again take up. He was engaged at the time, therefore, upon work appertaining to the Big Four car. The mere fact that he did no physical work on it—that it was discovered that he had not performed the defective work—does not alter the situation. It was in the course of his duty and under orders of his superior that he acted.

In *Central Railroad* v. *Sharkey,* Circuit Court of Appeals, 2nd Circuit, 259 Fed. 144, decided since the Winters case, and the Winters case is referred to in it, the Court held that a car repairer carrying bolts from West Eighth street freight yard of the Central Railroad to Bayonne Twenty-second street yard, who testified that he was employed as a car repairer for two years and that his day's work was on cars which, he said, "went to other states and came from other states," and where it appeared that the bolts which he was carrying were for use on a Pennsylvania car which had been placed on a repair track for repairs, was engaged in interstate commerce. This case is important, the Court holding that the mere fact that the car was marked "Pennsylvania" was sufficient to carry past the non-suit the question as to whether the employee was engaged in interstate commerce. The employee was not in the yard. He was carrying bolts from one yard to another. The car was under repair.

Applying the reasoning of the Sharkey case to the case at bar it is clear it is submitted that so far as the work of the plaintiff appertained to the Big Four car he was engaged in interstate commerce.

I have attempted to indicate that at the very moment of the accident plaintiff was engaged in three capacities, in work on N. Y. C. X-1284, in work on the Big Four car and in his general work of the day, which was indiscriminately in interstate and intrastate commerce. In so far as he was employed on N. Y. C. X-1284 he was engaged in inter-

state commerce within the reasoning of the Grybowski case and those heretofore cited, in so far as he was engaged in work on the Big Four car he was engaged in interstate commerce within the reasoning of the Sharkey case, 259 Fed. 144, and others heretofore cited, and in so far as he was engaged in the general work of the day he is clearly within the Winfield case and others and in conclusion on this branch I again refer the Court to the case of *Pittsburgh C. C. & St. L.* v. *Cole,* 260 Fed. 357, in which case the Circuit Court of Appeals for the Sixth Circuit considered that a man employed as a car repairer, in precisely the same kind of work as was the plaintiff in the case at bar, was employed in interstate commerce, and upon application made to the Supreme Court of the United States for a writ of certiorari the writ was denied. This case is later than any of those cited by defendant-in-error in the court below, and this brings me to the second sub-division of this subject matter.

II.

In any event the question whether the plaintiff was engaged in interstate commerce was for the jury.

The test applied by the Supreme Court in *Pederson* against *D. L. & W. R. R.,* 229 U. S. 146, is "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 *Shanks* v. *D. L. & W. R. R.,* 239 U. S. 559, 60 L. Ed. 436, the Supreme Court said:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

And one of the tests cited by the Circuit Court of Appeals in *Horton* v. *Oregon,* 72 Wash. 503, 140 Pac. 897, 47 L. R. A. (N. S.) 8, cited with approval in *Erie Railroad* v. *Collins,* Circuit Court of Appeals for the Second Circuit, 259 Fed. 172, is "Was the

relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce?"

It is conceded, of course, that where the facts are admitted ordinarily the question as to whether the employee is engaged in interstate commerce or not is one for the Court. Where the facts are in dispute the question is one for the jury.

In *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248, 260, the Supreme Court of the United States, speaking through Mr. Justice Pitney, said: "We conclude that with respect to the facts necessary to bring the case within the federal act, there was evidence that at least was sufficient to go to the jury."

Although the facts may not be in dispute, there may be an inference of fact in dispute which makes the kind of employment one for the jury. It is not only where facts are in dispute that the question is one for the jury. It is also where different inferences of fact may be drawn from admitted facts.

In *Hughes* v. *Atlantic City Ry. Co.,* 85 N. J. L. 212, this Court held where the facts were admitted that it still was a question for the jury whether there had been negligence. And the Court said, speaking through Mr. Justice Swayze: "This is a full recognition of the ordinary rule that inferences from the facts of the case are for the jury."

In ordinary cases where the facts are admitted and the question as to whether the employee was engaged in interstate commerce is to be determined solely from the fact as to whether or not an instrumentality upon which the plaintiff is working is an instrumentality of interstate commerce, the question then may properly be determined by the Court, for whether an instrument is an instrument of interstate commerce in ordinary cases would be under such circumstances a question of law. But in a case that calls for the application of the test laid down by the Supreme Court in the Pedersen and other cases, to wit, whether the employee is engaged in work so closely connected with interstate commerce as to be a part thereof, then irrespective of the fact that the facts may be conceded, the inference to be drawn from the conceded facts is one of fact and in our system of jurisprudence where it is necessary to draw an inference of fact it is the duty of the jury to draw it upon proper instructions.

In order to answer the question, "Was its performance (the work) a matter of indifference so far as commerce (interstate commerce) was concerned" must not an inference of fact be drawn. In order to answer the question "was it (the work) so

closely connected therewith (with interstate commerce) as to be a part of it" must not an inference of fact be drawn. Is it not in this case a question of fact as to what was the particular work upon which the plaintiff was employed? The Federal Employers' Liability Act does not alter the general rules with respect to the submission of the determination of questions of fact to the jury. One of the facts which the plaintiff must prove is that he was at the time of the injury employed in interstate commerce, and it is respectfully submitted that it is not for the Court to determine that fact. If either, *first,* the facts are in dispute, or *second,* different inference may be drawn from admitted facts.

III.

There was proof of negligence sufficient to take the case beyond a non-suit.

Although the motion to non-suit was granted upon the ground that plaintiff had not proven that he was engaged in interstate commerce, nevertheless this Court will sustain the non-suit, if it can be sustained upon any theory, and among the reasons advanced for the non-suit in the court below was that plaintiff had not proved negligence and that plaintiff assumed the risk.

Plaintiff was injured while going from one part of the yard to another on his work and while crawling under a car on a dead-head track. At the close of plaintiff's case the evidence was that it was customary for the workmen working about the yard to go from place to place in the yard either over or under or through the cars, as the case might be; that this was a custom covering a long space of time; that it was known to defendant and that it had never been criticised; that it was the ordinary method of procedure. The proof also was to the effect that when cars were placed on the dead-head tracks they were not ordinarily moved in the daytime; that when they were moved warning would be sent down along the line by hollering; that this was the customary method of warning; that at the time of the accident there was nothing to indicate to plaintiff, although he looked, that the cars which were standing on the dead-head track under which he crawled, were to be moved; that the warning customarily given was not given. Plaintiff proceeded in plain view of his superior.

The case, upon the question of negligence, is clearly within *Bright* v. *Lehigh & H. R. Ry. Co.,* decided by this Court November, 1919, 108 Atl. 220. In that case the plaintiff's intestate had

been a switchman employed by defendant company in its yard. He went, on the order of the yardmaster, to throw a switch, and as he was standing on an adjoining track there was kicked down on this track an oil car. This Court affirmed upon the *per curiam* opinion of the Supreme Court, which had said: "The question is whether, under the proofs, the defendant company may be said to have been negligent in failing to give some sort of warning of the 'kicking down' of this car. We think that question must be answered in the affirmative. There was evidence of a custom to give warning, of which the defendant company had knowledge." Its warning consisted in having a man to shout or whistle, or to have a man on the front of the car. The Supreme Court further said: "The question whether there was a custom recognized by the company, and which was broken, was properly submitted by the Trial Judge to the jury."

In *Willever* v. *Delaware, L. & W. R. Co.,* 99 Atl. 321, 89 L. 697, this Court held that where there was a custom of the railroad in moving cars to have a man in a conspicuous position on the front end of the leading car to signal the engineman in case of need, an employee who, in the performance of his duties had placed himself two hundred feet in front of a long train of empty freight cars not being drilled, and standing on a track not used for drilling purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train and, without warning, pushed it over him without a man being placed on the ground end of the leading car, the question of the negligence of the train crew was properly left to the jury. The Court said:

> "We think the present case falls rather within that line of cases illustrated by D'Agostino *v.* Pennsylvania Railroad Co., 72 N. J. L. 358, 60 Atl. 1113, in the Supreme Court, and Germanus *v.* Lehigh Valley Railroad Co., 74 N. J. L. 662, 67 Atl. 79, in this court, both of which hold that, where a system or custom of warnings under certain circumstances is established, the employees involved had the right to rely upon such warnings being given and that failure to give them, resulting in injury, constitutes a cause of action."

In *Chicago, Rock Island and Pacific Railway Co.* v. *Ward,* Supreme Court of the United States, Advance Sheets No. 11, April 15, 1920, 303, the Court said:

> "Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger

> to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached."

In the case at bar the method of passing from place to place in the yard, by going under the cars, was an established custom to the knowledge of defendant; the established custom was not to move the cars without warning; no warning was given. There was sufficient evidence of negligence to go to the jury.

IV.

Plaintiff did not assume the risk.

The burden of proof on the issue of assumption of risk is on the employer. *Kanawha* v. *Kerse,* 239 U. S. 576, 60 L. E. 448.

Mr. Justice Pitney, in *Chesapeake & Ohio Railway Co.* v. *Profitt,* 241 U. S. 462, said:

> "The employee is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is plainly observable that he must be presumed to have known of it."

In *Gila Valley, etc., R. Co.,* v. *Hall,* 232 U. S. 94, 58 L. Ed. 521, the Supreme Court said:

> "The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him."

In *Grybowski* v. *Erie Railroad Co.,* 88 N. J. L. 1, affirmed on opinion of the Supreme Court, 89 N. J. L. 361, the Supreme Court, Gummere, *C. J.,* said:

> "The third ground upon which the defendant rested its motion was that the plaintiff was barred from a recovery because her decedent had assumed the risk of the accident which produced his death. This ground, also, we think, is without substance. The doctrine of assumption of risk has no application to such risks as arose solely and directly out of the negligent acts of fellow servants. And if it did so apply, as a general rule, it would have no pertinence in the case of accidents the right of recovery for injuries arising out of which is regulated by the federal statute; for to so hold would be to nullify the declaration of Congress that every common carrier, by railroad engaged in inter-

> state commerce shall be liable in damages to the personal representative of any employee who shall lose his life while engaged in such commerce, when his death results 'from the negligence of any of the officers, agents or employees of such carrier.' "

See *Chicago, R. I. & P. R. Co.* v. *Ward,* Advance Sheets, April 15th, 1920, p. 303.

Justice Pitney, while Chancellor, in *Burns* v. *Del. & Atl. Telegraph Co.,* 70 N. J. L. 746, said:

> "It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant under the circumstances, that there is danger to him in such a situation. It is his voluntary acceptance of, or persistence in, an employment that involves personal hazard to him that debars his action, the theory of the law being that his wages have been fixed in view of the hazard. But where the danger is unknown to the servant, he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him."

In *Lennon* v. *Erie R. T.,* 92 N. J. L. 209, this Court held, speaking through Mr. Justice Bergen:

> "The consequence of the negligence of the master, through a concurring cause for which he is responsible, does not charge the injured servant with the assumption of the risk, unless it be obvious, and where, as in this case, the knowledge by the servant of a dangerous condition, the risk of which it is claimed he assumed because obvious, or otherwise acquired, is to be inferred from testimony which is not conclusive, a jury question is present and its submission to the jury was not error."

Having in mind those cases which hold that a servant has the right, where there is a custom to give warning, to rely upon the giving of warning, it cannot be said that the employee assumes the risk of the warning not being given. To so hold would nullify the effect of the decisions.

It was clearly a question for the jury. Both upon the negligence and upon the question of assumption of risk, the jury might well have found that the manner in which the plaintiff went from one place of the yard to another was the customary manner; that it was the custom not to move the cars on the dead head tracks without giving the warning, and that plaintiff had the right to rely upon such warning being given, and that the failure to give

the warning was negligence; it had the right to find that the plaintiff did not assume the risk of his fellow employees failing to give this warning. If the warning had been given there would have been no accident.

It is respectfully submitted that the judgment of non-suit should be reversed and a *venire de nova* awarded.

MERRITT LANE,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

FREDERICK HERZOG, *Plaintiff-Appellant,* *vs.* WALKER D. HINES, as Director General, etc., operating New York Central Railroad, *Defendant-Respondent.*	On Appeal from Supreme Court

BRIEF FOR DEFENDANT-RESPONDENT.

This action is based on the Federal Employers' Liability Act. Plaintiff sues to recover damages for injuries received in the New Durham Yards of the West Shore Railroad Company on June 20th, 1919.

Plaintiff was a car repairer and was in the employ of defendant as such at the New Durham Yards from September 25, 1918 to the date of the accident. On that day plaintiff attempted to cross a track known as track No. 25 by crawling under the bumpers of two freight cars in a string of cars coupled together and standing on that track. Track 25 was being filled with cars at that time and while plaintiff was underneath the bumpers of the cars they were moved by the switch engine, causing the injuries complained of.

The questions involved on this appeal are:

(1) Was plaintiff engaged in interstate commerce at the time of the accident?

(2) Did plaintiff prove the negligence alleged in the complaint?

(3) Did plaintiff prove any negligence against the defendant?

(4) Were plaintiff's injuries due solely to his own negligence?

(5) Did plaintiff assume the risks arising out of crawling under these cars?

(6) At the time and place of the injury was the plaintiff a trespasser?

(7) At the time and place of the injury was the plaintiff a mere licensee?.

(p. 75, line 1; p. 102, line 30.)

These questions are raised by the judgment of non suit ordered on the motion of defendant's counsel.

The non suit was granted on the ground that the plaintiff had failed to show that he was engaged in interstate commerce at the time of the accident.

The New Durham Yards contain 62 tracks running in a northerly and southerly direction (See Blue Print attached to this Brief).

These Yards are used for making up west bound freight trains both interstate and intrastate; for classifying east bound freight, both interstate and intrastate; for storage of freight for export; also for repairing cars for use both in interstate and intrastate traffic. (Interrogatory 3, and Answer thereto, p. 8, line 44.)

The tracks on which cars are repaired are known as "dead head tracks". They are on the easterly side of the yards, and numbering from west to east are known as tracks 24, 25, 26, 27, 11 and 10. Their location is shown on the attached blue print.

On the morning of June 20th plaintiff began work by making some light repairs on cars standing on track 24 south of the board walk. On

direct examination plaintiff testified that these cars were on track 25 (p. 27, line 30) but on cross examination he testified that they might have been on track 24 (p. 36, line 27).

Ernst, working partner of plaintiff, testifies positively that these cars were on track 24 (Ernst, p. 68, line 8 to line 25).

About 9 o'clock plaintiff and Ernst finished the work on track 24 and went to work on NYC Car X-1284. (Herzog, p. 27, line 42.)

This car was standing on track 27 near the store room. Plaintiff says that car and the store room are correctly located on the blue print. (Herzog, p. 37, line 20.) The car N. Y. C. X-1284 was taken out of service and placed on the repair tracks on June 17, and the repairs were completetd and the car returned to service on June 28. (Interrogatory No. 5 and Answer thereto, p. 15, line 13.) The repairs were extensive, heavy repairs and consisted of putting in new draft timbers, etc. (Herzog, p. 37, line 28.)

This was the second day plaintiff had worked on this car.

After plaintiff had been at work a short time on this car Fogerty, a car inspector, came to him and said, "Fred, come along; I want to see you" (Herzog, p. 28, line 15).

Plaintiff asked if he should take any tools with him and Fogerty replied that he should not as it was not necessary (Herzog, p. 45, line 17).

Plaintiff and Fogerty walked northerly to about the northerly end of track No. 26 where they met Assistant Foreman Popp.

Fogerty asked Popp to go with them and the three walked over to a car standing on track 21. Fogerty pointed out some defective repair work which had been done on that car and said to plaintiff "Here is some of your work from yesterday." Plaintiff denied that he had done the defective work and when Fogerty pointed to plain-

tiff's number on the car plaintiff said he had been taken away from that car to another job and some one else had done the defective work. In this he was corroborated by Assistant Foreman Popp. Fogerty then recalled that plaintiff had been put to work on another job and admitted that plaintiff had not done the defective work.

Forgerty then told plaintiff that he might go back to his work on car N. Y. C. X-1284. Plaintiff thereupon left Fogerty and Popp at this car on track 21 and started to go back to the work from which he had been taken by Fogerty. (Herzog, p. 28, line 18 to line 35; p. 37, line 40 to p. 43, line 12.)

Plaintiff walked straight through from track 21 to track 25. When he got to track 25 he found that track was full of cars. He crawled under there to go through to the other track. As soon as he got under the car the car moved over his hands and feet; then it was quiet for a while; then the cars started moving again and plaintiff began to holler. The next he saw was Mr. Hobbs, the blacksmith, who came and helped him out (p. 28, line 35 to p. 29, line 15).

I.

On the facts disclosed by the evidence plaintiff was not engaged in interstate commerce at the time and place of the injury.

The ground on which the court ordered judgment of non-suit to be entered was that plaintiff had failed to show that he was engaged in interstate commerce. If this conclusion of the trial court was correct, the judgment of non-suit was properly entered without regard to the other grounds on which the motion was made.

In *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S., 556, 60 L. Ed. 436, the U. S. Supreme Court said:

> "The question for decision is, Was Shanks at the time of the injury employed in interstate commerce within the meaning of the employers' liability act? *What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.*"

The Court then states that the true test of employment in interstate commerce in the sense intended by the Statute is:

> "'Was the employee, *at the time of the injury,* engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?'"

At the time of the injury Shanks was engaged in moving a fixture in a machine shop through which power was communicated to machinery used in repairing parts of engines, some of which were used in interstate transportation. The Court said:

> "Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument *then in use in such transportation.*"

Applying the principles laid down in the Shanks case to *Minneapolis, etc. R. R. Co.* v. *Winters*, 242 U. S., 353, 61 L. Ed. 358, the Supreme Court held that an employe of the railroad company who was engaged in making repairs upon an engine used indiscriminately in both intrastate and interstate commerce was not engaged in interstate transportation. The accident happened on October

21st. The engine was last used on October 18th to haul a train carrying freight in interstate commerce and on the next trip after it was repaired it hauled a train in the same kind of commerce. The Court said:

> "That is all that we have, and it is not sufficient to bring the case under the act. This 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."

In *Baltimore & Ohio R. R. Co.* v. *Branson*, 98 Atlantic, 224, plaintiff was employed as a painter in defendant's roundhouse. He painted engines and cars used in interstate transportation and while so engaged he suffered the injuries complained of. It is evident from the opinion in the case that he was engaged in re-painting the old engines and cars and not in painting new work.

The Maryland Court of Appeals held that he was engaged in interstate transportation and affirmed a judgment in his favor.

On error to the U. S. Supreme Court this judgment was reversed without opinion (242 U. S., 624; 61 L. Ed., 534). The Court filed the following memorandum:

"Judgment reversed with costs upon the authority of Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S., 439, 59 L. Ed., 1397, 35 Sup. Ct. Rep. 902; Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436 L. R. A. 1916 C, 797, 36 Sup. Ct. Rep. 188; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S., 177, 180, 60 L. Ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Minneapolis & St. L. R. Co. v. Winters, 242 U. S., 353, ante, 358, 37 Sup. Ct. Rep. 170."

In *Chicago K. & S. R. R. Co.* v. *Kindlesparker*, 239 Fed. 1 (C. C. A. 6th Circuit), the court affirmed a judgment in favor of the plaintiff who was injured while repairing an engine, which in the language of the Circuit Court of Appeals was "used indiscriminately in the movement of intrastate and interstate traffic".

The engine in question had been placed in the Company's shop for repairs April 15, 1914, and the repairs were completed July 4th, 1914. On July 3, the engine was moved under its own steam from the shop to the turntable and there the plaintiff was injured while equipping the engine for service. This was the last work required on the engine, and it was there put into switching work in which it was stipulated that "it handled indiscriminately intrastate and interstate freight". It was further stipulated that when it was afterwards used outside of switching service, it was used in hauling freight trains "composed of cars containing intrastate and interstate commerce."

The U. S. Supreme Court (246 U. S., 658; 62 L. Ed. 925) reversed the judgment of the Circuit Court of Appeals on the authority of the Winters case, filing a memorandum reading as follows:

"Per Curiam: Judgment reversed with costs, and case remanded to the District Court of the United States for the Western Dis-

trict of Michigan for further proceedings, upon the authority of *Minneapolis & St. L. R. Co.* v. *Winters*, 242 U. S., 353, 61 L. Ed. 358, 37 Sup. Ct. Rep. 170."

The Winters case, the Bronson case and the Kindlesparker case have been followed in numerous cases in the State Courts and in the Federal Circuit Courts of Appeal.

In *C. R. R. Co. of N. J.* v. *Paslick*, 239 Fed., 713, (C. C. A. 2nd Circuit), plaintiff was a helper in a blacksmith's shop appurtenant to and part of the repair establishment of the railroad company. He was hurt while working on repairs to a Baltimore & Ohio car. It was urged in that case that the car on which plaintiff was at work belonged to an interstate carrier; that it must have come from another state and would naturally return to that state. The Court held on the authority of *Chicago &c. R. R. Co.* v. *Harrington*, 241 U. S., 180; 60 L. Ed. 941, and *Minneapolis, etc. R. R. Co.* v. *Winters*, 242 U. S., 353, that while so employed plaintiff was not engaged in interstate commerce.

In *Parsons* v. *D. L. & W. R. R. Co.*, 153 N. Y. Supp. 179, plaintiff was injured while working on a car belonging to a Canadian Railway Company having its domicile in Quebec. The car had been brought to the repair shops of the defendant at Colonie, N. Y., for repairs to its safety appliances, and for a new roof. While drawing nails from the roof boards a piece of nail struck plaintiff in the eye. The car was in the repair shops from June 17 to July 17th and was empty. The car came into the possession of the defendant company empty in the course of an interstate trip. After being repaired the car left the repair shops and went to Corinth, New York, where it was loaded with paper for Cleveland, Ohio.

Plaintiff was awarded compensation by the State Commission of New York State and the Rail-

road Company appealed on the ground that at the time of the injury he was engaged in interstate commerce. The Appellate Division held that while plaintiff was engaged in repairing the car he was not engaged in interstate transportation and said:

"It is a well known custom that a railroad company at its pleasure uses foreign cars found upon its road, making compensation therefor, and that it is not required promptly to return home a car if it has use for it. For all practical purposes we may treat this car as that of the appellant company. It was in its possession, subject to its control and use at its will in its business, with no recognized obligation to send it home while it had use for it. We may assume that, if the empty car was to go home at once, it would not have been placed in the repair shop for the extensive repairs contemplated. It is true that, after the car left the shop, it was taken to Corinth and there loaded with paper for Cleveland. If the appellant had desired, it might as well have been loaded with freight for Albany, Buffalo, or any other intrastate point. There is nothing to indicate that, at the time the car was taken to the shop, there was an intention that its next trip should be an interstate one. Evidently there was no intention upon the subject. It was not known just when the repairs would be finished or what use the appellant would make of the car when it left the shop. The movement of the empty car from Eagle Bridge to Colonie and from Colonie to Corinth was not interstate commerce. The interstate trip from Pennsylvania to Maine and from Maine to Eagle Bridge had been finished. The interstate trip from Corinth to Cleveland had not been entered upon. We may assume that cars are

loaded at Corinth Mills daily for different destinations. The load for this car happened to be interstate freight. Apparently the loading was the first indication of an interstate trip. We need not consider what would be the result if this car, enroute from Maine to Canada, had been stopped off at Colonie for repairs necessary to be made to enable it to get home. * * * If a home car of the appellant company, at the end of an interstate trip, in need of repair before again entering service, had been brought into the shops for repair, the repair would not be an act of interstate commerce merely because the first trip after the repairs happened to be an interstate service. The after service is immaterial. The question is as to the character of the car as it stood in the shop."

The case at bar is clearly within the rule laid down by the U. S. Supreme Court in *Minneapolis etc. R. R. Co.* v. *Winters, Baltimore & Ohio R. R. Co.* vs. *Branson,* and *Chicago K. & S. R. R. Co.* v. *Kindesparker,* and in *C. R. R. Co. of N. J.* v. *Paslick,* in the the U. S. Circuit Court of Appeals, and *Parsons* v. *D. L. & W. R. R. Co.* in the Appellate Division of the N. Y. Supreme Court. It is a stronger case for defendant than any of the cited cases. While working on Car X-1284 plaintiff was not only repairing a used car taken out of service for the purpose of being repaired, but it was a car *which is not shown by the record to have been used at any time in interstate traffic,* while the engines and cars involved in the above cases were all used indiscriminately in interstate and intrastate traffic.

Car X-1284 was not shown to have been used as a commercial car, but as a refuse car.

We are not now concerned with the cleaning of passenger cars, and preparing them for present

service in an interstate trip, to which they had been assigned, nor are we concerned with the transferring of this refuse to the car X-1284, nor with the transportation of the refuse to the dump at Little Ferry. With the possible exception of the actual work of removing the refuse from passenger cars to fit them to be presently used on an interstate run, all the above work would doubtless be held to be outside of interstate transportation. But we are dealing simply with work on a car as to which the record merely shows that some time before being withdrawn from service to be repaired, and for some time after being restored to service, it was used to carry refuse from Weehawken to the Little Ferry Dump. The record further shows that part of this refuse was burned and the remainder was used for filling purposes on the meadows, where a new freight yard is under construction. When completed this yard will receive both interstate and intrastate traffic. (p. 21, line 40 to p. 22, line 32.)

Whatever view may be taken as to the character of the service in which the car was employed, the language of the Supreme Court in the Winters case is applicable:

> "'At the moment it was not engaged in either'' (kind of commerce).

In his effort to show that Car X-1284 was engaged in interstate commerce, plaintiff's counsel has been lead, no doubt from a hurried examination of the printed case, to some inaccuracies in his statement of facts. He says that the car was especially assigned to this work; that the refuse from the trains was not stored at Weehawken, but was removed from the trains as gathered, loaded on the N. Y. C.-X trains and immediately transported to the dump at Little Ferry. As a matter of fact, the record shows no special or permanent assignment of this car to any particular service.

It merely shows its employment in this service, both before and after the repairs. Nor is there anything in the record to show where the refuse was first put after it was removed from the passenger cars, or what time elapsed after such removal before it was placed in the refuse car, nor how soon after being loaded in that car it was transported to the dump.

Even if it should be held that the transportation of this refuse was work in interstate commerce, it would not avail the plaintiff, for as above pointed out, we are not concerned with the transportation of the refuse, but merely with the repair of a car which at the moment was not engaged in transportation at all, and as to which it was then uncertain to what service it would be put eight days later when the repairs had been completed.

Plaintiff's counsel argues that "The refuse was interstate in character."

The refuse was not in any sense an article of commerce. It was not at any time freight or goods in the course of transportation. It could not give interstate character to any of the means used to dispose of it.

The effort to give interstate character to the car on Track 21 to which plaintiff went at the request of Fogerty, signally fails.

In a question addressed to the plaintiff the car is called a "Big Four" car (p. 42, line 44.) This is the only indication as to the ownership of that car. Nor is there anything to indicate when it came to the defendant's possession, or under what circumstances, whether loaded or empty, how long it had been in its possession, and on the repair track, the nature of the repairs made, whether it ever left the possession of the defendant, or the State of New Jersey, and if so, when and under what circumstances; to what service it was next put, and by whom. All of these things were whol-

ly undisclosed. The record simply shows that the car was in the New Durham Yards on Track 21; that repairs of some kind had been made to the car. The plaintiff thinks it was standing by itself when he, Fogerty and Popp, went to it (Herzog, p. 42, line 44). Thus practically all we know about this car is that it was a railway car standing on one of the New Durham Yard tracks; and this is not enough to establish its character as an instrumentality of interstate transportation at that particular time. Again, the language of the U. S. Supreme Court in the Winters case is applicable, for "At the moment it was not engaged in either" (interstate or intrastate transportation).

Plaintiff's counsel repeatedly speaks of the plaintiff as having been called to "inspect" this car. He was not called to inspect it. He was not called to do anything which in any way would facilitate its movement in any direction or for any purpose. He was simply called to look at some defective work which it was supposed he had done. The purpose was to point out the defect and to reprove him for his carelessness and prevent a recurrence of such work.

Fogerty said to him, "Fred, come on; come with me; I want to see you." Fogerty did not then tell plaintiff what he wanted to see him for. He did not speak a word to plaintiff until they got up to the car (Herzog, p. 37, line 43 to p. 38, line 10).

Plaintiff asked Fogerty if he should take any tools with him. "He said, no, it ain't necessary" (p. 45, line 18). Just after plaintiff was told he might return to his work on track 27, the man who made the defective repairs was called over to the car on 21 and reproved severely for his careless work (p. 43, line 10 to line 25). There is nothing to show that this man corrected the faulty work.

In view of the fact that the case at bar is clearly within the rule of the U. S. Supreme Court

laid down in the Winters case, the Branson case and the Kindlesparker case, there would seem to be no necessity for citing analagous cases which have been decided by the U. S. Supreme Court and various state courts by the application of the principle upon which the above three cases were decided. Attention is, however, called to the following cases in which it was held that the employee was not, at the time of the accident, engaged in interstate transportation:

In *Illinois Central Ry. Co.* v. *Behrens,* 233 U. S., 473; 58 L. Ed. 1051, a fireman employed on a switch engine by an interstate railroad who was injured while moving several cars loaded with intrastate freight from one part of the city of New Orleans to another, was held not to have been engaged in interstate commerce, although prior to the time of the injury he had assisted in moving both kinds of traffic and upon completion of the movement in which he was engaged at the time of the injury, the crew was to have moved cars loaded with interstate freight.

In *D. L. & W. R. R. Co.* v. *Yurkonis,* 238 U. S. 439; 59 L. Ed. 1397, it was held that an employee of a railroad company which owned and operated a coal mine, was not engaged in interstate commerce while mining coal which was to be used by the railroad company in its interstate traffic.

In *C. B. & Q. Ry. Co.* v. *Harrington,* 241 U. S., 177, 60 L. Ed., p. 941, a switching crew was moving cars loaded with coal belonging to the Company from storage tracks where it had stood for about a week to a coal shed where it was to be deposited for use as the company needed it for its engines engaged in both kinds of commerce. The court said of this movement, that it was nothing more than putting the coal supply in a convenient place from which it could be taken as required for use. Held, that the movement of the coal to the storage tracks was of no importance,

and that an employee assisting in the movement from the storage tracks to the coal shed was not engaged in interstate commerce.

To the same effect is *L. V. R. R. Co.* v. *Barlow,* 244 U. S., 183; 61 L. Ed. 1070.

In *Illinois Central R. R. Co.* v. *Cousins,* 126 Minn., 172, the Supreme Court of Minnesota held that a railroad employee who was injured while wheeling coal for heating a shop where other employees of the company were repairing cars theretofore used and thereafter to be used in interstate commerce, was within the provisions of the Federal Employers' Liability Act. The U. S. Supreme Court reversed the state court on authority of the Yurkonis case and the Shanks case. (241 U. S., 641; 60 L. Ed. 1216.)

In *Illinois Central Ry. Co.* v. *Perry,* 242 U. S., 292; 61 L. Ed. 309, plaintiff was a freight conductor whose run was wholly within the state of Kentucky. He made a round trip in one day. On the south bound trip interstate traffic was carried. On the return trip on the day of the accident, the freight was all intrastate. He was injured on the return trip. Held, that at the time of the injury he was not engaged in interstate commerce.

In *Erie R. R. Co.* v. *Welsh,* 242 U. S., 303, 61 L. Ed. 319, plaintiff, a conductor of a yard crew had just finished an interstate movement and was returning to the office for further orders. But for the accident he would have been assigned to another interstate job. Held, that this was not sufficient to bring him within the Federal Statute.

In *Nash* v. *M. & St. Ry. Co.,* 131 Minnesota 166, the Minnesota Supreme Court held that an employee of the railroad company who was assisting in moving an outhouse which was to be used in connection with a passenger station of an interstate railroad, was engaged in intrastate commerce. The U. S. Supreme Court reversed the

judgment on the authority of the Yurkonis case, the Shanks case, the Harrington case, and the Cousins case.

(242 U. S., 619; 61 L. Ed. 531.)

In *Hansen* v. *N. Y. C. R. R. Co.*, 103 Atl., 200, a fireman finished an interstate run on Saturday night. He expected to go out on the same run on Monday morning. On Sunday he started for the roundhouse to get his overalls to be washed and to get some tools from an engine at the roundhouse for use on the engine he expected to take out on Monday morning. He was killed before reaching the roundhouse.

Held, by this Court, that the evidence did not show employment in interstate commerce at the time of the injury.

In *Vollmers* v. *N. Y. C. R. R. Co.*, 167 N. Y. Supp., 462, decedent was a plumber engaged in inspecting and repairing a passenger station then in use by an interstate railroad. While so engaged he received the injuries resulting in his death. The Appellate Division of the Supreme Court held that the decedent was engaged in interstate commerce. This decision was reversed by the N. Y. Court of Appeals without opinion on the authority of *Shanks* v. *D. L. & W. R. R. Co.* *Vollmers* v. *N. Y. C. R. R. Co.*, 223 N. Y., 571.

In *Gallagher* v. *N. Y. C. R. R. Co.*, 222 N. Y., 649, decedent was employed by the railroad company as a carpenter. He was repairing a trestle of a coal pocket used to supply coal to engines hauling interstate commerce. The New York State Industrial Commission found that decedent was not engaged in interstate commerce, and awarded compensation under the State Act. The award was sustained by the Court of Appeals.

In most of the foregoing cases the work being

done was more or less directly beneficial to interstate commerce, and in some of them it was absolutely necessary to that commerce, but it was not so directly connected with interstate transportation as to be a part of it. Hence, the employees were not within the Federal Statute.

The ruling of the trial court on the question of interstate commerce conformed to the law as laid down by the U. S. Supreme Court and judgment of non suit rendered on that ground should be affirmed.

Of the cases cited by the plaintiff the case of *N. P. R. R. Co.* v. *Maerkl,* 198 Fed., 1, the case of *Boyle* v. *P. R. R. Co.,* 228 Fed., 266, and the case of *Pittsburgh, etc. R. R. Co.* v. *Cole,* 260 Fed., 357, were cases arising in connection with the repair of rolling stock. The Maerkl case and the Boyle case were decided prior to the decision of the Winters case, the Bronson case and the Kindlesparker case in the U. S. Supreme Court, and they are overruled by those cases.

The Cole case was decided subsequent to the decision of all the above U. S. Supreme Court cases, and emphasis is laid upon the fact that a writ of *certiorari* was denied by the U. S. Supreme Court. It is to be noted, however, that the question of the employment of the plaintiff in interstate commerce at the time of the accident was not put in issue and was not raised in the trial court. The motions on behalf of the defendant which were overruled and which were brought up for review were as follows:

(1) There was not sufficient proof of actionable negligence to entitle the case to go to the jury.

(2) If there was any proof of any negligent act on the part of the defendant company a clear case of assumption of risk as a matter of law is made upon the plaintiff's own testimony.

(See p. 359, bottom.)

The question of interstate transportation not having been raised in the trial court, or in the Circuit Court of Appeals, it could not, of course, be raised on the application for a writ of certiorari. Hence, this case is not an authority in favor of the plaintiff.

The case of *Central R. R. Co. of N. J.* v. *Sharkey* 259 Fed. 144, is also a case arising out of repairing rolling stock, but in this case it appears that repairs were being made on a P. R. R. car and that the car was under orders to move to Philadelphia as promptly as possible, and that the repairs were made to enable the car to proceed in accordance with that order. These circumstances create an entirely different situation from that disclosed by the evidence in this case.

All the other cases cited by plaintiff come under one of two classifications:

(1) The employee was actually engaged in moving interstate traffic at the time of the injury, or

(2) The employee at the time of the injury was engaged upon or directly connected with something which was permanently devoted to interstate commerce, and was continuously necessary to the moving of interstate traffic.

Examples of cases coming under the first classification are:

Erie R. R. Co. v. *Winfield,* 244 U. S., 170,

where the employee was leaving the railroad yards after having been engaged during the day in moving both kinds of traffic.

N. C. Ry. Co. v. *Zachary,* 232 U. S., 248,

where the employee was engaged in preparing his engine to presently move a train which carrying interstate traffic.

Examples of cases coming under the second classification are:

Pedersen v. *D. L. & W. R. R. Co.*, 229 U. S., 146,

where the employee was carrying material to be used in the repair of a bridge on the main line of an interstate railway;

Erie R. R. Co. v. *Collins*, 259 Fed., 172,

in which the employee was in charge of a signal tower and water tank and was injured while operating a pump for pumping water into a tank for present use of locomotives in both interstate and intrastate commerce. In this case the court points out (p. 174, top) that the water was being pumped into a tank "where it is at once to be used."

Erie R. R. Co. v. *Szary*, 259 Fed., 178,

where the employee was engaged in procuring sand to be used on locomotives engaged in both classes of commerce. The sand provided each day was exhausted by each day's demand. It was constantly being used in interstate transportation.

These cases are governed by an entirely different rule than the case at bar.

II.

Plaintiff failed to prove the negligence alleged in the complaint or any other negligence.

If plaintiff failed to prove negligence the judgment of non-suit must be affirmed no matter whether he was engaged in interstate transportation or not.

The negligence alleged in the original complaint was the moving of the cars on the dead head track, without giving the customary notice

to warn any car repairers working or crawling under the cars, and thereby the plaintiff who, in the performance of his duties was in the act of crawling under certain cars on the dead head track, was injured (Complaint, p. 2, paragraph 4).

After the motion for judgment of non-suit had been made, plaintiff's attorney moved for leave to amend the complaint.

This motion was granted against the objection of the defendant. Thereupon plaintiff's counsel dictated an amendment on the record, alleging a custom of the employees within the knowledge of the defendant, to go from one part of the dead head yard to the other parts as occasion might require, by crawling underneath cars standing upon dead head tracks; that it was the duty of the railroad company having knowledge of such custom to warn employees moving from one part of the yard to another of any movement upon dead head tracks, which would endanger their safety.

A second count was added alleging the failure of the railroad company to make any provision for adequate warning of the employees (p. 77, line 22).

The only customary warning proved by plaintiff was that before the switch entering a dead head track was unlocked to permit the placing of cars thereon, it was customary for the person going up the track to unlock the switch, to give warning and workmen along the track who heard the warning repeated it. This warning was given for the benefit of car repairers working on tracks next adjacent to the track about to be filled, so that they would not place themselves in position where they might be struck by the moving cars on the track that was being filled, and so they would not leave any of their tools or materials in such a position as to be struck by the moving car.

Plaintiff testifies that "whenever they brought

in cars that were there, they made noise enough so everybody would know it, *or those people that were working on the track they were told.*'' (p. 30, line 40).

He further testifies that ''They come in on the first car, pushing in the last car, and hollering and warning everybody every time'' (p. 31, line 5).

Martin, plaintiff's witness, testifies that it was the custom to holler—pass the word along the line; one man holler up to the other end and then it would come down along the line; anybody heard it would pass it on (p. 53, line 8). This witness had no knowledge of a custom to guard a track while it was being filled, nor to send men out along the track (p. 53, line 12).

On cross examination this witness testifies that the warnings about which he had spoken on his direct examination *were given when the dead head track was about to be filled;* that the man who opened the switch to let the cars in on the dead head track would go up the track toward the switch and call a warning. If there were men *working along the next track to it,* and heard the warning they would holler it down along. This warning was given to prevent the men working on the tracks next adjoining on each side from getting in the way of the cars and that was the only warning customarily given (p. 57, line 42 to p. 58, line 22).

Henry Manson, plaintiff's witness, testifies that he did not hear any warning that track 25 was going to be filled. He saw no men going along the track to warn them. He was in the shanty (marked ''rest room'' on the blue print), having a sandwich at the time of the accident (p. 59, line 42).

This witness further testifies that he did not see the man go up the track to open the switch (p. 61, line 9).

The warning that is given is a warning that the track is about to be filled; that is for the benefit of the men who are working on cars on the adjoining track, so they will not leave tools or equipment in position to be struck by the moving cars (p. 61, line 12 to line 30).

The only warning given that a track was to be filled would be just before the switch was open (p. 67, line 15 to line 20).

Arthur Ernst, plaintiff's working partner, testifies that when they were going to fill a track, generally there is a man that has got a key to open the switch and let you know and they would yell it along the track and shout it to one another (p. 69, line 5).

He does not know whether warning was given on the morning in question or not (p. 69, line 12). Thus, the evidence is uncontradicted that the only warning given is the warning given by the man who opens the switch and his warning is repeated by such workmen as hear it. It is for the benefit of men working on dead head tracks next adjacent to the one to be filled. No other warning is customarily given. It was not customary to give warning after the filling of the tracks had commenced to men who might be walking across the yards.

When the filling of track 25 was commenced, plaintiff was working on track 27 and was entirely out of danger. He got into danger by attempting to crawl under cars while the track was in the process of being filled. At the time when the accident occurred, one string of cars had already been pushed into track 25 and plaintiff had no right to expect a warning with respect to the moving of those cars.

The plaintiff not only failed to show that he was entitled to warning under the circumstances disclosed by the evidence, but he likewise failed to show that the customary warning was not given

at the usual time, i.e., just before the opening of the switch. None of the witnesses who testified knew when the switch was opened. None of them is shown to have been in a position at that time where he was entitled to notice of the filling of the track or in danger from the moving cars while the track was being filled, or where he would have heard the notice, if given.

Plaintiff was on Car X-1284 on track 27 when the switch was opened. That was a long distance from any danger, and doubtless he would have given no attention to the warning.

The testimony of all the witnesses on this point is merely negative,—they did not hear the warning. They did not show their location at the time the warning should have been given, nor did any of them have any interest in the warning, if given.

Plaintiff passed through the opening between the line of cars standing on track 24, he did not stop at all, but went right ahead, right away, to crawl under the cars, there was no opportunity to warn him (Herzog, p. 50, line 32).

If the customary warning was given, that was sufficient.

Healey vs. *Erie R. R. Co.*, 91 N. J. L., 325.

III.

The accident was due to the negligence of the plaintiff in attempting to cross track 25 while it was being filled with cars.

The evidence is conclusive that there was no custom of crawling under cars on the dead head tracks until the cars had been spaced or spotted, the switch engine taken out of the track, the switch locked and the numbers of the workmen placed on the cars to indicate what cars each man should work on.

It is uncontradicted that track 25 was being filled at the time of the accident.

Martin testifies that just a short time before the accident he was walking up track 25 *where it was clear,* then he crossed through 24 and walked up (or north) between 24 and 23 along the outside of track 24. While so doing he saw Popp, Fogerty and Herzog coming down from the north yard between tracks 21 and 22 (Martin, p. 53, line 29).

They were kicking cars around up on the head end of 25. There was a space there. He stood and talked with Maley, one of the train crew. Then went down (south) between track 26 and 25. While doing so he heard plaintiff hollering (p. 53, line 35). The string of cars they were then moving was along on track 25 and out on the lead track (p. 54, line 25).

Martin was on the east side of 25, coming down, and on the west side going up (p. 54, line 32).

Henry Manson was in the shanty (rest room) at the time of the accident. He could see the head end of the train backing in there from where he was sitting; he also saw a brakeman sitting on top, coming down along the line, coming south, and all of a sudden he motioned for the train to stop and everybody ran up the head end. Then he saw Herzog carried out (p. 60, line 2; p. 64, line 15).

The process of filling the dead head tracks is as follows:

First, the switch is unlocked, then a string of cars is pushed in. Sometimes the crew has to cut out one or more loaded cars, or sound cars from the string and place such cars on another track. That requires two or more drills to be made. When the required number of cars has been placed on the track they are then spaced or spotted by the crew of the switch engine. That means that the cars are uncoupled at various

places and a space opened for the men to pass through. There are from two to eight cars between spaces. After spacing the cars the switch engine is taken out into the north yard, the switch is locked and the blue flag is set up. Then the Foreman or Assistant Foreman places the number of each man on the cars he is to repair (Herzog, p. 32, line 45 to p. 35, line 18).

When this has all been done, and not until then, do the men go to work on the cars or know on what cars they are to work (Herzog, p. 35, line 22). The repairer does not go to work on any car until his number has been put on it (Herzog, p. 35, line 42 to p. 36, line 1).

The evidence produced by plaintiff shows clearly that not until the track has been filled in the manner indicated, the cars spotted, the engine taken out, the switch locked, the blue flag set and the numbers of the men put on the cars do the men venture to go to work on the cars or crawl under them.

Plaintiff testifies that in going from one part of the yard to another, the custom "is any way at all, crawl under, or walk over, or whatever it is, the nearest and the best." This is because "we have cars marked up on all tracks, 24, 25, 26 and 27. We can't very well walk around four or five cars that way and come back when your car is right over on the opposite track" (Herzog, p. 29, line 30).

Plaintiff's reference to having "cars marked up on all tracks", to walking around four or five cars "when your car is right over on the opposite track", clearly points to a time when the men are working on the cars and that is after the switch engine has left the dead head track, the switch locked and all danger of the cars being moved is past. When this has been done it would, of course, be assumed that it is safe to crawl under the cars.

Before cars have been spaced or spotted on the repair tracks they are liable to be moved by the switch engine at any time (Herzog, p. 45, line 33).

They are liable to be moved until the engine has been taken out of the dead head track (Herzog, p. 45, line 36 to p. 46, line 2).

A dead head track is a track on which cars are not to be moved without warning to the men working on them.

The repair tracks are not dead head when they are being filled.

They are not dead head tracks until the cars have been spaced and the engine has gone out and the switch locked—as long as anything is moving it is not a dead head track.

The repair tracks become dead head tracks after the cars have been spotted and the engine has gone out, the switch locked and the blue flag put up (Herzog, p. 48, line 15 to line 35).

It is not the custom for men to crawl under cars on the repair tracks while they are being filled (Herzog, p. 48, line 36).

If the track is being filled the cars are liable to be moved at any time so long as the engine is on the track (Herzog, p. 48, line 40).

As soon as the cars are marked up, everybody goes to work, but not until they are marked up (Herzog, p. 50, line 18).

In going from one place to another in the yard, *it was customary for the men to go through an opening, if there was one,* if there was no other way they would crawl under the cars (Martin, p. 52, line 43).

It certainly is not the custom for men to crawl under cars on the dead head track until the cars have been spotted and the men ready to go to work on them (Martin, p. 57, line 1).

Witness never knew men to crawl under cars on the dead head tracks until after they have been spotted. If they are not spotted or are not num-

bered with the numbers of the workmen it is not considered safe to go under them (Martin, p. 57, line 10 to line 30).

Henry Manson testified for the plaintiff that the custom of the yard is we generally go through underneath the cars to take the shortest way through *to do our work in on the dead head* (Manson, p. 59, line 35).

This evidently refers to the time when the men have gone to work on the cars.

The men do this after the cars have been placed on the track. *"We cannot do it when they are placing the cars"* (Manson, p. 61, line 38).

When the cars are spotted on the dead head track there is a space left for three or four cars, and the men go through that space (Manson, p. 62, line 1).

The men take it for granted that the switch is locked when they go under the cars. A man would not go under the cars unless he supposed the switch was locked. The cars are spaced before the switch is locked (Manson, p. 62, line 30; p. 63, line 20).

Witness never knew a man to crawl under the cars while the track was being filled. It would be very unsafe (p. 62, line 38).

The cars are spaced before the engine leaves the track (Manson, p. 63, line 42).

Witness never knew a man to crawl under cars when the track was not protected. If the blue flag was not up and the engine out of the track, it would be very dangerous to crawl under cars (Manson, p. 65, line 18; p. 66, line 10).

Arthur Ernst testifies for plaintiff that the custom was that "if there was an opening they would go through the opening; otherwise they would sometimes crawl underneath the cars" (p. 69, line 1).

It was not customary to crawl under cars while the track was being filled. Even if the cars were

for the time standing still, this would be a most dangerous thing to do (Ernst, p. 69, line 25).

The cars were spaced by leaving openings with from two to eight cars between openings (Ernst, p. 69, line 35).

The workmen's numbers are put on the cars after the switch engine goes out. If the men's numbers were not on the cars, that would indicate that they were not to work on them and that it would be unsafe to go under the cars (p. 70, line 10 to line 28).

Ralph Fopiano testifies that it is very dangerous to crawl under the cars while the track is being filled. That nobody crawls under the cars before the switch engine goes out of the track, if he knows it (p. 72, line 1).

Although on his direct examination plaintiff testified that he looked in both directions before he started to crawl under the cars, on his cross examination he testified that there were a number of cars on track 24 where he crossed it to reach track 25; that there was a space there between the cars on track 24 and he passed through that space to track 25 (p. 43, line 32); that he started to crawl under the cars on track 25 *right away* after coming through the space between cars on track 24 (p. 50, line 32).

He crawled under the drawhead where the opening was just wide enough for him to crawl through and where he was close against the wheels, instead of under the middle of the car where he would have been 15 feet or more from the wheels (p. 50, line 42).

IV.

Plaintiff knew, or should have known, that track 25 was being filled when he attempted to cross it.

At the time of the accident the repair tracks were frequently filled in the daytime (Herzog, p. 31, line 18; p. 32, line 28).

When plaintiff went to work in the morning, track 25 was empty all the way north from the boardwalk. The only cars on that track were a few south of the walk. (Herzog, p. 36, line 42; Ernst, p. 70, line 28.)

Plaintiff does not remember whether there were cars on track 25 when he, Fogerty and Popp crossed that track on the way to track 21 (Herzog, p. 39, line 18; p. 41, line 32).

There must have been cars on track 25 at that time, because:

1. Martin walked up track 25 *where it was clear* and then crossed over 24 and continued between 24 and 23. While walking between 24 and 23 he saw plaintiff, Fogerty and Popp coming down from the north yard between tracks 21 and 22 (Martin, p. 53, line 28).
2. Martin continued walking north between 24 and 23 up nearly to the head of 25. There was a big space there between the cars on 25. He stopped and talked with Maley, who was near the head of 26. They were kicking cars around there. Then he crossed track 25, passing through the opening between the cars, and walked south between 25 and 26 until he got down near where plaintiff was hurt, when he heard him holler (Martin, p. 53, line 39).
3. Plaintiff, Fogerty and Popp crossed track 25 north of the place where the car stood on track 21—up near where the switch comes in (Herzog, p. 41, line 19).

4. From the time plaintiff started with Popp to go to track 21, until he got back to 25, was a very short time—only a couple of minutes. It takes about 30 minutes to fill a track (Herzog, p. 49, line 41 to p. 50, line 11).

Apparently Martin crossed track 25 at about the same place as plaintiff, Fogerty and Popp did, and within a few minutes of the same time. Within a very short time afterwards plaintiff was back to track 25 and started to crawl under the cars. The kicking of the cars which Martin saw and the movements which Manson saw from the rest room (Manson, p. 60, line 1) must have been in plain view of plaintiff when he started to crawl under the cars. If he did not see these things it must have been because he did not look.

Track 25 having been empty when plaintiff went to work in the morning and being "full of cars" when he returned from track 21, this was evidence to him that the track was being filled.

Further and conclusive evidence that the track was being filled and was then a live track appears from the following facts:

(1) The cars were not spaced but were all coupled together. Plaintiff looked for spaces but there were none. The cars were all coupled together. (Herzog, p. 44, line 33 to line 42; p. 52, line 10.)

(2) There were no men working on track 25 in the neighborhood where plaintiff was hurt. There was none in that vicinity at that time (Herzog, p. 47, line 40 to p. 48, line 15).

(3) Plaintiff saw no cars in 25 marked with the numbers of the workmen (Herzog, p. 50, line 25).

(4) Plaintiff saw no blue flag on track 25 when he crawled under the cars (Herzog, p. 49, line 10).

Thus, when the accident happened there was not a single indication that track 25 was then a dead track, and every thing plaintiff noticed indicated that it was being filled.

V.

Under the circumstances disclosed by the evidence plaintiff assumed all risks arising out of crawling under the cars at the time and place of the accident.

Plaintiff had been at work in the New Durham Yards from September 25, 1918, to June 20, 1919. He was thoroughly familiar with the method of operating the yards. He knew the repair tracks were frequently filled during the day and his testimony shows that he was thoroughly familiar with the dangers present when cars were being placed on these tracks. He knew just how long these dangers continued and the things which indicated that the cars had been finally placed and the track properly protected. Yet, when he came to track 25 which had been empty in the morning, he saw thereon a string of cars, the number of which he could not give, extending in both directions farther than he could see, all coupled together, without any spacing, with no workmen's numbers on them, no one working on track 25 in that vicinity, and no blue flag in sight. He passed through an opening between the cars on track 24 and immediately started to crawl under the cars on track 25. No clear case of assumption of risk can be imagined. This alone would defeat the plaintiff's action.

VI.

Plaintiff was a trespasser or at best a mere licensee at the time and place of the accident.

It is, of course, conceded that being called from his work to look at the car on track 21, plaintiff had a right for that purpose to cross the yards at a proper place, but he had no right to be underneath a car on track 25 at that time. He had departed from any proper course or passageway, and while crawling under the cars at the time and place when and where the injury was received, the defendant owed him no duty, except to abstain from wilfully injuring him.

This phase of the case is ruled by the following cases:

Haber v. *Jenkins Rubber Co.*, 72 N. J. L., 171;

Harris v. *United Steamship Co.*, 75 N. J. L., 826;

Hobbs v. *Great Northern Railway*, 142 Pac., 20, Washington Supreme Court.

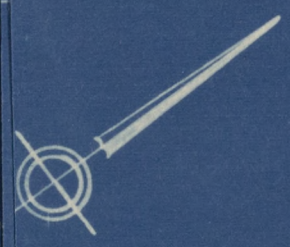
It is respectfully submitted that the judgment of non-suit should be affirmed.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys of Defendant.

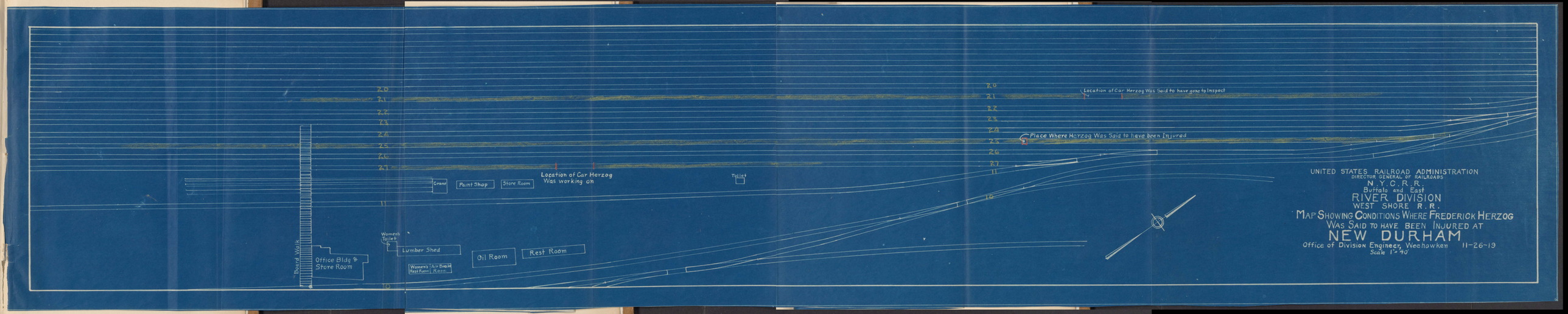
as Said to have gone to Inspe

een Injured

STRATION



DERICK HERZOG
URED AT
M
11-26-19


20
21
22
23
24
25
26
27
11
10
Board Walk
Office Bldg & Store Room
Women's Toilet
Lumber Shed
Women's Rest Room
Air Brake Room
Oil Room
Rest Room
Crane
Paint Shop
Store Room
Location of Car Herzog Was working on
Toilet
Location of Car Herzog Was Said to have gone to Inspect
Place Where Herzog Was Said to have been Injured
UNITED STATES RAILROAD ADMINISTRATION
DIRECTOR GENERAL OF RAILROADS
N.Y.C.R.R.
Buffalo and East
RIVER DIVISION
WEST SHORE R.R.
MAP SHOWING CONDITIONS WHERE FREDERICK HERZOG
WAS SAID TO HAVE BEEN INJURED AT
NEW DURHAM
Office of Division Engineer, Weehawken 11-26-19
Scale 1"=40'