

INDEX.

	Page
Complaint	1
Answer	7
Reply	8
Order	9
Reasons	10
Order	11
Conclusions	12
Judgment	14
Notice of Appeal.....	15
Grounds of Appeal.....	17
Testimony	23
Motion to Non-Suit.....	135
Motion to Direct Verdict.....	274
Judge's Charge	279

PLAINTIFF'S WITNESSES

John F. Kathan

Direct	23
Cross	30
Redirect	38
Recross	45
Direct (recalled).....	97
Cross "	100
Redirect "	101
Recross "	103
Direct (rebuttal).....	273

	Page
James Griffen	
Direct	47
Redirect	52
Redirect	55
Direct recalled	133
Charles Brusle	
Direct	60
Direct (recalled)	137
Cross "	138
Redirect "	139
Robert C. George	
Direct	66
Cross	66
Redirect	67
Direct (recalled)	124
Cross "	124
Redirect "	126
Frederick Smith	
Direct	68
Cross	70
Redirect	74
Recross	74
Direct (recalled)	126
Samuel Craig	
Direct	74
Cross	79
Redirect	80
Recross	85
Redirect	87
Direct (recalled)	127
Cross "	129
Redirect "	130
Robert McCartney	
Direct	88

	Page
Cross	94
Redirect	96
Recross	96
Leo A. Souders	
Direct	104
Cross	107
Direct (recalled)	121
Mrs. Rose Hansen	
Direct	107
Cross	113
Cross (recalled)	122
Miss Anna Tucker	
Direct (rebuttal)	249
James Holt	
Direct (rebuttal)	251
Cross "	256
Redirect "	262
Recross "	263
Redirect "	267
Recross "	269

DEFENDANT'S WITNESSES

Philip Freleigh	
Direct	144
Cross	147
Direct (recalled)	178
Cross "	178
Redirect "	179
Frederick Smith	
Direct	148
Cross	160
Redirect	175
Recross	177

	Page
Robert C. George	
Direct	180
Cross	183
Redirect	186
Recross	192
Leo A. Souders	
Direct	198
Cross	203
James Griffin	
Direct	209
Cross	213
Samuel Craig	
Direct	221
Cross	229
John F. Kathan	
Direct	234
Cross	239
Redirect	242
Direct (recalled)	245
Cross "	245
Redirect "	247
Recross "	248
Charles Brusle	
Direct	243
Exhibits	
P-1	304
P-2	304
P-3	304
D-1	305
D-3	306

Complaint.

Hudson County Circuit Court.

HOLDEN IN AND FOR SAID COUNTY.

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

10

ROSE HANSEN, as administratrix
of the goods and chattels,
rights and credits, moneys and
effects of Hans Peter Hansen,
deceased,

Plaintiff,

vs.

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, a
corporation,

Defendant.

Complaint.
Action at Law

20

The defendant was summoned to answer unto
said plaintiff therein in an action at law upon the
following complaint.

The plaintiff, Rose Hansen, as administratrix
of the goods and chattels, rights and credits,
moneys and effects of Hans Peter Hansen, de- 30
ceased, residing in the Township of North Bergen,
in the County of Hudson and State of New Jersey,
says:

1. That before and at the time of the commit-
ting of the grievances hereinafter mentioned, to
wit, on the 3rd day of August, 1913, at Granton,
in the County of Hudson, in the State of New
Jersey, the said defendant was, and still is, en- 40

Complaint

gaged in the business of a common carrier of passengers and freight by railroad, and was and still is engaged in commerce between the States of New York and New Jersey, and other States of the United States of America, and the said defendant then and there owned, possessed and had the management and control of a certain railroad,
10 with its appurtenances, namely, the Hudson Division of the West Shore Railroad, of which said defendant was the lessee, and which was then and there operated, controlled and used by it in such business of common carrier and in interstate commerce aforesaid.

2. That said defendant then and there employed divers large numbers of servants and employees to manage, operate and run its said
20 railroad in its business of common carrier as aforesaid, and in interstate commerce as aforesaid, and the plaintiff's intestate was, on the 3rd day of August, 1913, a resident of the State of New Jersey, and was then and there employed in such commerce by the defendant in the capacity of a fireman, for the purpose of firing an engine drawing cars and trains of cars carrying passengers and freight over said Hudson Division of the West Shore Railroad, and in interstate com-
30 merce between the States of New York and New Jersey, and other States of the United States of America, as aforesaid, and being so employed, the plaintiff's intestate was engaged in said commerce in firing an engine as aforesaid, over the railroad aforesaid, and the injuries hereinafter mentioned were received and suffered by the plaintiff's intestate, Hans Peter Hansen, while employed in such commerce and were inflicted by
40 the defendant through its officers, agents, servants and employees while he was so employed in such

Complaint

commerce by the defendant, as such common carrier in commerce between the aforesaid States.

3. The employment of the plaintiff's intestate as such fireman was exceedingly dangerous and hazardous, if he was not provided with a reasonably safe place in which to perform his said work, and such place was not carefully and properly inspected, protected and guarded, if the engines, cars, tracks, rails, road-beds, tools and appliances were not kept in safe, sound and indefective condition and repair; if the cars and engines of said defendant were not properly manned, and a man was not kept on the rear end of engines and tenders while they were running backwards, if cars and engines were not run at a moderate rate of speed in the yards of said defendant and if the plaintiff's intestate was not warned of the approach of such cars and engines and it thereupon became and was the duty of the defendant to provide and maintain sound, safe, and indefective engines, cars, tracks, road-beds, tools and appliances and to inspect the same at frequent intervals, and also to provide and maintain a reasonably safe place for its employees, and more especially the plaintiff's intestate to perform the duties required of him by the said defendant, and when he was employed upon the tracks of said defendant company, to warn him of the approach of all cars and engines on said track so that he might not be subjected and exposed to unnecessary risks, dangers and hazards of life and bodily peril, not contemplated by his employment, to properly man said cars and engines, and at all times to keep a man on the rear end of such cars and engines and ring a bell when they were running backwards, and not to run backwards in the yard of said company at a greater rate of speed than 6 miles an hour.

Complaint

4. Said defendant then and there disregarded its duty in that behalf and did not provide sound, safe and indefective engines, cars, tracks, rails, road-beds, tools and appliances, did not provide a reasonable safe place for its employees, and more especially the plaintiff's intestate to perform the work required of him as such fireman, 10 did not keep the cars and engines of said defendant properly manned, did not keep a man on the rear end of its engines and cars while running backwards, did not ring a bell when running backwards in accordance with the rules of said company, did not warn the plaintiff's intestate of the approach of cars and engines, and thereby the plaintiff's intestate was subjected and exposed to extreme and unnecessary dangers of life and bodily peril, not required nor contemplated 20 by his said employment, and there, while he was so employed in such commerce as such fireman at the place aforesaid, and while said defendant was such common carrier and engaged in commerce between the aforesaid States, and while the plaintiff's intestate was engaged in such work of firing and caring for his engine over the tracks and road-bed of the defendant used in such commerce as aforesaid, and while he was engaged in removing 30 tools from one engine to another, to be used in caring for his engine used in such commerce, and by reason of the unsound, unsafe and defective condition of the engines, cars, tracks, road-beds, tools and appliances, which had been allowed to be and remain out of order for a long space of time, and by reason of the unsafe place furnished by the defendant in which the plaintiff's intestate was required to perform his work, and by reason of the defendant failing and neglecting to guard 40 said plaintiff's intestate, and warn him of the approach of all trains and engines that might

Complaint

pass over said track while he was lawfully employed thereon, and just after the plaintiff's intestate had stepped from an engine to one of the tracks of said defendant, an engine running backwards in a northerly direction over one of said tracks at a high and dangerous rate of speed, without ringing any bell, and improperly manned, there being only one of the crew thereon, and no man on the rear of said engine and tender, ran foul of and struck against said plaintiff's intestate, whereby he was knocked down to and upon the ground, and run over and killed by said engine, on said 3rd day of August, 1913, leaving him surviving his widow, Rose Hansen, who was before and at the time of his death his wife, and one child, Petria Elizabeth Hansen, now 19 months of age, as his only next of kin and dependents.

5. And this plaintiff further avers that at the time of the death of plaintiff's intestate, he and this plaintiff were, and she still is a resident of the State of New Jersey, and that the said defendant was and still is a corporation organized and existing under the laws of the State of New York.

6. This action was commenced within two years from the date the said cause of action accrued, wherefore and by virtue of an act of Congress of the United States of America entitled "An Act relating to the liability of common carriers and railroads to their employees in certain cases," and approved April 22nd, 1908, and the supplements thereto, and amendments thereof, said acts being public acts, an action has accrued to said plaintiff to demand of and from the said defendant the sum of money hereinafter demanded, in manner and form as is demanded.

Complaint

7. Said plaintiff brings here into Court the letters of administration of the goods and chattels, rights and credits, moneys and effects of the said Hans Peter Hansen, granted to her by the Surrogate of the County of Hudson and State of New Jersey, on the 27th day of July, 1915.

10 8. Plaintiff demands the sum of \$300. for the funeral and burial expenses incurred by her for the burial of the remains of the said Hans Peter Hansen, the plaintiff's intestate.

9. Plaintiff demands as damages the sum of Twenty-five Thousand (\$25,000.) Dollars.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

20

Filed
Clerk's Office
Aug. 3, 1915.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

30

40

Answer.

The defendant answers as follows:

The defendant, New York Central and Hudson River Railroad Company, a corporation organized and existing under the laws of the State of New York, says that:

It denies the truth of the matters contained in the complaint. 10

Second Defense:

The plaintiff's intestate was contributorily negligent in that he walked about the yard of the defendant at a time when he was not discharging his duties as an employe of the defendant, and crossed the tracks in said yard without looking, listening or exercising ordinary care, for his own safety, by reason of which the injuries complained of resulted. 20

Third Defense:

The risk attendant upon the walking about said yard and crossing said tracks of the plaintiff's intestate was obvious to him and was therefore assumed by him.

Fourth Defense:

Neither the plaintiff's intestate nor the defendant was engaged in interstate commerce at the time when and the place where the alleged injury occurred. 30

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Filed
Clerk's Office
Aug. 19, 1915.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

Reply.

REPLY TO SECOND DEFENSE.

Plaintiff denies the allegations in the second defense of the answer filed in this cause.

REPLY TO THIRD DEFENSE.

- 10 Plaintiff denies the allegations in the third defense of the answer filed in this cause.

REPLY TO FOURTH DEFENSE.

Plaintiff denies the allegations in the fourth defense of the answer filed in this cause.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

20

We hereby consent that the within reply be filed as of time.

VREDENBURGH, WALL & CAREY,
Attys. for Deft.

30

Filed
Clerk's Office
Sep. 30th, 1915.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

40

Order.

Application having been made within six days after the rendering of the verdict herein for a rule to show cause why said verdict should not be set aside,

IT IS, on this Sixth day of November, Nineteen hundred and Sixteen,

ORDERED that the plaintiff show cause before this Court at the Court House in Jersey City, on the Twenty-fourth day of November, 1916, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why said verdict should not be set aside and a new trial granted.

AND IT IS FURTHER ORDERED that the objections of the defendant to the rulings of the trial court upon the following matters be and they are hereby expressly reserved, to wit:

- (1) To the admission in evidence of the statements made by plaintiff's intestate to the plaintiff. 20
- (2) To the admission in evidence of the statements made by plaintiff's intestate to the witness Kathan.
- (3) To the refusal of the Court to strike out said statements.
- (4) To the refusal of the Court to limit the effect of said statements in accordance with defendant's motions.
- (5) To the refusal of the Court to non-suit the plaintiff. 30
- (6) To the refusal of the Court to direct a verdict for defendant.
- (7) To the refusal of the Court to charge as requested.
- (8) To the charge of the Court as objected to by defendant.

Let this Rule be entered.

LUTHER A. CAMPBELL,
Judge Hudson Circuit Court. 40

Filed
Clerk's Office
Nov. 10, 1916.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

Reasons.

The defendant sets down the following reasons why the verdict herein should be set aside and a new trial granted,
Because—

- (1) Said verdict is contrary to the clear weight of the evidence.
- 10 (2) Said verdict is contrary to the charge of the Court.
- (3) The verdict is excessive.
- (4) There is a material variance between the pleadings and the proofs.
- (5) The verdict is the result of mistake, passion or prejudice on the part of the jury.
- (6) The Court admitted illegal evidence over the objection of the defendant in addition to the evidence with respect to the admission of which defendant has reserved its exceptions.
- 20

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

Filed
Clerk's Office
Nov. 10, 1916.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

30

40

Order.

On the oral argument of the rule to show cause herein, the defendant having abandoned the fourth reason assigned under said rule, because said reason was made one of the grounds of the motion for non-suit, and defendant's objection to the refusal of the court to non-suit the plaintiff having been reserved,

IT IS, on this 30th day of January, Ninteen hun- 10
dred and Seventeen,

ORDERED, that said fourth reason be and the
same is hereby stricken out.

LUTHER A. CAMPBELL,
Judge.

Filed
Clerk's Office
Jan. 30, 1917.
Hudson County, N. J. 20
JOHN J. MCGOVERN, *Clerk.*

Order.

Upon the return of the Rule to Show Cause
made herein,

IT IS ORDERED that the hearing thereon be set for
December 8, 1916, at the Court House in Jersey
City, at 10 o'clock in the forenoon. 30

LUTHER A. CAMPBELL,
J.

Filed
Clerk's Office
Dec. 4, 1916.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

WELLER & LICHTENSTEIN, Esqs., and ALEXANDER
SIMPSON, Esq., for plaintiff. 40
VREDENBURGH, WALL & CAREY, Esqs., for de-
fendant.

Conclusions.

CAMPBELL, J.

Considering the amount of this verdict from every direction and angle permitted and warranted by the evidence and according to it and resolving all questions of uncertainty and probability in favor of the plaintiff, and for and toward the sustaining of the verdict for the purpose
10 of testing it upon the question of excessiveness, I am forced to the conclusion that it is excessive.

A most liberal verdict, and the maximum that I would not have disturbed is \$16,500. From the same method of reasoning and calculation applied to the jury's verdict I must conclude that upon the question of contributory negligence they must have found against the defendant, and I do not find the evidence such upon this point as to warrant my disturbing or questioning the jury's find-
20 ing thereon.

While upon the other questions involved under this rule, the questions of fact, measured by the evidence, were close and the questions of law were likewise difficult and the correctness of the court's rulings and findings thereon may with great reasonableness be questioned, yet as to the facts I cannot find such failure of proof or such preponderance against the establishing thereof as warrants the disturbing of the verdict for that
30 reason and upon the correct or incorrect solving of the questions of law, I am likewise in the position that considering the care and extent to which each was argued and considered at the trial, I cannot bring myself to any other conclusion thereon than that then expressed and found.

The verdict should be reduced to \$16,500, and the Rule to show cause will be dismissed except as to the amount of damages.

Plaintiff shall file her consent to reduction of
40 the verdict to \$16,500, and her waiver to the bal-

Conclusions

ance of \$3,500 within ten (10) days from the date hereof, otherwise a *venire de novo* shall issue upon the question of damages only.

Dated January 15, 1917.

LUTHER A. CAMPBELL,
Judge.

Filed 10
Clerk's Office
Jan. 15, 1917.
Hudson County, N. J.
JOHN J. MCGOVERN, *Clerk.*

The plaintiff in the above entitled cause, hereby agrees to accept a reduction of the verdict in the above cause from Twenty Thousand (\$20,000) Dollars to Sixteen Thousand Five Hundred 20 (\$16,500) Dollars and requests that judgment be entered for that sum.

Dated January 19, 1917.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

Filed
Clerk's Office
Jan. 19, 1917.
Hudson County, N. J. 30
JOHN J. MCGOVERN, *Clerk.*

Judgment.

This action was tried before Judge Luther A. Campbell, with a jury at the Hudson Circuit Court October 21st and 30th, 1916.

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

They say they find for the plaintiff, and against the defendant and they assess the damages of the
 10 plaintiff on the Occasion of the premises at the sum of Twenty Thousand (\$20,000.) Dollars over and above his costs and charges by the said plaintiff about his suit in this behalf expended.

And the matter coming on to be heard on a rule to show cause why the verdict so as aforesaid found should not be set aside and a new trial granted.

The Court orders unless the Plaintiff shall remit all of said verdict in excess the sum of Sixteen Thousand Five Hundred (\$16,500.00) Dollars
 20 as and for her damages on occasion of the premises and the plaintiff here remits the excess aforesaid.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Sixteen Thousand Five Hundred (\$16,500.) Dollars damages and her costs which are taxed at Eighty-two Dollars and Fifty-four Cents (\$82.54) making in the whole the sum of Sixteen Thousand Five Hundred
 30 Eighty-two Dollars and Fifty-four Cents (\$16,582.54).

Judgment entered this Nineteenth day of January, A. D. 1917.

LUTHER A. CAMPBELL,
Judge.

Attest:

JOHN J. MCGOVERN,
 (Seal. *Clerk.*)

Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

ROSE HANSEN, as Administratrix
etc. of Hans Peter Hansen,
deceased,

Plaintiff,

vs.

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY,
Defendant.

Action at Law
Notice of
Appeal 10

PLEASE TAKE NOTICE:

That the defendant New York Central & Hudson River Railroad Company hereby appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above stated cause. 20

Dated January 30, 1917.

Yours respectfully,
VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

To:

MESSRS. WELLER & LICHTESTEIN,
Attorneys for Plaintiff.

30

Services of a copy of within notice of appeal is hereby acknowledged this 30th day of January, 1917.

WELLER & LICHTENSTEIN,
Attys. for Plaintiff.

Filed
Clerk's Office
Jan. 31, 1917.
Hudson County, N. J.

40

Notice of Appeal

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

LUTHER A. CAMPBELL,
Judge.

20

30

40

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ROSE HANSON, as Admx. &c. of
Hans Peter Hanson, deceased,
Plaintiff-Respondent.

v.

NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY,
Defendant-Appellant.

On Appeal
Grounds of
Appeal. 10

The appellant states the following grounds of appeal:

1. The following questions were admitted (to the plaintiff): 20

“Q. What did he say?” (referring to statement said to have been made by decedent).

To the witness Kathan:

“Q. Continue that conversation. What else was said by you and by him?”

2. The Court denied defendant’s motion to strike out the testimony with respect to decedent’s declarations as to his purpose in going to the roundhouse. 30

3. The Court overruled defendant’s motion for a non-suit.

4. The Court overruled defendant’s motion to direct a verdict for the defendant.

5. The Court declined defendant’s requests to charge as follows: 40

Grounds of Appeal

(1). The statements of Mr. Hanson, as testified to by Mrs. Hanson and Mr. Kathan, that he was going to the roundhouse, taken either by themselves or in conjunction with the other evidence in the case, are not legal evidence that he intended to go to the roundhouse.

10 (2). There is not sufficient legal evidence in the case to warrant the jury in finding to what place Mr. Hanson intended to go when he left his home on August 3rd, 1913.

(3). The statements made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in conjunction with the other evidence in the case, are not legal evidence that he intended to transfer tools from No. 25 or the pony engine and put them on any other engine.

20 (4). The evidence in the case is not sufficient to warrant the jury in finding that Mr. Hanson intended on the 3rd day of August, 1913, to take tools from No. 25 or the pony engine and put them on the engine of the pick-up train.

(5). The evidence in the case is not sufficient to warrant a finding that when the accident happened Mr. Hanson was on his way to get tools from No. 25 or the pony engine and put them on the engine of the pick-up train.

30 (6). The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken by themselves or in connection with the other evidence in the case, are not sufficient to warrant a finding that at the time of the accident he was on his way to the engine house for the purpose of getting his overalls.

40 (7). The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in connection with the other evidence in the case, are not sufficient to warrant the finding that at the time of the accident Mr. Han-

Grounds of Appeal

son was acting within the scope of his employment.

(8). The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in connection with the other evidence in the case, are not sufficient to warrant a finding that at the time of the accident Mr. Hanson was engaged in interstate commerce. 10

(9). The evidence in the case is not sufficient to warrant a finding that at the time of the accident Mr. Hanson was acting within the scope of his employment.

(10). The evidence in the case is not sufficient to warrant a finding that at the time of the accident Mr. Hanson was engaged in interstate commerce.

(11). The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that there were any tools on No. 25 or the pony-engine. 20

(12). Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that at the time of the accident Mr. Hanson intended to transfer tools from No. 25 or the pony-engine to any other engine. 30

(13). Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that it was either necessary or proper that tools should be taken from No. 25 or the pony-engine and transferred to any other engine.

(14). Said statements, taken either by themselves or in connection with the other testimony in the cases, are not sufficient to warrant a finding that the transferring of tools from No. 25 or the 40

Grounds of Appeal

pony-engine to any other engine, was the duty that Mr. Hanson owed to the defendant or that, if he had done so, he would have been acting within the scope of his employment, or in interstate commerce.

10 (15). On the evidence in the case, if Mr. Hanson had transferred tools from No. 25 or the pony-engine to any other engine, he would have been doing that for which he was not employed, and while so doing, as well as while going to and from the place of making such transfer, the relation of master and servant would not have existed between Mr. Hanson and the defendant.

20 (16). There is not sufficient evidence in the case to warrant a finding that Mr. Hanson crossed engine track No. 2 (being the track on which the accident happened), for any purpose within the scope of his employment.

(18). If Mr. Hanson went upon engine-track No. 2 without looking for the approach of the engine which struck him, he was guilty of contributory negligence and plaintiff cannot recover.

30 (19). If Mr. Hanson went upon engine-track No. 2 under such circumstances that, if he had used reasonable care, he would have seen the engine approaching, which struck him, and have avoided it he was guilty of contributory negligence and plaintiff cannot recover.

(20). Under the evidence in this case the employees used the paths through the railroad yard as mere licensees, and there can be no recovery against defendant, except for wilful injury.

6. The Court modified defendant's request to charge that "if the crossing of the track on which Mr. Hanson was struck was the proximate cause of the accident, the plaintiff cannot recover", by
40 adding thereto the following: "provided you find

Grounds of Appeal

that the defendant was not guilty of negligence, which either in whole or in part caused the accident”.

7. The Court charged the jury as follows:

“I am referring to this evidence or testimony which has been called declarations or statements made by Hanson to his wife before he left home and the statement or declaration made to Kathan, the engineer, while he stood alongside of the engineer’s locomotive in the yard. The wife says, finally, that this is what he said to her as he left his home, and that was, she says, about somewhere about eleven o’clock in the morning of Sunday, August the 3rd: ‘I am going up to the roundhouse and take the tools off number 25, to put on the pick-up and to get my dirty overalls off—out of the locker to bring home.’ Kathan says what he said to him as he stood alongside of his locomotive was—or, rather, Kathan says, ‘I said to him, ‘Peter, where are you going?’ and Hanson replied, ‘I am going to the roundhouse.’” Kathan says he then said to him, ‘What are you going for, Peter?’ And Hanson replied, ‘I am going for my overalls.’

That testimony, gentlemen, is only valuable and usable to describe and denote the purpose for which Hanson was proceeding. It is not evidential of the fact that there were tools upon the pony-engine. It is not evidential of the fact that those tools were proper and suitable tools or tools necessary and proper to be used upon the pick-up engine. It is not evidential of the fact that the doing of those things or of that thing was a thing which Hanson was called upon to perform as a part of the duty which he owed the company, and

Grounds of Appeal

is only of value to describe or to indicate to you the prupose of Hanson, provided you have been satisfied by a fair preponderance of the evidence upon the part of the plaintiff or have been satisfied by the plaintiff by a fair preponderance of the evidence that those other facts of which I have just spoken to you actually did exist, and those facts are, principally, that there were tools upon the pony-engine, they were suitable and proper and necessary tools to be used upon the pick-up engine, and that it was a part of the duty that Hanson owed to the defendant company that he should provide such tools for the engine, upon which he was to work the next morning."

20 Dated, March 2nd, 1917.

VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.

Service of a copy of the within grounds of appeal is hereby acknowledged this 2nd day of March, 1917.

WELLER & LICHTENSTEIN,
Attorneys for Respondent.

30 Filed, March 2, 1917.

Testimony.

(Jury called and sworn.)

(RECESS.)

(Counsel for the respective parties opened to the jury.)

Mr. Simpson: That book of rules, have you 10
got that?

Mr. Carey: Mr. Craig, let me have that.
(Book of rules produced.)

JOHN F. KATHAN, SWORN.

Direct Examination by Mr. Simpson:

Q. Where do you live? A. 533 Fourth Street, 20
Union Hill.

Q. What is your business? A. Locomotive en-
gineer.

Q. On the 3rd of August, 1913, what was your
business? A. I was taking engine 3907 to Wee-
hawken for train 15.

Q. Did you know on that day Mr. Hansen who
was killed on that day? A. Did I know Mr. Han-
sen? Yes, sir.

Q. Did you know Peter Hansen? A. Yes, sir. 30

Q. Did he work with you on the so-called pony
engine? A. He was.

Q. When did he cease working on the pony en-
gine? A. The latter part of June or the middle
of June, I wouldn't say for sure on that, Mr. Simp-
son.

Q. How big an engine was that pony engine? A.
Twenty-five ton engine.

Q. Do you recognize these keys as being the
keys of the pony engine? A. Well, I tell you, I 40

John F. Kathan, for Plaintiff—Direct

got a notch—(examines keys). No, no, the keys there ain't the pony—they are switch keys.

Q. These are switch keys. Did you send over for the keys? A. I thought she had them, but those are not the keys.

Q. What keys did you send for? A. I sent for the key to the house, like a notch key.

10 Q. Of the house? A. Yes. That is a switch key there you have there. That is a switch key for unlocking the switches.

Q. What are these brass keys? A. We used to have locks for the tool—for holding oil cans in.

Q. Locks A. Used to be brass locks to hold oil cans on.

Q. On the locomotive? A. We took them off when we laid her up.

Q. These were oil can locks? A. Them two, yes.

20 Mr. Carey: I see no relevancy to the issues here. We are brought in court on a charge that this action happened at the time that **this** man was engaged in interstate commerce, and that it happened because and while this decedent was engaged in removing tools from one engine to another to be used in caring for his engine in interstate commerce and at a place where he was required by the defendant to do this kind of work, and that it happened just after the intestate had stepped from an engine to one of the tracks. Now it is apparent that this engine concerning which inquiry is now being made had been laid up for several weeks, so that the evidence with respect to that engine cannot be of any relevancy to the issues which we are called upon to answer.

30

40 Mr. Simpson: I insist that is complete relevancy. I am intending to prove that the **dead** man was on his way to the pony engine to get something from it at the time he was killed

John F. Kathan, for Plaintiff—Direct

for the purpose of putting it on the other engine, and that it is within the purview of the complaint. If it is not I simply ask leave to amend.

Mr. Carey: I think that is the chief objection being made by your opponent, that it is not within the purview.

Mr. Simpson: I think it is, but if your Honor thinks it is not I would ask to amend it. 10

The Court: Well, you may proceed, Mr. Simpson, and of course if the proofs do not conform sufficiently and properly with the complaint I will hear your motion again, Mr. Carey.

Mr. Simpson: Then I will ask to amend the complaint, that is all.

Mr. Carey: Your Honor will allow an objection to be noted? 20

The Court: Yes.

Q. This pony engine had keys that you wanted, didn't it? A. Yes.

Q. What were the keys that you wanted? A. I wanted the keys to get in the front house, that is all.

Q. What was in there? A. There was nothing in there at the time. That is after she came back from the shops. 30

Q. Before she came back from the shops, what was in it? A. There was nothing. We took everything out of there.

Q. You didn't take his overalls out? A. His overalls wasn't on her.

Q. How do you know? A. I know where he kept them.

Q. Where did he keep them? A. In a locker in the round house. 40

Q. In the roundhouse? A. Yes.

John F. Kathan, for Plaintiff—Direct

Q. There were lockers in the roundhouse? A. Yes.

Q. What did they keep in the lockers? A. Their clothes as they came in, their overalls.

Q. Anything else? A. Yes; lots of men keep their oil cans there.

Q. Anything else? A. Torches.

10 Q. Torches? Anything else? A. No. I don't keep everything in my closet. That is what I keep in mine.

Q. I mean the firemen? A. That is all they can keep in the back.

Q. Torches? A. We keep a torch.

Q. Oil cans; overalls? A. No, the firemen don't keep them.

Q. What does he keep in the locker? A. His overclothes.

20 Q. Anything else? A. Not as I know of.

Q. You don't know what they keep, do you? A. Yes, I do.

Q. How do you know? A. I know by the way I seen some of them lock up their overalls.

Q. Ever see this man open his locker? A. Yes, sir.

Q. What kind of a key did he use? A. He has a flat key—little flat key.

30 Q. Brass key? A. No, they are flat keys. I had a brass lock up in the roundhouse in Granton.

Q. On his locker I am talking about? A. He had a little brass lock.

Q. What kind of key? A. Flat key.

Q. How big was this lock in the roundhouse? A. I couldn't say, Mr. Simpson.

Q. On this pony engine you say there was no tool box that you know of? A. Yes, there is tool boxes.

40 Q. What did they keep in them? A. They keep oil cans in them.

John F. Kathan, for Plaintiff—Direct

Q. Tools at all A. Not tools.

Q. Hammers and chisels? A. They belong to the engineer. Each engineer has got his kit.

Q. And they are on the engine? A. They don't come under the firemen at all, got no business with them.

Q. I didn't ask you that. I asked you if there was a place for them on the engine? A. Yes. 10

Q. Was there any such kit of tools on the pony engine? A. Yes; I had a kit and I have got it yet.

Q. On the pony engine? A. Yes.

Q. Was the pony engine in the house the day he was killed? A. No, sir; she was on the side track.

Q. On the side track outside the roundhouse? A. Yes.

Q. How near? A. Well, around them outside spurs.

Q. On the outside spurs? A. Yes. 20

Q. Now on August 3rd where were you? A. I was on 3907 taking her to Weehawken.

Q. Running your engine, weren't you? A. Yes, sir.

Q. South between New Durham and Granton? A. Yes.

Q. How were you running your engine, running it head on or backwards? A. Backwards.

Q. Did you overtake two men walking south on the track next to you? A. I did. 30

Q. As you came up did you recognize the two men? A. I did.

Q. Who were they? A. They were my fireman, Mr. Smith, and Mr. Hanson.

Q. You stopped the engine, didn't you? A. Stopped and picked up Mr. Smith.

Q. You had some talk with Hanson? A. With who?

Q. You had some talk with Mr. Hanson? A. I spoke to Hanson on the ground. 40

John F. Kathan, for Plaintiff—Direct

Q. You got off, did you? A. No, sir; he was down on the ground; I done it out of the cab.

Q. Then Mr. Smith got on your engine, didn't he? A. Yes.

Q. And then did you pass another engine run by Engineer Clearwater? A. I did.

10 Q. That was going how fast, about? A. That was going north—oh, fast, I couldn't judge.

Q. About six miles an hour? A. I should judge about six.

Q. Wasn't going very fast, was it? A. No, I should judge not. I wouldn't judge on that. I am no judge, as I was going one way and the other man coming the other way.

20 Q. You stopped your engine then, didn't you about seven hundred and fifty feet away from there, where you seen the two men where you had stopped to pick up— A. No, hold on, that is wrong, Mr. Simpson. From the time Pete left me until the other engine went by was about three hundred and fifty feet that I had gone from the time that thirty-eight—that other engine went south, see, that I got down this here three hundred and fifty feet further from him.

Q. You stopped some time? A. I stopped it right there, yes.

30 Q. Then when you got up—did you get off your engine? A. Yes.

Q. Did you see that Hanson had been run over? A. I did not see Hanson run over.

Q. I know you didn't, but did you see he had? A. Yes, sir.

Q. You got off afterwards? A. Yes.

Q. After it was all over? A. Yes.

Q. Where was he lying? A. Pete—his body—he was lying in the middle of the track.

Q. Was he dead then? A. Yes.

40 Q. Where was Clearwater's engine? A. Clearwater's engine had gone around up to the pit.

John F. Kathan, for Plaintiff—Direct

Q. Did you go up to Clearwater's engine? A. Sure I did.

Q. And Clearwater did not know he had gone over him, did he? A. No, sir.

Q. How was Clearwater's engine going when you saw it, going backwards or forwards? A. Backwards.

Q. Was there anybody on the engine with Clearwater? A. His fireman. 10

Q. Do you know who that was? A. Mr. Craig.

Q. How long was Hanson your fireman, Mr. Kathan? A. Well, I should judge he was my fireman, Mr. Simpson, about two years before that accident happened.

Q. Well now if the engine broke down on the road, would he, the fireman, have anything to do to help you fix it up at all? A. Why, the fireman helps a man, sure. 20

Q. That is the engineer is the man that does the main work? A. Under his jurisdiction.

Q. The engineer does the main work, but the fireman helps him, I suppose? A. He gives him any assistance he wants.

Q. That is, handing tools and things like that? A. Handing tools or anything he asks for him to help.

Q. When you saw these men walking, these two men, on the tracks, were they walking in with reference to the roundhouse, the Granton roundhouse? A. Right straight to the roundhouse. 30

Q. How far were they from the roundhouse? A. Well, I wouldn't be a good judge. I should judge about a good quarter of a mile. I should judge that, a good quarter of a mile. Q. Going in that direction? A. Yes.

Q. Now how many tracks are there at the point where you found Hanson's body? A. There is four. 40

John F. Kathan, for Plaintiff—Cross

Q. Was his body on the same track that Clearwater's engine had been on? A. Yes, sir.

Q. What position did you see it was lying in? I mean was it straight across the track or up and down between the rails? A. No; laying right along this way—alongside of the rails, see—east side—the east side—west rail.

10

Cross Examination by Mr. Carey:

Q. Did you say that you met these two men about at least a quarter of a mile from the roundhouse? A. I wouldn't judge, Mr. Carey; I think it is a good quarter of a mile from the roundhouse.

Q. What track was your engine on? A. My engine was on number one.

20 Q. On track number one? A. Well, that is the—we call it the eastbound track; a good many people call it souhtbound track, because the track runs south, but the timetable calls it the eastern bound, and that is the reason we call it the eastbound track.

Q. That is the track used for what purpose? A. Used for outgoing engines to Weehawken and Granton.

Q. Outgoing engines where? A. For Weehawken and Granton.

30 Q. For Weehawken and Granton? A. Yes.

Q. What was the track on which Clearwater's engine was? A. Used for incoming engines from Weehawken and Granton.

Q. And that was known as what track? A. Number two.

Q. Track number two? A. Number two.

Q. Now those tracks were side by side, were they? A. Yes, sir; side by side.

40 Q. Which one is the easterly track and which one is the westerly track? A. That is the shop track—

John F. Kathan, for Plaintiff—Cross

Q. No, you don't understand me. Which one of these two tracks, number one or number two, is the westerly track of the two? A. Number two. There is number two track.

Q. Number two was what, the westbound track? A. Westbound—no, number one is westbound and number two is eastbound. The number two is the eastbound track—or westbound track. 10

Q. Which track were you on? A. I was on number one.

Q. You were eastbound? A. I was going eastbound.

Q. Then number one is the eastbound track? A. The eastbound track.

Q. Now Clearwater's engine was on what track? A. Number two, the westbound track.

Q. Number two, which was the westbound track? A. Yes, sir. 20

Q. Now those tracks there run pretty nearly north and south, don't they? A. They run north and south.

Q. Now east of the railroad yard is there a public street? A. East of the railroad yard, yes, sir.

Q. That is opposite the place where this accident happened? A. Yes, sir.

Q. There is a public street? A. Yes, sir.

Q. And it runs right along the edge of the railroad yard, does it not? A. Yes, sir. 30

Q. What is that street? A. That is the Bergen pike, I believe, Bergenpike road.

Q. Bergen Turnpike? A. Bergen Turnpike.

Q. Which track is nearer the Bergen Turnpike, number one track or number two track? A. Number two track.

Q. Number two track is nearer to Bergen Turnpike? A. Yes, sir.

Q. And number two is the easterly track of those two, isn't it? A. Yes, sir. 40

John F. Kathan, for Plaintiff—Cross

Q. And number one track— A. Is the western.

Q. Is on the westerly side? A. Yes, sir.

Q. Of number two? A. Yes, sir.

Q. And the farthest away from Bergen Turnpike? A. Yes, sir.

Q. Which side of the roundhouse was this pony engine that has been spoken of? A. She is at—
10 at this side, and that is west of the roundhouse.

Q. West of the roundhouse? A. Yes, in a circle that is not covered over.

Q. What's that? A. In a half circle that is not covered over.

Q. It was on a side track there? A. Yes, sir.

Q. Which direction was it from the roundhouse, north of the roundhouse or south of the roundhouse? A. The pony?

Q. Yes. A. West of the roundhouse.

20 Q. Was it directly west? A. Right directly west; that is, the roundhouse runs in a circle—a half circle runs this way, and she laid right west.

Mr. Carey: Mr. Lichtenstein, I have a map here which shows the layout of the place, of the roundhouse and down (shows Mr. Lichtenstein map).

Mr. Simpson: This is 1916. Is it the same situation as 1913? This is May, 1913.

30 Mr. Lichtenstein: That is all right. (Map placed on easel.)

The Court: Is it consented this map may be used?

Mr. Lichtenstein: Yes.

Q. Now, Mr. Kathan, won't you step down to the map and will you point to the roundhouse?

(Witness indicates.)

40 Q. That is that round structure shown on the map, isn't it? A. This is the roundhouse. Here are the spur tracks—

John F. Kathan, for Plaintiff—Cross

Q. Talk so we can hear you? A. This is the roundhouse and this is the spur tracks we are talking about that is not covered.

Q. That is there are one, two, three, four, five, six, seven, eight, nine, ten and switch eleven—eleven tracks on the westerly side? A. Thirteen; there is two here.

Q. Thirteen tracks on the westerly side of the roundhouse which are not covered over? A. Yes, sir. 10

Q. And what do you call those tracks? A. Storage tracks. When there ain't room in the roundhouse for those engines we put them out there.

Q. Do you know where the pony engine was on the day that Mr. Hanson was struck? A. Yes, sir.

Q. Where was it? A. It was on the east—fourth track.

Q. On the fourth track? A. Yes. 20

Q. Now can you point out about the place where you met Smith and Hanson? A. Met Smith and Hanson about there (indicating).

Mr. Simpson: Mark it with a pencil.

A. Right opposite the office.

Q. Right opposite the office and you were on track number one? A. I was on track number one.

Q. I will mark that with X and K, for Mr. Kathan's name. 30

Mr. Simpson: He says something about the office?

Mr. Carey: He refers to the storehouse office which is on the westerly side of these tracks.

Q. Now, Mr. Kathan, I see that one of those tracks is sketched in yellow. Which track is that?

A. That is number two track.

Q. And that is the track on which Clearwater's engine was running? A. Yes; that is where Clearwater's engine was running. 40

John F. Kathan, for Plaintiff—Cross

Q. And that is the westbound track into the roundhouse, is it? A. Into the roundhouse.

Q. Now this track next to it, westerly of it, is—
A. Number one.

Q. Number one track, and that is the track on which you were? A. Yes.

Q. Or your engine was? A. Yes, the track I
10 was on.

Q. Eastbound track? A. Eastbound track, or southbound, whatever you call it.

Q. Are these tracks which are east of number two track, active tracks? A. No, sir.

Q. What are they used for? A. Used for storing cars and doing shop work like I have to do down there, and for storsehouse work—to the storehouse.

Q. How frequent are the movements over those
20 tracks, say number two track? A. Oh, might be twice a day—I might—about four times a day over them there tracks or switches, might use them twice a day to go up to the storehouse, and I might use it two or three times a day.

Q. Now you may resume your seat, Mr. Kathan? Was Mr. Hanson your fireman when you were on the pony engine? A. Yes, sir.

Q. And you say that the pony engine had been laid up since some time in June, you think? A.
30 Yes, sir; she was laid up the latter part of June or the middle of July; I wouldn't be sure about it, but it was in June.

Q. How long had Hanson been your fireman on that engine, on the pony engine? A. I guess about two years pretty near, Pete have me there.

Q. While on the pony engine how frequently did you run through that yard and over those two tracks number one and number two? A. Oh, run through there pretty near every other day. Oh,
40 sometimes maybe a week before Pete would get

John F. Kathan, for Plaintiff—Cross

up there with me, but he would be over there, of course.

Q. He would be? A. Yes, sir.

Q. For what purpose? A. Well, he would come over to get stuff, you know, that he want for the engine. The engine didn't go out every day then, you know.

Q. What was that pony engine used for? A. For 10
the officials, going out to make inspections of the road.

Q. Now you were asked if you sent to Mrs. Hanson for some keys? A. I did send to Mrs. Hanson for keys.

Q. When did you send for them? A. That was after, just after she came back from the shop with a new boiler.

Q. Was that before or after the accident? A.
That was afterwards. 20

Q. Afterwards? A. Yes.

Q. Did you get the keys that you sent for? A.
No sir, I did not.

Q. Those keys that were shown to you? A.
They were no good to me for that.

Q. Did they have anything to do with the pony engine? A. No, sir.

Q. Nor with any other engine, as far as you know? A. I don't know anything about it, but there is one key there, a switch key that is to open 30
switch locks, has nothing to do with the engine, but the other keys I don't know anything about.

Q. And the key to the switch lock is the only key that you have any knowledge about? A. That is all on that ring.

Q. In that bunch which was shown to you? A.
On that ring.

Q. On that ring which was shown to you? A.
Yes. That is the only one I could identify on that ring, it was a switch key. 40

John F. Kathan, for Plaintiff—Cross

Q. On this day when Hanson was struck and killed, had you asked him to do anything for you?

A. No, sir.

Q. Was he at all interested or employed about the engine on which you were then engaged? A. No, sir.

Q. Had he been engaged on any engine on which
10 you were engaged subsequent to the time when the pony engine was laid up? A. No, sir.

Q. Was he fireman on the pony engine at the time it was laid up? A. Yes, sir.

Q. Who was your fireman after you ceased using the pony engine? A. Mr. Smith.

Q. And that is the Mr. Smith whom you met on that day? A. Yes, sir.

Q. Now, Mr. Kathan, what did you do in connection with Mr. Smith on that day? A. Why,
20 we took 3907 to Weehawken for their—

Q. No; what did you do with reference to Mr. Smith when you met him down there? A. I don't hardly understand.

The Court: He already stated he took him on the engine.

A. I took him on the engine.

Q. He was the fireman who was to go with you on the engine? A. Yes, sir.

Q. And you had brought the engine down from
30 the roundhouse, down to that point where you met him, and then took him on board? A. Yes, sir.

Q. Did you know Mr. Clearwater, the engineer on the other engine? A. Yes, sir, I knowed Mr. Clearwater.

Q. How long had you known him? A. I knowed Mr. Clearwater I should judge about twenty years, maybe longer.

Q. Is Mr. Clearwater living now? A. No, sir;
40 Mr. Clearwater is dead.

John F. Kathan, for Plaintiff—Cross

Q. How long has he been dead? A. Well, I couldn't exactly tell you the time.

Q. Do you know of your own personal knowledge that he is dead? A. Yes, I took an oath to that.

Q. At the time that you met Smith and Hanson did Hanson do anything at all in connection with the engine that you were on? A. No, sir.

Q. Was he at that time under your instructions in any way? A. No, sir. 10

Q. Had you any connection with him at that time with respect to your duties as an engineer? A. No, sir, I did not.

Q. Or had he any connection with you at that time in connection with his duty as fireman? A. No, sir, he did not.

Q. Was there anybody else on the engine at the time you met Smith and Hanson besides yourself? A. No, sir, there was not. 20

Q. And after you took Smith on was there anybody else on the engine with you from that point on down? A. There was not.

Q. Now you are the engineer on the pony engine and had been prior to the time it was laid up and had been for how long? A. About six weeks she was laid up, then she went to the West Albany shops.

Q. How long prior to that had you been engineer? A. About two years. 30

Q. Do you know whether or not there was anything left on the pony engine at the time of this accident? A. There was nothing left on it.

Q. What had you to do if anything in connection with removing the things from the pony engine? A. I took everything—I took everything out of the house and shipped it to Weehawken, so it would not be spoiled, the carpets and chairs.

Q. Took everything out of the— A. Yes.

Q. You say out of the house, what do you mean 40

John F. Kathan, for Plaintiff—Redirect

by that? A. That is the house where the officials ride.

Q. You mean the pony engine and the car are all in together? A. All one piece.

Q. You called that a house? A. That is a house, the cab.

Q. And you had taken everything out? A. Yes, 10 carpet and chairs.

Q. Now how long did the pony engine lie there? A. Laid there about six weeks, I think.

Q. What was done— A. Before she went to Albany shops.

Q. Then she went to the Albany shops for what purpose? A. New boiler.

Q. Was any use made of the pony engine from the time she was laid up some time in June— A. No, sir.

20 Q. —until after she came back from the Albany shops? A. No, sir; did not dare to use it.

Redirect Examination by Mr. Simpson:

Q. When the pony engine was laid up he went directly to this other run, didn't he? A. He, Mr. Simpson—I couldn't tell you about that. I—

Q. Well, we don't have to ask you about that, because we can assume that. Your pony engine was laid up for six weeks, you say? A. Yes.

30 Q. She was laid up during all that time? A. Yes, sir; she was laid up longer.

Q. How do you know that he had not left something on the pony engine itself? A. Because there was nothing at all, because if there was I would have told Peter myself about it.

Q. Do you know he had anything? A. I had all the boxes opened myself.

Q. These keys you told Mr. Carey, you could only identify one— A. That is the switch key.

40 Q. Just do not be so eager. You told Mr. Carey

John F. Kathan, for Plaintiff—Redirect

you could only identify one, and you told me that some of them were keys for oil cans; which is the fact? A. I can identify this key, that is the switch key the company provided.

Q. I didn't ask you the other ones? A. I cannot identify them keys. We had tool boxes them days that we locked.

Q. Where were the tool boxes? A. On the tank 10
boxes of the engine. I haven't got a set of keys to-day of what we had when she was here at that time. I couldn't identify—if I could identify I could match my keys with them.

Q. Do they look like tool box keys, these keys?
A. I couldn't say.

Q. Do they look like it? A. I don't know.

Q. Why, you have seen tool box keys? A. Yes.

Q. Had them yourself in your hand? A. Well, 20
they are different keys, different locks.

Q. Are they brass? A. They are brass, yes.

Q. About that size? A. They are that size, but
different shapes, all of them.

Q. Sure you cannot tell whether the key part
is the same? A. No.

Mr. Carey: I object to counsel leading this
witness in that manner.

Mr. Simpson: He is manifestly a hostile
witness. He is employed by the defendant,
and to that extent he is interested. 30

The Court: That does not mean he is hos-
tile, necessarily.

Q. What do you say? Do you say, that, having
had brass keys in your hand for tool boxes of the
kind that was on the engine, you cannot tell
whether these resemble them or not? A. I couldn't
just answer the question. There is two keys fits
the one lock. There is two keys for one lock, un-
derstand. 40

John F. Kathan, for Plaintiff—Redirect

Q. Yes? A. Each man has a key.

Q. I see. A. So it can only mean the two locks.

Q. Two locks? A. Yes.

Q. But do they look generally like the tool box keys? A. I have keys something like it, but they are not exactly like that.

10 Q. You could not identify them under oath as being tool box keys? A. No, sir, because the company's initials are not marked on them.

Q. Do you know what this other little flat key is? A. That is a switch key.

Q. What is this one? A. I think that is his locker key. I wouldn't swear on that, you know.

Q. But it looks like it? A. Yes. It looks a little odd, yes.

20 Q. Mr. Carey asked you if you asked him to do anything about the engine and you said no; remember that? A. Yes.

Q. What did you ask him? What kind of conversation did you have with him?

Mr. Carey: I object to what conversation he had with him.

Mr. Simpson: He opened the door to ask him to characterize the conversation. Now then I am entitled to the rest of the conversation. He has opened the door.

30 The Court: I am in difficulty about whether that question was asked or not.

Mr. Simpson: Well, read it, will you, please?

The Court: I know he asked him whether he had anything to do on this engine that he was on.

Mr. Simpson: No, I remember distinctly he said, "Did you ask him to do anything about this engine." He characterized it, but if the jury gets the conversation they may say he did.

40 The Court: I will allow the question to be

John F. Kathan, for Plaintiff—Redirect

asked and answered, but of course whether it is going to be relevant—

Q. What did you ask him? A. I asked him—

Mr. Carey: Just a moment. If counsel asked the witness what if anything he said to him in connection with the engine that he was on, that would be relevant, but to ask him for the conversation, general conversation which they had is entirely irrelevant. 10

Mr. Simpson: It is not irrelevant. How can he bind me to a part of a conversation? He asked for a conversation, he opened the door, he gave the answer he wants.

The Court: Take your exception.

Q. Just tell us what he said? A. I asked Mr. Hanson where he was going. 20

Q. Go on. A. And he told me he was going to the roundhouse.

Mr. Carey: Wait a minute. I object to what Mr. Hanson told him.

The Court: How is that pertinent?

Mr. Simpson: That is part of the conversation. He says, "Did you ask him."

The Court: Let me see if I cannot settle it. Of course you would be entitled to have the whole conversation so far as it is relevant to the matter which Mr. Carey brought out on cross examination. 30

Mr. Simpson: Oh, no, the jury have a right to say—

The Court: If that is so, then show me what your authority is for it. I do not know that that is so.

Mr. Simpson: You do not need any authority. If a man asks for a conversation—

The Court: Ordinarily a conversation be- 40

John F. Kathan, for Plaintiff—Redirect

tween these two men would not be relevant. On your direct examination you could not have asked it, and you only have the right now to go into it because Mr. Carey on his cross examination brought out something about it, which would, if answered, be relevant to the issue.

10 Mr. Simpson: Yes.

The Court: Aren't you then standing—or, if you brought out fully the conversation, you are only entitled to have that which will be relevant to the subject.

Mr. Simpson: No; I am entitled to what occurred, now, because Mr. Carey says, "What occurred between you and this man."

20 The Court: He didn't say that. Go back to the notes. As I understand it, the question was did you ask him to do anything about or upon the engine upon which you were then.

(Testimony repeated by stenographer as follows: "On this day when Hanson was struck and killed had you asked him to do anything for you? A. No, sir. Q. Was he at all interested or employed about the engine on which you were then engaged? A. No, sir. Q. Had he been engaged on any engine on which you were engaged subsequent to the time when the pony engine was laid up? A. No, sir. Q. Was he fireman on the pony engine at the time it was laid up? A. Yes, sir. Q. Who was your fireman after you ceased using the pony engine? A. Mr. Smith.")

30 Q. Continue that conversation. What else was said by you and by him?

Mr. Carey: This is under my objection.

40 The Court: I understand you have your exception, and the exception goes to the entire answer, unless I strike it out.

John F. Kathan, for Plaintiff—Redirect

A. I says to Peter, I says, "Peter, where are you going?" He says, "I am going to the round-house." I says, "What are you going for, Peter?" and he says, "I am going for my overalls." There is all that was.

Q. Now then after you have this conversation—

Mr. Carey: I object. Now, if the Court please, it is apparent that this is not relevant, and that the testimony which has been given is mere hearsay testimony. 10

The Court: Now let me stop you right there. Wherein is that relevant now?

Mr. Simpson: It is not a question of relevancy. It is a question as to whether or not Mr. Carey's having asked about a conversation makes that conversation proper on redirect.

The Court: For what purpose? 20

Mr. Simpson: To show his answer was incorrect.

The Court: For any other purpose?

Mr. Simpson: No, I do not think we can use it for any other purpose, because if so, I could have asked on my direct, but my idea is that it was relevant and proper to ask this man for the conversation because Mr. Carey had opened the door.

The Court: Very well; I am going to leave 30 it in this way; I am going to leave it, I am not going to strike it out, but you are protected by your exception on that, and I understand it is only used, if it has any value at all, for the purpose of showing what he said to your question was an incorrect statement. It is not usable for any other purpose; in other words, it will not assist and it will not be used to assist the plaintiff in making of his case.

Mr. Simpson: I do not think your Honor 40 has a right to make any such ruling.

John F. Kathan, for Plaintiff—Re-direct

The Court: Very well; then I will strike it out, for any other purpose than that.

Mr. Simpson: Your Honor I think should at least hear me before coming to a determination. If it is competent—that is the question—if it is competent then it is competent for all purposes. Your Honor cannot limit it at all.

10 The Court: I do not so understand. It was only used for one purpose.

Mr. Simpson: I know, but if it is competent it is competent.

The Court: Competent for that purpose for which it is usable—for which the question was permitted to be asked.

Mr. Simpson: And you rule as a matter of law it is competent for no other purpose?

20 The Court: Yes, that is the ruling I make now, and that is the reason I have left it in.

Mr. Simpson: You make the ruling. Of course you are the judge. You say it is competent only for that purpose.

The Court: I want it understood that it cannot be used under my ruling for any other purpose than that which you designated it to be used for. With that you stand content, I suppose?

30 Mr. Simpson: Well, I—no, we don't say that is our contention. We say that your Honor is agreeing with him.

The Court: I do so rule for that purpose.

Mr. Simpson: All that is Mr. Carey's contention, and of course ours is the other way and your Honor rules against us.

Q. Now, Mr. Kathan, is the path shown on this map down here? A. Yes.

40 Q. Where is that path? Is it where it is marked here "path"? Here is something marked "path"

John F. Kathan, for Plaintiff—Recross

here. A. The path starts here—the path starts right down there—it is a road.

Mr. Lichtenstein: Indicating the Bergen Turnpike.

A. Comes down to the Bergen Turnpike and ends up here.

Mr. Lichtenstein: Indicating a path running at right angles to the Bergen Turnpike west to a track or point marked "dump track", and then running north parallel with the track marked "dump track" to a point in yellow marked "path", and then running along the lines of yellow marked "path" in a northerly direction with several jogs and continuing along the yellow lines marked "path" to the plotting marked "roundhouse".

Q. Now then your pencil mark on the map is where you saw him first, or where the body was found? A. Where the red X is.

Q. Where the lead pencil X is is where you saw him first, isn't it? A. Yes.

Q. Do you know how many lockers there are in the roundhouse? A. I do not, Mr. Simpson.

Q. And I understand that this man now deceased was not your fireman at the time he was killed, was he? A. Which man?

Q. Hanson was not your fireman? A. No, sir, no, sir, he was not.

Recross Examination by Mr. Carey:

Q. Now, Mr. Kathan, you have indicated where a path starts in from the Bergen Turnpike opposite the Y. M. C. A. Building? A. Yes, sir.

Q. Railroad Y. M. C. A. Building, and you traced that path all the way up to the roundhouse?

A. Yes.

John F. Kathan, for Plaintiff—Recross

Q. Will you state where that path is with reference to these two tracks, number one and number two. A. It is outside—the path is outside of the shop track, one track over from—one track over from this way.

Q. Then it is between the path and track number two, there is what you call the shop track, is there? A. Yes.

Q. And that track is not an active track, the shop track? A. No, not the shop track.

Q. Now then in the vicinity of this accident and where this accident occurred, is that path entirely east of both of the tracks number one and number two? A. Yes.

Q. Yes. Now is there another path besides that indicated on this map, and if so, where does that path lie? A. That path goes right up this way, right along your shop, and so up in here to the storehouse; you do not have to cross no tracks at all, right alongside of the Bergen Turnpike road, it is used for the shop.

Q. That is farther, still farther east than the track which you first, the path which you first pointed out? A. Yes, sir.

Q. Now I notice here opposite the roundhouse something which indicates—something in yellow which indicates— A. Steps.

Q. A path down from the Bergen Turnpike to the roundhouse? A. Yes; them is steps going down.

Q. Those steps are steps prepared by the railroad company at that point? A. Yes; used by the employee to go to the roundhouse and getting things.

Q. And these steps lead down to various paths here that go to different parts of this section in here and into the roundhouse? A. Yes, sir.

James Griffin, for Plaintiff—Direct.

JAMES GRIFFIN, SWORN.

Direct Examination by Mr. Simpson:

Q. What is your business, Mr. Griffin? A. Locomotive engineer on the West Shore.

Q. Were you the engineer of this locomotive on which this dead man was fireman? A. Yes, sir.

Q. How long had he been firing with you when he was killed? A. About three weeks.

Q. Two weeks? A. About three.

Q. What was your run? A. A pick-up between Weehawken and Kingston.

Q. Kingston, New York? A. Yes.

Q. What does that mean, pick-up? A. That is drops cars and pick-up cars at every station along the road.

Q. As you went along? A. Yes.

Q. The same as you came back? A. Yes, sir. 20

Q. What was the last run he was on with you? What time did you get in? A. We got in six thirty.

Q. Sunday or Saturday? A. Saturday.

Q. Six thirty at night? A. Yes, sir.

Q. When were you to go out again? A. Monday morning.

Q. What time? A. Three o'clock.

Q. What engine did you have when you came in on Saturday? A. 2105.

Q. Had you had that one right along? A. No, 30 sir.

Q. What one had you had the— A. We had no regular engine; any engine that we catch.

Q. Where do you catch it? A. At Granton.

Q. At the roundhouse? A. Any engine that the conductor turns up we get.

Q. Well, the hostler gave you the engine? A. Yes.

Q. Did you get it at the roundhouse? A. Yes, sir. 40

James Griffin, for Plaintiff—Direct

Q. The Granton roundhouse? A. Yes, sir.

Q. How do you know about the engine, do you go there and the hostler tells you, "Here is the engine"? A. No, sir; we go in and register and don't know what engine we get, and the roundhouse foreman informs us what engine.

10 Q. Where do you register? A. At the register room at the roundhouse.

Q. Train dispatcher? A. Yes, engine dispatcher.

Q. That is Mr. Roberts, isn't it? A. No, sir.

Q. Mr. George? A. Mr. George, yes.

Q. Now what time do you say you went out on Monday? A. We left the roundhouse 3.45, or registered at that time.

Q. In the morning? A. In the morning.

Q. He was to go out with you that Monday morning? A. Yes, sir.

20 Q. Where did you go that Monday morning without him; you went to Kingston, as usual, didn't you? A. Yes.

Q. On this pick-up freight? What tools did he have on the engine that you came in on, that is on Saturday, what tools were there on the engine, fireman's tools? A. Well, there was a rake, a hook and a shovel. That is all I know.

Q. That is all he had that you know? A. Yes.

30 Q. There weren't any tools for the purpose of fixing the engine, such as hammers, chisels, or anything of that kind that he had? A. We don't have anything to do with them.

Q. He didn't have? A. We don't have anything to do with them.

Q. If the engine broke down you would not fix it with your fingers and a manicure set? A. Sometimes we do.

Mr. Carey: I object.

40 Mr. Simpson: He is working for the New York Central Company, and I must have some

James Griffin, for Plaintiff—Direct

leeway in examining him. However, I can frame it so it won't be leading.

Q. If your engine broke down on the road what would you do, how would you fix it? A. Well, if we didn't have any tools we would send for an engine or a machinist to come to repair the engine.

Q. If you did have tools what would you do? 10
A. If it was not a very big job we would send for things that would fix her.

Q. What tools would you send for? A. I don't know.

Q. A slight job, such a job as you, Mr. Griffin, could fix yourself? A. You could fix it, that is going about ten miles, so as to go to a place where you could get it fixed.

Q. This job that you said you could do yourself, what kind of tools would you require for that? 20
A. I don't know what kind of job.

Q. An ordinary, everyday job? A. It is every day according—there ain't no job on an engine we would stop to fix. If we could fix it we could go along without it.

Q. You said yourself if it was an ordinary job you would fix it yourself, if it was not you would go to a machine shop? A. Yes.

Q. What kind would you fix yourself? A. Well, maybe the bell ringer or something like that. 30

Q. And what would you fix that with, what kind of a tool? A. Any what we have.

Q. Hammer? A. Monkey wrench or hammer or monkey wrench.

Q. Chisel or monkey wrench? A. Yes.

Q. Would you find those on the engine? A. Yes, everything is put on the engine.

Q. If you had them they would be on the engine? A. Yes, everything is put on the engine.

Q. What kind of an engine did you take out, did 40

James Griffin, for Plaintiff—Redirect

you say, on Monday? A. On Monday, I don't know. I don't know the number of the engine.

Q. Was it 2900 or was it 23 or 25? A. Might be 2900, it might be twenty hundred, twenty-one hundred, whatever they turned out.

Q. Were you in the yard on Sunday? A. No, sir.

10 Q. When this accident happened? A. No, sir.

Q. And did not see any of the accident? A. No, sir.

Q. Where did you leave your engine that you brought in? A. At the ashpit at Granton.

Q. Did you have a locker in this roundhouse
A. Yes.

Q. Did you get into it with a key like this, a flat key? A. No, sir.

20 Q. What did you keep in the locker there? A. Why, I never kept nothing but overalls.

Q. Would you put those on when you went out on the run, in the roundhouse? A. No, sir.

Q. When you got off the run, took them off and put them in there again? A. Yes, sir.

Q. How would you get them cleaned, take them out of the locker home? A. Sir?

Q. How would you get them cleaned, take the out of the locker home? How would you get them cleaned? A. Take them home when they get dirty.

30 Mr. Carey: I object to what this witness would have done with his overalls.

Mr. Simpson: To show a custom there with overalls.

The Court: If it were directed to the intestate's habits, what he did, it might be different.

Q. Did the fireman wear overalls, this fellow, while he was working?

40 Q. Did you see him take them off and put them on? A. No, sir, I did not.

James Griffin, for Plaintiff—Redirect

Q. Did you see him with them on? A. Yes, sir.

Q. He had a locker in the roundhouse? A. I don't know nothing about that.

Q. You don't know? A. No, sir.

Q. But you know he wore overalls? A. I know he wore overalls.

Q. You wore them and you kept them in a locker? A. Yes. 10

Q. Did you see other lockers there? A. Yes, sir.

Q. Did you see other men keeping their overalls in lockers? A. Yes, sir.

Q. Other firemen? A. No; there is no firemen keeps them around where my locker is.

Q. Yours is where the engineer is? A. No, mine is away up at the other end of the roundhouse.

Q. What kind of lockers are around your locker? A. Well, the roundhouse men. 20

Q. You mean men that work in the roundhouse? A. Yes.

Q. No other engineers or firemen around yours? A. No, sir.

Q. How big is this roundhouse where these lockers are? A. Well, it is about thirty-two stalls.

Q. Who is the man in charge of the roundhouse? A. Roundhouse foreman.

Q. What is his name? A. His name is Billy Morris. 30

Q. Is he here to-day? A. No.

Q. Was he roundhouse foreman on the 3rd of August, 1913? A. I don't know.

Q. Do you know who was roundhouse foreman then? A. The night man was Charlie Hesson.

Q. You don't know who the day man was? You say the day man's name is Morris.

Q. What is his first name, do you know? A. William, I guess, William Morris.

Q. When you got on your engine that you took 40

James Griffin, for Plaintiff—Redirect

out the last trip that you took with Hanson was he on the engine before you got on? A. Yes, sir.

Q. What was he doing when you got on? A. I don't know.

Q. But he was on the engine before you? A. Yes, sir.

Q. Was it his general custom to be on when you
10 got on? A. Yes, sir.

Q. He was on before you got on? A. Yes, sir.

Q. And the engine was ready for you to take out then? A. Yes.

Q. And he got the fire up, didn't he, or kept it up? A. Yes.

Q. The hostler got it up and he kept it up? A. Yes, sir.

Redirect Examination by Mr. Carey:

20 Q. Mr Griffin, you got in at 6:30 on Saturday, night, did you? A. Yes, sir.

Q. This pick-up train, was that ever run on Sunday? A. No, sir.

Q. That is what you call a six-day job? A. Six-day job.

Q. Was there any occasion to go to the yard or the roundhouse in connection with this job, this pick-up train on Sunday? A. No, sir.

30 (Objected to. Question withdrawn and answer ordered stricken out.)

Q. Were you in the roundhouse or in the yard on that Sunday at all? A. No, sir.

Q. You say that you came in on engine 2105, according to your recollection? A. Yes, sir.

Q. What do you do when you bring your engine in, where do you place it? A. Leave her on the ashpit.

Q. Who takes charge of it then? A. Hostlers.

40 Q. Does either the engineer or fireman have any-

James Griffin, for Plaintiff—Redirect

thing to do with it after it has been placed on the ashpit? A. No, sir.

Q. Now, when you get your engine from day to day do you have the same engine? A. No, sir.

Q. Or are you liable to have different engines? A. Always have different engines.

Q. On this pick-up train are you more liable to have different engines on that train than on other trains? A. Yes, sir. 10

Q. You were not called for any service in connection with the pick-up run? A. No, sir.

Q. Or any other run on that Sunday, were you? A. No sir.

Q. Now when you get your engine where do you get it? A. We get it right at the roundhouse.

Q. Right in the roundhouse? A. Right at the roundhouse.

The Court: At the roundhouse or in? 20

A. At the roundhouse.

Q. That is inside or outside? A. Outside.

Q. Who has brought it to the point where you take it? A. The hostler.

Q. Now when the engine is prepared for going out does either the engineer or the fireman put things on to the engine? A. No sir.

Q. Who attends to that? A. They have tool men and an oil man; they have a man hired for that purpose. 30

Q. What are the duties of the tool man and the oil man? A. The oil man puts the oil on the engine and the tool man puts the tools on the engine.

Q. Do either the engineer or the fireman do anything in connection with the putting those tools or oil on the engine? A. No sir.

Q. Whose duty is it to see that these things are provided for? A. The engineer.

Q. That is when he takes his engine he makes the investigation, does he? A. Yes, sir. 40

James Griffin, for Plaintiff—Redirect

Q. To see whether the necessary supplies are on the engine? A. Yes, sir.

Q. And does the fireman have any duty to do in connection with that?

(Objected to as calling for an expert opinion. Objection overruled).

A. No, sir, he does not.

10 Q. If there is anything lacking in connection with the equipment of the engine what does the engineer do after— A. He notifies the roundhouse foreman and the roundhouse foreman notifies the toolman or the oilman or whoever it is and he puts it on the engine.

Q. And neither the engineer or the fireman do anything at that time in connection with the supplies? A. No.

20 Q. Excepting the engineer notifies the foreman of the roundhouse? A. Yes.

Q. You say that you went out on Monday morning at 3 A. M.? A. Yes.

Q. That is that you left the roundhouse at that time? A. That is the time that we got to the roundhouse to leave there 3:45.

Q. You get there and register? A. Yes.

Q. You register, do you not? A. Yes, register at 3:45, we leave.

30 Q. Then you are ready to go after 3:45? A. Yes.

Q. Register at 3:45? A. Yes.

Q. What time do you actually go out? A. Then we go back to Weekawken and we leave Weehawken at 4:45.

Q. On the Monday morning run, if it had not been for this accident, Mr. Hanson would have been your fireman? A. Yes.

Q. Unless something unusual had prevented? A. Yes.

40 Q. Was that his regular run? A. Yes.

James Griffin, for Plaintiff—Redirect

Q. Now you spoke about the tools the fireman had on the engine. Were those tools changed from one engine to another when you changed engines? A. No, sir.

Q. Or did they remain on the engine? A. The tools, as the engine comes in, they are all taken off and taken in the tool house, and as the engines are ordered they are taken and put back on from one— 10

Q. Oh, yes; so when the engine comes in from the run all tools are taken off? A. Yes, all tools are taken off.

Q. Before they go out the tool man attends to putting them back on and equipping the engine? A. Yes.

Q. So that an engine may have one shovel, for example, to-day, and another shovel to-morrow? A. Yes. 20

Q. The same shovel and the same tools do not go with the same engine? A. No, sir.

Redirect Examination by Mr. Simpson:

Q. On the Monday morning that you took this engine out after this accident what time did you get on the engine? A. I got down to the round-house at three o'clock and ready to go 3.45.

Q. What time did you get on the engine? A. About—we ain't supposed to get on until 3.45. 30

Q. Is that the time that you got on?

The Court: If you know, what time did you get on that particular Monday morning? A. I got on 3.45.

Q. Did you leave at 3.45? A. Yes, sir.

Q. So you got on the engine and left the same time, did you? A. Yes, sir.

Q. What did you do after you got on the engine, anything except start the engine out of the 40

James Griffin, for Plaintiff—Redirect

roundhouse? A. Started backing the engine up and took a tank of water, and I—

Q. Anything else? A. No, sir.

Q. That is all you did, and when you got in motion of course you had to keep looking ahead, did you, to see where you were going? A. Yes, sir.

Q. You have told me all that you did from the
10 time that you got on the engine? A. Yes.

Q. What tools did you have on this new engine that you did get on? A. It was a monkey wrench, a hammer and a chisel.

Q. How did you know? A. I looked them over.

Q. Why, you didn't say that. You said all you did was getting on the engine at 3.45? A. That is all.

Q. What is that? A. They lay right there for
20 you to look at as you get up, they lay at your feet.

Q. They were at your feet? A. Yes.

Q. Then you did something more than get on the engine and start it out? A. No, I didn't.

Q. Didn't you look at the tools? A. You couldn't help but see them.

Q. Did you look at the tools? A. Yes.

Q. Did you do anything else besides getting on the engine and starting it out? A. No, I didn't.

Q. You didn't look at the tools? A. Yes, I
30 looked at the tools.

Q. Then you did something else? A. No, I didn't.

Mr. Carey: I object to his wrangling with the witness.

Q. All you did was get on the engine and start out? A. Started up.

Q. Made a casual glance at the tools? A. Yes.

Q. Where were they? A. Laid right at your
40 feet on the deck.

James Griffin, for Plaintiff—Redirect

Q. What was it? A. Hammer and monkey wrench and chisel.

Q. That is all at your feet? A. Yes.

Q. Did you ask the fireman anything about it?
A. No, sir.

Q. Didn't say a word to him? A. No, sir; he had everything ready.

Q. What did he have ready? A. Well, that is 10
all—his gauge lights, that is all he had to light.

Q? What A. He had his gauge lights lit for water and steam gauge.

Q. Anything else? A. That is all he has to do.

Q. I didn't ask you what he had to do, I asked you what he did do? A. I wasn't there to see.

Q. You don't know what he did? A. No, sir.

Q. How long was he on the engine, this fireman, before you went out? A. You will have to ask— 20

Q. Who was he? A. I don't know who he was.

Q. Don't know the man you took out? A. No, sir.

Q. Know his name? A. No, sir. Too long ago.

Q. You say that a fireman has nothing at all to do with the tools? A. No, sir.

Q. Never has them in his hands? A. Oh, I don't say that.

Q. What? What would he have them in his hands for? A. I don't know what he has in his 30
hands. He had a shovel and hook.

Q. Well, without the shovel and the hook—the hammer and the chisel and the monkey wrench, ever hand them to you when you are working on the engine? A. No.

Q. How long have you been working with a fireman on an engine? A. Fifteen years.

Q. Have you ever done any temporary repairs on your locomotive? A. Yes, sir.

Q. Never in all that time has a fireman handed 40
you tools? A. No, sir.

James Griffin, for Plaintiff—Redirect

Q. And you never asked him where the tools are? A. Because I was always younger than the fireman.

Q. So you did all the work; the fireman was on for an ornament?

(Objected to as irrelevant and improper.

Question withdrawn.)

10 Q. Did you take the tools off this engine that you left on Saturday night? A. No, sir.

Q. Did you get off the engine and leave the fireman Hanson on the engine? A. No, sir.

Q. Did he get off before you? A. Yes, sir.

Q. How long before you? A. Ten minutes.

Q. What did he do when he got off?

Mr. Carey: I object to it as irrelevant to the issues made by the pleadings in this case which are to the effect that this man was removing tools from one engine to another at the time when this accident happened.

20

The Court: Well, I have already made the suggestion as to that, Mr. Carey, if their proofs do not match up with their pleadings we will have to meet that when they get to the end of the case.

Mr. Simpson: I did ask to amend the complaint so as to set up, if we did not—

The Court: You did not ask to amend it; you said you would amend it if it is necessary.

30

Mr. Simpson: If there is any technical objection at this time, I will ask now.

The Court: It may not be necessary, because your proofs at the end of the case may conform to your pleadings. If they do there will not be any quarrel, if they do not then you may ask to amend.

40 Q. Did he have his overalls on when he got off

James Griffin, for Plaintiff—Redirect

the engine this Saturday night? A. I don't know.

Q. You don't remember? A. No, I do not.

Q. Did you have overalls on? A. Yes, sir.

Q. Where did you put your overalls when you got off Saturday night? A. In my locker.

Q. Where did you get them when you went to work on Monday? A. In my locker. 10

Q. Where did you say you registered before you took out the locomotive? A. In the register room at the roundhouse.

Q. Whose office is that? A. That is the engine dispatcher's.

Q. You wrote your name when you registered? A. Yes.

Q. And also the locomotive you took? A. Yes, sir.

Q. And the run you were on? A. Yes, sir. 20

Q. Now you were asked also about whether there was any necessity for you to be on duty Sunday, something of that kind. Did you ever take out a special run? A. No, sir.

Q. Isn't it a rule of the company after a man is off eight hours he is supposed to be on duty subject to call at any time? A. No, not a regular man.

Q. Well, when is he subject to call? A. Whenever his jog goes out. 30

Q. His what? His job goes out? A. Whenever his jog goes out—whenever his run goes out.

Q. He is then supposed to be there? A. He is supposed to be there.

Q. If they wanted you before how would they get you? A. I never was called.

Q. You never were called? I think that's all.

James Griffin, for Plaintiff—Cross
Charles Brusle, for Plaintiff—Direct

Cross Examination by Mr. Carey:

Q. Now when men are called for special runs is there any rule with respect to the man who shall be taken? A. Yes, sir.

Q. What is the rule? A. Extra men.

Q. So long as there are extra men available is
 10 a man taken who has a regular run? A. No, sir.

Q. If a man is taken—if a man should be taken from a regular run when there were extra men available, what would be done in connection with the man who called the regular man when an extra man was available? A. The roundhouse foreman has got to stand the man's pay, got to pay him a day's pay, the man loses the job.

Q. That is the man who calls the regular man when there are extra men available has to pay the
 20 extra man's time for the run which he might have had? A. Yes, sir.

CHARLES BRUSLE, SWORN.

Direct Examination by Mr. Simpson:

Q. What is your employment, Mr. Brusle? A. Chief clerk of the superintendent of the West
 30 Shore.

Q. That is operated by the New York Central and Hudson River Railroad Company? A. Yes, sir.

Q. New York Central now? A. New York Central Railroad.

Q. I subpoenaed you to produce certain records with reference to—with reference particularly to the run of this dead man. Have you got any records showing what run he was on at the time he
 40 was killed? A. No, sir.

Charles Brusle, for Plaintiff—Direct

Q. Haven't any records in the office, eh? A. Not in the office, no sir.

Q. Where would those records be? A. There are two places for them to be, either in the record room at the station or out on the pier at Weehawken.

Q. Who would have charge of them? A. There would be a number of departments they would have to be produced by or gotten from. 10

Q. But you are in charge of the Division Superintendent's office in his absence, aren't you? A. No, sir.

Q. Who is in charge? A. I have charge of the clerical force.

Q. Who is in charge while the division superintendent is away; who takes his place? A. Why. I sort of look out for things, although I am not in charge. 20

Q. Who is in authority? A. In other words, I have not an official position.

Q. Who is in authority in the absence of the division superintendent? A. Really nobody; everything that is done is done in his name.

Q. Done by you? A. Either handled by myself or the chief train dispatcher or the train masters.

Q. You would speak for him in his absence? A. On certain subjects, yes.

Q. You are his chief clerk, I suppose, and he is absent now? A. Yes. 30

Q. You are seemingly in charge of the office, aren't you? A. Yes.

Q. Have you got any such records as I have called for in my subpoena? A. No, sir.

Q. You have got a copy of this subpoena? A. I got one, I got a copy of a book of rules that I brought down.

Q. You gave me that? A. Yes.

Q. Have you the subpoena with you, the copy? A. No, I have not. 40

Charles Brusle, for Plaintiff—Direct

Q. Did you give it to Mr. Carey? A. Yes.
(Mr. Carey produces subpoena.)

Q. You have not then, I take it, or do not produce, "the conductor's train and operator's reports, wheel reports, freight way bills, bills of lading, train sheets, also all records in writing, showing the number of cars taken out by the train upon which Mr. Hanson worked the day before his death, on the last trip he made before his death, and the locomotive taken out on the run which he would have gone on the day after his trip, if he had lived, also the registers in which entries are kept of train employees showing the number, whether or not the employees are on duty, also carbon copies of any way bills of freight sent out on the train on which he acted as fireman on the day before his death, and on the train which he was to go out on on the day after his death if he had lived, also all roundhouse records showing the card of the engine upon which he was fireman the day before his death and the day after his death, and also records showing the location of the engine which went out upon the run he would have gone out on on the day succeeding his death if he had lived, showing the location of the same on the day of his death, and the day before; also records showing the location of the pony engine on which he was working at the time said engine was used to take the officials of the road over an inspection trip." You have none of those records, have you?
A. No, sir.

Q. Now under the act of Congress you are compelled to keep some of those records, aren't you?
A. Yes; there are some of them kept.

Q. Where are they? A. Well, that is something I cannot answer offhand; they are kept by a number of departments.

Charles Brusle, for Plaintiff—Direct

Q. Speaking as the chief clerk of the division superintendent you confess you are ignorant on that subject? A. No, sir; I do not confess I am ignorant; I would say I do not know, nor I do not know.

Q. Where are they? A. They are kept by different departments. I would have to go over them in detail before I could tell you where they could be obtained. 10

Q. Tell me where the records—where the conductor's train and car reports and wheel reports are kept? A. The superintendent of freight transportation, Grand Central station.

Q. New York City? A. Yes, Mr. G. H. Alexander.

Q. That is beyond the jurisdiction of this court, G. H. Alexander? A. Grand Central Station.

Q. Where are the freight way bills, bills of lading and train sheets? A. It would be impossible for me to tell you the train car numbers; I don't know how many cars were in the train. 20

Q. Well, where generally are your train sheets kept? A. Well, if you give the car numbers they can undoubtedly get the copies of the bills of lading from the office at Weehawken, but they can't do it without something to identify with.

Q. Train sheets? A. Train sheets can be obtained, but not on such short notice as you gave us yesterday. 30

Q. Where can I get the train sheets? A. They are on the piers at Weehawken.

Q. Are there any other records? A. Mr. Simpson, if you will allow me, a train sheet is what is kept by the dispatchers, the train dispatchers at Weehawken, and shows absolutely nothing except an engine number, an engineer's name and the conductor's name, and the time they leave, the time they pass different stations on the road, and the number of cars they have. 40

Charles Brusle, for Plaintiff—Direct

Q. What is the wheel report? A. The wheel report is kept by the conductor; he shows the number of each car that is in his train, where he got it and where he is taking it.

Q. Do you know who is the roundhouse foreman on the day of this accident, August 3rd, 1913?

A. No, sir.

10 Q. Do you know who is now? A. No, sir. I want to make that plain. That is an entirely different department from the transportation department.

Q. What department is that? A. Motive power.

Q. Who is the head of the motive power department? A. Mr. H. N. Strauss, master mechanic.

Q. Is he at Weehawken? A. No, sir, Granton,
20 New Jersey.

Q. He is the master mechanic? A. Yes, sir.

Q. Now then, are the registers kept on which there are entries kept by the train employees or for them, showing the number or whether or not the employees are on duty? A. Yes, sir.

Q. Who has kept them? Where—at your office? A. Why, we did have them. They are what we call form T-48 and T-49,—I believe that is what you are referring to.

30 Q. Yes. That is the register? Who would have those? A. I think Mr. Carey has one or two of them. The third one we are unable to find.

Q. The third one. Will you let me see the two that you have?

Mr. Carey: Yes, sir. (Produces paper.)

Mr. Simpson: What are these?

Mr. Carey: They are the registration sheets. We call them T-48 and 49. As I understand it, those are the sheets on which the

Charles Brusle, for Plaintiff—Direct

employees register, that is, the transportation, the traffic men?

The Witness: Yes, sir.

Mr. Carey: Register as they come in to take their run and as they come from their run?

The Witness: Yes; they are used in place of a book.

Q. Now the carbon copies of way bills and freight turned out on the train on which this dead man acted as fireman before his death; you would not have those, would you? A. No, sir; never saw them.

Q. The roundhouse records, you would not have those? A. No, sir.

Q. Who would have those, the master mechanic? A. I presume he would, although you do not make it clear there what you want by roundhouse records. Maybe a hundred records kept in the roundhouse.

Q. Well, the roundhouse records showing the card of the engine upon which he was fireman the day before his death. A. The master mechanic ought to be able to get that for you.

Q. Now were you employed by the West Shore or rather the New York Central Railroad on the 3rd of August, 1913? A. Yes.

Q. Were they engaged in transporting freight and passengers out of New Jersey to other states and from other states into New Jersey on that day? A. As far as I know.

Q. Where do the lines run—Buffalo? A. What do you mean, the lines?

Q. I mean the West Shore? A. The West Shore Railroad runs to Buffalo, but our division runs to Albany—that is the Albany division.

(No cross examination.)

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Robert C. George, for Plaintiff—Direct

ROBERT C. GEORGE, SWORN.

Direct Examination by Mr. Simpson:

Q. Mr. George, what is your position? A. Engine dispatcher.

Q. For the New York Central Railroad? A. Yes.

10 Q. Were you engine dispatcher in August, 1913? A. Night engine dispatcher.

Q. Did you have anything to do with the dispatching engine on which Hanson worked the last run he took out? A. No.

Q. That would be the Saturday before his death, I suppose the 2nd of August or the first of August? A. Did I have anything to do with it?

Q. Yes. A. In what way?

20 Q. By designating the engine? A. No, I don't designate the engine.

Q. What is your— A. I send them in a call and if they get out on time the roundhouse foreman designates the engine.

Q. Who do you see gets out? A. Engineer and fireman and crew.

Q. Did you see that Hanson got out on the last run? A. Did I see?

30 Q. Yes? A. That is impossible. It is too long ago for me to remember. I have to handle too many.

Q. Is your work to be there to see that they are there? A. Yes.

Q. And check them up if they are not there? A. Yes.

Q. And the engine is delivered to them by the roundhouse foreman? A. Yes.

Cross examination by Mr. Carey:

40 Q. These sheets T-48 and T-49, are they kept in your department? Are they kept in connec-

Robert C. George, for Plaintiff—Redirect

tion with your business? A. Yes; the sheets we are using are that, that is, on that date.

Q. These sheets T-48 and T-49, they are kept under your supervision, are they? A. Yes, sir.

Q. And you see that the men register on those? A. Yes.

Q. You know this so-called pick-up train? A. Yes. 10

Q. The testimony shows that that was the train on which Mr. Hanson was working? A. Yes.

Q. Does that train work on Sunday? A. No, sir.

Q. Did you issue any call for Hanson for services on Sunday? A. No, sir.

Q. I speak of the Sunday on which he was killed? A. Yes, sir.

Redirect Examination by Mr. Simpson: 20

Q. That pick-up train was the train that took freight from station to station, wasn't it, picking up cars? A. That is the supposition, I do not know what they picked at all. I have nothing to do with what they take.

Q. What did you mean by taking this pick-up train? What do you mean by pick-up train? A. That is what we call it, we call it pick-up, to go out—it is the engine. We have nothing to do with the train at all. All I have to do is the engine 30 crew.

Q. Don't know what the train is? A. No, sir; I don't know what it consisted of.

Frederick Smith, for Plaintiff—Direct

FREDERICK SMITH, SWORN.

Direct Examination by Mr. Simpson:

Q. Mr. Smith, what is your business? A. Fireman.

Q. Did you see Mr. Hanson on the day that he was killed? A. Yes, sir.

10 Q. Where did you see him first? A. In the Y. M. C. A.

Q. Did you leave the Y. M. C. A. with him? A. Yes.

Q. Where did you walk with him when you left the Y. M. C. A.? A. Walked up the path.

Q. Where were you going? A. Going to the engine.

Q. Looking for your engine then? A. Yes, sir.

20 Q. How far did you walk with him before you found your engine? A. Down around the machine shop there on the—

Q. How did you walk, along the path, or how? A. Along the path.

Q. You and he walked along the path? A. Yes.

Q. Was the engine going the same direction as you were or was it coming to meet you, the engine you got? A. To meet us.

Q. When it got to you it stopped, did it? A. Yes.

30 Q. You got the engine? A. Yes.

Q. Then did the engine go on—your engine, I mean, the one that you got on? A. It went right away.

Q. Which direction did it go? A. Well, went back again to the coal pocket.

Q. Coal pocket? A. Yes.

Q. Did you see another engine around there? A. Not at the present time.

40 Q. Where did you go then? Where did you go? A. I went on the engine and tried to fix up the fire.

Frederick Smith, for Plaintiff—Direct

Q. Fix up the fire? A. To fix up the fire, put a hard coal fire on.

Q. Did you see Hanson's hat fly up in the air?

A. Why, after the engine passed.

Q. Your engine? A. Yes.

Q. Yours? A. No; after Ben Clearwater's engine passed, then the—

Q. Then did Ben Clearwater's engine pass you? 10

A. After that.

Q. It passed your engine? A. Yes.

Q. What track was it on? A. I don't know the number of tracks here, but we went down on the eastbound track and he was going up on the westbound.

Q. Don't know the number of the track? A. No, sir.

Q. How was Clearwater's engine going, with the tender first? A. Tender first. 20

Q. Backing? A. Backing up.

Q. After it backed did you see Hanson's hat fly in the air? A. After the engine passed, yes.

Q. You saw his hat fly in the air; then where did your engine go? A. Why, he stopped it.

Q. Did you get off? A. No, sir.

Q. Did you stay on the engine? A. I stayed on the engine.

Q. And when Clearwater's engine passed you it was going slow? A. Well, I couldn't judge 30 that.

Q. You don't know? A. No.

Q. Then did your engineer come back, Mr.—what is the name of the engineer, Mr. Griffin? A. Kathan.

Q. He came back and you went on, did you?

A. Why, I went up there and got him, Clearwater. I went the same track up here and got Clearwater.

Q. Oh, you went up to Clearwater? A. Yes.

*Frederick Smith, for Plaintiff—Cross**Cross Examination by Mr. Carey:*

Q. You say that you saw Hanson at the Y. M. C. A. building? A. Yes, sir.

Q. Won't you come down here and show us where the Y. M. C. A. building is on this map? A. That is the Y. M. C. A. (indicating).

Q. That is the building right there and it is
10 marked Y. M. C. A.? A. Yes.

Q. Then you say you followed up along this patch that is going in here at right angles? A. Yes.

Q. To Bergen Turnpike? A. No; right over here, between the tracks—I followed here the dump track.

Q. On which side of the dump track? A. On the outside.

Q. Towards the— A. Toward the Turnpike.
20 Followed right up here—right down, over here—right down here—that track here—the track that leads into the shop track—followed right up, and we got here, over here, to make the engine 3907.

Q. 3907, you met the engine? A. I met the engine.

Q. That was Kathan's engine? A. Kathan's engine.

Q. Which way was Kathan's engine going? A. Backing up.

30 Q. Towards what? A. To the coal pocket here.

Q. That is going east? A. Yes, going east.

Q. That is south, really, isn't it? You understand the railroad was east and west. It was going towards Weehawken? A. Yes.

Q. Where was it that you met the engine, Kathan's engine? A. Right across that office here.

Q. Right opposite this office building here? A. Yes.

Q. About where the X mark is? A. Yes.

40 Q. That was the engine you were to get onto?
A. Yes.

Frederick Smith, for Plaintiff—Cross

Q. Kathan had gone to the roundhouse and was bringing the engine down? A. Yes.

Q. You were going up this way to meet him? A. Yes.

Q. You knew that he had gone up to get the engine and would come back and meet you, didn't you? A. Yes.

Q. That is why you were going up here? A. 10
Yes.

Q. Now up to the time when you got opposite the house here did you cross there to one of those tracks on which the engines ran? A. Yes. I crossed the westbound track.

Q. No; up to the time you saw the engine coming? A. No. No, I followed right up the path.

Q. Followed up that path? A. Right this point and then I crossed right over.

Q. While you were on that path were you in 20
any danger of being struck by an engine on either one of those tracks?

(Objected to as asking for an opinion.

Question withdrawn.)

Q. How far away from the most westerly of these two tracks, that is the westbound track, was this path that you followed along? A. Well, the track between here.

Q. The track between the path and the engine 30
track which led into the roundhouse? A. Yes.

Q. And that was the track on which Clearwater's engine was? A. Yes.

Q. When Kathan brought his engine down there and brought it to a stop then you crossed over both of these tracks, did you? A. Yes, sir.

Q. You got on to the engine? A. I got on the engine.

Q. Which side of the engine were you on? A. 40
Why, I got on the right side, at a point west, head on—got on the right hand side.

Frederick Smith, for Plaintiff—Cross

Q. Your engine was headed toward Weehawken? A. No, headed toward the west.

Q. Were you on the side nearest to the track where Clearwater's engine was? A. Yes.

Q. Or on the opposite side? A. But after I got on the engine I went on my left side.

10 Q. Were you on the side of the engine towards the westbound track or were you on the westerly side of the engine? A. When I got on?

Q. Yes? A. Why, on the westerly side.

Q. On the westerly side, that is, you were on the side of the engine further away from Bergen Turnpike? A. Yes.

20 Q. Then when you left the path and started to cross these two engine tracks to get to your engine, or, rather, when you started across the westbound engine track to get over to your engine, you had to cross a track between that and the track on which Clearwater's engine was? A. Yes.

Q. If Mr. Hanson had continued on the path toward the roundhouse, would he at that point have crossed the track on which Mr. Clearwater's engine was running? A. Why, up above.

Q. No, at that point, I mean? A. No.

Q. Down where our engine stopped? A. No.

Q. Or where he was struck? A. No.

30 Q. If he had continued on that path toward the roundhouse would there still have been between him and the track on which Clearwater's engine was the other track at the point where he was struck?

Mr. Simpson: I object on the ground that that is for the jury to say from this diagram and the physical situation.

The Court: Well, I suppose it is explanatory of the diagram.

Frederick Smith, for Plaintiff—Cross

Q. Do you understand the question?
(Question repeated by stenographer.)

Q. Strike out that question. You have testified there was a track between the path and the track where Clearwater engine was running? A. There is a track between there?

Q. Yes; that is what I say, between the path and the engine track where Clearwater's engine was running there is a track, a railroad track? A. Yes.

Q. Is that right? A. That is two tracks yet.

Q. Two tracks? A. Well, there is the path and the track there where the dead track is, we call it, where the engines go to the shop.

By the Court:

Q. That is the dead or shop track? A. Yes, the shop track, and then will come the westbound track. 20

By Mr. Carey:

Q. Now step down here once more, Mr. Smith. You notice here on this map a yellow X which is marked where the accident is said to have occurred; now was that about the place where the accident occurred, where that yellow cross is? A. I couldn't tell exactly. I guess so. 30

Q. Now then this yellow which you see along here, a kind of a wavy line, represents what? A. That is the path.

Q. Between that path and about the place where he was struck there is an indication of another track? A. Yes.

Q. Now was there a track between the path and this engine track opposite the place where he was struck? A. There is a track there between the path. 40

Samuel Craig, for Plaintiff—Direct

Q. That is what I say; is there a path between it? A. Yes.

Q. Was there such a track between the path and this engine at the time he was hurt? A. Yes.

Redirect Examination by Mr. Simpson:

Q. Did you not see this accident, you did not
10 see this man hit by the locomotive? A. No.

Q. Then you don't know where he was hit? You don't know where he was hit? A. Well, he stood with the engine there.

Q. But you didn't see the man when the engine struck him, did you? A. No, I did not.

Q. Then you don't know where he was hit, do you? A. No.

Recross Examination by Mr. Carey:

20 Q. Do you know where the body was found?
A. Yes, the body, I do.

Q. Was the body found about that place where that yellow X is located? A. Yes, certainly.

SAMUEL CRAIG, SWORN.

Direct Examination by Mr. Simpson:

30 Q. You worked for the New York Central Railroad? A. Yes.

Q. Where do you live? A. 471 Hudson Avenue, West New York.

Q. You were on this engine with Mr. Clearwater that ran over and killed Hanson on the third of August, weren't you? A. Yes, sir.

Q. You did not see him before your engine ran over him, did you? A. No, sir.

40 Q. Clearwater didn't see him? A. Not that I know of.

Samuel Craig, for Plaintiff—Direct

Mr. Carey: I object. He can't tell what Clearwater saw.

Q. Well, you didn't know. How did you or Clearwater know that there had been an accident? Wasn't it because some one came up and told you?
A. Some one told us.

Q. What did you do when you found out that you had run over a man? A. Went right back to the scene of the accident. 10

Q. How far away from where you stopped your engine was it? A. Oh, I don't know, probably five minutes walk,—seven minutes walk, something like that.

Q. When the accident occurred was your engine going rear end first? A. Yes, backing up.

Q. Which side were you on? A. On the left side of the engine, the fireman's side, the east side of the engine backing up. 20

Q. And Clearwater was on the west side backing up? A. Yes, sir.

Q. Where did you find the body? A. In between the tracks.

Q. Was it nearer the west side or the east side? A. Well, I don't know, it laid right in between the two rails.

Q. Parallel with the two rails? A. Parallel with the rails, yes. 30

Q. He was dead then, was he? A. Yes.

Q. Where had your engine come from? A. The engine had come from Ravina.

Q. Where were you going? A. To Weehawken.

Q. What were you going to do? A. Deliver the train to Weehawken and went back to Granton engine house with the engine.

Q. This was— A. Coming in with a train.

Q. You had a train on? A. Coming in with a 40 train.

Samuel Craig, for Plaintiff—Direct

Q. I thought it was an engine alone? A. No; we had the engine alone.

Mr. Carey: He brought his train to Weehawken and was taking the engine back.

Q. This train you brought from where, Ravina, New York? A. The train came from Albany.

10 Q. You unhooked from the cars and were taking the engine to the roundhouse? A. Yes, at Weehawken we unhooked from the cars.

Q. How were you going on the trip when you ran over this man, fast or slow? A. About six miles an hour.

Q. How many tracks are there in the yard? A. Oh, lots of tracks around there.

Q. What time of day was it? A. Around noon time.

20 Q. Perfectly clear day, wasn't it? A. Perfectly clear.

Q. Nothing to obstruct your vision or the engineer's as you looked out? A. Nothing to obstruct my vision.

Q. You were looking in the same direction? A. I don't know how the engineer was looking.

Q. You don't know whether he was looking or not? A. I don't know anything about him.

30 Q. But there was nothing the way you were looking? A. Nothing in my way.

Q. To obstruct your vision? A. No, sir.

Q. Were you looking in the direction in which the engine was going? A. Yes.

Q. You did not see this man at all? A. No, sir.

Q. Mr. Clearwater, your engineer, has died since the accident, has he? A. I don't know for sure. They said he did.

40 Q. You did not attend his funeral? A. I wasn't to his funeral; I didn't know of his death until after he was buried.

Samuel Craig, for Plaintiff—Direct

Q. You were a fireman on this occasion, were you? A. Yes.

Q. Fireman on a passenger train? A. Yes, sir.

Q. Did you have a locker in the roundhouse?

A. My locker is in the roundhouse, yes.

Q. What did you keep in the locker? A. Overalls.

(Objected to as being immaterial and irrelevant. The court overruled the objection and an exception was noted to the defendant.) 10

Q. How many firemen to your knowledge had lockers in the roundhouse? A. I don't know how many.

Q. Any besides you? A. Oh yes.

Q. Did not every fireman have a locker in the roundhouse? A. I don't know, but I know they haven't got them all now. 20

Q. How many of them, what percentage of them had? A. I don't know anything about it.

Q. Nine or ten? A. I don't know.

Q. How many firemen are there? Do you know how many fireman there are working on that division? A. I don't know.

Q. You don't know any firemen at all that work on that? A. Yes, I know a lot.

Q. How many do you know? A. Oh, I don't know. I know lots of them. I couldn't tell you how many I know. 30

Q. Twenty, do you know? A. Yes.

Q. Have they got lockers in the roundhouse? A. I don't know.

Q. You know you hadn't one? A. I know I had one, got one now, and there is a fireman in the locker with me.

Q. Who is your next door neighbor? A. I don't know. There is nobody next door neighbor to me. I have an entire locker. 40

Samuel Craig, for Plaintiff—Direct

Q. The one you had on this day, who had a locker next to you? A. I don't know.

Q. Who had the one on the left hand? A. I had one on the end.

Q. Nobody next to you? A. Somebody in there, I don't know who it was.

Q. You don't know who it was? A. No, sir.

10 Q. Do you know any of the men that had lockers in the roundhouse? A. Yes, Hitchcock had a locker four lockers from mine.

Q. Did you ever see a fireman have a locker besides yours? A. Yes, see them have lockers.

Q. See them using them? A. See them go in. They said they were going in to lock up their overalls; I don't know where they went.

Q. How often would you see them, twice a day?

A. No; if I was to the roundhouse and met some-
20 body going in to lock them up.

Q. Common thing, wasn't it? A. Common thing, yes.

Q. You kept your overalls there, I suppose?
A. Yes.

(Adjourned to October 26, 1916, 10 A. M.)

October 26, 1916, 10 A. M.

30 SAMUEL CRAIG, recalled.

Further Direct Examination by Mr. Simpson:

Q. You know what the procedure was on the New York Central Railroad where you are a fireman at the time this man was killed, as to engineers? Were the engineers taken from the firemen? A. I don't understand.

40 Q. After the fireman passed an examination did he become an engineer? A. Yes, sir.

Samuel Craig, for Plaintiff—Cross

Q. Are you an engineer now? A. Yes, sir.

Q. How long have you been an engineer? A. Passed my examinations on the third day of August, 1911.

Cross Examination by Mr. Carey:

Q. You were asked if there was anything in the way to obstruct your view northerly at the time you were coming back with your engine to the roundhouse. You have answered that there was not. What had you reference to in connection with that answer? A. There was no obstructions

in the way along the track of sticking out from the tank that would affect my view or my vision.

Q. The engine was running backwards, as I understand? A. Yes.

Q. Was the view of the track cut off for some distance by the tank? A. Yes; by the tank it was cut off, yes.

Q. About how far? A. Oh, about a hundred feet, maybe not that much.

By Mr. Simpson:

Q. What tank do you mean, the tank on the engine or some stationary engine? A. To the track that we were running on, yes.

By the Court:

Q. You mean the water tank which was ordinarily called the tender? A. Yes; some people call that the tender, we call it the tank.

By Mr. Carey:

Q. Does that answer apply to the view which you had on the same side of the engine on which you were sitting? A. Yes, sir—that applies to my vision, which I could see.

Q. It would be somewhat further cut off on the opposite side of the track?

Samuel Craig, for Plaintiff—Redirect

Mr. Simpson: I object, on the ground that he was not on the opposite side.

The Court: I understand that the question goes to this, that if he were looking straight ahead on the side which he was upon, then the view was cut off a hundred feet, and if you were looking across to the other side it would be somewhat further?

10

A. Yes, about a hundred foot on the opposite track. The two tracks running parallel, the track I am on I could see further away to the end of my tank than I could on the other track, because the tank cuts off that much.

Redirect Examination by Mr. Simpson:

Q. Then you could not see as good when the engine was going backward as when you were running forward? A. On my side I could, yes.

20

Q. Then it was not cut off at all? A. On my side about twenty-five feet from the end of the tank.

Q. Was it cut off from you when your engine was running front? A. There was no vision cut off except right close to the tank.

Q. Then is it a fact that when you are running backward you cannot see as far as you can when you are running forward? A. Yes; you can see just as far ahead.

30

Q. There is no more obstruction backwards than forward? A. Oh, you cannot see as close; you can see just as far ahead to the tank.

Q. As close to your engine? A. That is it.

Q. In other words, running with your head on you can see clear to your engine? A. Yes.

Q. Running back you cannot? A. That is right.

40

Q. Any rule which you knew of of the New York Central providing as to how you should run

Samuel Craig, for Plaintiff—Redirect

an engine if you ran it backwards through the yards with a view to protecting the men who might be working about the tracks? A. We have rules governing the road running backwards over the road, but nothing in the yard.

Q. No system at all? A. We have a speed restriction in the yard, different places.

Q. What rule, if any, about running backwards? 10
How did you protect running it backwards? A.
No rule at all.

Q. How on the road? A. The different places, thirty miles an hour, running backwards fifteen miles, and some places sixteen miles an hour.

Q. I am not talking about speed, but anything else? A. That is the speed restriction.

Q. Is there anything else, any rule governing the running of an engine backwards on the road?
A. Yes. 20

Q. What is it? A. Over crossings where heavy traffic is, where there is no gate or flagman, to use, to exercise care in backing up or around depots.

Q. What care do you exercise? A. Go careful so you won't hurt anybody.

Mr. Carey: I object to this line of examination. We are in the yard at this time and not on the public street or on the main line of the road. 30

(Discussion.)

Q. When you ran this engine there was nobody out on the back of the tender to look behind the tender, was there? A. I didn't run the engine.

Q. When the engine was running you were on the engine, weren't you? A. I was on the engine.

Q. You were not back of the tender, were you?
A. No, sir.

Q. Clearwater was not on the back of the ten- 40

Samuel Craig, for Plaintiff—Redirect

der? A. I don't know. I don't think he was there.

Q. You think the engine ran itself? A. No, sir.

Q. Who was running the engine? A. I don't know who was running it. Clearwater was running the engine when it left Weehawken.

Q. Who was on it when you killed this man?

10 A. Clearwater was on when—

Q. You knew you were under oath when you said you didn't know who was running the engine, didn't you? A. I didn't know who was running the engine at the time, because I didn't look over there. Clearwater was on the engine when I left Weehawken, and he was on the engine when I reached the ashpit, but who was there—

Q. You don't know whether some angel came in and ran it? A. I don't know. I attend to my
20 own work. I can't look at his.

Q. You were not on the back towards the tender, were you? A. No, sir, I was not.

Q. When the engine was stopped Clearwater was not on the back of it keeping lookout, was he?
A. No, sir.

Q. See any one else in the employ of the West Shore on the back of this tender looking out as the engine went backwards through the yard? A.
No, sir.

30 Q. You say as far as you knew there was no rule governing you in running an engine backwards through the yard as to looking out for the employees who might be on the track? A. Why, wouldn't run over a man if we saw him.

Q. If you didn't see him you would run over him? A. I suppose if we didn't see him we would.

Mr. Carey: I object.

The Court: Isn't that a conclusion?

40 Q. So far as you know was there any rule gov-

Samuel Craig, for Plaintiff—Redirect

erning the running of these engines such as you were running through the yard when they were running backwards? A. I wasn't running the engine.

Mr. Carey: I object. Well, the witness has answered the question.

A. You just asked me about running an engine. 10

Q. I didn't ask you if you were running that engine. A. Yes, you did.

The Court: Just stop when you hear them object. It seems to me we are wasting a great deal of time by this cross fire, without getting anywhere. Now certainly, Mr. Witness, you understand the question, and when the question is put to you—

Q. You kept a lookout at the time this man 20 was killed? A. Yes.

Q. You were looking out? A. Yes, sir.

Q. Were you looking out to see if there was any one in the way so you would not—the engine would not hurt him? A. Yes.

Q. All right. Was there any rule that you knew about governing you in your duties on that engine with reference to the running of the engine backwards—not that you ran it backwards, but that you were physically on the engine doing something while it was running backwards? A. I 30 wasn't doing nothing at the time excepting looking out the window.

Q. You were on the engine? A. Yes.

Q. Were you keeping a lookout and guarding it? A. Yes.

Q. All right. Was there any rule governing you in keeping that lookout, that you knew? A. Yes, sir.

Q. What was it? A. When I am not engaged 40

Samuel Craig, for Plaintiff—Redirect

in firing I should be looking out of the window?

A. What for?

A. For all obstructions on the track, danger signals—

Q. Employees? A. Everybody. Don't mention nobody; it mentions everybody.

Q. Where is that rule? A. In the book of
10 rules, operating department.

Q. Any other rule that you know of? A. Not that I know of.

Q. You have studied these rules, haven't you?
A. Yes.

Q. Are now an engineer? A. Yes, sir.

Q. Had to pass an examination on these rules?
A. Yes.

Q. When did you pass your examination? A.
About three weeks ago I went on through the book
20 of rules—this month.

Q. When did you pass your examination? A.
Examination?

Q. Yes, for engineer? A. Passed by mechanical examination the 31st of August, 1911.

Q. When did you pass your other examinations?
A. Why, get them every year—go through the book of rules.

Q. How long have you been an engineer? A.
About five years.

30 Q. You were not one at the time of this accident? A. I had been promoted, but I had not run any engine.

Q. You had studied the rules before that time?
A. Oh, yes.

Q. Now this yard that you were running through at that time, how many tracks were there in it? A. Well, there is a whole lot of tracks around there.

40 Q. And more engines than yours, and cars, in the yard? A. Why, there is cars over there in Granton yard; always full of cars.

Samuel Craig, for Plaintiff—Recross

Q. Was this the yard through which all the engines went that came in from trains in the depot? Was it the yard, in other words,—the yard used by the traffic from the Weehawken depot? A. Yes, them two tracks in the yard.

Q. It is the Granton yard? A. Granton yard.

Q. Is that the only yard in connection with the Weehawken depot? A. Why, no, the Weehawken yard. 10

Q. There is the Weehawken yard? A. Yes.

Q. What is the distinction? What is the Granton yard used for, or what was it used for at the time of this accident? A. Why, storage cars, making up of trains.

Q. Busy yard, was it? A. Busy yard, yes.

Recross Examination by Mr. Carey:

Q. At the time this accident happened were there any engines near you except the Kathan engine, and the engine you were on? A. I don't think there was, no, sir. 20

Q. Was the yard as busy on Sunday as it was on a week day? A. No, sir.

Q. To what extent was it less busy on Sunday? A. Why, some of the yard engines did not work.

Q. Now the busy part of the yard was westerly of those two engine tracks, was it not? A. Yes, sir. 30

Q. And the two engine tracks themselves? A. Yes, sir.

Q. Do you know about how many movements a day there were over those two engine tracks? A. Oh, I don't know. I could tell you if I looked at the book and to see how many engines was ordered; must be about somewhere around seventy engines a day go over them two tracks, according to the trains we have.

Q. Do you distinguish the tracks as number one and number two? A. Yes. 40

Samuel Craig, for Plaintiff—Recross

Q. And number one track is your track? A. Number one track is eastbound track, as we call it.

Q. That is the track which goes to Weehawken?
A. Yes.

Q. And number two track is the track which leads from Weehawken back to the engine house?
A. Yes.

10 Q. And the engines going to and from the engine house to Weehawken use those two tracks?
A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. And not the other tracks? A. No, sir.

Q. Do you know how long Hanson had operated an engine or been on an engine over those two tracks? A. Ever since they have been there, I guess.

Q. Ever since they have been there? A. Ever
20 since the Granton roundhouse was put up there.

Q. How long ago was that? A. I think that roundhouse was built there in 1911. I couldn't give a positive answer on that, but I was working up the road at the time.

Q. What kind of a day was this? A. A nice good clear day.

Q. How about the wind? A. Don't think there was any wind. Think it was a still day.

Q. Now the tracks between these two engine
30 tracks and the highway were seldom used for movements of cars or engines, were they? A. Oh, they were just used for shop purposes.

Q. And storage? A. And putting engines on to them; storing engines there until they got room in the shop to overhaul, or take them out of the shop; stand them there until they could get ready to use them. Put cars there what have supplies on them and one thing or another for the shop.

*Samuel Craig, for Plaintiff—Redirect**Redirect Examination by Mr. Simpson:*

Q. Will you point on the map where your engine passed the Kathan engine? A. That I cannot say.

Q. You don't know that? A. No, I don't know that.

Q. How long did you pass the Kathan engine before you stopped your engine? A. I don't know. 10

Q. A hundred feet or ten miles? A. Don't know nothing about that other engine until I see it coming, that is all I noticed of it.

Q. Don't know when you passed it? A. No.

Q. Did it pass on the next track to you? A. It was on the next track to us.

The Foreman of the Jury: If your Honor please, may I ask the witness a question?

The Court: Yes.

20

By the Foreman:

Q. You say when you were on the engine—were you in the cab on the left side, or were you back on the tender? A. In the cab on the left side.

Q. On the left side? All right. A. The fireman's side, the left side of the cab.

By Mr. Carey:

Q. And the left side of the engine would be toward the yard? A. Be toward the yard, backing up, yes, on the east side of the track. 30

By Mr. Simpson:

Q. Was there a curve there on the engineer's side? Did you say there was a curve there on the engineer's side? A. Not at that point.

Q. What point? A. Why, along there.

Q. Along where? A. From the shop up to the cross-over there, straight piece of track. 40

Robert McCartney, for Plaintiff—Direct

By Mr. Carey:

Q. Did you see the body after Mr. Hanson was struck? A. Yes, sir.

Q. Can you point on the map to about the location where the body was found? A. Yes.

Q. Do that, please? A. Right about in there (indicating).

10 Mr. Simpson: Mark it with lead pencil.

That is where that yellow X mark is located on the map? A. Red mark, yes.

Q. That was on number two track? A. Yes.

By Mr. Simpson:

Q. Mark where your engine stopped, if it is not marked there? A. Where my engine stopped?

Q. Yes. A. My engine stopped up there.

20 Q. Make a pencil mark there; make C there, will you?

(Witness complies.)

Q. All right.

ROBERT MCCARTNEY, SWORN.

30 *Direct Examination by Mr. Simpson:*

Q. Where do you live, Mr. McCartney? A. 798 Church Lane, North Bergen.

Q. On the 4th of August, 1913, where were you employed? A. On the New York Central.

Q. What was your work? What did you do? A. I was engaged as a fireman, locomotive fireman.

Q. Did you know this pony engine on which Hanson worked at that time? A. Yes, sir.

40 Q. Did this pony engine have two boxes on the side of it? A. Yes, sir.

Robert McCartney, for Plaintiff—Direct

Q. Had you seen any keys to those tool boxes—
what kind of keys they were? A. Well, it is so
long ago I couldn't—

The Court: Had you seen them?

Q. Were they brass keys, iron, gold or alumi-
num? A. Brass keys.

Q. What were in those tool boxes? 10

Mr. Carey: I object, unless the witness
says he knows of his personal investigation,
what was in the tool boxes.

Mr. Simpson: I submit that is not a proper
objection to be made. I ask if he knows, and
if he doesn't know it can be brought out on
cross examination. That is not a good objec-
tion. An objection is that the question is
irrelevant or it is incompetent. What the
witness does or does not know certainly is not 20
the ground of objection.

The Court: It has been asked if he knew
what was in the tool boxes. He is asked if
they were there.

Mr. Simpson: I do not have to ask him if
he knows.

(Question repeated.)

A. What was in there in the time I was on the job?

Q. When were you on the job, how long before 30
he was killed? A. About a year, I guess.

Q. A year on the pony engine? A. Yes, sir.

By the Court:

Q. Let me get it straight. Do you mean that
you had been working a year on it or that you
had ceased working on the pony engine as fire-
man a year before August 3rd, 1913,—which do
you mean? A. The year before August 3rd.

Q. You mean you ceased as fireman on the pony 40
engine a year before August 3rd, 1913? A. Yes.

Robert McCartney, for Plaintiff—Direct

By Mr. Simpson:

Q. But you had seen the engine in that year, hadn't you, around the yard? A. Yes, sir.

Q. There wasn't any structural change in the year that you could observe, was there, for instance, the engine was not overhauled?

(Objected to as leading.)

10

Q. Was there any structural change? Were the tool boxes changed or any part of the structure of the engine changed? A. I wasn't around on the engine from the time I gave the job up.

Q. You saw the engine? A. I saw the engine from a distance, yes.

Q. As far as you could see was there any change, any structural change in it?

20 Mr. Carey: I object. The witness has evidently not qualified to testify here whether there was any structural change.

A. Not that I could see.

Mr. Simpson: That is arguable to the jury; certainly it is not an improper question.

The Court: He says none that I could see.

30 Q. You had keys to these tool boxes at no time yourself? A. I didn't have it. They were at the roundhouse.

Q. You got them to use them? A. I got them to use them.

Q. Whenever you wanted to use them? A. Yes, sir.

Q. Was there a cab to the engine that was opened with a key too? A. Why, yes.

Q. Now I show you these keys: Was there any key that you used for that pony engine that resembled that key?

40 (Objected to as immaterial. Objection overruled and exception noted to defendant). (Question repeated.)

Robert McCartney, for Plaintiff—Direct

A. No, I wouldn't say that was the key.

Q. I didn't ask you that. You are still working for the New York Central? A. Yes.

Q. I didn't ask you that. I asked you if that resembles the key that you used? A. Something like it.

Mr. Carey: I object to it. I object to the constant repetition of counsel to the witness 10 when he does not get an answer which is satisfactory to him, "You are working for the New York Central." These witnesses have all shown themselves to be conscientious and painstaking witnesses, to tell what they know, and it is unfair to the witness and leaves an unfair impression."

Mr. Simpson: I withdraw that question and ask him—

Mr. Carey: Reiterated and iterated in this 20 case.

Mr. Simpson: I will withdraw it, and I will not ask him again who they work for.

Q. Does that key resemble the key which you used when you were working in the cab on the engine? A. I wouldn't say it did or I wouldn't say it didn't.

Q. Does it resemble? Does it look like it? A. It is a key something like it. I wouldn't say that 30 is the key.

Q. How was the key made that you used; was it a flat key? A. It was a key on that style, something of that style.

Q. What did you use it for? A. To gain admittance from the engine cab into the front part, the parlor.

Q. Had a parlor on this pony engine? A. Yes, sir.

Robert McCartney, for Plaintiff—Direct

Q. That parlor was used by who? A. By the officials.

Q. And the key to the tool box that you got to use, were they keys at all like these that you used in structure— I don't mean were they identical with these, I don't mean were they filed like this, but I mean generally were they resembling
10 these keys? A. Something on that nature.

Q. Something on that order? And the keys that did resemble, what did they open on the pony engine? A. Why, the tool boxes on the tank.

Q. How many were there? A. Two.

Q. One on each side of the tank? A. One on each side.

Q. What tools were kept in the boxes?

Mr. Carey: I object to it as immaterial.

20 Q. Had several tools.

The Court: Of course that must go back to the time when this witness says he worked upon the engine. Of course he said he had no knowledge and that he had not been on the engine I understand his testimony for a year prior to August 3, 1913.

Mr. Carey: What there was there then or what the character of the key is by which admission to the tool boxes was gained, is utterly irrelevant and immaterial in this case.
30

The Court (after discussion.): I will allow the question. You may have your exception. (Question repeated.)

A. Well, I couldn't tell you what was kept at the time.

Q. What time? A. The accident.

Q. Did I ask you anything about the time of the accident?

40 The Court: Do not argue with the witness.

Robert McCartney, for Plaintiff—Direct

I will strike it out myself. Your knowledge only goes, as I understand it, Mr. Witness, up to a year before the time of this accident.

The Witness: Yes.

The Court: Because you say you stopped working as a fireman upon the engine at that time?

The Witness: Yes, sir. 10

The Court: Now then, this question, therefore goes to that time when you were working upon the engine.

(Question repeated.)

The Court: If you know, of course. If you don't know—

A. Why, hammers and chisels and monkey wrenches.

Q. What were they used for? A. Making repairs on the engines, I suppose. 20

Q. Would you help in making those repairs if they were made when you worked on the engine?

A. No.

Q. Who made the repairs? A. They made the repairs at the roundhouse, at the shop.

Q. If they didn't make them at the roundhouse. If she broke down between Weehawken and Scarborough? A. But she never was broke down.

Q. If she was, what would you do, leave here there? 30

Mr. Carey: I object.

Mr. Simpson: It is not important. I will withdraw that question.

Q. But you say they were used to make repairs on the engine, do you? A. Sir?

Q. These tools were—

The Court: He has testified they were to be used. As I understand, he never had a 40

Robert McCartney, for Plaintiff—Cross

breakdown on the road so he cannot say.

Mr. Simpson: Cross examine.

Cross examination by Mr. Carey:

Q. You would not say, would you, that any of those keys on this ring which I show you were the keys to any lock used on the pony engine? A. I wouldn't swear to it, no sir.

Q. The most you can say is that the keys which were used for those locks, some of them resembled some of these keys? A. Some of them resembled, yes.

Q. By whom were these keys used?

The Court: These particular keys.

Q. The keys to the locks on the pony engine, they were used by the officials of the railroad, were they not? A. Well, used by everybody.

Q. You don't mean everybody? A. Everybody that had anything to do with the engine.

Q. They were used by the officials, were they not? A. Yes, sir.

Q. And they were used by the engineer? A. By the engineer and fireman.

Q. And firemen used them to get into the tool box? A. Yes, sir.

Q. When? A. Whenever he wanted to get in there before going out or on coming in.

Q. Well, the tools wouldn't be taken out except there was some use for them around the engine, would there? A. No, sir, not, hardly.

Q. You say that you were never on the engine when there was any breakdown on it? A. No, sir.

Q. So, so far as you know, these keys were never used by either the engineer or the fireman when you were on the engine to get into those tool boxes, were they? A. Why, yes. They take their —a wrench out and want to fill a lubricator or do any oiling—

Robert McCartney, for Plaintiff—Cross

Q. That is the engineer? A. Yes.

Q. You didn't do that? A. Sometimes.

Q. Eh? A. Sometimes.

Q. You did it yourself sometimes? A. Yes sir.

Q. You know where the pony engine was kept after it was laid up for repairs? A. You mean prior to the accident?

Q. Yes. A. Why, she was kept at the Granton roundhouse. 10

Q. You never made any examination of the engine at all? A. No sir, I never was on her.

Q. Never noticed it any more than you would notice a freight car in the yard there, did you? A. Yes sir.

Q. Eh? A. Never noticed it, no sir.

Q. Never paid any attention to it at all? A. No, sir. 20

Q. So it might have been changed in more ways that one without your knowing anything about it?

A. Yes. might have been.

Q. And this engine was all housed over by this car which was in it, wasn't it? A. Yes sir.

Q. So that on the outside it looked like a car? A. Something on that style.

Q. Yes. Any changes in structure on the inside of course, would be entirely beyond the observation of anybody except they went into the car? 30

A. Yes sir.

By the Court:

Q. Were you ever upon the pony engine after the time that you stopped being the fireman, and which you say, as I remember, was a year before the accident? From the time you stopped as a fireman upon the pony engine, were you ever upon it again up to the time of the accident? A. No sir.

*Robert McCartney, for Plaintiff—Redirect**Re Direct Examination by Mr. Simpson:*

Q. These tool boxes were not in the parlor of the car, were they? A. No sir, they were on the tank, on the front of the tank.

Q. They were not housed over, were they? A. No sir, they were not.

Q. They were in perfectly plain sight, weren't they? A. Well, they were up on the deck of the engine.

Q. Well, any man that walked around the engine could see the tool boxes, couldn't he? A. Yes, if you looked pretty close for them, he could.

Q. Did not have to go into the parlor to see the tool boxes? A. No sir.

Q. They were on the exterior of the engine, then, weren't they? A. Yes.

Q. How large were they, about? About thirty-six inches in length.

Q. How deep? A. A foot deep and about a foot wide.

Recross Examination by Mr. Carey:

Q. Well, you say a man walking around the engine could see them if he looked carefully? A. Yes sir.

Q. But if he walked around casually he would not see them at all, would he? A. No, sir.

30

By Mr. Simpson:

Q. If he walked around with his eyes shut he would not see them,—I beg your pardon, I thought he was through.

By the Court:

Q. I want to ask one more question. I understand you to say in order to get into the cab of the engine there was a door that had to be unlocked?

40 A. Yes, sir.

John F. Kathan, for Plaintiff—Direct

Q. So that you could not get upon the engine then or upon the place where you say these boxes are or were without going through this doorway upon the engine? A. No; you could get them through the gangway, go through the gangway to get the boxes.

Q. The gangway is behind the cab? A. Between the tank and the engine. 10

By Mr. Carey:

Q. In walking around the engine you would have to look carefully before you could see these boxes or their condition, wouldn't you? A. You could then, unless they made any changes; I don't know.

Q. What say? A. I say they would then unless they made any changes or made the boxes any larger than what they were. 20

JOHN F. KATHAN, recalled.

Direct Examination by Mr. Simpson:

Q. How long did you work on this pony engine? A. Upon the pony, five years this time.

Q. I mean the time of the accident to the man, August, 1913? 30

Mr. Carey: I don't think he understands his question.

Q. You remember when Hanson was killed? Was that August, 1913? A. Yes.

Q. You testified that you took everything off the pony engine before he was killed? A. I did, yes sir.

Q. How long were you on the pony engine at the time he was killed? A. I should judge about a year and a half. 40

John F. Kathan, for Plaintiff—Direct

Q. Did you have this man as fireman? A. I had him on there sometimes.

Q. Well, did you have him on—were you the engineer when he quit being fireman on the pony engine? A. No sir, I wasn't, but Mr. Umbleby.

Q. When did you get on the pony engine? A. I went on—I couldn't state—this was along about—
10 I think 1912, the latter part of 1911.

Q. And stayed continually until when? A. I stayed right up until now.

Q. Now. Then in that period of time has there been any change in the tool boxes at all? A. The tool boxes?

Q. Yes. A. Them tool boxes on the tank is not for tools, but they are for oil.

Q. I didn't ask you that. Has there been any change in the tool boxes? A. Not as I know of.

20 Q. All the time you have been on the engine? A. No sir.

Q. You said yesterday something about sending to this dead man for the keys of the pony engine.

Mr. Carey: I object. He didn't say anything about sending to the dead man.

30 Q. What did you say yesterday about having sent for the keys to the pony engine? A. I asked Mr. McCartney, the man just being on the stand ahead of me, if he get me the key for the house.

Q. Which is the house? A. Where the people get in the house, the coach.

Q. You mean for the officials? A. Yes.

Q. Well, when did you send for them? A. I think that was just after she came back from Albany along in—June, when she came back. She was away pretty near April or May, I couldn't state which,—and after she came back to the shop.

40 Q. When had you had a key like that yourself? A. I lost my key.

John F. Kathan, for Plaintiff—Direct

Q. When? A. In Albany.

Q. When? A. When she went to the shop. When I sent them with her to go to the shop.

Q. Sent who with her? A. Sent the keys with the engine to the shop.

Q. To the shop? A. Yes.

Q. That is the time you lost your keys? A. They couldn't find them in West Albany, but I 10 got another set.

By the Court:

Q. Who did I understand you to say you asked for the keys or to get the keys? A. Mr. McCartney.

Q. That is the witness who just was on the stand? A. I asked him—he said he thought he could get me the key for the house. I didn't have no key. 20

By Mr. Simpson:

Q. From who? A. From Mrs. Hanson.

Q. How many keys were there? You said keys? A. One.

Q. You called it keys? A. I said key then.

Q. Well, you said keys? A. Well, key.

Q. Did you ask for the keys or key? A. I asked for the key of the front house.

Q. What kind of key is it? A. It is a little— 30 notched like the ordinary lock key.

Q. Like a key of a drawer? A. No; a key for a drawer, a long key, about five inches long.

Q. You are still the pony engineer? A. Yes.

Q. Have you got that key with you? A. No sir; the keys is hung up in the office.

Q. When did you hang them up? A. In Weehawken, in the office.

Q. When? A. Every time I come in with her. 40

John F. Kathan, for Plaintiff—Corss

Cross Examination by Mr. Carey:

Q. You speak of the keys to the house; what do you mean the house? A. That is the front part of the house where the officials ride.

Q. You mean a part of this car in which the officials ride? A. Yes.

Q. That is the entrance door, is it? A. Yes.

10 Q. To that car? A. Yes; there is two doors, one on each side as you go—you go from the front end of your engine up the sides.

Q. How does the engineer get to this position on the engine? A. The engineer, he goes up on the back through the side, just like this opening here and then he goes in the house here.

Q. Have a key to that door? A. A key? There is no reason to use a key there; it is all open here.

Q. Oh, I see. A. No door there. There is a door
20 in back of me, but we don't use it.

Redirect Examination by Mr. Simpson:

Q. How many keys are there there for that pony engine altogether? A. How many keys?

Q. Yes. A. There is two, three, four.

Q. What are they for? A. I have got a key for the front door, a key for my tool box and key for each tank box.

Q. What is the tank box? A. Tank box where
30 we—that is the box you hold that—

Q. You hold what? A. Our oil cans.

Q. What is the tool box? A. Tool box is a box about twenty-four inches long, six inches deep, twelve inches wide.

Q. Where is that? A. That we carry around with us every different job we go on.

Q. Is that opened with a key? A. We have a lock on it.

Q. What kind of a key opens it? A. We have
40 a lock? A key.

John F. Kathan, for Plaintiff—Redirect

Q. Brass or steel? A. No sir.

Q. Or gold, or what kind? A. We had an iron key.

Q. Iron key opened the pony engine tool box?

A. That box belongs—we carry it whatever job we go on.

Q. You take it from one job to another? A. Yes; each man has his own kit of tools. 10

Q. You take your whole tool box? A. We carry the tool box—we don't carry it, but there is a man carries it for us.

Q. Who carries it? A. A man the company hires.

Q. What is the name? A. He is in Granton.

Q. What is his official job? A. He is supposed to put tools on the engine and take tools off.

Q. What is his official job? A. Tool boy.

Q. He puts tools on the engine? A. He puts 20 them on all engines.

Q. If a tool boy hadn't put enough tools on the engine, how would you go about preparing for the run; would you send the fireman for tools? A. I would not. I would send for the roundhouse foreman.

Q. If you were in a hurry? A. I might speak to the boy myself.

Q. And get the tools yourself? A. I would tell him and he would put them on. 30

Q. You would not send your fireman? A. I never have.

Q. The fireman is there to relieve you in this manual labor? A. No.

Q. Things that he cannot do you can do as engineer? A. He ain't there to do none of my work whatsoever as a fireman.

Q. Doesn't he run messages for you? A. No, sir.

Q. Doesn't he oil the engine? A. No, sir, he 40 ain't supposed to oil it.

John F. Kathan, for Plaintiff—Redirect

Mr. Carey: I object to this inquiry; nothing about tools in the question.

Q. What did you say about the tools; that each man had his own kit of tools? A. Each engineer has his own kit of tools.

10 Q. What does that consist of? A. Consists of a hammer, monkey wrench and cold chiesl.

Q. Is that in a box? A. That is in a box with a lock on it. Some men might have a little more.

Q. You do, as I understand you, all the oiling of your engine; the fireman never got down and oiled one side while you oiled the other? A. No sir.

Q. Never took off the caps or anything? A. No sir; I do that myself.

20 Mr. Carey: What materiality has this? It is wasting time.

The Court: I don't know, sir.

Q. What do you get as engineer; how much money are you paid?

Mr. Carey: Objected to as immaterial and irrelevant at this time because there is no evidence in the case that he was an engineer or was about to become an engineer.

30 The Court: Of course it might be out of order, but then it would seem to save him from taking this witness off the stand and proving it by others. Of course it is out of time, but it will be valueless if you do not show that this intestate was in a position where he was entitled to become or might have become an engineer. If you cannot show that this testimony is valueless. I am only taking it to save time now.

40 A. Four dollars and a quarter a hundred miles, my pay.

John F. Kathan, for Plaintiff—Recross

Q. How much do you earn a month? A. Make about a hundred and thirty-five or a hundred and forty dollars a month.

Q. What is the highest? A. That is the highest I made.

Q. A hundred and thirty-five or a hundred and forty? A. Yes.

Q. How long have you been an engineer? A. 10 With the New York Central since 1889.

Recross Examination by Mr. Carey:

Q. Does the length of service of an engineer have anything to do with the steadiness of his work? A. It has. Seniority prevails in all cases.

Q. And length of service also has a very important bearing upon the amount that an engineer earns? A. Yes.

Q. And you have attained this earning capacity through an experience of a good many years, have you not? A. Yes sir. 20

Q. Now when an engineer is first qualified as an engineer, what is his position with relation to work? A. Remain on the extra list as an engineer.

Q. And he may be on the extra list a long time or a short time? A. Yes sir.

Q. Depending somewhat on the ability which he shows in connection with his work as an engineer? A. According to his age. 30

Q. According to his age? A. Yes.

Q. You mean the age as an engineer? A. His age as an engineer.

Q. And whether or not he will continue to hold his position as an engineer will depend upon the ability he shows in the practical operation, would it not? A. Yes sir.

Q. Frequently a man is demoted from an engineer back to a fireman because of the failure to 40

Leo A. Souders, for Plaintiff—Direct

show his capacity as an engineer? A. No—business falls off, then they put them back.

Q. Well, suppose a man fails to show capacity as an engineer? A. Then he is put back as a fireman.

Q. The earning capacity of the engineer depends on his ability as an engineer, and upon his
10 age as an engineer, number of years' experience as an engineer, and on the amount of business, does it? A. Yes sir.

Q. Anything else besides that? A. Well, all jobs pays different. They all don't pay alike. According to the job the man has got.

Q. And other things being equal, the man of longest service has the first claim on the desirable jobs, has he? A. The man that is longest in the
20 service has the preference of any job.

LEO A. SOUDERS, SWORN.

Direct Examination by Mr. Simpson:

Q. What is your business? A. Roundhouse foreman.

Q. Where? A. Granton.

Q. Were you such foreman on the 3rd of August,
30 1913? A. Yes sir.

Q. How long had you been such foreman? A. I was acting that day only as general foreman.

Q. On the third of August, 1913? A. Yes, sir.

Q. What were your duties on that day? What did you do as roundhouse foreman? A. Look after the repair of locomotives.

Q. What else? A. Well, anything that might come in the line of—

Q. How many locomotives were there around
40 the roundhouse that day? A. I couldn't tell you.

Leo A. Sonders, for Plaintiff—Direct

Q. Do you know where the pony engine was that day? A. No sir.

Q. Wasn't she on the track outside the roundhouse? A. I suppose she was on the track. I don't know where.

Q. Any record that will show where she was? A. No sir, not to my knowledge.

Q. Were there any lockers in the roundhouse? 10
A. Yes sir.

Q. How many? A. I couldn't say.

Q. Fifty? A. Possibly.

Q. Who used these lockers? A. Well, they are there for the benefit of the firemen, engineers, machinists and all employees.

Q. What was kept in the lockers? A. Well, clothing that they worked in, working apparel.

Q. Working apparel; anything else? A. I don't know. 20

Q. You haven't got a locker there? A. No, sir.

Q. Never had one? A. Yes, I had one.

Q. When did you have one? A. When I was a machinist.

Q. What did you keep in it?

(Question objected to. Question withdrawn.)

Q. How many firemen had lockers there, do you know? A. No sir. 30

Q. How many firemen used that roundhouse on the 3rd of August? A. I couldn't tell you.

Q. Were there fifty? A. I couldn't say.

Q. Twenty? A. I couldn't say.

Q. Two? A. Oh, well, we know that there would be that many.

Q. How many do you know that there was? A. I don't know how many.

Q. Were there ten there? A. Possibly. 40

Leo A. Sonders, for Plaintiff—Direct

Q. Possibly ten. Where were these lockers situated? A. On the wall of the roundhouse.

Q. Did you get or have anything to do with the engine that went out on the pick-up run, 3.45 in the morning, on Monday, the 4th of August?

A. I don't remember.

Q. You don't remember? Is there any record of it at all? A. I suppose there is records there when the engine was passed.

Q. Who would have that record? A. Central.

Q. Who? A. The Company would have it—the officials.

Q. You didn't see that engine? You don't know what engine it was, do you? A. No sir.

By the Court:

Q. How long were you on duty that day, do you know, or were you on during the day or during the night? A. During the day, twelve hours.

Q. When did your service end that day, on the 3rd? A. Six o'clock.

Q. At night? A. Yes sir.

By Mr. Simpson:

Q. Did you see—where were you, in the roundhouse? A. Yes sir.

Q. Were there any engines pulled in and pulled out that day? A. Yes sir.

Q. How many of them? A. I don't know.

Q. You saw men around the roundhouse that day? A. Yes sir, employees.

Q. Did you see on the outside around the roundhouse, the dead man, Hanson? A. Yes, sir—not around the roundhouse—no.

Q. Where did you see him? A. I saw him after he was killed.

Q. Where was that? A. He was lying down in the yard.

Le A. Sonders, for Plaintiff—Cross
Mrs. Rose Hanson, for Plaintiff—Direct

Q. How far from the roundhouse? A. I don't know.

Q. Although you saw where he was you don't know how far from the roundhouse? A. No.

Cross Examination by Mr. Carey:

Q. Did all of the firemen have lockers at the 10 roundhouse there? A. No, sir; not all of them.

Q. Some of them had lockers at other places? A. Yes; coal pockets and sand stations.

Q. Down at Weehawken? A. Weehawken.

MRS. ROSE HANSON, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mrs. Hanson? A. 798 20
Church Lane, New Durham.

Q. What was the name of your husband in his lifetime? A. Peter Hanson.

Q. How old was he when he was killed? A. Thirty-three years and three days.

Q. How old are you? A. I am now thirty-eight.

Q. How old is your child? A. Two years; she will be three in December.

Q. What is her name? A. Elizabeth.

Q. What did he earn in his lifetime? A. He 30
averaged eleven hundred a year.

Q. How did he use his money? Did he give you part or did he give you all of it and you give him back? A. He always gave me his salary.

Q. What did you do with it? A. I used it for us to live on.

Q. And run the house? A. Yes, run the house.

Q. And give him spending money? A. Yes, sir.

Q. How much spending money would you give 40

Mrs. Rose Hanson, for Plaintiff—Direct

him? A. Well, possibly five dollars every two weeks he would take up the road with him.

Q. His clothes were bought out of it? A. Yes.

Q. How much clothes would he buy a year, I mean everything? A. His hats and shoes and other clothes.

10 Q. How much money do you suppose he would spend a year? A. Well, possibly forty dollars.

Q. Do you know whether or not before he was killed he had passed his examination as engineer?

A: Yes, sir.

Mr. Carey: I object.

Mr. Simpson: Well, do you contest that, Mr. Carey? Do you deny he passed his examination as an engineer?

20 Mr. Carey: He had not passed his examination as engineer. He was not qualified as an engineer.

Mr. Simpson: All right.

Q. On the 3rd of August did your husband leave home? A. Yes, sir.

Q. And what time of the day did he leave home? A. Eleven o'clock.

Q. Did he have working clothes and other clothes? A. No, he was dressed in his——

30 Q. Did he own working clothes and other clothes? A. Yes.

Q. Did he take anything out of his working clothes before he went out? A. His working suit hung in the closet off the kitchen while I was washing dishes, and he came up and he said——

Mr. Carey: I object.

Q. Do not tell us, but did he take anything out of his working clothes? A. A bunch of keys.

Q. I show you a bunch of keys. Did he take this bunch out of his working clothes? A. Yes.

40 Q. After he went out when did you get this bunch

Mrs. Rose Hanson, for Plaintiff—Direct

of keys back again? Who gave it to you? A. The round—the machine shop foreman and Mr. Perry of the Y. M. C. A. brought the keys with other things, his hat and a few other things.

Q. From the New York Central? A. Yes.

Q. Did you get his watch? A. Yes.

Q. Was it stopped when you got it? A. It stopped at 11.52.

Q. I didn't ask you that. A. Yes, sir. 10

Q. Was the watch stopped when you got it? A. Yes.

Q. What time was it stopped at? A. 11.52.

Q. What time had he left the house? A. Eleven.

Q. Now before he went out did he say anything to you with reference to where he was going? A. Yes.

Q. Wait a minute, do not answer. Do you object to that? 20

The Court: She answers yes.

Q. What did he say?

Mr. Carey: I object to it as being hearsay and incompetent, and a self-serving statement.

(Discussion.)

The Court: I shall overrule the objection. You may have your exception, Mr. Carey. Of course, I may strike it out. It may not be relevant.

Mr. Simpson: That will appear when we get it. 30

Q. What did he say as he left the house? A. He was going up to the roundhouse.

Q. What did he say? Give us his language, not what you think he said. Give us his exact words. A. "I am going up to the roundhouse and take the tools off the engine to put on the pick-up and get my dirty overalls out of the locker."

Q. Take the tools off the engine; did he say what engine? 40

Mrs. Rose Hanson, for Plaintiff—Direct

Mr. Carey: I object to what engine.

The Court: I will give her one more opportunity. It is very important. You want to

tell in the exact language.

Q. Tell us everything he said.

10 The Court: Tell us exactly what he said and all he said without having your attention directed any further to the subject.

A. "I am going up to the roundhouse and take the tools off of number 25 to put on the pick-up and to get my dirty overalls off—out of the locker, to bring home."

Q. Who washed his overalls? A. I had—I wasn't very well at the time and the woman washed them.

20 Q. Where were they washed? A. She came for them on Sunday evening.

Q. Where were they taken from? A. From my home.

Q. How did they get to your home? A. He always brought them.

Q. Had he brought them from the run of Saturday? Did he bring his overalls Saturday night? A. No.

Q. Had not brought them? A. No.

30 Q. Where did you live then? A. No. 9 Cordes Place.

Q. What place? A. New Durham.

Q. How long had you been living there? A. Nearly four years.

Q. Was your husband an educated man? A. Very much.

Q. How much? What was his education? Was he graduated from any technical school? A. No, he had not graduated, but he was—he had nearly graduated. He had left before he was graduated.

40 Q. What school did he attend? A. I don't know.

Mrs. Rose Hanson, for Plaintiff—Direct

Q. Did he have any technical books at all at home? A. Yes, in Danish and in English.

Q. What? A. In Danish he had some.

Q. In German, some? Have some in German? A. No.

Q. And did he teach besides being a fireman? Did he instruct? A. Some of the men would come over to the house; would be possibly eight or nine of them together. 10

Q. How long had he been working for the New York Central Railroad? A. Seven years.

Q. Had he always been a fireman? A. Yes.

Q. He began as a fireman, did he? A. Yes, sir.

Q. And what did you say his earnings were? A. Averaged eleven hundred dollars a year.

Q. What time did he get in from his run on the Saturday before he was killed? A. Between six and seven. 20

Q. He came home, did he? A. Yes, sir.

Q. And went to bed? A. He came home and took a bath and had his dinner and went over to the barber shop and was shaved, and he got home about nine o'clock and he sat out on the porch a while and then went to bed.

Q. Did you always live in this same place while he was working for the Central Railroad? A. No, sir; we lived for five months on Main Street, New Durham. 30

Q. Do you know of your own knowledge anything about what he did with reference to being on duty for the railroad even when he was not at the yard and not on his run? Do you know what he did about being on duty while he was at home? A. Yes, sir.

Mr. Carey: I object.

The Court: How does she know?

Mr. Simpson: Simply what he did, that is what I asked.

Mr. Carey: I object. Unless it is confined to 40

Mrs. Rose Hanson, for Plaintiff—Direct

the day in question when he was injured, his custom is immaterial.

Mr. Simpson: My question is not in any way confined to the day he was injured, but to show the custom, how this man worked for the railroad in carrying on their work.

10 The Court: I will overrule the objection. You may have your objection.

Mr. Carey: Objection.

Q. What did he do for a period of a year preceding his death with reference to his being on duty while he was at home? What did he do?

Mr. Carey: I object to the question in that form. The same objection, and ask that an objection be noted.

The Court: It may be noted.

20 Q. Not what he said to you, but what he did, you are asked? A. When he would come in off the run he would usually take his eight hours' rest, and if any time we left the house he would always notify the roundhouse where they would find him, so if there was a short call, why, he was ready.

Q. After taking eight hours' rest? A. Yes, after taking out eight hours' rest.

30 Q. Would he ever leave the house without notifying the roundhouse where he could be found? A. Never.

Q. Was there a child born after his death? A. Yes.

Q. That is the child in court? A. Yes, sir.

Q. Were there any other children born of the marriage? A. Yes, sir.

Q. Is the other child alive? A. No.

Q. Was the other child alive at the time of his death? A. No.

*Mrs. Rose Hanson, for Plaintiff—Cross**Cross Examination by Mr. Carey:*

Q. Then you have now but the one child, Mrs. Hanson? A. Yes.

Q. You say that his earnings averaged eleven hundred dollars a year? A. Yes.

Q. Where do you get that average, Mrs. Hanson? A. Well, Peter had books that he always—he kept from one year to the other, and I saw it in his 10 books. I have the books at home.

Q. You have the books? Have you the books here? A. No.

Q. Did not bring them with you? A. I brought them yesterday, and I came away in such haste today I forgot them.

By Mr. Simpson:

Q. You can have them if you want them. What books are they? A. Nobody could get them. 20

Q. You can go up and get them for Mr. Carey if he wants them? A. All right.

By Mr. Carey:

Q. How much did he earn for the year 1912? A. Well, now, I don't know. I couldn't tell you that.

Q. Was it more or less than eleven hundred dollars? A. Well, it was between—it was always over ten hundred and nearly eleven. I know that I can safely say. 30

Q. Nearly eleven hundred? A. Yes, sir.

Q. Can you say that he ever earned in any one year eleven hundred dollars? A. Any more than eleven hundred?

Q. No.; did he earn eleven hundred in any one year? A. Yes, sir.

Q. What year? A. I can't remember that; I don't know.

Q. Did he ever earn any more than eleven hundred? A. No, I don't think so. 40

Mrs. Rose Hanson, for Plaintiff—Cross

Q. Most of the years he earned less than the eleven hundred? A. Well, not less than ten hundred; it was always near eleven, I knew that.

Q. Did you know how much your husband had earned between the first of the year 1913 and the 3rd day of August, 1913? A. I remember the last pay day was on Tuesday.

10 Q. Yes. Now just answer the question? A. He gave me sixty-two dollars in two weeks.

Q. That is not the question.

(Question repeated by stenographer.)

A. No.

Q. And you do not recall now what year it was that he earned eleven hundred dollars? A. Well, it was more than one year, I know that, but I don't remember the exact year.

20 Q. How many years did you say he was working for the company? A. One year on the tug boat as fireman and nearly seven in the service of the railroad, on the railroad; in November it would have been seven years.

Q. You say that he turned over all his wages to you? A. Yes.

Q. He was paid semi-monthly, wasn't he? A. Yes, sir.

30 Q. And each time he turned over his wages to you, did he? A. Yes.

Q. Who kept the books of which you spoke? A. He kept his time book, that was his time, so if they were in his debt he would know where he was at.

Q. Did he enter in this book the amounts that he received? A. Yes; he was a very methodical man.

Q. Did he do that continuously during these years? A. Always.

Q. What is that? A. He always did.

Q. So that during the whole seven years there

Mrs. Rose Hanson, for Plaintiff—Cross

was a record of the amount? A. No—just after we were married, just the four years.

Q. How long had you been married? A. Four years.

Q. How long had you been married, four years?

A. It would have been four years the 23rd of August.

Q. During the four years he kept a record of his earnings? A. When he brought his—when we were married he destroyed everything, that is, brought them to the house and destroyed them, and everything that could be—

The Court: The question is, after you were married and up to the time of his death, did he keep such a record? A. Yes, he had four books.

Q. From the time of your marriage down to the time of his death he kept a book in which he kept his earnings? A. Each year he had a new book.

Q. Did he keep in that book a complete record of his earnings? A. Yes.

Q. The amount that he earned? A. Yes, sir.

Q. Not only his time, but also his amount? A. Yes, exactly.

Q. And those are the books of which you spoke a little while ago? A. Yes, sir.

Q. Now at the time he left, you say that he was dressed in his good clothes? A. Yes, sir.

Q. How did you fix the time of his leaving the house? A. Well, the only way I could fix it was the way I had done my work. That is the only way I figure from the time I—we got up at nine o'clock, and from the time I done my work usually I could tell just the time, and of course I don't say it was exactly eleven, but it was around eleven—it was even after eleven, if any—a little after.

Q. What is it? A. It would be after eleven, not before.

Mrs. Rose Hanson, for Plaintiff—Cross

Q. What were you doing at the time? A. I was reading. I had my morning's work done and was reading at the window. That is where he left me. I heard the news.

Q. What were you reading? A. The Sunday paper.

10 Q. How long had you been reading? A. Possibly three-quarters of an hour.

Q. Now as to his expenditures, you gave him back from the money that he gave you, money to meet his ordinary expenditures, did you? A. Yes.

Q. Did you have any regular amount that you gave him? A. No.

Q. How much did you give him on the average per month? A. Well, possibly ten dollars a month.

Q. Is that all? A. That is all.

20 Q. Ten dollars a month covered that? A. You know, Mr. Carey, they always take out before they pay the men their salary their expenses up to the Y. M. C. A. on the road. Of course, we did not consider that, anything he bought up the road. The Y. M. C. A. fees was always taken out before his salary was given to me, so all the expenses he had of eating up the road at any time, he never received the money for that, so you see that is what he would give me, on the average, I mean. I would never give him anything for that. This five dollars possibly every two weeks was money that he would use for himself. I don't know what he would use it for, really I never asked him.

30 Q. That did not cover then the expenses which he had at the Y. M. C. A.? A. Well, it wasn't very much, because he always took a pail, and he had a large pail, a bigger pail than the men usually use, and I put two meals in it, and he seldom bought anything up the road. He would go in the Y. M. C. A. with his pail and possibly buy a cup of coffee
40 or tea, and he would eat from his pail from home.

Mrs. Rose Hanson, for Plaintiff—Cross

Q. That would be deducted from his pay before you received the money? A. No, that pail came from home.

Q. What was it that was deducted from the pay before you received the money? A. Well, at any time, you know, very often they are held up the road. Sometimes he would be held up longer and he would have to get a meal up there. He bought a ticket—I forget just how much the tickets were—
10 he would buy a ticket maybe every three months up the road, the Y. M. C. A.

Q. Now, Mrs. Hanson, I haven't got it quite clearly in my mind yet just what expenses this ten dollars a month which you gave him covered? A. Well, now, I don't know myself what he used it for, Mr. Carey. I never questioned him, because he never questioned me what I did with the money he gave me. I never asked him what he did with the
20 ten dollars. I am saying possibly it was ten dollars; I don't know if it was or not.

Q. You cannot tell what that was? A. No; it would depend on the expense at home. He wouldn't always take that.

Q. Who paid the rent? A. I did.

Q. And the furnace? A. I.

Q. And the clothing for——? A. I used to always see to that. A railroad man don't have much
30 time for such things.

Q. You paid for his clothing, did you? A. Yes; I would usually go with him, and the shirts and collars and such things I would buy.

Q. So you attended to all the payment of all the living expenses? A. Everything.

Q. And can you tell us about how much you spent a year for his clothing and the care of his clothing, washing and so forth? A. Well, possibly forty or
40 fifty dollars.

Mrs. Rose Hanson, for Plaintiff—Cross

Q. Would that cover his——? A. He was a very careful man, he did not need——

Q. Would that cover the entire expenditures for clothing? A. Yes; he only bought three suits in four years we were married.

Q. Now how far was your home from the Y. M. C. A. building? A. Possibly three blocks.

10 Q. Three blocks? A. Yes, sir.

Q. What street was it on? A. On Peerless Place. They changed it; it used to be Fifth. At the time he was killed it was Fifth Street.

Q. They changed it to what? A. Peerless Place.

Q. What was the number? A. Number 9, I believe.

Q. Did Fifth Street run parallel with the Bergen Turnpike? A. Yes, sir.

20 Q. And what street did Mr. Hanson go out to the Bergen Turnpike when he was going to his work? A. He would usually go down Fifth to North Street, that is a block, and go down North Street to the Bergen Pike, and go down to the Y. M. C. A.

Q. Was there a street called Fisher Avenue? A. Yes.

Q. How far was that from Fifth Street? A. Well, Fifth Street runs into Fisher Avenue.

Q. Fifth Street runs into Fisher Avenue? A. Yes, sir.

30 Q. What street was it he went out to, to North Street? A. To North Street.

Q. How far from Fisher Avenue was North Street, how many blocks? A. One block.

Q. And going north, first Fisher Avenue and then North Street? A. North Street, yes.

Q. How long would it take to walk from his home, number 9 Fifth Street, to the Y. M. C. A. building?

Mr. Simpson: I object.

40 The Court: Well, do you know, Madam, how long it would take him?

Mrs. Rose Hanson, for Plaintiff—Cross

The Witness: Well, I don't know, but I could estimate, that is all.

Q. About how long do you think?

Mr. Simpson: I object.

The Court: Well, I suppose that objection is good, Mr. Carey. I might know how long it would take for me to walk to a certain point, 10 but how long it would take you, unless I had something to base it on——

The Witness: Peter was not a very fast walker.

Q. Yes. Let us see, he went from Fifth Street to North Street? A. Yes, sir.

Q. How far was it from Fifth Street to North Street? A. A block.

Q. Full block? A. Yes; just lacking one house 20 off the corner.

Q. What was the corner nearest to your house? A. William Street.

Q. William Street? A. Yes, sir.

Q. Your house was within one block of William Street? A. Yes, sir.

Q. And then going——? A. Within one block of William Street? No, it was not.

Q. Within one house of William Street? A. Yes, 30 sir.

Q. Which way did William Street run? A. Parallel with North.

Q. Parallel with North? Then he went to North Street? A. Yes, sir.

Q. And then passed along North Street? A. Yes.

Q. To the Turnpike? A. Yes.

Q. And that would bring him out on the Turnpike just one block north of Fisher Avenue, would it not? A. Yes.

Mrs. Rose Hanson, for Plaintiff—Cross

Q. Now how many blocks did he walk on North Street? A. Just a block.

Q. One block? So it was two blocks from your house—? A. Yes, it is two blocks.

Q. —to Bergen Turnpike? A. Yes.

Q. Now do you know how long he had been working on the pick-up? A. He had been out on the pony on this 1st, 2nd and 3rd of July, and he went out on the pick-up on the 7th—Sunday was on the 6th.

Q. The pick-up did not work on Sunday, did it? A. No, sir.

Q. How do you get the dates, the 1st, 2nd and 3rd of July? A. Well, out of this book, his time book.

Q. That is how you know it? A. Yes.

Q. When he went out on the pony engine what time of the day would he leave? Have any regular time? A. Well, that was called at all hours, you know.

Q. No regular time? A. No.

Q. And when he went out on the pick-up what time did he leave the house? A. He used to leave the house possibly quarter after two.

Q. What is that? A. Two o'clock in the morning—quarter after two—every other day.

Q. Every other day? A. Yes.

Q. So he worked one day and laid off a day? A. One day on this end and one day on the—up in Kingston, and he would come down.

Q. He went up one day? A. Yes.

Q. And came back the next day? A. Yes.

Q. Now when he spoke to you about getting tools off the engine did he mention the number of the engine? A. Number 25, I would say.

Q. Did he say number 25? A. No; he said that pony.

Q. He said from the pony? A. Yes.

Leo A. Sonders (Recalled), for Plaintiff—Direct

Q. On your direct examination you said number 25? A. Well——

Q. Which was it? A. Number 25 and the pony are the same engine, Mr. Carey.

The Court: The question is which did he say that morning?

The Witness: Number 25, he said.

10

Q. A moment ago you said he said he was going to take the tools off the pony engine. A. Mr. Carey, you understand what I meant, the pony—I was talking to you direct and you would understand, and I was speaking to you,—you know that I meant 25.

Mr. Simpson: You talk to these gentlemen.

Q. I think the question was what your husband said to you. A. He said, "I am going up on the number 25." 20

Q. "Going up on the number 25"? A. Yes, sir, to get the tools out.

Q. When he got out to Bergen Avenue of course he had a public road all the way from Bergen Avenue up to the roundhouse?

(Objected to as not proper cross examination. Objection sustained.)

30

LEO A. SONDERS, recalled.

Direct Examination by Mr. Simpson:

Q. Do you know anything about a system whereby the men who are not actually on work would report at the roundhouse their whereabouts, where they could be found? A. Yes, sir.

Q. What was that? How would they report?

A. They can call the dispatcher if they are going 40

Mrs. Rose Hanson (Recalled), for Plaintiff—Cross

somewhere and notify the dispatcher that they would be going.

Q. What is that for? What is the purpose of that? A. In case there is a short call, or a call during his absence away from home.

Q. What is a short call? What does that mean?

A. Well, they have—probably they call one man
10 and he would not be at home and they could call another, call the next man.

Q. Until they get a man? A. Yes.

Q. And the system was if a man left his home he would let them know where he could be located?

A. Yes, sir.

By Mr. Carey:

Q. You say they call the engine dispatcher? Call
by telephone? A. Yes.

20

Mr. Carey: I want to ask a further question of Mrs. Hanson.

MRS. ROSE HANSON, recalled.

Further Cross Examination by Mr. Carey:

Q. Mrs. Hanson, you have stated that Mr. Han-
30 son had taken his examination for engineer. Is that a fact? A. Yes, sir; I have the—

Q. How do you know he had? A. I know the morning he went to take the examination and he brought home the percentage. It is true he never—you know how long it takes for them to give them their diplomas. Unfortunately he never received his diploma, but I have his slip where the man that examined him gave him 98 per cent and 97 per cent and 90 in machinery and 90 air.

40 Q. You have a slip to that effect? A. No.

Mrs. Rose Hanson (Recalled), for Plaintiff—Cross

Q. What have you? A. I have just a slip where the man who examined him—sort of a diploma—well, I wouldn't know what you call it.

Q. Where is that? A. Well, it is at home. I didn't think that was important, but I have it. I have kept everything that he—

Q. That covered but one examination, didn't it? A. That covered his third examination—the last, 10 the final examination, the same as the rest of the men.

Q. How did you know? A. Why, any one that is inside of our house would know.

Q. Because he told you? He told you about it? A. No, I knew—why, certainly. Who else would tell me?

Q. He told you about taking the examination? A. Yes.

Q. You know nothing about it except what he 20 told you and the paper which he showed you? A. And the talk of all the railroaders—

Q. What's that? A. You know at the time of the examination everybody is excited and they are talking about it. That is the time the men were coming to the house.

Q. That is, you heard other men talk about taking the examination? A. Yes. I knew when each went in their turn.

Q. Have you examined one paper of the kind 30 which you speak? A. No, just the one—just a little slip.

Q. How long before his death did that occur? A. In February.

Q. February preceding? A. Yes.

Q. He had never qualified as an engineer? A. No; he had never acted—been in service as an engineer. He had run the engine for the engineer, I know.

Robert C. George (Recalled), for Plaintiff—Direct

ROBERT C. GEORGE, recalled.

Direct Examination by Mr. Simpson:

Q. You are the engine dispatcher? A. Yes.

Q. What are your duties? I don't know whether I have asked you that. What is the duty of the engine dispatcher? A. Why, we have charge of
10 the men, the engineers and firemen, calling them, assigning them.

Q. Sending them where they are to go? A. Yes.

Q. Were you engine dispatcher on the 3rd of August, 1913? A. Night engine dispatcher.

Q. Would they come to your office to be assigned? A. Yes, naturally.

Q. Where would you get the men, for instance, when you found this man was killed you had to get a fireman in his place, how would you get him?

20 A. We had an extra list.

Q. Got them from the extra. That is all.

Cross Examination by Mr. Carey:

Q. You continually keep an extra list, do you not? A. Yes.

Q. When you have to supply a run do you always take the supply men from the extra list if you have men on the extra list? A. To take another man's place?

30 Q. Yes. A. A man lays off; the man on the list is always used for that purpose, yes.

Q. You always take a man from the extra list to fill the place where a man does not take his own run? A. Always.

Q. You do not take a man from the regular— A. No.

Q. —from a regular run to put him on to supply the place of a man who does not appear to take his run? A. No, sir.

Robert C. George (Recalled), for Plaintiff—Direct

Q. Taken from the extra? A. Extra list, yes.

Q. Have you records to show whether or not you had extra men on the list on the 3rd of August, 1913? A. This is the book that ought to show, sir.

Q. Will you turn to them and see whether or not you had on your extra list extra fireman to call to take the place of any man who did not take the run on the 3rd of August, 1913? A. Yes, sir. 10

Q. How many extra men did you have available—extra firemen—did you have available for call on that day? A. How many available?

Q. Yes. How many extra firemen did you have available for call on that day? A. How many available?

Q. Yes. How many extra firemen did you have on your list for that day? A. Oh, I imagine—I had left here about seven on the extra list when I went home at seven o'clock in the morning, sir. 20

Q. Seven men on the list? A. Yes.

Q. Do your records show whether any of those men were called on that day? I mean those extra men? A. Any that were called after I had got home?

The Court: During the time you were there.

A. I was there—I went home seven in the morning.

Q. Do your records show whether or not any of those extra men who were on the list were called on that day? A. Why, yes. 30

Q. Who was called, according to your records? A. Two in here called after I had gone home.

Q. Who are they? A. Why, Fireman Weissshope and Fireman McKee, and also Fireman Olson over here on the extra passenger list.

Q. So after all those men had been called and had been assigned to runs there were still extra firemen available for call? A. Yes, sir. 40

Frederick Smith (Recalled), for Palintiff—Direct

Q. Your duty and the engine dispatcher's duty was to call men from this extra list to take the place of any man who did not appear to take his run? A. Yes.

Q. If you took a man from a regular run instead, what would happen? A. I would have to pay the man that was first out on the extra last.

10 Q. Pay him what he would have earned if he had made the run? A. For putting the man on that took the run.

Q. Is that a subject of agreement between the firemen and the company? A. I believe it is. It is an understood fact, at least—I never looked it up to see if it was——

Re-direct examination by Mr. Simpson:

Q. When you call an extra man and he tells you
20 he won't come and he could not come, what do you do then? A. Next man.

Q. Suppose you exhaust the list, what do you do then? A. Why, then we call—hunt up some more—got them on the sick list—hunt them off there.

Q. Regular men on the sick list? A. Yes.

Q. Get whoever you can, in other words? A. When you exhaust your list you get anybody that you can get, yes.

Q. How do you keep track of them? Can you
30 find them? Got their addresses and all that sort of thing? A. Why, yes, sir.

FREDERICK SMITH, recalled.

Direct Examination by Mr. Simpson:

Q. Where did these two engines pass on the day the man was killed? A. Passed on the deadhead—
40 opposite the machine shop.

Samuel Craig (Recalled), for Plaintiff—Direct

Q. Can you show us where they passed each other? A. Right here, sir. (Indicating on map.)

Q. That is before you got on the engine, isn't it?

A. No; I got on here.

Q. Yes, and they passed here? A. Yes, somewhere around here.

Q. Opposite the office, you say, practically—the blacksmith shop, rather? A. That is the blacksmith shop. 10

Q. Somewhere around there.

(No cross examination.)

SAMUEL CRAIG, recalled.

Direct Examination by Mr. Simpson:

Q. You did not have any markers at the rear of your engine, did you, any flags or anything of the kind? A. One white light on the back of the tank. 20

Q. It was not lit? A. Yes.

Q. In the day time? A. Yes.

Q. A white light lit in the day time? A. Yes.

Q. Any flags at all? A. No, sir.

Q. But on the rear of your train in the day time you put flags, don't you? A. No, sir. Markers—lamps without lights into them.

Q. On the rear of a train? A. Yes, sir. 30

Q. Did you know that rule 19 says the following signals will be displayed, by day green flags? A. That rule is overruled. We had rules added to it.

Q. They gave you a rule that wasn't any good, eh? A. No; they modified that rule with other rules.

Q. Is that the rule in force now? A. No, that rule is not in force now.

Q. You say this rule was not in force on the 3rd of August, 1913? A. I don't think it was.

Samuel Craig (Recalled), for Plaintiff—Direct

Q. Have you a book of rules in your pocket? A. No, sir; I have not.

Q. When was the last book of rules printed, do you know? A. I don't know. I can tell if you look at it.

Q. This is 1908. This rule you say is not enforced in— A. 1908, that is when that book of rules was printed.

Q. When was the one printed after that? A. There has not been any printed since that.

Q. This rule is in force? A. No, sir; it is not.

Q. How do you know? A. We had bulletins published modifying the rule.

Q. You have bulletins modifying the rules? A. Yes; special instructions.

Q. Modifying the rules? A. Yes.

Q. I show you a picture of a rear of a tender running backwards. Does it say anything about lighting a light in the day time on it? A. No, sir; that is right.

Q. This is right? A. Yes, sir.

Q. At night you run with the light lit? A. Yes. We have a light day times, too.

Q. You were burning the company's oil in the day time? A. Yes, sir.

Q. Perfectly sunny, clear day, wasn't it? A. Yes.

Q. You had a light lit? A. Yes, sir.

Q. Was it lit all the way in from Ravina? A. It was lit at Weehawken.

Q. Do you know how wide this tender was behind your cab? A. Standard size, that is all I know. I couldn't tell you.

Q. Did it extend outside your cab? A. What?

Q. The tender? A. Oh, yes; that runs way out.

Q. The width? A. The same as the cab.

Q. How did it cut off your vision? A. Why, being so far away it did, the end of it.

Samuel Craig (Recalled), for Plaintiff—Cross

Q. You being so far away from the end of it?

A. No.

Q. And don't you know how wide it was? A. No.

Q. Don't you know how wide the cab was? A. No.

Q. Who would know that? Who is charge of the locomotive? A. Why, I guess you can get that from the master mechanic's office or the road fore- 10
man, I should say.

Q. What was the number of this engine? A. I think it was 3857.

Cross Examination by Mr. Carey:

Q. Speaking about this marker light on the rear of the engine—

Mr. Simpson: I object. There is no proof of a marker light. I asked him if he had any lights and he said he had a light. 20

Q. What do you that call that light? A. We call them a marker light.

Q. When the engine is in motion will you state whether or not that light is burning all the time?

A. That light is lit for the purpose of going through the Weehawken tunnel; that is the object of that light being lit.

Q. Was it lit on this day? A. Yes, sir.

Q. When was that light extinguished? A. The 30
men in the roundhouse distinguished them lights. I don't know. They may not have been distinguished for a week after that for all I know.

Q. You did not extinguish them? A. No, sir.

Q. When your engine reached the roundhouse that light was still burning? A. As far as my knowledge was concerned, yes, sir.

Q. Who attends to lighting it? A. The foreman does. 40

Samuel Craig (Recalled), for Plaintiff—Redirect

Q. But he does not attend to extinguishing it?

A. Sir?

Q. He does not attend to putting the light out?

A. No, sir.

Q. That is always done where? A. At the round-house.

10 *By the Court:*

Q. That is the extinguishing of it, the putting it out, is done at the roundhouse? A. Yes, sir.

Re-direct Examination by Mr. Simpson:

Q. The fireman does something besides put coal on the fire, then; he lights a light once in a while?

A. Yes, sir.

Q. Anything else? Put in oil in the engine, lubricating oil? A. No, sir.

20 Q. You never put grease in the grease cups or anything of that kind? A. No, sir—but I have done it.

Q. Have done it? A. Yes.

Q. Why did you say no, sir? A. They don't have to do it.

Q. I didn't say they had to do it. I say did they do it? Did you do it? A. I have done it, yes. I don't do it for everybody.

30 Q. How does a fireman ever become an engineer if all he does is put coal on the fire? A. He studies it up.

Q. Without any practical experience? A. Yes.

Q. You have run the engine sometimes as fireman, haven't you, to get experience? A. Oh, yes.

Q. That is the way you get the experience? A. Some men will let you do it and some won't.

Q. To get practical experience? A. Yes.

Q. And study the construction of the engine, too? A. Yes.

Samuel Craig (Recalled), for Plaintiff—Redirect

Q. Now, you say that this light is for the purpose of going through this tunnel. That is a dark tunnel, I suppose? A. We light that in the day time going through the tunnel.

Q. That is the only purpose it was lit for? A. That is all.

Mr. Simpson: I want to ask your Honor—you remember your Honor made a ruling—I have got in a conversation and you limited that conversation simply to the effect of impeaching or qualifying his testimony, I think. Now, under the case of State vs. Hunter it is clearly admissible, as part of the *res gestae*, and I apply to your Honor to lift that limitation which you put on that testimony.

Mr. Carey: I object to lifting that limitation. 10

The Court: It is clearly nearer in time than the other subject. You now have in mind the moment he was at the roundhouse, as to what his purpose was in being in the yard and where he was going.

Mr. Carey: Mere casual conversation at the time.

Mr. Simpson: A statement made by the deceased. 30

The Court: I am only wondering, Mr. Carey, whether or not it is in the same position that has been admitted. Of course this rule was not brought to my attention.

Mr. Simpson: I did not know it myself until I started to study this thing up, until I picked up Wigmore, that is the first I got of the case of State vs. Hunter.

The Court: I will take that under advisement. 40

Samuel Craig (Recalled), for Plaintiff—Redirect

Mr. Carey: You see, the accident does not take place at the roundhouse; it does not take place in connection with anything connected with the roundhouse.

Mr. Simpson: Only the path—that is all.

10 Mr. Carey: The path is outside the place where he was hurt. Track between the track on which he was hurt and the roundhouse. He was over in a place where he had no business to be, and that will disqualify the evidence which has already been given as to the statement. He is not in pursuance of the declaration which he made; if he had been he would have gone right up the road there instead of going in there and going a further distance around. It is not in performance of the alleged declaration.

20 (Discussion.)

The Court: I am going to hold that question momentarily or for a little while, gentlemen. I will give you the benefit of my decision just as soon as it becomes necessary for you to have it.

Mr. Simpson: We are going to close our case.

30 The Court: I will overrule the objection or the limitation I formerly put upon it, and with the same view I have of the admission or right to admit the declaration as testified to by Mrs. Hanson,—I will admit that now for the same purpose, to which you may have your exception entered.

James Griffin, for Plaintiff—Direct

JAMES GRIFFIN, recalled.

Direct Examination by Mr. Simpson:

Q. This pick-up freight that you were engineer of with this man, did you pick up loaded cars or empty cars or any kind of cars? A. All kinds.

Q. All kinds; and took into New York and brought them from New York? A. Yes, maybe— 10
wherever they were destined to—wherever you get one—get three or four for Weehawken or for Tappan, or any place like that.

Q. Delivered them wherever you got them? A. Yes, sir.

Mr. Simpson: I want to make a formal offer of the keys and the rules.

Mr. Carey: I object to the keys as not hav- 20
ing been identified as used by the pony engine or to any engine to which this man had access as fireman of the defendant company. On the further ground that those keys have not as yet been identified as keys that were found on the man's person.

(Discussion.)

The Court: Well, I will overrule the objec- 30
tions and the keys may be admitted. You have your exception.

Mr. Simpson: And the rules I offer now, produced by the defendant, of the operation of the yard on that day.

The Court: Is there any objection to the rules, Mr. Carey?

Mr. Carey: No.

The Court: They will be admitted.

Plaintiff rests.

Recess.

*Motion to Strike Out Testimony**Motion to Strike Out Testimony:*

Mr. Carey: If the court please, I move now that the testimony with respect to the decedent's declaration as to his purpose in going to the roundhouse be stricken out. The purpose of his going—

10 The Court: Well, Mr. Carey, I am perfectly willing to hear you, of course, if it is proper, and if you have any new matter to urge that was not urged against that before.

Mr. Carey: I have.

The Court: But if that is not so, I have already passed on it and you have already yourself fully protected in that respect.

20 Mr. Carey: I wish to call now to your Honor's attention a phase of the case or of the testimony which I did not dwell upon in my previous argument. My present argument relates to the purpose of the decedent as expressed in his declaration made to his wife, and in his declaration made to Mr. Kathan, the engineer. The declaration or the purpose stands upon a different basis than the declaration of an intention to do something which may be corroborated by the plaintiff, that the man subsequently proceeds to do what he says he is going to do. Now the purpose which he has in doing what he says he is going to do and which may be shown that he followed out by going to the place which he says he intended to go to, or going in that direction—
30 this declaration of purpose is merely a state of mind and cannot be shown by—particularly in this case—by anything which followed. It is, according to the testimony of Mrs. Hanson, that he said, "I am going down to the roundhouse to get some tools from the pony engine, or from number 25, and take them up
40

Motion to Non-Suit

to the pick-up and to get my overalls and bring them home." Now his intent or purpose cannot be checked up by acts which he did. His going to a certain place can be. So that the mental state of the man as exhibited by the declaration cannot be accepted as evidence of his intention to do the thing which he mentioned. 10

(Discussion.)

Mr. Carey: Now your Honor, if you will pass on that subject now I will await your ruling. If not I will proceed with the motion to nonsuit.

The Court: I think I may as well pass on it now as any time, Mr. Carey. I will decline to strike it out. My thought about it has not changed any since the original argument on the same testimony was made. I will decline to strike it out. 20

Mr. Carey: Grant me an objection on the record.

The Court: Yes.

Motion to Non Suit:

Mr. Carey: May the Court please, I move for a non-suit, first, on the ground that the plaintiff has not proved the case set out in the complaint. 30

The Court: In other words, that his proofs do not conform with his allegations?

Mr. Carey: Yes. Second plaintiff's intestate was not acting within the scope of his employment when the accident occurred. Third, he was not at that time engaged in the performance of any duty he owed to the defendant.

Motion to Non-Suit

10 Fourth, at the time of the accident plaintiff's
 intestate was a trespasser at a place where the
 accident occurred. Fifth, at the time and place
 of the accident plaintiff's intestate was at best
 a mere licensee. Sixth, at the time of the acci-
 dent plaintiff's intestate was not engaged in
 interstate commerce. Seventh, at the time and
 place of the accident the defendant was not
 engaged in interstate commerce. Eighth, plain-
 20 tiff's intestate was guilty of contributory negli-
 gence. Ninth, no negligence has been estab-
 lished against the defendant. Tenth, the risks
 attending any necessary crossing of the defend-
 ant's tracks at the point where the accident
 occurred were well known and obvious to the
 intestate and were assumed by him. Eleventh,
 defendant's liability, if any, arises under Chap-
 25 ter 5 of the Laws of 1911 and the amendments
 and supplements thereto.

The Court: That is the Employers' Liability
 Act of the State of New Jersey?

Mr. Carey: And this action cannot be main-
 tained.

(Discussion.)

The Court: Well, my ruling will be that I
 decline to non-suit.

30 Mr. Carey: Your Honor will allow an ex-
 ception to be noted?

The Court: You may have an objection.

(Mr. Simpson then asked to amend his plead-
 ings and dictated the amendment, but later
 withdrew the amendment.)

(Book of rules previously offered in evidence
 now marked Exhibit P-1.)

(Adjourned to October 30, 1916.)

Charles Brusle (Recalled), for Plaintiff—Direct

Jersey City, N. J., October 30, 1916.

Mr. Carey: The witnesses that you called for are here, if you want them.

Mr. Simpson: I only want the record of the examination, that is all.

10

CHARLES BRUSLE, recalled.

Direct Examination by Mr. Simpson:

Q. In response to a subpoena served upon the superintendent of your division of the New York Central Railroad you have produced this paper, have you? A. Yes, sir.

Q. What is the paper? A. That shows the result of an examination for promotion to engine man on mechanical and air brake. 20

Q. Of who? A. Of Peter Hanson—Hans Peter Hanson.

Mr. Simpson: Offer that in evidence.
(Exhibit P-2.)

Q. You have no written record showing what were the questions that were asked him about the mechanical part of the engine and what his answers were, have you? A. No, sir. 30

Q. That is an oral examination made by Mr. C. W. Stark, the superintendent of examinations, isn't it? A. Yes, sir.

Q. He asked these questions orally and then he certifies? A. Yes.

Q. And this is his certification? A. Yes.

Q. And there is no written record of questions and answers as given by him? A. So far as I know there are none.

Q. There are none in the division superintendent's office? A. No, sir. 40

Charles Brusle (Recalled), for Plaintiff—Cross

Cross Examination by Mr. Carey:

Q. This paper which has been marked Exhibit P-2 shows how many examinations? A. Two.

Q. And what do those examinations consist of?

(Objected to as not proper cross examination, unless the witness is shown to have personal knowledge.)

10

Q. Do you know how many examinations are given for the promotion of engineers—for the promotion of fireman to engineer and upon what subjects those examinations are made? A. Yes, sir.

Q. From your personal knowledge or what was done? A. I have never been present at the examinations, but through the rules the company have.

Q. From the rules of the company? A. Yes, sir.

20 Q. Have you seen the paper, the certificates which have resulted from those examinations? A. Yes, sir; one certificate that has been issued so far.

The Court: Not only in this matter, but generally the examinations for advancement from fireman to that of engineer?

The Witness: I have.

The Court: Have you seen the papers showing the result of examinations?

The Witness: I have, yes, sir.

30 Q. What is the first examination taken by a fireman for promotion to position of engineer? A. He takes three mechanical examinations.

Q. And what does that certificate relate to? A. That is the mechanical end of it—mechanical and air brake.

Q. Now, that shows them that he has taken the mechanical examination for promotion? A. Yes, sir.

40 Q. When he has taken those examinations and passed is he then qualified to act as an engineer? A. No, sir.

Charles Erusle (Recalled), for Plaintiff—Redirect

Q. What other examinations is it necessary for him to take? A. He fills out a standard examination book on rules of the operating department,—that is number 2. Number 3, oral examination by the trainmaster. Number 4, oral examination by the signal supervisor, on location and function of signals. Number 5, color and vision test. Number 6, physical examination. Number 7, watch inspection. Number 8, personal interview with the superintendent. 10

Q. Is there any record in your office to show that Mr. Hanson has taken any other examination than this examination shown by Exhibit P-2? A. No, sir.

Q. You have made a search to find that fact? A. Yes, sir.

Q. Then all of these examinations that you have mentioned are necessary before a man is qualified—and the passing of them is necessary before a man is qualified to act as engineer? A. Yes, sir. 20

Re-direct Examination by Mr. Simpson:

Q. Your office is the place where there would be the record of any other examination? A. Positively.

Q. You can find no record of any examination of any kind except this that you produce? A. Nothing whatever, no, sir.

Q. Now you are sure about it? A. No, sir; not that I could find. 30

Q. Now, just look at this paper. Does not this indicate there was some other records in your office of his passing an examination besides those you produce? A. That is an examination by—what is known as the examiner at Weehawken.

Q. Does that paper indicate that there are any records in your office concerning his examinations that you have not produced?

Mr. Carey: I object to the question concerning examinations. It should be limited to his 40

Charles Brusle (Recalled), for Plaintiff—Redirect

examination for promotion from fireman to engineer.

The Court: I assumed, of course, that was the purport of the question. It was, wasn't it?

Mr. Simpson: Certainly.

The Court: Because that is what we have been talking about.

10

Q. In other words, you have produced all the papers that you found in reference to the examination of this man in the files of your office? A. Certainly.

Q. Nothing else is there except that paper? A. No, sir.

Q. Hasn't that paper to do with his examination? A. It may not.

Q. What is that paper? A. Every two or three
20 years, I am not sure which, they appear before the examiner and have their eyes tested.

Q. Of his test for his eyes? Would the eyes have to be tested before he passed his examination as engine man? A. Oh, they are tested every so often.

Q. Would he be promoted as an engine man unless his eyes responded to the test? A. No, sir.

Mr. Simpson: I offer this paper in evidence.

Mr. Carey: I have no objection.

(Paper marked Exhibit P-3.)

30

By the Court:

Q. Do I understand, Mr. Witness, that test is as to engineers or engine men only; or both firemen and engineers? A. Engineers, firemen, conductors or brakemen, the yard men or switchmen.

Q. Same requirement as to all those employees? A. Yes, sir.

40

Mr. Simpson: This is something not properly re-direct. I ask it with the idea that your Honor has power to admit it any time, being merely the order of proof.

Charles Brusle (Recalled), for Plaintiff—Redirect

By Mr. Simpson:

Q. What is the highest money, the largest amount of money, earned by engineers in your company?

Mr. Carey: I object; in the first place, it is not shown that this witness knows, and in the second place—

The Court: We can stop right there and find out whether he does know or not. Of course, if he does not know your objection is a good one. 10

Q. You don't know the money that engineers are paid?

The Court: He hasn't said so.

A. I do.

Q. You do know it? A. Yes.

Q. What is the largest amount paid?

Mr. Carey: I object to the question as to what the largest amount paid is. 20

Mr. Simpson: I want to get the largest and smallest, so when it comes to the question of damages the jury will have some notion from which they may reason.

Mr. Carey: This man is not an engineer and it has not been shown that he is qualified as an engineer.

Mr. Simpson: The jury have a right to say he might have qualified. 30

Mr. Carey: The jury have no right to guess on these subjects.

The Court: They have a right to take into consideration a reasonable deduction as to whether the man probably would qualify himself. That is within the laws of probability. I will overrule the objection, provided, of course, your examination goes to the questions you suggested.

Mr. Simpson: The largest and smallest. 40

Mr. Carey: Note an objection.

Charles Brusle (Recalled), for Plaintiff—Recross

Q. Do you know what the largest amount earned by engineers is, and the smallest? A. I should say they range from one hundred and ten dollars to two hundred and sixty dollars.

Q. A month? A. Yes, sir.

Q. What class gets the one hundred and ten and what class the two hundred and sixty? A. The
10 man that got a hundred and ten would have a passenger run paying four dollars and a quarter a day and working about six days a week, and the man that gets two hundred and sixty or maybe two hundred and forty would be the man on the milk train that makes a round trip between Weehawken and Kingston daily.

Re-Cross Examination by Mr. Carey:

Q. That highest wage would be confined solely to
20 the man who runs the milk train? A. Yes, sir.

Q. And the desirable run is given to the man who has been the oldest in the service? A. Positively.

Q. And that is a rule between the company and its employees, engineers and firemen? A. Yes, sir.

Q. You have men in the service who have had long years of experience? A. Yes.

Q. And who would be entitled to the desirable job before a new man? A. Oh, yes.

Q. And the amount which a man would be able
30 to earn would depend also to a very large extent upon the efficiency which he showed after he became an engineer? A. Well—

Q. His capacity to handle the work on the jobs that pay this amount? A. That is based on seniority.

Q. Is there no question of capacity? A. Yes; if he was unable to do the work he would be taken off the job.

Q. When a man becomes an engineer then the
40 next question is what job he will be assigned to,

Charles Brusle (Recalled), for Plaintiff—Recross

if any, as an engineer? A. Yes; they are really never assigned to a job unless there be a vacancy for a few days. The jobs are all put up on what we call the bulletin board and they are bid in, the oldest man being given the preference.

Q. When a man is qualified to become an engineer he, for a time, is on the extra list? A. For a number of years most likely. 10

Q. For what time is he paid when he is on the extra list? A. Just for what he does, the work he does. If he works every day he is paid every day; if he works one day and lays off five days and gets no work he does not get paid for it; in other words, there is no guarantee.

Q. And the extra men, whether they will be placed in active service or not, depends very largely upon the condition of business of the railroad company? A. Yes, sir; that is what it is based on. 20

Q. Now this exhibit P-3 bears date April 23, 1912. What was the date of the examination of Mr. ———? A. February 10, 1913.

Q. So that this examination for the eyes was prior to the time he had taken any steps to qualify himself as an engineer? A. Yes, sir. That is regular—that is given to all employees in train yard service.

Q. And has no significance with respect to his passing the examination for engineer at all? A. 30
No, sir.

DEFENDANT'S TESTIMONY.

PHILIP FRELEIGH, sworn.

Direct Examination by Mr. Carey:

Q. Mr. Freleigh, you are an engineer in the employ of the defendant railroad company? A. I am, yes.

10 Q. Are you familiar with the yard at New Durham where this accident happened? A. Yes.

Q. And familiar with the layout of the tracks there? A. I am.

Q. Are you familiar with the maps which are used in—

Mr. Simpson: I will admit his qualifications.

Q. —in the engineer's office showing the layout of this track? A. I am.

20 Q. And is this map shown on the bulletin board one of the maps which is used in the engineer's office showing the layout of the yard? A. It is.

Q. Did you make any measurements there? A. I did.

Q. With respect to this accident? A. I did.

Q. This map appears to have been made—that is, the map showing the layout, on April 28, 1913; is that correct? A. To the best of my knowledge.

Q. Now when did you make your measurements? A. May 18, 1916.

30 Q. You know the scale of that map, do you? A. Yes.

Q. Now will you tell us what the distance is from the Y. M. C. A. to the place where Mr. Kathan had marked on this map by the letter X at the location where he took on fireman Smith? A. (Witness examines map.)

Q. You see the point marked with an X there and the letter K? A. Yes. About 1900 feet.

40 Q. Now will you tell us what the distance is from the point which is indicated by Mr. Kathan marked

Philip Freleigh, for Defendant—Direct

with an X and the letter K to the roundhouse? A. It is about 2500 feet.

Q. 2500 feet? A. Wait a minute.

Q. What was the distance you— A. I want to check that a minute. That is all right, 2500.

Q. What was the other distance you gave from that point to the Y. M.—

The Court: 1900 feet.

10

Q. Now you notice a cross there which has been testified as the place where the accident happened? A. Yes sir.

Q. Will you give us the distance from that place to the roundhouse? A. You refer to this red cross here? A. Red cross, yes. A. It is 2100 feet, about.

Q. And will you tell us the distance from the place where the accident happened to the Y. M. C. A. Building? 20

(Objected to on the ground there is no testimony yet as to where the accident happened. Objection sustained.)

Q. Will you tell us the distance from the place where the body was found as shown on the map to the Y. M. C. A. Building? A. It is about 2200 feet.

Q. You are familiar with the tracks which are known as engine tracks number one and number two in that yard? A. No, I don't know them by the numbers. 30

Q. You don't know them by the numbers? Do you know the tracks on which the engines run in and out? A. I do.

Q. Of the roundhouse? A. Yes sir.

Q. Will you state which track is the one that the engines run into the roundhouse on? A. The track in yellow here is the one that they run towards the roundhouse. 40

Philip Freleigh, for Defendant—Direct

Q. And the track which they run from the roundhouse to Weehawken is which track from that? A. It is immediately to the west.

Q. The next track to the west? A. Yes sir.

Q. Now will you state the distance between the rails, that is, the near rails of those two tracks at the point where Mr. Kathan indicated that his engine stopped and took on the fireman Smith?
10 A. That is at this point where this pencil cross is.

Q. Where the pencil cross is, yes? A. The distance between the two adjacent rails is 8.39 feet.

Q. 8.39 feet? A. That is the distance between the two adjacent rails.

Q. By the adjacent rails you mean the westerly rail of the westbound track and the easterly rail of the eastbound track? A. Yes sir.

Q. Give us the distance between those two rails
20 at the point where the red cross mark is located which has been testified to as the place where the body was found? A. That is 13.1 feet.

Q. That is, the tracks diverge from the place where the lead pencil mark is to the place where the red cross is? A. Yes sir.

Q. How far do they continue to diverge going in the westerly direction? A. They diverge for about three hundred feet beyond the point where you say the body was found and then there is a
30 crossover comes in?

Q. Crossover from what to what? A. You might call it from the east bound running track to the westbound.

Q. And from there up to the ashpit what is the widest difference, that is from the place where the crossover starts off,—what is the widest difference between the two tracks and what is the narrowest?
40 A. The widest difference is about 38 feet and then they go to a distance of zero just before they get to the ashpit,—practically come together.

Philip Freleigh, for Defendant—Cross

Q. The two engine tracks practically come together? A. Yes sir.

Q. One track which runs under the ashpit? A. No; there is more than one track.

Q. But these two tracks? A. Well, they practically come together by means of crossovers,—a sort of connection in there. They can get on by more than one track, but the distance between the two tracks, if you consider it practically gets zero when it gets up there to the ashpit, if you consider these are the two tracks and this is the crossover in here, this track would come on up here and then would come down up here, and when they get to this point they are zero. 10

Q. Point of the— A. Before they get to the ashpit.

Q. On the ashpit they intersect each other, do they? A. Yes. 20

Q. Give us the distance from the lead pencil cross K to the ashpit? A. About 1700 feet.

Q. And from the place where the body was found to the ashpit? A. About 1300 feet.

Cross Examination by Mr. Simpson:

Q. The ashpit adjoins the roundhouse, doesn't it? A. Depends on what you mean by adjoins.

Q. What do you think I mean by adjoins? A. Well, of course, adjacent to; is that what you mean? 30

Q. Yes. A. About 700 feet.

Q. From the roundhouse? A. Yes.

Q. And the ashpit is the pit where—you can take the stand—where engines go to have the ashes removed? A. As far as I know it, yes. I have seen them.

Q. These measurements you give are straight measurements as the crow flies? A. Well, I have 40

Frederick Smith, for Defendant—Direct

allowed for curves as best I could scaling on the map.

Q. That path that shows on the map seems not to be exactly straight, it seems to cross over tracks. Did you measure the path, allowing for curves or did you measure it straight? A. Well, I located—do you mean how did I locate the path on the
10 map?

Q. No; when you make your measurements? A. Well, that is what I was asking you.

Q. You have already given us certain measurements. Are those along the path or straight on the map? A. Along the track.

Q. Along the track, not along the path? A. No.

20 FREDERICK SMITH, recalled.

Direct Examination by Mr. Carey:

Q. Mr. Smith, how long did you know Mr. Hanson before his death? A. I know the time he is working there.

Q. During the whole time he worked there? A. Yes.

Q. Was he a fireman during the whole time of his service to the company? A. Yes sir.

30 Q. Know where he lived? A. Yes.

Q. Have you been to his house? A. Yes sir.

Q. About how far was it from his house to the Y. M. C. A. Building? A. Why, about five minutes' walk—four or five minutes.

Q. About how long would it take you to walk, or did it take you to walk from the Y. M. C. A. Building to the place where you got on to the Kathan engine? A. About ten minutes.

40 Q. And Mr. Hanson was walking with you? A. Yes sir.

Frederick Smith, for Defendant—Direct

Q. Where did you first see Hanson that day?

A. Around the Y. M. C. A., there on the porch.

Q. On the porch? A. On the porch.

Q. What was he doing? A. Standing there and talking.

Q. After you first saw him did he go into the Y. M. C. A. Building? A. Why, he asked me if I was going up to the roundhouse and I told him 10
yes.

Q. Were you going to the roundhouse? A. Yes sir.

Q. What did he do then? A. He said, "Wait a minute," he says, "I will go right with you," so he went into the Y. M. C. A. and came out and we walked, both, the path—

Q. Wait a minute now. Where did he go after he— A. He went in the Y. M. C. A.

Q. Went into the Y. M. C. A.? A. Yes. 20

Q. Did you wait for him? A. Yes sir.

Q. When you came out you walked together?
A. Yes sir.

Q. On that day were you expecting Kathan to come down—

Mr. Simpson: I object to what this man was expecting, on the ground that it is not relevant or competent.

Q. What were you looking for as you went up 30
towards the roundhouse?

(Objected to as irrelevant and incompetent.
Question allowed.)

A. Looking for the engine of Mr. Kathan coming down.

Q. Who is the fireman on the Kathan engine?

A. I was fireman.

Q. When you saw the Kathan engine what did 40
you do? A. He stopped and I crossed over.

Frederick Smith, for Defendant—Direct

Q. Crossed over what? A. Crossed over these tracks on the engine—3907.

Q. Which track was the Kathan engine on? A. On the eastbound track.

Q. On the eastbound track, and that is the track number what? A. I don't know the number.

Q. Don't know them by number? A. No.

10 Q. Now in going to the Kathan engine did you cross the westbound track? A. Yes, sir.

Q. Which side of the engine was Mr. Kathan on, on the easterly side or the westerly side? A. On the westerly side.

Q. Eh? A. On the west—on the side track, as I call it.

The Court: He said he was on the west side track.

20 (Question repeated by stenographer.)

A. Well, on the right side there.

Mr. Simpson: Facing which way, facing the roundhouse or the other way.

A. Why, the engine was facing head on the roundhouse, backing up.

Mr. Simpson: What side was Kathan on, the right side facing the roundhouse?

30 The Witness: Yes sir.

Mr. Simpson: Or the other way?

The Witness: Facing the roundhouse.

Q. Then Mr. Kathan was on the side of the engine toward you? A. Yes, sir.

Q. When you got on the engine which side did you get on? A. The same side that Kathan was.

Q. When you crossed the westbound engine track what did Hanson do? A. He stood there and
40 talked with Kathan.

Frederick Smith, for Defendant—Direct

Q. Eh? A. He stood by the engine talking with Kathan.

Q. On what track had he crossed, if any? A. Why, the westbound track.

Q. He had crossed the westbound engine track? A. Yes sir.

Q. And he was standing aside of the engine talking with Kathan? A. Yes sir. 10

Q. Had you crossed the westbound track prior to the time you crossed over to get on your engine?

A. I didn't catch you.

(Question repeated by stenographer.)

Q. I mean while you were walking up the track with Hanson? A. No, no, I didn't.

Q. Then when Mr. Hanson was talking with Mr. Kathan he was standing between what tracks? A. Between the westbound track and the eastbound 20 track.

Q. Did Mr. Kathan get off his engine at that time? A. No sir.

Q. And during the time that he was talking with Hanson Mr. Kathan was where? A. Sitting on the seat box.

Q. Now at that time did you hear anything said by Mr. Hanson to Mr. Kathan about engine tools? A. Didn't hear nothing.

Q. Did you hear anything said by Mr. Kathan 30 to Mr. Hanson about engine tools or firemen's tools? A. No, I didn't pay any attention to them.

Q. Did you hear any conversation between those two men at all with reference to any tools at that time? A. No.

Q. What did you do when he got on to the engine? A. Why, I went first and sat down on the seat box and then I remembered in a minute I had to fix up the fire. 40

Frederick Smith, for Defendant—Direct

Q. Did you start on that work? A. Then I started in hooking the fire up.

Q. Was anything said, so far as you heard, between Mr. Hanson and Mr. Kathan in regard to the pony engine, or number 25? A. No sir, I didn't hear that.

10 Q. When did you next see Mr. Hanson? A. After his death.

Q. Where was he lying at the time? A. Between the tracks.

Q. You have indicated about where he was lying already? A. Yes sir.

Q. Did you hear Mr. Kathan say or do anything after the Kathan engine started?

(Objected to if it is in the absence of the dead man. Question allowed.)

20 A. Yes.

Q. What did Mr. Kathan do?

(Question objected to as immaterial. Question allowed.)

A. He blew the whistle.

Q. What else did he do? A. He hollered.

Q. Do you know what he said? A. Well, I can't remember now.

30 Q. How many years have you been a fireman, Mr. Smith? A. Oh, for eleven years.

Q. Now when an engine is brought in from a run to the roundhouse or to the ashpit at the New Durham yard, what duties has the fireman with respect to the tools on the engine, his tools or any hools? A. Nothing, only his tools will be overhauled, and he would take them off.

Q. His tools would be overhauled? A. Overhauled.

40 Q. Did he have tools which he used on the engine? A. I don't use any tools.

Frederick Smith, for Defendant—Direct

Q. When you are firing? A. Well, only a scoop, that is all I am using.

Q. What were the duties of the fireman after the engine had gone to the ashpit or to the round-house with reference to those tools; did he do anything with them? A. There is a tool man provided there.

Q. Does the fireman do anything? A. No sir. 10

Q. Who does anything in connection with the firemen's tools after the engine came in the round-house or ashpit? A. The tool boy.

Q. What does he do? A. He takes them off and puts them on.

Q. He takes them off and where does he put them? A. In the tool car. There is a tool house provided for them.

Q. Can you show where the tool car is or the tool house is on the map here? A. Yes. 20

Q. Will you point to that, please? A. (Witness indicates.)

Q. It is marked on the map "Tool-car," is it? A. Yes, sir.

Q. You say the tool boy takes the tools off the engine and puts them in the tool car? A. Yes sir.

Q. Does the fireman have any duty to do with reference to removing those tools from the engine? A. No sir.

Q. Now, when the engine is prepared as for 30 going out on its trip what duty has the fireman with respect to putting fireman's tools or any other tools on to the engine? A. Only where he see them put them on, the tools.

Q. What? A. The scoop and hook, that is all his tools there.

Q. What are his duties with respect to putting them on? Does he put them on? A. No.

Q. Who puts them on? A. The tool man.

Q. Now where does the tool man get the tools 40

Frederick Smith, for Defendant—Direct

from? A. Why, the storehouse there where he draws them tools when he ain't got them or the engineer has got a box.

Q. You say the storehouse; you mean that tool car there? A. Yes; there will be all them tools in there.

10 Q. Now in 1913 were there toolmen employed for taking the firemen and engineer's tools off the engine? A. Yes.

Q. And placing their tools on to the engine at the time when the engine went out for its run? A. Yes sir.

Q. Now when the tools are put on to the engines are they the same tools that were taken off of that engine when it runs in, or how is that? A. No sir; any tools around there will be put on.

20 Q. Any from the storehouse or from the tool car? A. Yes sir.

Mr. Simpson: I object to Mr. Carey testifying for the witness.

Q. Now have you taken the examination for engineer? A. Yes.

Q. What is the first examination taken for promotion as engineer, to the position of engineer A. The mechanical examination.

30 Q. And that mechanical examination relates to what? A. Only air brake—about air and machine—machinery.

Q. I show you this exhibit P. I-1 and ask you what that certificate indicates? A. That is from C. W. Stark, he writes them out.

Q. What does it indicate, what examination? A. That is the mechanical examination—perhaps the percentage you got on engines and on air.

40 Q. Yes. What other examination follows the mechanical examination? A. Why, call it—we

Frederick Smith, for Defendant—Direct

have to go through the book of rules, block signals and trainmaster and Mr. McCoy, and to the doctor.

Q. Mr. McCoy is the superintendent? A. Superintendent—the last.

Q. And till he has gone through all of those is he qualified to act as engineer? A. Well, he goes through everything there he is qualified as engineer. 10

Q. If he passes? A. They send you a receipt or letter when you qualify as engineer.

Q. What is it you say you have got after you have passed all those examinations? A. (Producing paper.) A letter like that.

Q. A letter showing that— A. Qualified as an engineer.

Q. Is there anything in this paper D-2 which relates to any examination on the rules? A. No.

Q. Of the company? A. No. 20

Q. Do you know when Mr. Hanson took his examination on the mechanical part of the engine? A. I couldn't tell you when.

Q. When with respect to the time that you took it? A. I took December 5, 1912.

Q. December 5, 1912. Now under the rules of the company who would be first entitled to take the remaining examinations after the mechanical examination? A. The first man—the oldest man has the preference. 30

Q. As between you and Mr. Hanson who would be first entitled? A. I do.

Q. When did you take your other examinations and qualify as an engineer? A. February the 8th, I think it was, or January—(examines paper). February 8, 1916.

Q. February 8, 1916. Then prior to the time you took your examination would Mr. Hanson be entitled to take his examination on rules? A. 40 Ahead of me?

Frederick Smith, for Defendant—Direct

Q. Yes. A. No.

Q. What kind of day was this on which this accident happened? A. Nice day, clear day.

Q. How about the wind? A. No wind whatever.

Q. Anything in the way of fog or smoke or anything of that kind to obstruct the vision in the yard when the accident happened? A. No sir, not
10 that day.

Q. About how far could you see in a southerly direction from the point where you got on to the Kathan engine,—about how far along the track did you see in a southerly direction and easterly direction from the point where you got on to the Kathan engine? A. I couldn't tell you that.

Q. Couldn't tell? A. No.

Q. Was there anything down in that direction to obstruct the view on that day? A. Why, just
20 a little curve around here where you—

Q. Before you got to the curve was there anything to obstruct the view? A. I can't tell that.

Q. What's that?

(Question repeated by stenographer.)

Q. Are you familiar with this path that goes up through the yards over to the roundhouse? A. Yes.

Q. What kind of path is it? A. Beaten path.

30 Q. Eh? A. Beaten path, made here by walking—a path—a track.

Q. Is anything done on that path by the company to make it a path? A. No sir,

Q. What ways were there for the people who wanted to go to the roundhouse to get there from the vicinity of the Y. M. C. A. Building? A. I think the short cut to get there—

Mr. Simpson: What is that?

40 Q. That is not what I asked you. How many

Frederick Smith, for Defendant—Direct

ways are there to get there? A. Well, they—accustomed to go back and forth that track all the while.

Q. I ask to have that answer stricken out.

Mr. Simpson: I object to it on the ground it is responsive.

Q. I asked you how many ways there were to go there. 10

Mr. Simpson: I say it is responsive. He is telling the ways to go and the ways are to go over the track by custom. It is perfectly responsive.

The Court: I will leave that stand for the present, to see what the further answer may be. Your question seemed to call for both, Mr. Carey, both the number of ways and what the ways would be, as I understand that question. Now you wanted to know first how many ways one at or about the Y. M. C. A. would go to the roundhouse? 20

Mr. Carey: Yes.

By the Court:

Q. How many ways are there, one, two, three, four, five or six? A. Two ways.

Q. Now you want to know what ways there were. What ways can you go? What are those two ways you can go from the Y. M. C. A.? A. That is the Hackensack Plankroad and that path. 30

Q. Hackensack Plankroad and that path? A. Yes sir.

By Mr. Carey:

Q. Opposite the roundhouse on the Hackensack Plankroad, what is there, if anything, to enable the men to get from the Hackensack Plankroad to

Frederick Smith, for Defendant—Direct

the path—to the roundhouse, I should say? A. Why, go up a staright track to the roundhouse, and down the ladder—down the stairs down there.

Q. Won't you come here to the map. In going up the Hackensack Plankroad to the roundhouse from the Y. M. C. A. Building, when you get to this point opposite the roundhouse what are there
10 there? A. There are stairs.

Q. Stairs leading down to what? A. Down to the roundhouse.

Q. What are these things indicated in yellow here? A. That is roadway—path to the roundhouse—the path that leads to the office.

Q. What are those paths there; what kind of paths are they? A. Well, boards—

Q. Boards, put there by whom?

Mr. Simpson: Will you get on the stand,
20 Mr. Witness?

The Court: Unless he needs to show it on the map.

A. By the roundhouse.

Mr. Simpson: I will admit for the purpose of saving time by the company.

By the Court:

30 Q. Who put those boards there at the path at the roundhouse? A. The roundhouse people.

Q. Did you do it? A. No, the company.

By Mr. Carey:

Q. Now you spoke of the other way of getting from the vicinity of the Y. M. C. A. Building to the roundhouse. That was the way where? A. Over the beaten path.

Q. Over that path? A. Yes.

40 Mr. Simpson: Beaten path.

Frederick Smith, for Defendant—Direct

Q. Over the beaten path. And over the beaten path shown on this map here? A. I guess it is, yes.

By the Court:

Q. Look at the map here and see if that shows the beaten path? A. Here (indicating.)

10

By Mr. Carey:

Q. Now that which is shown on the map there is the beaten path to which you refer? A. Yes.

Q. What is the color on the map? A. Yellow.

The Court: How is it shown on the map, if it is indicated in any manner?

Q. Yellow on the map. What is between the path in yellow on the map and the engine track at the point opposite the lead pencil cross and also opposite the place where the body was found? A. 20
That is the westbound track—the eastbound track, the track between that path.

Q. Between what? A. The westbound track and the path.

Q. Between the westbound engine track and the path there is a track? A. Yes sir.

Q. Now what speed limit is in the yard? A. Six miles an hour.

Q. Is that a matter of rule made by the company? A. Yes sir. 30

Q. I show you a time-table—a paper marked “Time-table No. 6-A, for employees only,” and on page 4, at the top of the page, a paragraph headed “New Durham.” Is that the rules to which you refer? A. Yes sir.

Mr. Carey: I offer that paragraph in evidence.

Mr. Simpson: I object to it now on the ground that I demanded them to produce all 40

Frederick Smith, for Defendant—Cross

the rules and they suppressed this rule when they offered me the rules. They did not have this rule, and I object now that it is not proper for them to offer it when I called for the rules; they had this under cover somewhere.

10 Mr. Carey: Oh, we didn't have it under cover. You asked for the book rules, and we produced just what you asked for.

Mr. Simpson: I object to offering part of the rule. The whole thing ought to go in.

The Court: If it is relevant to this particular thing, yes, but if it has no relevancy, why, of course, it is immaterial. I will overrule the objection.

(Paper marked Exhibit D-1.)

20 Mr. Simpson: It has not been read to the jury. (Reads.)

Cross Examination by Mr. Simpson:

Q. What does that mean, "Not afford proper protection?" A. Why, proper protection means that the men going up, seeing on the track.

Q. You mean the men on the engines when they run the engines have got to use care to protect people; is that what you mean? A. Why, got to look at everything what is going on there.

30 Q. Around the yard? A. Around the yard.

Q. Now on this day you were walking up to the roundhouse the same way Hanson was, weren't you? A. Yes.

Q. You were not out on the Hackensack Plankroad going up and crossing over to the office of the roundhouse, were you? A. No, I can't—

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

Q. You know where you were, don't you? A. Yes, sir.

Frederick Smith, for Defendant—Cross

Q. How long had you worked in that yard? A. In that yard?

Q. Yes. A. Oh, so long as I worked for the railroad.

The Court: How long is that?

A. Worked for the railroad eleven years.

Q. At the time of this accident you worked about nine years, or about eight years you were working there in that yard, and when you went up to the roundhouse you always went up this beaten path, didn't you? A. No, sir. 10

Q. Not always? A. No, sir.

Q. Sometimes you did? A. Well, not when I am going for work; I took the car.

Q. Took a car? A. Take the car.

Q. But this day you did not take a car, did you? A. No. 20

Q. You were walking up this day? A. I was walking, yes, sir.

Q. Now you know how long Mr. Kathan and Mr. Hanson were talking? How long were they talking? A. Why, I couldn't tell you that.

Q. Five minutes, before the engine started? A. I couldn't tell you that.

Q. Ten minutes. A. I couldn't tell you that.

Q. Twenty minutes? A. I don't know how long. 30

Q. But you know the engine was stopped there while they were talking, don't you? A. Yes.

Q. How long was the engine stopped there? A. I can't recollect that, so long ago.

Q. Five minutes? A. I don't know.

Q. Ten minutes? Say they stopped five minutes? A. Why, we stopped there, that is all I know.

Q. How long did you stop there? A. I couldn't tell you. 40

Frederick Smith, for Defendant—Cross

Q. Can't tell me within an hour of how long you stopped there? A. Didn't stop long there.

Q. How long, five minutes? A. I didn't look at the time.

By the Court:

Q. What is your best recollection, Mr. Smith.
10 Of course you have indicated to us that you don't know exactly how long, but can't you give us some idea of it? A. Two or three minutes.

By Mr. Simpson:

Q. Two or three minutes. All right. Then the engine went on? A. We went on, yes.

Q. Then you did not hear what these men said to each other at all? A. No, sir.

Q. You knew that Kathan was the engineer on
20 this pony engine? You knew that he worked with Hanson on the pony engine? A. Yes, sir.

Q. Now you had some talk with this lady about this accident, haven't you, that sits there on the end? A. No, sir.

Q. Didn't you tell this lady that this engine that killed Hanson came along without ringing any bell, and that you didn't know there was any engine there until after the accident? A. No, sir.

Q. Didn't you? A. No, sir.

30 Q. Did you say anything like that to her? A. No, sir.

Q. Did you say it was not ringing the bell and just as it got to a point about sixty feet back of the engine you saw Hanson's hat fly in the air? A. No, sir.

Mr. Carey: I object.

Q. What's that? A. No, sir.

Mr. Carey: I object.

Mr. Simpson: I want to contradict him.

Frederick Smith, for Defendant—Cross

Mr. Carey: I have not asked any question of this witness in regard to the ringing of the bell or anything of the kind.

The Court: Quite true.

Mr. Simpson: Of course he hasn't.

The Court: If I understand correctly, it is simply for the purpose of laying the foundation to contradict the witness for the purpose of attacking his credibility with reference to something which would be otherwise relevant to the issue. 10

Mr. Carey: But he has no right on cross examination, if the court please, to contradict him for the purpose of attacking his credibility about a subject that I have not asked him at all.

The Court: Oh, I don't understand that. I have always understood, as long as he asks about what would be relevant to the issue, he may, upon cross examination. If he brought him back as his own witness he could not use him for that purpose, because he is seeking to discredit his own witness. 20

Mr. Carey: When he is cross examining he is limited by the rules of cross examination. Those rules are that he must cross examine on the subject that the witness has been examined upon on direct examination. 30

The Court: Except—at least this is one exception—it is for the purpose of laying a foundation upon which he may later, if he can, contradict the witness to affect his credibility. You may take your exception if you think that is not the rule.

Mr. Carey: I ask the objection be noted.

Q. Didn't you tell Mrs. Tucker that this engine,

Frederick Smith, for Defendant—Cross

referring to Clearwater's engine, was coming swiftly and was not ringing the bell, and just as it got to a point about sixty feet back of his engine, meaning your own engine, you saw Hanson's hat fly in the air and remarked to Keaton, "Well, they have clipped him"? Didn't you tell that lady that? A. No, I don't know the lady.

10 Q. Whether you know her or not, did you tell her that? A. No, sir.

Q. Did you tell her anything like that? A. No, sir.

Q. Sure about that? A. No, sir.

Q. Did you say to Keaton, "Well, they have clipped him?" A. Didn't say nothing.

Q. Did you say to Keaton, "Well, they have clipped him?" A. Who?

The Court: To your engineer, Mr. Kathan.

20 A. Kathan, not Keaton.

Q. Did you say that to him, "Well, they have clipped him?" A. No.

Q. Did you see his hat fly in the air? A. I saw the hat fly, yes.

Q. You did see the hat fly in the air and you didn't say anything to Kathan at all, eh? A. No, sir.

30 Q. When you saw the man with whom you had walked—when you saw the hat fly in the air after the other engine passed you, you didn't say a word to your engineer, did you? A. No, sir.

Q. Not a word about it? A. Didn't say, no.

Q. Did you think that Hanson had been run over when you saw his hat fly in the air? A. No, sir, I didn't think nothing.

Q. Did you think something had happened to him? A. I thought probably he fell.

Q. Might have fallen? A. Yes.

40 Q. You knew there was an engine going down

Frederick Smith, for Defendant—Cross

near where you saw him fall, didn't you? A. Yes.

Q. How near to him was this engine when you saw his hat fly in the air—Kathan's engine? A. I didn't understand your question.

Q. How near to him was Clearwater's engine, to Mr. Hanson, when you saw Hanson's hat fly in the air? A. How near? Why, I couldn't tell you how near.

Q. Was it a hundred feet away from him? A. I couldn't tell you that, I didn't measure it.

Q. Was it two hundred feet away from? A. I don't know, whether or not ten or a hundred feet, I didn't measure the space.

Q. What is your judgment? You have testified quite glibly about figures. What is your judgment about it? A. I didn't judge.

Q. Haven't got any judgment at all? A. No, I didn't judge.

Q. Although you saw Clearwater's engine and you saw this man's hat fly in the air you cannot give us a judgment about how far apart they were? A. No.

Q. Don't know anything about it. Now you passed an examination on mechanics, didn't you? A. Yes.

Q. What questions did you have to answer to pass that examination? What did you have to tell them about? A. Why, quite many questions.

Q. About what? A. I have a book here to study out of.

Q. About what? A. About engines and about air.

Q. About engines? A. About engines.

Q. About repairing engines? A. Why, sure.

Q. What? A. Yes.

Q. About the use of monkey wrenches and hammers and chisels on engines? A. Yes.

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20

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Frederick Smith, for Defendant—Cross

Q. You were a fireman when you passed that examination, weren't you? A. Yes.

Q. What tools did you have on your machine?
A. Monkey wrench, hammer.

Q. Anything else? A. Flags.

Q. Anything else? A. Scoop and hook.

Q. Well, outside of the tools that you would
10 use to put the coal on the train, what other tools did you have? A. A scoop and hook.

Q. I know they are used for putting coal in. Outside of those? A. Why, we don't use them tools in that—

Q. You had a monkey wrench, you have already stated, and the hammer, what else? A. That engineer used them for—

Q. You had them on the engine. Don't be too quick. Nobody asked you what they were used for.

20 The Court: Don't let's have any argument with the witness. Let's have him understand the question and then he will answer it.

Mr. Simpson: That may be difficult.

The Court: Of course.

(Question repeated.)

Q. What other tools?

30 Mr. Carey: I object. This question was not limited to the tools which the fireman has. He is asking about tools on the engine.

The Court: These are whatever tools there may have been on the engine aside from those tools which I understand to be the tools which the fireman would have to use, and those would be the scoop and the hook.

A. And the gauge lights.

Q. Aside from those things what—you are asked what other tools ordinarily upon engines, whether
40 you use them or whether the engineer used them?

A. Oh, shaking lever.

Frederick Smith, for Defendant—Cross

Q. Was that to be used by you? A. That was used by shaking the grates.

Q. Those are all the tools that you used, but now what other tools were ordinarily upon an engine? You have already said a monkey wrench and the hammer? A. Flags—set of flags.

Q. Call a flag a tool? What kind of tool is a flag? A. Oh, green flags and one red one. 10

Q. You call those tools? A. It belongs to the tools.

Q. Belong to the tools, do they? Where do they keep them on the engine? A. In the engine.

Q. In the box? A. There is a little box provided for shutting them up.

Q. Where is that box? A. In the engine, in the cab.

Q. Behind? A. Behind the seat box or somewhere. 20

Q. Behind the seat box? A. Yes.

Q. What side of the engine is it on? A. On the left side.

By the Court:

Q. That is the fireman's side? A. Yes.

By Mr. Simpson:

Q. These tools,—you say you passed an examination on how to use a monkey wrench and hammer and chisel when you were a fireman, did you? 30
A. Uh, huh!

Q. You passed the examination? A. Yes.

Q. On how to use them? A. Yes.

Q. What were they used for on the engine you were on? What did they use them for? Before you passed the examination, we will say, what were they used for? What did they do with them? Who ever used them? I don't care—

Mr. Carey: I object to it as not proper cross 40
examination.

Frederick Smith, for Defendant—Cross

Mr. Simpson: Are we bound by this witnesses' answer? Haven't we a right to search him on cross examination?

(Discussion.)

Mr. Simpson: I know, but he says "I never used tools." Now I ask him who did use them.

10 The Court: Oh, that is your question?

Q. Who used the tools? Who did you see using tools on the engine? A. The engineer.

Q. And they were on the box on your side, were they? A. No.

Q. Well, you just said they were on the left hand side? A. The flags.

Q. Where are the monkey wrench—were there there two tool boxes? A. No, it is on the tank.

20 Q. Were there two tool boxes? A. Only one.

Q. That is where these flags were, in the left hand side? A. They get out on the left side.

By the Court:

Q. How many tool boxes were there on these cabs? A. Only one.

Q. Whereabouts on the engine was this one tool box? A. On the tank.

Q. On the tank? A. Yes.

30 Q. That is up back of the cab? A. Yes.

Q. Which side of the tank? A. Generally put on the engineer's side.

Q. What tools were in there? A. Why, hammer, monkey wrench and the chisel and a piece of waste.

Q. Hammer, monkey wrench, chisel and a piece of waste? A. Sometimes waste.

By Mr. Simpson:

40 Q. Did you ever use waste on the engine? A. Yes.

Frederick Smith, for Defendant—Cross

Mr. Carey: I object to it as not proper cross examination and it is not material to the issues in this case. Here is an accident which happens when the man is, on the present theory of the case, in the roundhouse. He is not on the engine for the purpose of firing or anything of that kind.

Mr. Simpson: I know, but if you read the 10 Pederson case you will find that you cannot separate interstate commerce into its component parts.

The Court: I am not going into such a discussion now. I have my own pretty firmly fixed idea as to the subject. I will overrule the objection for the present at least. You will have your exception.

Mr. Carey: I ask that my objection be 20 noted.

By the Court:

Q. Did you ever use waste when a fireman on the engine? A. Yes.

By Mr. Simpson:

Q. Where did you get it? A. The tool—oil man, puts it on.

Q. Where did you get it? A. On the engine.

Q. Where on the engine? A. The tool man puts 30 it on.

Q. Where was it? Did he put it in the smoke-stack or in the firebox or where? A. On the seat box.

Q. On the seat box? A. Yes.

Q. Not in the tool box? A. No.

Q. None of it in the tool box at all? A. No.

Q. Now the tool box you said is there on the left hand side of the engine? A. No.

Frederick Smith, for Defendant—Cross

Q. Was it on the left hand side? A. No, on the right.

Q. Always on the right side? A. That is the place for it.

Q. On the tool box?

The Court: On the tender?

10 A. On the tank.

Q. What were these tools, the monkey wrench and the hammer and the chisel, used for on the engine?

Mr. Carey: I object to it as not proper cross examination and as immaterial.

The Court: I will overrule the objection and you may have your exception.

Mr. Carey: Exception.

(Question repeated.)

20

A. For filling the lubricator.

Q. Use a hammer to fill a lubricator? A. No, use the monkey wrench.

Q. What was the monkey wrench, the hammer and the chisel used for? A. Why, to tighten up something—nut or something like that.

Q. Anything else? A. Well, I don't know.

30 Q. Well, when you passed your examination as engineer did you have to tell them anything about the lubricator? A. Yes.

Q. You knew something about the lubricator, did you? A. Yes, sir.

Q. What did you know about the lubricator, how to use it and how to fill it and all that? A. Yes.

Q. How did you learn that? A. Out of the book.

Q. You never did it before you passed an examination, did you? A. But I did.

Q. What? A. Well, yes.

40 Q. "Well, yes?" A. Yes, sir.

Frederick Smith, for Defendant—Cross

Q. How many years while you were fireman were you doing it? A. I done it on my own accord.

Q. I know you did it on your own accord. Did anybody tell you to say that? A. No.

Q. You did it of your own accord. When you did it of your own accord how did you do it, what way did you conduct the operation. How did you fill the lubricator? A. By unscrewing— 10

Q. With what? A. With a monkey wrench.

Q. Then what did you do? A. Put oil in it.

Q. Then tightened it up again? A. That is what I did.

Q. Eh? A. Yes, sir.

Q. Where was the engineer when you did it? A. Where he was—I couldn't tell you where he is; sometimes around oiling his engine.

Q. Oiling his engine? A. Yes. 20

Q. When the engine gets in to a place where it has got to be oiled don't you take on side of it and the engineer take another sometimes? A. No, sir.

Q. You never did that? A. No, sir.

Q. What? A. No, sir.

Q. Where did you get the monkey wrench to lubricate the engine with? Out of the tool box A. Out of the tool box.

Q. What engines did you lubricate? Do you know the numbers of them? A. No, sir. 30

Q. How many of them were there? A. I couldn't tell you.

Q. How long had you worked before you passed your examination? A. Quite a few.

Q. How many, ten? A. I couldn't tell you.

Q. How long had you been working as a fireman before you passed your examination? A. About nine—eight or nine years.

Frederick Smith, for Defendant—Cross

Q. You passed your examination on lubrication, didn't you? A. Yes.

Q. Now when you met Mr. Hanson the first time this day where was he? A. Down in the Y. M. C. A.

Q. What is the Y. M. C. A.? A. That is a place here provided for men to sleep and board and eat,
10 lodge there; it is a lodging house.

Q. You waited on the outside while he went in and then he came out and then you two went up together towards the roundhouse, did you? A. Yes, sir.

Q. Did you walk on this path until you came to your engine? A. Yes, sir.

Q. When you saw your engine did you signal your engine or did the man see you? A. He seen me.

20 Q. And stopped? A. Yes.

Q. Then you got on the engine? A. Yes.

Q. When you walked over Hanson walked over with you, didn't he? A. Yes, sir.

Q. Then you got on your engine? A. Yes, sir.

Q. Now how far had your engine gone before you saw Hanson's hat fly in the air? A. I couldn't tell you how far.

Q. Well, were you going towards the roundhouse or away from the roundhouse? A. Away
30 from the roundhouse.

Q. Where were you going? A. To the coal pocket.

Q. Is that past the Y. M. C. A. building? A. No.

Q. That is between the Y. M. C. A. and the roundhouse? A. The coal pocket is right up—alongside of the coal pocket—there is the Y. M. C. A. and there is the coal pocket.

Frederick Smith, for Defendant—Cross

Q. How near to the coal pocket were you when you stopped your engine? A. How many?

Q. How near? A. Well, I don't know.

Q. Had you got to the coal pocket? A. No.

Q. Had not got to it. Why did your engine stop, if you know? A. To pick me up.

Q. Do you know when it went on after you got on it?

10

The Court: You went on towards the coal pocket, didn't you?

A. Yes.

Q. Did you get to the coal pocket? Did your engine get to the coal pocket? A. Yes; at last we got at the coal pocket.

Q. Before the man's body was found or afterwards? A. Why, we stopped when we seen the body laying between the tracks, we stopped.

20

Q. Did you see the body laying between the tracks? A. Yes, sir.

Q. As you passed you saw the body? How soon was that after you saw the hat?

Mr. Carey: I object. He didn't say that, as he passed he saw the body.

Q. What do you mean, Mr. Smith, if you don't mean that? What did you mean? Did you see this body lying in the tracks? A. Yes.

30

Q. Did you see it before you passed the body or after you passed the body? A. After.

Q. Well, how did you come to see it after? A. Why, Kathan seen it.

Q. Oh, Kathan called your attention to it? A. Yes.

Q. Then you turned around? A. Then I turned around to see it.

Q. Then did your engine stop? A. Yes.

Q. About how far from the body were you when

40

Frederick Smith, for Defendant—Cross

you stopped? A. I can't tell you how far, I didn't measure it.

Q. Half a mile?

The Court: Give us some estimate, Mr. Smith. Take the length or width of this room, and say it was that length or twice the length or twice the width?

10

A. About an engine length or a couple of engine lengths, I couldn't say exactly.

Q. Are you an engineer now? A. Yes, I am promoted to an engineer. I ain't run yet, but I am firing.

Q. Still working as a fireman? A. Yes.

Q. Have you got the keys to a tool box on you, to your tool box?

20

(Objected to as not proper, and as immaterial. Objection sustained.)

Q. Now just show us on this map—come down here again,—show us on this map how you walked up these tracks until Kathan saw you and stopped? How did you walk from the Y. M. C. A.

The Court: This will be valueless unless the witness is now able to physically tell us how he did it.

30

Mr. Simpson: We can draw a line with a lead pencil how he went.

The Court: All right.

Q. Draw a line with a lead pencil how you went?

A. (Witness indicates on map.) Went like that.

Q. Make it with a lead pencil, make a line.

(Witness marks on map.)

40

Q. All right. How many times did you cross tracks before you got on the engine; or how many tracks did you cross. From the Y. M. C. A. how

Frederick Smith, for Defendant—Redirect

many tracks did you cross until you got on your engine? A. One—well, do you mean from the Y. M. C. A.?

Q. Back and forward how many tracks did you cross? How many times did you cross a track up to the time you stepped on the train, whether it was the same track or not? A. About three, I think, I am not sure.

10

Redirect Examination by Mr. Carey:

Q. Did you cross either of the engine tracks prior to the time when you crossed the engine track number 2, to get on to your engine? A. When the engine stopped I crossed over.

Q. Had you crossed— A. No.

Q. —any engine track prior to that time?

The Court: Before that time?

20

A. I don't know which track you mean there.

Q. Well, you have described two tracks there as being engine tracks. One track leading into the roundhouse and the other track leading out of the roundhouse. Do you recall? A. Why, there is one leads in the shop, and there is one track next side of the shop.

Q. I am not speaking about those. I am speaking about the engine tracks, the tracks on which the engines went to the roundhouse and came out from the roundhouse? A. Yes.

30

Q. How many of those tracks were there? A. Only two.

Q. Only two? A. Yes.

Q. One was the eastbound track, engine track? A. Yes.

Q. Is that right? A. Yes.

Q. And the other the westbound engine track? A. Yes.

40

Frederick Smith, for Defendant—Redirect

Q. Now before you started to get on to your engine had you crossed either one of those tracks from the time you left the Y. M. C. A. Building?

A. No, sir.

Q. Which of the engine tracks did you first cross? A. Crossed—

Q. The eastbound or westbound? A. The west-
10 bound track. We laid on the eastbound.

Q. The engine was on the eastbound track? A. On the eastbound.

Q. Up to the time when Kathan stopped his engine for you to get on had you crossed the westbound track? A. No.

Q. Now you spoke of using tools to lubricate the engine while you were still a fireman. Whose tools were those? A. The engineer.

Q. The engineer's tools, but did you as a fire-
20 man have any tools of your own for the purpose of lubricating the engine? A. No, I don't carry any.

Q. When you got these tools you got them from those tool boxes? A. The engineer's tool box.

Q. You spoke about a distance of about two engine lengths? About how long is an engine, do you know? A. No, I don't know the engine length.

Q. When you said two engine lengths did you mean the engine and the tender? A. I think so,
30 engine and tender, yes.

Q. Now on this day when you were walking up with Hanson were you intending to go all the way to the roundhouse? A. Yes.

Q. Mr. Kathan had already gone up to the roundhouse? A. Yes, sir.

Q. And he was going to bring the engine down? A. Yes.

Q. You didn't have anything to do with bringing the engine down.

Frederick Smith, for Defendant—Recross

Mr. Simpson: I object, on the ground that he doesn't know what Kathan was going to do until he saw him.

The Court: I don't know how he knew it unless he communicated it to him.

Recross Examination by Mr. Simpson:

Q. Why were you intending to go to the round- 10
house? What were you going there for? A. To
get an engine.

Q. To get on the engine? A. Getting the en-
gine.

Q. You were going to get the engine? A. I
hadn't gone up then, but I was going.

Q. That is where you expected to get it, at the
roundhouse? A. Yes.

Q. Now I omitted to ask you, and with the
Judge's permission I will ask you this. You have 20
said you got on the engine and described what you
did and all that sort of thing. Did you see or hear
this Clearwater's engine until after Kathan called
your attention to the fact that there was an acci-
dent? A. Why, I seen him pass.

Q. You saw him pass you? A. Yes.

Q. That is all you know? A. That is all I seen.

Q. Now didn't you tell this lady that you neither
saw nor heard Clearwater's engine at the same 30
time that you had this other conversation with her
that you say never occurred, but I call your atten-
tion to the fact for the purpose of fixing the time
and place. Didn't you tell this lady, this lady on
the end, that you neither saw nor heard Clear-
water's engine until the accident? A. I did not.

Philip Freleigh (Recalled), for Defendant—Direct

PHILIP FRELEIGH, recalled.

Direct Examination by Mr. Carey:

Q. Just step to the map, will you, Mr. Freleigh, and state what distance there is a clear view from the point X-K in the southerly direction along engine track—along the westbound engine track?

10 The Court: X-K has been testified to be what point?

Mr. Carey: The point where Smith and Hanson crossed the track.

The Court: Where Smith got on the Kathan engine?

Mr. Carey: Yes.

A. I cannot give you that, how far a vision would be. I can get you the distance from this point here.

20 Q. Can you tell by scaling? A. I cannot tell how that curve would cut off the vision.

Q. Very well. Will you tell us what distance can be seen from the point where the body was found in a southerly direction? A. It is 970 feet.

Q. Can you tell whether there is a longer or shorter view from the point where the lead pencil cross is on the map? A. I cannot say whether it would be longer or shorter.

30 *Cross Examination by Mr. Simpson:*

Q. What is the curve you refer to? You speak of some curve? A. Well, the tracks are curved.

Q. Where are they curved? A. Well, beyond here (indicating), say a distance of about 700 feet from where the body was found.

Q. A curve? A. You can see that they start a curve.

Q. When you say southerly, is that the direction of the Y. M. C. A.? Yes.

40 Q. Northerly is the roundhouse? A. Yes.

P. Freleigh (Recalled), for Defendant—Redirect

Redirect Examination by Mr. Carey:

Q. What is the distance from the lead pencil cross there to the place where the track begins to curve, looking in a southerly direction or an easterly direction? A. You mean on the westbound?

Q. On the westbound, yes, sir. A. That is approximately 210 feet.

Q. Would the view have been clear from the X 10 mark down to the beginning of the curve? A. Oh, yes.

Q. What is the answer? A. It would.

Q. Would the clear view extend any beyond the beginning of the curve? A. I should judge it would.

Q. And can you tell us about how far beyond the beginning of the curve? A. Probably be a couple of hundred feet more, I couldn't say exactly. 20

Q. Can you tell how far the clear view is in the other direction, westerly direction? A. You mean up the track toward the roundhouse?

Q. Yes, from the place where the body was found? A. About a thousand feet.

Mr. Simpson: That question is where the body was found to the roundhouse?

Mr. Carey: Toward the roundhouse.

Mr. Simpson: That is in a northerly direction, the same direction the engine was going 30 when it hit him?

Mr. Carey: Yes.

Robert C. George, for Defendant—Direct

ROBERT C. GEORGE, recalled.

Direct Examination by Mr. Carey:

Q. Mr. George, are you familiar with this path which was shown on the map and used in the examination of the witnesses? A. Yes, sir.

10 Q. Will you describe that path, what kind of path is it? A. Oh, it is a path made by the men walking back and forth.

Q. Anything done by the company in connection with making that path? A. No, sir.

Q. What happens when the company repairs its tracks along where that path is? A. They are liable to tear it up any time and cover it up.

20 Q. Is there any other way by which the men customarily go from the vicinity of the Y. M. C. A. to the roundhouse than by this beaten path which is shown on the map? A. The plankroad, I guess.

Mr. Simpson: I object to the guess.

A. Well, they go by the plankroad.

Mr. Carey: I do not want him to guess.

The Court: If you don't know, say so—if you have knowledge.

A. I was speaking—I ain't positive there are any men going, but the way I go.

30 Mr. Simpson: That is what we want.

Mr. Carey: Yes, precisely.

By the Court:

Q. Have you ever taken notice of men who were at or near the point indicated as Y. M. C. A., as to how they proceeded from that point toward the roundhouse? A. Yes; they go up the plankroad. I have seen them start up the plankroad at least. Went up that way myself at times.

40 Mr. Simpson: What is the answer?

(Answer repeated by stenographer.)

Robert C. George, for Defendant—Direct

By Mr. Carey:

Q. What is there opposite the engine house from the plankroad down to the engine house, if any?

A. Why, the stairs.

Q. Shown on the map there? A. Yes, sir.

Q. Where do those stairs lead to? A. Why, they lead right to the engine house offices—path there—board path—board walk. 10

Q. By whom are the stairs and the board walk made? A. By the company.

Q. You have already testified that you were an engine dispatcher? A. Yes.

Q. And were at the time of the accident? A. Yes, sir.

Q. Do you know what the duty of the fireman was with respect to transferring tools from an engine at the roundhouse or on the ashpit at New Durham? 20

Mr. Simpson: I object. The duty would be either the written rule, or it would be by the direct employment. This man has shown no familiarity either with the written rules or the direct employment, or that there was any rule, so that he has not yet qualified to testify as to what the custom was.

The Court: The question is, do you know. He may answer yes or no, because if he says no— 30

Mr. Simpson: If he says yes, then I shall have to cross examine as to how he gets his knowledge.

(Question repeated.)

A. Yes, sir.

Mr. Simpson: I would like to cross examine as to the foundation of his knowledge.

The Court: Mr. Carey may or I may ask him what his knowledge is based on. 40

Robert C. George, for Defendant—Direct

Mr. Simpson: But I say that is my right to cross examine before he does get in this testimony.

The Court: Yes.

Mr. Simpson: Well, I cannot ask it until he has laid the foundation.

The Court: He has not asked it yet.

10

Q. What is the source of your knowledge with respect to the duties of a fireman in this particular? A. Why, I have always been told that. The engine house foreman tells you that, that the man provided—

The Court: No, no; you are only asked what the source of your knowledge is. You say you know what the practical requirements of a fireman are with regard to this matter. Now you are asked how do you get that knowledge which you say you have?

20

A. Get it from the engineer's agreement, for one thing—the agreement the engineers and firemen have with the railroad company.

By the Court:

Q. You get it from an agreement which the engineers and firemen have with the railroad company? A. Yes, sir.

30

Mr. Simpson: I submit therefore that the agreement is the best evidence of that. You cannot characterize the terms of an agreement.

By Mr. Carey:

Q. Do you know about the agreement? A. I know that part of it, yes.

Q. I show you a document labeled "New York
40 Central and Hudson River Railroad Company,

Robert C. George, for Defendant—Cross

rates of pay for firemen and arrangements for handling same," effective May 10, 1910, and ask you if that is the agreement to which you refer?

(Witness examines paper.)

Q. Calling your attention to section 47 of the agreement, or a copy of the agreement? A. Yes, sir; that is the one I have reference to. 10

Mr. Carey: I offer in evidence article 47 of this—

Mr. Simpson: I object until I have a chance to cross examine this man and find out what the date of this is and what this paper refers to.

Cross Examination by Mr. Simpson:

Q. What is the date of this paper?

The Court: I assume it is not dated. 20

Mr. Simpson: I am asking him to test his familiarity with it.

A. I don't know. I don't know what the date is. I don't know the date.

Q. You do not know the date? A. No, sir.

Q. When did you first see this paper? You say you get your information from it? A. When did I first see it?

Q. Yes. I am speaking of this copy now, not the original. A. This is the first time I saw that. 30

Q. The first time you have ever seen it? A. That copy of it, yes.

Q. Well, how do you know it agrees with any other copy? How do you know it is a true copy of an original? A. How did I know it? Because I read the original sir. That is the book. I haven't got a copy like that. What I have is the book—the book of our agreement.

Q. You haven't got this? You have some book, 40 eh?

*Robert C. George, for Defendant—Cross**By the Court:*

Q. Does the book or agreement agree with it?

A. Yes, sir.

Q. What do you mean by book agreement? A. That is a book between the engineers and firemen of the railroad company. That is a book drawn up with reference, to see if anything turned up,
10 we have it to refer to.

By Mr. Simpson:

Q. When you testified about a certain duty of the firemen you are testifying from the contents of some agreement which you refer to; is that right? A. Some agreement? Why, I am taking the customary way of handling the situation, yes.

Q. When Mr. Carey asked you do you know the duties of a fireman you answered yes, didn't you?

20 A. Yes.

Q. Then you do know it? A. Yes.

Q. Then I asked you how you knew it and you said because of knowledge gained from an agreement? A. Yes.

Q. Is that right? A. Yes.

Q. That is how you know it? A. Yes.

Q. Because of some paper which you call an agreement and that agreement contains all the duties of a fireman, does it? A. Yes.

30 Q. Everything he has got to do? A. Everything he is supposed to do.

Q. Does it leave anything to his option? A. I couldn't say.

Q. You don't know that? A. No.

Q. Yet you are testifying from it, aren't you? A. Yes.

Q. Testifying and you don't know what the contents of it are? A. What the contents?

Q. All right.

Robert C. George, for Defendant—Cross

Mr. Simpson: That is all. I don't know as we object.

The Court: There is no question so far that is not answered.

Mr. Simpson: I thought we ought to have a chance to look over this. He is offering these two things which he has marked. We have no objection, provided we have a chance to look 10 through this document and see if there is anything that qualifies it in that.

Mr. Carey: I offer Article 47 of that document.

Mr. Simpson: I object, unless it is offered on this understanding, that we have a right to look over it and see if there is anything which qualifies or explains article 47 or 48.

The Court: I suppose on the idea that if there is, all that part of the instrument which 20 is bound up in that thing would be proper to be admitted and go in?

Mr. Simpson: Yes.

The Court: Rather than excluding all the rest for this one article. That is the understanding on which you are to use it?

Mr. Carey: Yes.

The Court: All right.

Mr. Carey: "Article 47. Company shall furnish man to fill and clean headlights and 30 markers on all pooled and double-crewed road engines, a man to perform similar service on single crew engines, pushers and helper engines, when practicable, and to have supplies placed on engines where practicable and consistent so to do."

Q. What is meant by double-crewed road engines?

Mr. Simpson: I object that he does not show 40

Robert C. George, for Defendant—Cross

special knowledge, and also I object that he cannot qualify upon this paper. The men who drew this paper know what this paper means. This man does not show that he had anything to do with the drawing of the paper?

Q. Do you know what double-crewed road engine is?

Mr. Simpson: I object on the ground that the paper speaks for itself.

(Discussion.)

The Court: Do you wish to cross examine him on his efficiency in that respect, Mr. Simpson?

Mr. Simpson: Yes.

Cross Examination by Mr. Simpson:

20 Q. Have you ever drawn up a paper like this?

A. No, sir.

Q. Were you consulted by the New York Central president or secretary when this paper was drawn up? A. No, sir.

Q. As to the meaning of its terms? A. No, sir.

Q. You simply work under this agreement, don't you? A. Yes.

Q. When you say you know what it means what you mean to say is that you know how to interpret this paper? A. Yes.

Redirect Examination by Mr. Carey:

Q. Do you know what a double crewed road engine is?

Mr. Simpson: I object on the ground it is not relevant or competent, if he knows what it is.

The Court: I will overrule the objection.

Robert C. George, for Defendant—Redirect

A. Why, double crewed engine is an engine with two crews, that is, a crew for one day or a crew for the next day, or vice versa.

Q. That is where a train goes out every day?

A. Train goes out on Monday in one direction it would be coming in the opposite direction on that Monday too. That would be a double crewed engine—two crews.

10

Q. As to this pick-up engine, what kind of engine was that with reference to this definition of a double crewed engine? A. Why, that was double crewed, that is it is a double crew.

Q. Will you describe the movements of a pick-up train, say, as to its going out and coming in, beginning with the first of the week, Monday. There was—did he go out on Monday? A. Yes.

Q. When did the crew which went out on Monday return? A. Tuesday.

20

Q. On Tuesday? A. Tuesday night, ordinarily.

Q. Was there also a pick-up train coming in on Monday? A. Yes, sir.

Q. And that pick-up train which comes in on Monday would go out when? A. Tuesday morning.

Q. When did it go out prior to coming in on Monday? A. Why, it would leave the upper end Monday.

Q. Leave the upper end on Monday? A. Yes. 30

Q. When would it leave the lower end? A. Tuesday.

Q. No, preceding? Preceding its coming in on Monday, A. Why, Saturday. Saturday morning, yes.

Q. Now what is a pooled engine? A. Well, pooled engine is what we call first in and first out, that is, an engine that comes in and as soon as it comes in is labeled to be turned and sent right out again.

40

Robert C. George, for Defendant—Redirect

Q. Then the rule under this agreement is that the engine which is first in shall be the first one out? A. Yes, sir.

Q. And that you call a pooled engine? A. Yes.

Q. You say that the engine on the pick-up was a double crewed engine? A. Yes, sir.

10 Q. Then did this rule, this article 47 of the agreement apply to this engine? A. Yes, applied to all them engines.

Q. Now when the engine came in what was done with it and by whom with respect to the tools on the engine, either engineers or firemen?

Mr. Simpson: This engine.

Q. At the time—this engine or any other engine? A. Coming in?

20 Q. Yes. A. Left at the ashpit to have the fire cleaned.

Q. Go on.

(Question repeated.)

A. Why, there would be nothing done as far as I know with respect to the tools with regard to engineer and fireman.

By the Court:

30 Q. What would be done, irrespective of who has to do with it, what would be done with an engine coming in, with the tools, whether they were tools of the fireman or the engineer? A. The toolman would take them off the engine.

By Mr. Carey:

Q. What would he do with them? A. Put them in the tool car, a car provided for that purpose.

40 Q. When the engine was equipped for going out who would have anything to do with the placing of the tools on the engine, and when would they be placed on and by whom?

Robert C. George, for Defendant—Redirect

The Court: That refers to both kinds of tools, both scoop and hook and such tools as the fireman ordinarily would use, as well as the tools which the engineer would use, does it?

A. Why, the tool man would place them on.

Q. Now when did the fireman and engineers learn what engine they would go out on when they were prepared to go out for a run? A. Why, ordinarily when they come to register. 10

Q. When they come to register? A. Yes.

Q. How long are they required to register before they go out on their run? A. Why, fifteen minutes before leaving the roundhouse.

Q. Yes. Where would they get that information from as to what engine they were to have?

A. They get it from me usually, and they might meet the engine house foreman and ask him and he might tell him, but as a general thing they get it from me. 20

Q. Taking the pick-up train for example, as it was run in August, 1913, when would you know what engine was to be used on the pick-up train?

A. Why, I might know three or four hours before it was due to go out and I might not know for an hour, until an hour before it was due to go out.

Q. When was the pick-up engine due to leave the roundhouse on August 3 and 4—no, August 2nd and fourth, 1913? A. I find they are registered out 3.30 in the morning. 30

Q. When did the engine leave the roundhouse? A. 3.45—due to leave.

Q. Now at what time would you learn what engine was to go out on that pick-up train, approximately? A. Well, ordinarily about four hours beforehand. 40

Robert C. George, for Defendant—Redirect

Q. That would be what time? A. Oh, they would be probably eleven o'clock or twelve o'clock.

Q. What did you do with respect to the number of the engine to go out on the pick-up train, when you learned what engine was to go out? What did you do with respect to the engine number? A. Why, I put it in my book.

10 Q. Put it anywheres else? A. No, sir.

Q. Anybody put it anywheres else? A. Why, the engineer and firemen when they registered put it down.

Q. Now on the pick-up run when did Mr. Hanson's time begin and when did it end? A. Why, the time—

Q. I refer to the time for which he was paid? A. When he registered on duty and when he registered off duty. Under those circumstances it

20 would be begun at 3.30 in the morning.

Q. The time from which his wages were computed was the time between the registering on and registering off; is that right? A. Yes.

Q. You have testified that Mr. Hanson came in on Saturday night on the pick-up train? A. According to the register sheet.

Q. Yes. When would he be due to go out on the pick-up train, when next? A. On Monday morn-

30 Q. Now what engine did Mr. Hanson come in on on Saturday night; does your train sheet show that? A. That sheet should show it, yes; I don't remember it.

Q. Turn to your train sheets and see what engine he came in on? A. The engineer came in on the 2105.

Q. 2105? A. Yes, sir.

40 Q. Did 2105 go out on the following day, Sunday, and if so, on what train? A. There is an order here for Sunday night.

Robert C. George, for Defendant—Redirect

Q. Sunday night, what date? A. The third of August.

Q. What time? A. Does not give the time on the sheet here. He did not register the time.

Q. Give the train number? A. Extra.

Q. Have you a record which shows what train it went out on and at what time? A. The crew that went out on that engine were ordered for 9.35 P. M. 10

Q. For 9.35 P. M.? A. Yes, sir.

Q. What time was that train due to go out—that is, the engine due to go out of the roundhouse? A. The engine would be due to leave the roundhouse at 9.50.

By the Court:

Q. Is that in the evening or morning? A. In the evening, 9.50 P. M. 20

By Mr. Carey:

Q. When did 2105 return from that trip on which it went out on Sunday evening, August 3rd? A. 9.10 P. M. August 4th.

Q. 9.10 P. M. August 4th. Your records show what engine was assigned to the pick-up for the morning of August 4th? A. 2076.

By the Court:

Q. 2076? A. Yes, sir. 30

Q. Who went out on engine 2076 as engineer? A. Engineer Griffin, according to the sheet here.

By Mr. Carey:

Q. He registered on that engine? A. Yes.

By the Court:

Q. Does that same record or any record you have show the time when engine 2076 was assigned 40

Robert C. George, for Defendant—Recross

as the engine for the pick-up train to go out on the morning of August 3rd? A. No; we haven't any record of that at all. That is a verbal record, or verbally given from the engine house foreman.

Q. Does your record show when engine 2076 came in last preceding its going out on the pick-up on August 3rd? A. The last record here shows 2.20

10 P. M. August 3rd.

Q. 2.20 P. M.? A. This record, yes.

By Mr. Carey:

Q. Now when a man has been assigned to a regular run he was called a regular man, was he? A. Yes, sir.

Q. After a man had been assigned to a regular run did he report to you his movements or where he could be found during the time when he was off
20 duty? A. Never had one do it yet, sir.

Q. Did Mr. Hanson after being assigned to his pick-up report to you where he could be found while off duty? A. I never recollect him doing it.

Q. Now as to these movements on tracks number 1 and 2, engine tracks, are you accustomed to distinguish them as tracks number 1 and number 2? A. No, sir.

Q. How many movements are there ordinarily on those two tracks, the outgoing and the incoming engine tracks per day? A. I should judge in
30 the neighborhood of seventy or seventy-five.

Q. Was this article 47 in the paper which I show you, which has been offered in evidence in effect at the time of the accident? A. Why, yes.

Recross Examination by Mr. Simpson:

Q. 2076 was the engine that went out on the pick-up run on the morning of the 3rd, wasn't it? A. Morning of the 4th.

40 Q. 4th. He had run the pick-up run on the 30th

Robert C. George, for Defendant—Recross

and 31st of July, 2076? A. It may have been possible.

Q. Haven't you got the sheet here? A. Not for those dates, no.

Q. What sheets have you there, only just that one to show what you want to show? A. Second, third and fourth of the month.

Q. Will you bring them here and show us? A. 10
What engine he took out?

Q. On the 30th and 31st of July? A. I don't know where I can get them.

Q. Where did you get these? A. From Mr. Brusle.

Q. Did you ask him for it? A. Yes.

Mr. Simpson: Have you got the sheets of the 30th and 31st of July?

Mr. Brusle: No, sir, but I have what you asked for, showing— 20

Mr. Simpson: No; have you the sheets which show whether he took out 2076 on the 30th and 31st of July on the pick-up run.

Mr. Brusle: I believe I have.

Mr. Simpson: Will you give them to this witness so he can refresh his memory?

Mr. Brusle: Yes. (Hands papers to witness.)

Q. What engine did he take out on the 30th and 31st of July? A. I couldn't say. He has Engineer Griffin's slip here. He has 2076. 30

Q. Yet you could not say? A. I could not.

Q. Why couldn't you say? A. Because I handle too many engines to try and keep them in my mind.

Q. You used this report once without that mental obscurity, didn't you? A. No, sir; these are registering sheets. I take these. 40

Robert C. George, for Defendant—Recross

Q. Those are your own? A. These are the sheets that the men register on.

Q. Those that you have just seen are Mr. Griffin's? A. They are engineer Griffin's time slips.

Q. Now Mr. Witness you are what, the engine dispatcher? A. Yes.

Q. This pony engine, did you have control of
10 that? A. No, sir.

Q. Had nothing to do with it? A. No, sir.

Q. Do you know how long that was laid up at the roundhouse out of use? A. Why, no, I wouldn't say exactly.

Q. On the 3rd of August? A. That I couldn't say.

Q. Where was your office, in the roundhouse? A. No.

Q. Where? A. Why, the office away from the
20 roundhouse, about a hundred feet from the roundhouse—fifty feet away from the roundhouse.

Q. Go to the roundhouse at all? A. It is connected with the roundhouse by a bridge or path, whatever you might call it.

Q. When you went to the office did you go from the Y. M. C. A. or from your home? A. From my home.

Q. So when you went to the office it was more convenient for you to ride on the trolley car right
30 out to the board walk from the plankroad and go that way, that is the way you went? A. No, sir.

Q. How did you go? A. I usually walked up that path.

Q. On the tracks, eh? A. Yes, sir.

Q. This was the beaten path you all used, wasn't it? A. Yes, by the men.

Q. So it was considerably used to be made that way, wasn't it? A. Yes.

Q. Never made by the company or laid out by
40 the company, but just a beaten path made by use? A. Yes, sir.

Robert C. George, for Defendant—Recross

Q. So there is considerable traffic along that way? A. Yes, sir.

Q. To make that path? A. Yes.

Q. When you spoke of the path you spoke of it as it existed on the 3rd of August, 1913, didn't you? A. Why, yes, sir.

Q. Still there? A. Still there, yes.

Q. Any other paths through the yard besides that one? A. I couldn't say? A. In the direction of the roundhouse? A. That I couldn't say.

Q. Now you are the man who assigns the engine? A. No, sir; I don't assign—the engine house foreman assigns them.

Q. What did you do with reference to assigning engines, anything? A. No; I got the assignment from the engine house foreman. He tells me what engines are to go out.

Q. Then what did you do? A. What do I do? 20
When I find out about it I make a note of it and tell the crews for them to come around to go out and what engine they are to get.

Q. You tell the crews to come in and take that engine? A. Yes.

Q. Who is the man that has the assigning of the engines? A. Engine house foreman.

Q. Where was 2076 between eleven and twelve on the morning of August 3rd? A. That I couldn't tell you, sir. 30

Q. Who would know that? A. I couldn't tell you.

Q. Who has control of the engines, the supervision of them? Who is responsible for them when they are not in action? A. Engine house foreman if they are at the engine house.

Q. If they are not at the engine house? A. Well, they would be on the road then.

Q. They have either to be under the control of the engine house foreman at the roundhouse or else on the road? A. On the road, yes. 40

*Robert C. George, for Defendant—Recross**By the Court:*

Q. You told us, Mr. George, that engine 2076 reported in August 3 at 2.20 in the afternoon? A. Yes, sir.

Q. That is according to your record? A. That is according to the record.

Q. Does your record show from where engine
10 2076 came that day? A. No; they don't put any of that on here at all.

By Mr. Simpson:

Q. Where was it 2.20? That is not 2076 you are talking about? A. Yes.

Q. 2076? A. Yes.

Q. On August 3, in the afternoon about 2.20 it was sent out, you say? A. No, sir, registered in, sir.

20 Q. Registered in? A. Yes.

Q. Would you get the other ones that came in or was it after them came in? A. Why, I get them when they register on the sheet.

Q. Who registered them? A. Engineer and fireman supposed to register for themselves.

Q. They register there? A. Their arrival.

Q. Some time after they arrive? A. By their arrival—they register there when they are finished.

30

By the Court:

Q. Those sheets do not show, as I understand, where the engine came from that was registered in? A. No, sir.

Q. Or what disposition was made of it except as it might show afterwards it was registered out? A. Yes, the engineer's time slip would show where he came from, and that would be all. The ashpit comes under the jurisdiction of the engine house
40 foreman.

Q. So the engine house foreman would be the

Robert C. George, for Defendant—Recross

man who could tell us what became of engine 2076 between the time it was registered in, August 3rd at 2.20 in the afternoon, and the time it went out?
 A. It must have laid at the roundhouse, because it is not registered.

Q. Your work was not in the roundhouse? A. No, sir.

Q. You would not see what a fireman did or did not do in the roundhouse? A. No, sir. 10

By Mr. Carey:

Q. Does any of your records show what train the engine 2076 came in on on August 3rd? A. Came in as an extra, that all, sir.

Q. Do your records show where that extra came from? A. No, sir.

Q. You are not able to state then? A. No, sir.

Q. How long after the engineer brings his engine to the roundhouse or ashpit is it before he registers his arrival? A. Why, might be five minutes and might be ten minutes. 20

By the Court:

Q. As I understand, he has made it as soon as the engineer has completed his work? A. Yes, sir.

Q. He then comes in—the engineer and fireman, they then come in and register? A. Yes, sir. 30

By Mr. Carey:

Q. By completing his work, what do you mean?
 A. An engineer has a work report to make out on his engine.

By the Court:

Q. What do you mean by that? A. There is a work report clerk there, and the engineer tells what work is necessary to be done on the engine.

Q. Repairs and something of that sort, he must 40

Leo A. Souders, for Defendant—Direct

make a report at the time he registers in? A. Yes, sir.

Q. Is that all that he does between the time he arrives and the time that he registers? A. As far as I know, yes, sir.

By Mr. Simpson:

10 Q. Who registered in 2076 on Sunday? A. Engineer Wendt.

Q. Is he here? A. No, sir.

By the Court:

Q. And the fireman? A. Wynn.

LEO A. SOUDERS, recalled.

20

Direct Examination by Mr. Carey:

Q. Mr. Souders, you were assistant foreman of the roundhouse on the day of this accident? A. Yes.

Q. Were you on duty that day? A. Yes, sir.

Q. Now Mr. Souders, will you tell us what your duties are as roundhouse foreman? A. Well, I look after the work in general, see that the engines are—the work is done and equipped ready to be
30 sent back where they are called for.

Q. When the engine comes into the roundhouse at New Durham, what is done with respect to the tools and who does it, and by tools I mean the engineer's tools and the fireman's tools? A. They are removed by the tool boy.

By the Court:

Q. What does he do with them? A. He places them on a car which is provided for them.

40

Leo A. Souders, for Defendant—Direct

By Mr. Carey:

Q. What is that? A. They are removed by the tool boy and placed in a car provided for that purpose.

Q. A tool boy is a boy how old? A. Well, about eighteen, nineteen.

Q. May be less than eighteen years? A. Yes, may be, he could be. I don't know.

Q. How young are they, the tool boys, when they are employed? A. Well, about eighteen or nineteen, something like that; some of them are older.

Q. And how old? A. Some of them are men that have been, been an old man on the job.

Q. Now when an engine is being prepared to go out, who has the supervision of the equipping of it with tools? A. Why, the tools—

Q. I refer to engineer's tools and firemen's tools? A. The tool boy places them on the engine.

Q. The same man? A. Same man takes them off and places them on.

Q. When the engine come in, what, if any tools are left on the engine, either fireman's or engineer's? A. None at all.

Q. On that day, August 3rd, at what time did you come on duty? A. Six or seven in the morning. Six, I think it was, shortly after six.

Q. How long did you continue? A. Twelve hours.

Q. When you were on duty at night you came on duty what time? A. Seven o'clock, until seven.

Q. With respect to the designation of the engine for the pick-up train, what time did that train leave in August, 1913? A. I wasn't on at night that night, sir; I was on day at that time.

Q. Were you subsequently on nights? A. No. I went on nights after that. I was assistant foreman day times, and then I was put on nights.

10

30

40

Leo A. Souders, for Defendant—Direct

Q. Then you were put on foreman at night?

A. Assistant foreman.

Q. When you came on as foreman at night, did you have the designation of the engine for the pick-up train so as to go out on the following morning? A. Yes.

10 Q. At what time did you make the designation of the engine to go out on the pick-up train? A. Well, I made the board up about seven o'clock, shortly after.

Q. About seven o'clock? A. Yes, sir.

Q. When you made the board up at that time you put on the different engine numbers for the different trains? A. Yes, sir.

20 Q. Were those numbers always the ones that went out on the trains? A. No, sir, not always; may something turn up, you know, that you couldn't get the work completed, then we would have to get another engine to take its place.

Q. Well, was the engine for the pick-up train designated before seven o'clock in the evening? A. Before seven?

Q. Yes, when it was going out the following morning. A. Well, it is a regular crewed engine, and of course it would be theirs if it was going out in case nothing happened that it would be held in.

30 Q. That was determined you say, about seven o'clock in the evening? A. Yes.

Q. Under whose direction are these tool men or tool boys? A. Under the roundhouse foreman's.

Q. What, if any, were the duties of the fireman with respect to transferring tools to an engine which was to go out, to the engine that he was to be fireman? A. None at all.

40 Q. What were his duties with respect to removing the tools from the engine which he had come in on? A. None at all.

Leo A. Souders, for Defendant—Direct

Q. I call your attention to Article 47 of this paper dated May 1, 1910, and ask you if that article of the agreement was in effect between the firemen and the railroad company in August, 1913? A. Yes, sir.

Q. Now will you state whether or not that rule governed the putting on or taking off—or, rather, the putting on of tools for the fireman and engineer? 10

(Objected to.) (Question withdrawn.)

Q. What did the term “supplies” apply to in that paragraph of the agreement?

(Objected to.)

Mr. Carey: I think that is competent. He was a man who was in charge of the round-house and the equipping of engines with supplies. 20

The Court: Well, you might ask him what supplies were placed upon the engines.

Q. What supplies were placed on engines—

The Court: About to depart on a trip?

Q. —as they were about to go out for their run?

A. Well, markers,—and classification lights, flags, oil can, hook, shovel, shaking lever.

Q. Anything else? A. And tool box. 30

Q. To whom did the tool box belong? A. The engineer.

Q. And the markers, what were those? A. Those are placed on the front and rear of the engine.

By the Court:

Q. What are they, flags? A. No, they are lights. 40

Leo A. Souders, for Defendant—Direct

By Mr. Carey:

Q. Marker lights? A. Yes, sir.

Q. Flags are flags used on the engine? A. Yes.

Q. The shovels are used by the fireman? A. Yes.

Q. And the hook is used by whom? A. By the fireman.

10 Q. And the shaker bar? A. By the fireman.

Q. And the gauge lights? A. They are lit by the fireman.

Q. And by whom are they placed in position? A. By the tool boys—that is on the engine.

Q. What do you mean by those gauge lights? A. They give light to the steam gauge and water glass.

20 Q. Those are really for the benefit of the engineer, aren't they? A. Yes, so he can see the water and how much steam.

Q. And other supplies put on the engine at the roundhouse, oil or anything of that kind? A. Yes.

The Court: He included that in his list.

A. Yes, oil cans.

Q. And water and coal, they are not put on there, are they? A. The water is put on by the fireman and the coal also—no, the coal is put on by the coalers at the coaling station.

30 Q. When are the water and coal put on? A. The water is put on before he leaves the roundhouse and the coal is put on after he gets to the coaling station.

Q. Now with respect to the firemen's tools which are put on the engine, will you state whether or not the same tools are always put on the same engines, or what the custom is?

By the Court: That is, the identical tools?

40 A. No, sir.

Leo A. Souders, for Defendant—Cross

Q. Are they the identical tools that came off that engine? A. Yes, not the same tools.

By Mr. Carey:

Q. Is any effort at all made to put the same tools back on an engine from which they came, the same identical tools? A. Well, they come in on one engine and they are taken off and they are placed there and then they are put on the next engines—supplies are taken from whatever material is there. 10

Q. How long before the engineers and firemen go out on their engines do they learn the numbers of the engines they are to take out? A. At the registering time.

Cross Examination by Mr. Simpson:

Q. A regular crewed engine, you spoke of, what did you mean? You said it was a regular crewed engine and it was to go out as usual, if nothing happened? What did you mean by that? A. Why, the crew that goes out regularly every trip—a man that is assigned to the one engine. 20

Q. Yes. Well, what does that mean, the regular crewed engine,—they take out the same engine? A. Not necessarily.

Q. What do you mean? A. Yes, the engine is supposed to go out, but anything that would happen it would not go out, of course something else— 30

Q. Then a regular trip like the pick up trip, would take out a regular engine, unless something happened; is that right? A. Yes.

Q. You know this pick-up took out 2076 on the 30th and 31st of July, the same engine that she took out on the 3rd of August? A. No, I do not.

Q. Do you know anything about it? A. No, sir, I do not. 40

Leo A. Souders, for Defendant—Cross

Q. Well, that is what you mean then by a regular engine, is it, an engine which your regular crew had? A. Yes, sir.

Q. Unless something happens they take out that engine on that trip, is that right? A. Yes, sir.

Q. Now this man Holt you saw sitting in the back of the room here, was your tool boy at the
10 same time that Hanson was working, wasn't he?

A. I don't remember.

Q. Don't remember? Do you remember him complaining to you that the firemen would take tools while he was away and that there were not enough tools at the roundhouse, and that he was fighting all the time with the fireman about taking tools?

(Objected to as not competent and not
20 proper cross-examination. Question withdrawn.)

Q. Now you say it is the duty of the fireman. Can you point to any written rule specifying the duties of a fireman? A. No, it is—

Q. Can you point to any written rule? A. No.

Q. Then why do you say it was the duty of the fireman? It was not the duty of the fireman to see that proper tools were on the engine? A. It is the duty of the fireman to see that the proper
30 tools are on the engine.

Q. It is his duty? A. It is his duty to see that they are on, but it is not his duty to put them on.

Q. But it is his duty to see they are there? A. Yes.

Q. Why did you say it is not his duty to get off and find tools if he finds they are not proper tools on the engine? A. Because they have the man there for the purpose, and he complains to him.

Q. Suppose that man is not there, haven't you
40 known firemen to get off and get the tools? A. Oh, yes, I have seen them get a tool.

Leo A. Souders, for Defendant—Cross

Q. Do not the firemen like to have their own tools? A. What's that?

Q. Don't they like to have their own tools, the same tools they have been used to working with?

A. I don't know.

Q. But you have seen them get off and get tools themselves? A. I have seen them take tools.

Q. What tools is it their duty to see are on the engine? A. Shovel, hook. 10

Q. What else? A. And the shaking lever.

Q. How about the gauge light? A. Gauge light.

Q. How about the markers? A. Markers and flags.

Q. How about monkey wrench and chisel and hammer? A. The fireman has nothing to do with them.

Q. What? A. He has nothing to do with them.

Q. How do you know? Can you point to any rule that says he has nothing to do with it? A. He has nothing to do with tools. 20

Q. Can you point to any written rule? A. No.

Q. Why do you say that? A. Because practically I have been there and know that they never did.

Q. Haven't you seen firemen get off and get hammers and chisels when they complained?

A. No, sir.

Q. Haven't you seen them get off and get monkey wrenches? A. No. 30

Q. Has not this man complained to you about the fireman taking monkey wrenches and chisels and tools? A. I don't remember that.

Q. Don't remember that? A. No.

Q. You cannot point to any written rule saying what the fireman's duties are in reference to tools, can you? A. No, sir.

Q. You are simply testifying now to the general practice, aren't you? A. Yes, sir. 40

Leo A. Souders, for Defendant—Cross

Q. What you have seen them do? A. And we get letters from the master mechanic's office that governs this thing.

Q. Have you got any of them with you? A. No, sir.

Q. What do you do with those letters you get from the master mechanic's office? A. We file
10 them in the office.

Q. You have them in the office? A. Yes, sir.

Q. Is there any bulletin board there? A. Yes, but they don't get on the bulletin board, they go just to the foreman, and are O.K.'d. and put away.

Q. What is the monkey wrench and chisel and hammer put on the engine for? What is it on the engine— A. In case they break down, if it was a light repair they could make it and proceed.

20 Q. And that the engineer and fireman could make it? A. The engineer.

Q. You said they; did you mean— A. I said the engineer.

Q. You did not.

(Stenographer repeats previous answer as follows: "In case they break down, if it was a light repair they could make it and proceed.")

30 Q. When you said "they could make it", you meant the engineer? A. Engineer and fireman.

Q. Engineer and fireman, eh? A. Yes.

Q. Changed your mind about that now, have you?

The Court: Strike it out, unless—you want it answered, do you?

Mr. Simpson: Not if you strike it out.

The Court: If it is a quetsion it will stand.

Mr. Simpson: I will withdraw it, if you

Leo A. Souders, for Defendant—Cross

think it was improper, but it was not intended to be a mere statement.

Mr. Carey: What goes out?

Mr. Simpson: My question.

The Court: It won't go out if you say it is a question.

Mr. Simpson: I will withdraw it.

The Court: I prefer to have it answered 10 now, and it may be answered.

Mr. Simpson: I understand I have a right to withdraw it until it is answered. I will withdraw it.

Q. What repairs would they make with these—

Mr. Carey: I would like to have the witness' answers repeated for two or three questions back.

Mr. Simpson: I object to interrupting my 20 examination.

Mr. Carey: I want to know what the witness said.

(Testimony repeated by stenographer.)

Q. What repairs would they make, what kind of repairs? A. I don't know.

Q. Light repairs? A. Whatever would break down.

Q. Huh! Whatever would break down. Now 30 these keys, can you identify these keys? A. No, sir, I do not.

Q. You did take a bunch of keys off the dead man's body, didn't you? A. Yes, sir.

Q. Where did you find them? A. In his pocket.

Q. What did you do with the keys you took off his body? A. I gave them to Mrs. Hanson.

Q. When did you give them to her? A. That evening when I returned from work.

Leo A. Souders, for Defendant—Cross

Q. Were they brass keys, any of them? A. I don't remember the keys at all.

Q. How many of them were there? A. I don't know.

Q. Don't remember that? A. No, I don't remember that.

Q. These pony engine tools were kept locked up in the tool box, were they, on the pony engine?
10 A. I don't know.

Q. They were not taken out and put in any tool place every time the engine came in, were they?
A. I don't know.

Q. Don't know? Don't know anything about the pony engine? A. No, sir.

Q. Was it at the roundhouse on the 3rd of August when this man was killed? A. Yes, sir.

Q. Was there? How long had it been there?
20 A. Well, I don't remember. Just know it was there. There for some time, though.

Q. Some time? Were there lockers in the roundhouse? I think I examined you about that?
A. Yes.

Y. Where did you get these keys, what pocket were they in, of the dead man? A. I don't believe I remember.

Q. Don't remember that? A. No.

Q. Can you tell me where 2076 locomotive was
30 when he was killed? A. No, sir.

Q. What did you mean by the regular crew? A. I meant a regular crew is the regular engineer and regular engine, goes out on his engine.

Q. Regular trip? A. Yes.

Q. That crew, I understand you, unless something happened, would have a regular engine? A. Yes, sir.

By Mr. Carey:

40 Q. Will you state whether or not changes were

James Griffin, for Defendant—Direct

frequent in August, 1913, that is, changes of engines? A. Yes, sir, at that time we were short of power.

Q. What was the reason for frequent changes being made at that time?

Mr. Simpson: I object.

The Court: He has already stated. He said he was short of power, meaning by that short of locomotives? 10

The Witness: Yes, pressure of business.

Q. You know nothing about what is done by the engineer or firemen when they are out on the road in connection with repairs? A. No, sir.

JAMES GRIFFIN, recalled.

Direct Examination by Mr. Carey: 20

Q. Mr. Griffin, you are the engineer on the pick-up train in August, 1913? A. Yes, sir.

Q. How long have you been the engineer on that train? A. About eleven months.

Q. Do you recall whether or not in August 1913, and prior to that time there were frequent changes in engines or not? A. I cannot say.

Q. How long have you been an engineer? A. About sixteen years. 30

Q. You were a fireman before you were an engineer? A. Yes.

Q. When your engine comes into the engine house at New Durham, who takes charge of the engine with respect to removing tools? A. The tool boy.

Q. You don't do anything about that yourself? A. Sir?

Q. Do you as engineer do anything about that, removing the tools? A. No, sir. 40

James Griffin, for Defendant—Direct

Q. Where does he put the tools? A. They lay on the end of the tank.

Q. Where does he put the tools when he takes them off? A. He puts them in the tool car.

Q. When you come in to bring an engine out, when do you learn what engine you are to take out?? A. Fifteen minutes before leaving time.

10 Q. Where do you learn it? A. Learn it when we register.

Q. From whom? A. From the engine dispatcher.

Q. Who attends to the equipping of the engine with tools prior to going out? A. Tool boy.

Q. Do you as engineer do anything about equipping the engine with tools? A. No, sir.

Q. If you find that there are no proper tools on the engine, what do you do? A. Notify the round-
20 house foreman.

Q. What does he do? A. He goes to the tool car and tells the tool boy to put them on.

Q. Are you familiar with the agreement between the engineers and fireman on the one hand and the railroad company on the other hand in regard to equipping engines with tools? A. Yes.

Q. I ask you if Article 47 of this paper, dated May 1, 1910, relates to the equipping of engines with tools?

30 (Question objected to. Question withdrawn.)

Q. Who puts the supplies on the engine? A. The tool man.

Q. The tool man? What supplies does he put on? A. He puts on oil, flags, lamps, hook and shovel, shaking bar, that is all.

Q. What tools for the engineer? A. Monkey wrench, hammer, cold chisel.

40 Q. Are you familiar with the speed limit of

James Griffin, for Defendant—Direct

trains in the yard at New Durham at the time this accident occurred? A. Yes.

Q. What was the speed limit? A. Six miles per hour.

Q. Under the rule of the company? A. Yes, sir.

Q. When did you last see Hanson alive? A. Saturday night. 10

Q. Prior to August 3, which was Sunday, had you asked Mr. Hanson to get any tools from the pick-up for your engine? A. No, sir.

Q. Had you asked him to bring anything from the pick-up engine to your engine? A. No, sir.

The Court: Do you mean it that way? You mean from the pick-up engine to your engine, which was the pick-up engine?

Mr. Carey: Yes.

The Court: You said from your pick-up engine to your engine. 20

Q. I mean, rather, had you asked him to bring any tools from engine 25 or the pony engine to your engine? A. No, sir.

Q. Had you asked him to bring anything from No. 25 or the pony engine to your engine? A. No, sir.

By the Court:

Q. There is one question I want to ask Mr. Griffin. When they speak of different classes of tools, you have spoken of the shovel and the hook and shaker bar and then also spoken of the monkey wrench and hammer and cold chisel, which have been designated as engineer's tools? A. Yes. 30

Q. As to the latter class of tools—I understand as to the former class, that is, the hook and the shovel and the shaker bar, they were used indiscriminately upon all locomotives, that is, those 40

James Griffin, for Defendant—Direct

which were taken off of one locomotive would not necessarily come back on that locomotive at all?
A. No, sir.

Q. How about engineer's tools? A. Well, seeing where there is men that has regular—has boxes, and there is men that hasn't got boxes.

Q. Engineers, you mean? A. Yes; and when
10 they haven't got boxes they put their—just ordinary tools in it, and where they have a box and lock they put the box—

Q. What was your situation with tools? A. I had no box and my tools were thrown loose right up on the—

Q. You got indiscriminate tools, as it were? A. Yes.

Q. You might have the same tools two or three days in succession and you might not have them in
20 a year? A. If we got them we get them out of the casing, but we wouldn't get them out of here.

Q. But you have no box? A. No box.

By Mr. Carey:

Q. Did you ever work on the pony engine? A. No, sir; I never worked—never was on the pony engine.

(RECESS.)

30

JAMES GRIFFIN, resumed:

By the Court:

Q. I will ask a question. The direct examination was concluded. How long did you say, if you did say, that you had been an engineer on this pick-up train? A. About eleven months.

Q. How long had Mr. Hanson been your fireman
40 on that train? A. About three weeks.

James Griffin, for Defendant—Cross

Q. About three weeks? A. Yes.

Q. During that three weeks he had been continuously your fireman? A. Yes.

Cross Examination by Mr. Simpson:

Q. During those three weeks you had only run this interstate run, what you call the pick-up—that is the only work you did? A. Yes, sir. 10

Q. Had you ever seen a fireman using the monkey wrench or the hammer or the chisel on the engine? A. Yes, sir.

Mr. Carey: I object to it as improper cross examination.

Q. What would they use? A. Scraping the shovel or something.

The Court: What is the objection?

Mr. Carey: Improper cross examination, 20
immaterial on the issues in this case.

(Discussion.)

Mr. Carey: It is not cross examination on any subject which I have touched on. What I have touched on is precisely what your Honor has stated. whether or not it was the duty of the fireman to put these tools on the engines or to take them off. I have not questioned any witness as to the use which the fireman made of tools which were on the engine? 30

The Court: I do not remember that you have. However, I am going to give the plaintiff the benefit of it, and you may have an exception.

Mr. Carey: Objection.

Q. Is that what you say the fireman used the monkey wrench, chisel and hammer for? A. Sometimes a valve on the left hand side of the 40

James Griffin, for Defendant—Cross

engine would let the steam escape and he would tighten up the jam nut on the valve; sometimes the steam would escape on the blower valve, and if they put their hand up and burn it they would take the monkey wrench and tighten up the packing.

10 Q. Had you ever seen a fireman get off the engine when he was not satisfied with the tools the tool boy had put on and get tools of his own? A. No, sir.

Q. Never seen the fireman do that? A. No, sir.

The Court: May I not make this request, in speaking of tools, that you will distinguish the tools you mean. There are two sets of tools you have been talking about, and it is confusing to me to know which it applies to, whether the shovel and hook and so forth, or
20 the monkey wrench and hammer and so forth.

Q. You say it was no part of the fireman's duty to see that any tools were put on the engine; is that right? A. No, sir.

Q. You also stated it was no part of the fireman's duty to see that a monkey wrench, chisel or hammer, were put on—no small tools? A. No, sir.

30 Q. Why did you say that? A. Because I am responsible for the tools.

Q. You are responsible? A. Yes.

Q. That is the reason you say it was not the fireman's because of your personal responsibility? A. I am personally responsible.

Q. There is no written rule that you know of? There is no written rule that you know of? A. No, sir.

Q. No published rule of the company? A. No, sir.

40 Q. You are not testifying as to the practice

James Griffin, for Defendant—Cross

around the roundhouse; you are simply testifying as to your individual actions? A. Yes, sir.

Q. That is all. A. I am responsible for—

Q. That is all. Wait a minute. Supposing you found that when you were out on the road that you have a breakdown, and that you did not have suitable tools, monkey wrench, hammer and chisel, to repair it, would you say anything to the fireman? 10

Mr. Carey: I object to it as being immaterial.

Mr. Simpson: He says it was not the fireman's duty. If he admits he would scold the fireman, then there will be another question, why would you scold the fireman, to show that the jury—

The Court: I will let it be heard. Take your exception, Mr. Carey. 20

Mr. Carey: Exception noted.

A. No, sir.

Q. Why wouldn't you say anything to the fireman? A. Because I would telegraph to the superintendent and tell him I didn't have the proper tools to do the job.

Q. You would do what? A. Telegraph to the superintendent.

Q. That you didn't have proper tools to do the job? A. Yes, sir. 30

Q. But shouldn't you have the tools on your engine before you left? A. The job I am talking about. Yes.

Q. No, but your tools—suppose you didn't have the monkey wrench and chisel? A. No; we don't go out without them.

Q. Don't go out without them? A. No.

Q. The fireman gets on before you do, on the engine? A. Yes. 40

James Griffin, for Defendant—Cross

Q. What does he get on for? A. To look after his fire.

Q. How long do you get on before the engine pulls out? A. Fifteen minutes.

Q. Fifteen minutes? A. Yes.

Q. The fireman has got to have his gauges on there to look after the fire hasn't he?

10 The Court: The running gauge lights?

Q. Water gauges? A. They are standard.

Q. The gauge lights? A. They are—

Q. He has to have those on? A. Yes, sir.

Q. Doesn't he screw those on with a monkey wrench? A. No, sir.

Q. What does he screw them on with? A. With his hand.

20 Q. He has got to look after that before you get on, hasn't he? A. He has got lots of time to look after it when I get on.

Mr. Carey: Louder.

Q. Has he got to look after it before you get on? A. No, sir.

Q. He doesn't pay any attention to it until you are on the engine—to his gauges? A. Until I get on the engine?

30 Q. Until you get on the engine? A. After we get on the engine. We have fifteen minutes to get on the engine. He has steam by the time that I am—

Q. You say he is on before you? A. Yes.

Q. You don't know what he does before you get on? A. No, sir.

Q. What did you earn as an engineer?

Mr. Carey: I object to it as immaterial.

40 Mr. Simpson: I want to show if he was an engineer. He may not have been an engineer. I can find out if he is—

James Griffin, for Defendant—Cross

The Court: It would go towards showing what compensation of an engineer would be. Is that relevant, Mr. Simpson?

Mr. Carey: That is not proper cross examination.

Mr. Simpson: I will make him my own witness.

Q. How much did you earn? A. Averaged 10
about one hundred and fifty a month.

Q. How much are you earning? A. About one
hundred and fifty a month.

Q. The same thing? A. Yes, sir.

Q. As I remember the testimony, Mr. Carey has
not asked you anything about this accident, has
he, this time? A. No, sir.

Q. You were present at the accident? A. No,
sir, I was not. 20

Q. Oh, you were not? A. No, sir.

Q. Now what engine did you take out—you
took out 2076 on the 3rd of August, didn't you?
A. I guess so.

Q. On the 4th of August and on the 30th and 31st
of July you took out 2076, too, didn't you? A.
2105, I think.

Mr. Simpson: Let me have those slips,
please. I want those in your handwriting,
to show what you signed, for what engine 30
you took out on the 30th and 31st of July.

Mr. Carey: Those are on the latter end of
the package. The 30th and 31st are on the
latter end.

A. Right here.

The Court: Can he pick it out?

Mr. Brusle: I will get that for him, if you
will allow me. On the 30th of July, 2076.

James Griffin, for Defendant—Cross

Q. Is that the engine you took out on the 30th of July, 2076? A. Yes.

Q. What did you take out on the 31st, the same thing? A. 2076.

Mr. Carey: Came back on that?

The Witness: Came back on that from Kingston.

10

By Mr. Simpson:

Q. If you went out without tools you would be suspended by a rule of the company, without proper tools? A. Yes, sir.

Mr. Carey: I object to it as incompetent and improper cross examination, and immaterial.

20

Mr. Simpson: He testified on his direct examination it was not the fireman's duty to put tools on the engine. I want to show the effect of not having proper tools on the engine.

The Court: I do not think it will hurt you.

Mr. Carey: All right.

Q. Would you be suspended if you went out without proper tools? A. Yes.

Q. Would not your fireman be suspended also? A. No, sir.

30 Q. Wouldn't you both be suspended? A. No, sir.

Q. Have you ever known of a case where an engineer was suspended alone without the fireman? A. Yes.

Q. When? A. Lots of them.

Q. For not taking out proper tools? A. No, I never knowed of anybody.

Q. Name one case in which an engineer was suspended when proper tools were not taken out? A.
40 I never knew of an engineer being suspended, not for not taking out proper tools.

James Griffin, for Defendant—Cross

Q. You didn't mean that? What did you mean by that, you would have— A. We always have our proper tools when we go out, yes.

Q. You understood that language? A. Yes.

Q. What did you mean by saying you would be suspended? A. If we went out without tools we would be, but we always see we have the tools.

Q. Now you say you would be suspended? Is that right? A. Yes, sir. 10

Q. Have you ever known of a case being suspended? A. No, sir.

Q. Don't know the name of any engineer being suspended? A. No, sir.

By the Court:

Q. For that cause? A. No, sir.

By Mr. Simpson:

Q. You can point out no written rule that you have any knowledge about in this company dealing with the care in putting on tools, such as monkey wrench, hammer and chisel, on locomotives about to go out? A. Nothing but the tool boy. 20

Q. I know, but have you any written rule which mentions tools, t-o-o-l-s-, and designates what the fireman's duties are in respect to tools? A. No, sir.

Q. What time did you take out this pick-up run on Monday? A. 2076. 30

Q. What time? A. 3:30.

By Mr. Carey:

Q. Who lights the fires on the engine? A. They have men in the roundhouse.

Q. The fireman doesn't attend to that, does he? A. No, sir.

James Griffin, for Defendant—Cross

By Mr. Simpson:

Q. The fireman ever do hostler's duty? A. I don't know.

Q. Isn't the man that lights the fires a hostler? A. No, sir.

Q. What is a hostler? A. A hostler is a man that takes engines from the ashpit in the round-
10 house and fetches them out.

Q. Who is the man that lights the fires? A. He is the man in the roundhouse.

Q. What do they call him? A. Fire lighter.

Q. Does the fireman ever do hostler's duty? A. Yes.

Q. He does do that? A. Yes.

Q. What is pushing service? A. Pushing service—that is engines pushing trains over hills, to Haverstraw, and—

20 Q. Firemen do that? A. No, sir, they fire the engine.

Q. He never does pushing service? A. No, sir.

Q. What? A. No, sir.

Q. Well, what does this rule mean then, "Firemen in pushing service when used in service outside of regular pushing limits shall be paid road rates as per class of engine." A. Well, that is—

Q. Pushing? A. That is pushing. He fires the engine over the hill.

30 Q. Firing is pushing, is it? A. Yes.

Q. Will you tell me—did you say what the fireman did on the engine, what his duties were? You did not describe his duties to Mr. Carey?

The Court: I don't remember, Mr. Simpson.

Q. How long were you a fireman? A. Seven years.

Q. You had to pass an examination, didn't you?
40 A. Yes.

Samuel Craig, for Defendant—Direct

Q. On the mechanism of your engine and lubrication of your engine and all those things? A. Yes, sir.

By Mr. Carey:

Q. When the fireman does hostler's duty or when he attempts to light the fires on the engines in the roundhouse, that is on occasions when he is not employed on the road? A. Yes. 10

Q. Or he is not expecting to go out on the road? A. Yes, sir.

SAMUEL CRAIG, recalled.

Direct Examination by Mr. Carey:

Q. You have been employed both as fireman and engineer on the railroad company? A. Yes. 20

Q. How long ago did you qualify an engineer? A. (Examining paper.) I qualified on the 3rd day of December, 1911. I made a mistake, your Honor, when I rectified that here on Friday, on dates.

Q. How long had you qualified before you obtained a run as an engineer? A. Oh, about a year and a half ago when I started running.

Q. A year and a half ago? A. A year and a half, two years ago.

Q. That would be April of the year 1915? A. About 1915—I think it was 1914, in the winter, when I started. 30

Q. In the winter? A. Yes, sir. That year we had the blizzard when I started running—that last blizzard.

Q. Is that the first part of the year 1914 or the last part? A. It must be the last part of the year—or first part—I guess it was the last part.

Q. Are you now acting as an engineer? A. No, sir. 40

Samuel Craig, for Defendant—Direct

Q. What has been the reason—what are you acting as now? A. Locomotive fireman.

Q. Why have you not been acting as an engineer recently? A. Business fell off and I was set back firing on account of no work.

Q. Other engineers older in the service than you were prepared to take the job? A. Yes, sir.

10 Q. Will you state what examinations are taken by firemen to qualify themselves as engineers? A. The first examination is taken, the mechanical examination, the mechanism of the engine, air brakes.

Q. Following that, what examination is taken?

A. Following that we have an examination on rules—train rules and signals, time-table, and then after that we have an examination on a physical examination, eyesight—we have the eyesight every
20 two years—

Q. That eyesight is made as to what men? What men take the examination for eyesight? A. We have an examiner at Weehawken for that.

Q. What class of men? A. Everybody in the operating department, engineers, firemen, conductors, brakemen, hostlers and signal men.

Q. Then after you have completed all examinations before whom do you appear? A. The superintendent.

30 Q. And the superintendent of this division is who? A. W. K. McCoy.

Q. Mr. McCoy? A. Yes, sir.

Q. After you have taken all the examinations and appear before Mr. McCoy, are you given anything then to show your qualifications? A. Why, he gives you advice on rules, and finds out how you understand some of the particular rules, one thing or another.

40 By the Court:

Q. Does he give you anything to indicate that

Samuel Craig, for Defendant—Direct

he has passed you? A. Yes; I have a certificate he gave me.

By Mr. Carey:

Q. Will you produce that certificate, please? A. (Witness complies.)

Mr. Carey: I offer this in evidence.

Mr. Simpson: No objection.

(Paper marked Exhibit D-2.)

10

Q. Does a fireman receive a certificate of that character before he is employed as an engineer?

A. No, not to my knowledge.

Q. Eh? A. I never heard of any.

Q. Do you understand?

(Question repeated by stenographer.)

A. No, sir, does not.

Q. When does the fireman get that certificate?

20

A. After he has been qualified and through all the examinations.

Q. Well, does he get that certificate until he has qualified in every particular? A. No, sir, he does not.

Q. Does he practice as an engineer before he has received that certificate? A. I did, yes, sir.

Q. How long? A. Oh, I don't know. I can't give you no answer on that.

30

Q. Did you have anything to do in connection with the establishment of this rule with respect to putting equipment on the engine? A. Yes, sir.

Q. What did you have to do with it? A. I argued that rule in the lodge room before it was drawn up, before the copy was sent to the general managers.

Q. Argued that what? A. That question and that answer, that agreement there.

Q. Where? A. In the lodge rooms—in the lodge room.

40

Samuel Craig, for Defendant—Direct

Q. Large, l-a-r-g-e? A. Lodge.

Q. Oh, lodge? A. Yes.

Q. The firemen's lodge room? A. Yes.

Q. What was done on that matter after it was brought up in the lodge room? A. We decided to adopt it and it was handed to our local chairman to take before the general board, the general board acted on it and took the matter before the general
10 managers of the road, which has been adopted.

Q. When did this regulation come down, before or after these proceedings you have testified to?

A. What did you say?

Q. When was this agreement made, before or after this discussion which you have spoken of?

A. Why, it was before. It was made—that took effect the first of January, 1909.

Q. Was that before or after you had had this discussion in the lodge room? A. Oh, the discus-
20 sion was before it took effect.

Q. Yes. Then the agreement was made after the discussion, was it? A. Yes.

Q. Prior to the time—you refer to Article 47 of the agreement of May 10, 1910, or dated May 10, 1910— A. "Company shall furnish men to fill and clean headlights, and markers on all pooled and double-crewed road engines and men to perform similar service on single crewed engines, pushers and helper engines where practicable, and will have supplies placed on engines where practical and consistent so to do."
30

Q. There is a part of that question that was not adopted?

Mr. Simpson: I object.

By the Court:

Q. You just read from that paper what purports to be, I take it, paragraph 47?

40 Mr. Carey: I will withdraw the question, if the Court please.

Samuel Craig, for Defendant—Direct

Q. Have you a copy of the agreement which was made with the railroad company by the firemen following this discussion of which you have spoken? A. Yes, sir.

Q. Produce it, please?

(Witness produces a book.)

Q. Will you turn to the article in question? A. 10
Page 46, Article 47.

Q. Page 46, Article 47 of that book you have produced? A. Yes.

Q. When was that book issued? A. That book was issued February—in effect January 1, 1909.

Q. That is the agreement which was—

Mr. Simpson: I object on the ground that he cannot characterize this book. It speaks for itself. You cannot tell what it is.

Q. That was the agreement which was entered 20
into between the firemen and the railroad company following the discussion which you have testified to?

Mr. Simpson: Objected to as incompetent and immaterial.

A. Yes, sir.

Mr. Carey: Simply asking him to identify an agreement which followed a discussion.

The Court: And he has stated he has a 30
copy of the paper. Why don't you ask him, is this the copy?

Q. Is that the copy of the agreement? A. That is a copy of the agreement.

The Court: We produce it as a copy upon your request.

Mr. Carey: I offer this in evidence.

Mr. Simpson: I object to it on the ground, first, if such an agreement is relevant and 40

Samuel Craig, for Defendant—Direct

competent, there is no proof of it. This is not the best evidence of it. The best evidence of it is the original agreement. This is a printed copy of the agreement, and there is no rule of law making it admissible.

The Court: I suppose that is so.

10 Q. After the agreement was made, what was done in respect to printing and circulating the agreement among the firemen? A. Why, that is taken from the general—from the regular agreement and handed to our general chairman or our grand lodge officers and they print it off and deliver it to us.

Q. This is one of the copies which was distributed after the agreement was entered into which you have referred to? A. Yes, sir.

20 Mr. Carey: I submit that is competent evidence.

Mr. Simpson: I object to it until he shows he could not get the original here and that this man has compared this and can swear it is a true copy.

(Discussion.)

Mr. Simpson: If you will let me look at it I may not have any objection. (Examines book.) 47 is what you want to put in?

30 Mr. Carey: Yes.

Mr. Simpson: I have no objection to that.

Q. When did this go into effect? A. January 1, 1909.

Q. And this green pamphlet of May 1, 1910, was a subsequent printing of these rules? A. Yes, I suppose so, I have not been through that. I do not know of any other rules that have been brought up until 1914.

40 (Book marked Exhibit D-3.)

Samuel Craig, for Defendant—Direct

Mr. Carey: I also offer pararaph 51.

Mr. Simpson: I have no objection to that.
(Paragraph 51 marked Exhibit D-4.)

Mr. Carey: I also offer Section 18.

Mr. Simpson: All right. I have no objection.

(Section 18, marked Exhibit D-5.)

Q. In this agreement is there any agreement
with respect to calling extra men or calling regu- 10
lar men when extra men are available? A. It is.

Q. Will you turn to that? A. Yes, the second
clause of rule 18.

Q. Before this agreement was put into effect
January 1, 1909, who had equipped the engine
with firemen's tools as it was about to be sent out
on a trip? A. The fireman.

Q. And subsequent to the adoption of this agree- 20
ment who equipped the engine with tools? A. Be-
fore this agreement?

Q. After? A. Why, the man—the company fur-
nished a man for that purpose, the tool boy.

Q. What was that man called? A. Tool boy.

Q. And subsequent to the time that went into
effect did the firemen as a matter of practice
around the engine house at New Durham put the
tools onto the engine? A. Why, I don't know.

Q. Eh? A. I don't know. 30

The Court: That means after that.

A. After that went into effect.

Q. Did you as fireman? A. The tool boy done
it.

Q. What? A. The tool boy done it as far as I
know.

Q. Did you as a fireman do it after that time?

A. No, I never done it.

Q. What was the custom as far as you observed 40
around? A. Why, I always see him do it.

Samuel Craig, for Defendant—Direct

Q. Who? A. The tool boy do it.

Q. Now are you familiar with this path which has been spoken of in the testimony here? A. A path? Yes, I am.

Q. A path from the Y. M. C. A. up to the roundhouse? A. Yes, sir.

10 Q. How many ways were there which the men were accustomed to go from the Y. M. C. A. to the roundhouse? A. There was two from the Y. M. C. A. to the shop and three from the shop to the roundhouse.

Q. Three from the shop to the roundhouse? A. Yes.

Q. Will you step to the map and point them out? Can you do it on the map? A. I think I can. There is one path (indicating).

20 Q. That is the one marked yellow? A. That is the one colored yellow, that is up near the east and westbound tracks running in and out of the roundhouse; and then there is another path from the shop comes up back this way, up this way (indicating).

Q. Suppose you draw a pencil line from the shop through to the engine house, marking it?

30 Mr. Simpson: I object, unless it shows the time of the accident. I understand this man lived in Kingston before this accident and worked up there, and that he knew nothing about this yard, and I object unless the time is fixed as to these observations.

Q. Did you work around this yard at the time of this accident? A. Just in and out of the yard—in and out of the roundhouse.

Q. Did you know where the paths were? A. Yes.

Q. At that time? A. Yes.

40 Q. Now go on and indicate where the paths

Samuel Craig, for Defendant—Cross

went from the shop to the roundhouse? A. Down to this house, out of this portion here, and walked down along here.

Q. Make a mark right along. A. Right along that way, up in here, back of these tracks, right up here, across that track, and walked alongside of that track, right on in the shed there.

Q. Will you just write your name on that line? 10

A. Full name?

Q. Craig? A. (Witness complies.)

Q. What other way was there to go besides those paths? A. Bergen Turnpike—this other path up here.

Q. On reaching the point opposite the roundhouse where did they go? A. Which, this path?

Q. When they went up towards the Turnpike? A. Oh, the Turnpike went right up the roundhouse and down this pair of stairs here, four steps right here. 20

Q. Indicated in yellow there? A. Indicated in yellow.

Q. What kind of a day was this, Mr. Craig? A. What time of day?

Q. What kind of a day? A. It was a good day—bright day.

Q. Any smoke or fog or anything of that kind around there? A. No, sir.

30

Cross Examination by Mr. Simpson:

Q. This little printed book that you have been testifying to was simply an agreement entered into by the labor people, by the engineers and firemen and the officials of the railroad company, wasn't it? A. Yes, sir.

Q. Now I notice that this green one is subsequent in date to this little book that you have. This is May 1st, 1910, and the other one is 1909. Do you know anything about this green paper? 40
A. No, sir.

Samuel Craig, for Defendant—Cross

Q. Do you know anything about Article 48, saying that "where practicable will have supplies placed on engine, where it is practicable and consistent to do so"? A. Yes, sir.

Q. You know anything about it? A. Where they have men to do it they put it on.

Q. Do you know anything about this—I didn't
10 ask you to explain it to me. Do you know anything about this paper you have testified you didn't know anything about? A. I don't know anything about that paper, where that came from.

Q. That is what I asked you? A. I don't know, I don't know where that came from.

Q. What you are testifying to is something in 1909? A. Yes.

Q. And you say it was not a foggy day, a windy day? A. No, sir.

Q. Did you see this man's hat fly up in the air?
20 A. No, sir.

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

Q. You were on the engine that killed him, weren't you? A. Yes.

Q. You say you have never seen a fireman get off and get tools for his engine at any time? A. No, sir.

Q. Not at any time? A. No, sir.

Q. What did you mean by swearing a minute
30 ago it was the custom to do it before the operation of these rules? A. Why, we did before these rules went into effect.

Q. Then you did see one get off and go into the— A. Before these rules.

Q. I didn't ask you before or after. You swore you didn't. Have you ever seen a fireman get off and get tools? A. Yes, sir.

Q. When was the last time you saw one get off and get tools? A. Before January 1, 1909.

Q. Then they had tool boys at that time? A.
40 Yes.

Samuel Craig, for Defendant—Cross

Q. Thomas Holt, who is in the court room, was a tool boy before that time? A. I don't know.

Q. Wasn't he in the roundhouse? A. He has been a tool boy. I don't know how long he was there.

Q. They had tool boys at the time and it was customary for the fireman to get off and get the tools? What did the tool boys do when the firemen got off and got their monkey wrenches and hammers and chisels; what did the tool boys do at that time? A. Didn't have any. 10

Mr. Carey: I object. There is no evidence that they had monkey wrenches and tools.

The Court: You have not designated what tools, you mean.

Q. You said up to the adoption of this agreement it was customary for the firemen to get off the engine and get tools; and after the adoption of the agreement it was not; is that true? A. That is so. 20

Q. What tools did they get before the adoption of this agreement? A. Hook and scoop, flags, lamps.

Q. Anything else? A. That I know of.

Q. Small tools? A. Not that I know of.

Q. Never saw them getting small tools? A. I never saw anybody else get them, no. 30

Q. Did you ever get any? A. Yes.

Q. You got some? Yes, sir.

Q. What would you get small tools for? A. Trying to get out on time.

Q. Why didn't you get your tool boys to get them? A. We didn't have tool boys at that time.

Q. You did have in 1909? A. Before 1909, I am speaking about, gettings tools.

Q. Did you get any in 1909? A. No, sir.

Q. When was the last time you ever got off your 40

Samuel Craig, for Defendant—Cross

engine and got a monkey wrench, chisel or hammer? A. Before the year 1909.

Q. How long before the death of this man? A. What is the question?

Q. How long before the death of this man had you got off and got them? A. Four years, maybe longer than that.

10 Q. Suppose you found you didn't have any tools and there was no tool boy around and you wanted to get out of the engine house, and there was no foreman around, how would you get your tools? A. If I was running the engine I would go after them myself.

Q. You did run an engine as a fireman, didn't you? A. Eh?

Q. You have run an engine as a fireman, didn't you? A. Eh?

20 Q. You have run an engine as a fireman, before you were made an engineer? A. Yes, I have run engines for engineers.

Q. I mean before you were actually examined—now understand this if you can—before you were an engineer and got your certificate from the company, you have testified you ran an engine, did you? A. Yes, sir, for engineers, yes.

Q. I don't care if you ran them for grandmothers, did you run them? A. Yes, sir.

30 Q. Where would you run them as an engineer? A. Valley Railroad.

Q. How long would you run them? A. Do switching around town, maybe run them about a mile.

Q. Is that where you got your knowledge to pass your examination? A. Yes.

Q. That is the only way you could get it, practically? A. Practically, and from the book.

40 Q. To get a practical knowledge about running an engine you have got to run an engine, haven't you? A. Yes.

Samuel Craig, for Defendant—Cross

Q. You have got to have a practical knowledge before they will pass you, haven't you? A. Yes.

Q. They will pass you on a correspondence school certificate, will they? A. Yes, if you are able to pass the examination.

Q. Have you a correspondence school of engineers on the New York Central? A. I don't know. 10

Q. Don't know if they can take the Scranton Correspondence School course? A. I don't know if they have or not. I know I didn't take any.

Q. You say this was a clear day, no fog; is that it? A. Yes, sir.

By Mr. Carey:

Q. Was this section 47, to which your attention has been called, in effect in August, 1913? A. Yes, sir. 20

Q. In effect now? A. Yes, sir.

Q. Prior to the time when you received your certificate for an engineer did you ever run an engine around the yard at New Durham? A. Yes.

By Mr. Simpson:

Q. Have you got a copy of the book of rules on you? Have you got them in your pocket? A. Operating department?

Q. Yes? A. No, sir, I have not. 30

Q. Is this a book of rules of the operating department? A. Yes, sir.

Q. Will you show me anything in that regarding whether a fireman should or should not get off his engine to get tools? A. I don't know if I find them in here or not.

The Court: Is that the small book which was offered?

Mr. Simpson: By the plaintiff.

A. No, sir, nothing in here. 40

John F. Kathan, for Defendant—Direct

Q. Nothing in there that you can find? A. No, sir.

Q. You make more money as a fireman than Mr. Kathan does as an engineer? A. Yes, sir.

Q. How much do you make? A. \$5.20 a night.

Q. How much does it run? A. That runs every night, three hundred and sixty-five days a year.

10 Q. Five dollars and twenty cents? A. Yes; better job than running an engine.

Q. Better than running an engine? A. Yes.

Q. You are not complaining then because business is not good? A. Not a bit.

JOHN F. KATHAN, recalled.

20 *Direct Examination by Mr. Carey:*

Q. Mr. Kathan, you have already testified in this case? A. Yes, sir.

Q. You also testified that Hanson spoke to you on your engine on the day that the accident happened? A. Yes, sir.

Q. When you were on the way to Weehawken? A. Yes, sir.

30 Q. Where with respect to the engine track was Hanson when he was talking to you? A. Between the eastbound and the westbound track.

Q. When you say track you refer to the engine track? A. I refer to the track the engine was on and the westbound track comes in—between the two.

Q. Those are both engine tracks, are they not? A. Yes.

40 Q. When did you next see Hanson after you talked with him, while you were on your engine—oh, just a moment. Strike that out. At that time did you get off your engine at all? A. No, sir.

John F. Kathan, for Defendant—Direct

Q. Did Mr. Hanson at that time say anything to you whatever about any tools? A. No, sir.

Q. Either engineer's tools or firemen's tools? A. No, sir.

Q. Did he say anything to you about the pick-up engine or number 25? A. No, sir.

Q. Did he say anything to you about transferring any tools from one engine to another? A. 10
He did not.

Q. After talking with him you started your engine? A. I started my engine.

Q. Going in what direction? A. I was going east, to Weehawken.

Q. Towards Weehawken? A. Yes, sir.

Q. After you started your engine when did you next see Hanson? A. Next—3857 I think it was the number of the engine that Clearwater had— he went by me and I turned my head around and 20
I seen Mr. Hanson step to the eastbound track over on the west and I didn't see him turn around, I blowed my whistle at him, I tried to holler, but I was too far away, I couldn't make him hear against the noise of the other engine.

Mr. Simpson: I object to that.

The Court: Tell us what you did?

A. I says to my fireman, Mr. Smith, "I think he got over." 30

Q. You saw him come back? A. I didn't see him get killed.

Q. I understand that? A. I didn't see him get killed.

Q. But you did see him, you said, stepping from the eastbound track to the westbound track? A. That is the last time I saw him.

Q. Towards the westbound track? A. Yes, the last time.

Q. What was his position, what was he doing 40

John F. Kathan, for Defendant—Direct

when you saw him? A. He was walking with his hat on the back of his head.

Q. Which direction was he looking? A. He was looking west.

Q. Towards what? A. Towards the roundhouse.

Q. Did you see him look around at all? A. No,
10 I did not.

Q. To see whether anything was coming on track number 2? A. No, I did not.

Q. Did he look around at all while you saw him? A. No, he did not.

Q. What was the position of his head, as to his head being up or sideways, or— A. I couldn't say that. I was quite a ways away from him, but I see his hat on the back of his head—caught back on his head.

20 Q. When you saw him and you looked around how near was he to track number 2—just one moment— A. He was—

Q. Wait a minute. Strike that out. As he started back—started to walk toward the roundhouse where did he walk? A. He walked on the eastbound track first.

Q. The same track that you were on? A. Yes, sir.

30 Q. And when you saw him next you say that he was going towards the westbound track? A. He was walking right up the eastbound track.

Q. When you saw him next, when you turned around? A. He was crossing from the eastbound track to the westbound.

Q. How near to the westbound track was he? A. Well, I think he was going to step pretty near on it.,

Q. Then what did you do? A. I blowed the whistle.

John F. Kathan, for Defendant—Direct.

Q. Did you do anything else? A. Yes, and I hollered.

Q. What did you say? A. I couldn't—I hollered loud, but I couldn't make him hear.

Mr. Simpson: I object.

Q. Strike that out.

The Court: Whether he didn't hear may be stricken out. You are asked what you said. 10

Q. Did he pay any attention to your whistle? A. I couldn't say—no, I couldn't say that.

Q. Did he change the course or do anything in the way of turning his head or anything of that kind after you blew your whistle?

(Objected to as leading.)

By the Court: 20

Q. After you blew the whistle—which did you do first, holler or blow the whistle? A. I blew my whistle first.

Q. You hollered? A. Yes, sir.

Q. Were you watching Mr. Hanson when you did both those things? A. I had an eye on Mr. Hanson.

Q. What, if anything, did you see him do when you blew your whistle and hollered? A. The tank of 37 hid the view on me. 30

Q. That is the tank of the train that hit him? A. Yes, sir.

By Mr. Carey:

Q. Then next what did you see? A. I says—

The Court: What did you see?

A. The next I saw his hat.

Q. On which side of number 2 track? A. Number 2 track, a little between the shop track. 40

John F. Kathan, for Defendant—Direct

Q. Which side of number 2 track did you see his hat? A. The east side.

Q. Easterly side? A. Yes.

Q. Did you see his body subsequently? A. I saw his body after I went by it with the engine.

Q. After you went by it? A. Yes.

Q. Well— A. After we stopped—I got stopped
10 and went right up.

Q. You stopped and went back? A. Yes, I went right back.

Q. And the body was lying on which track? A. On the westbound track.

Q. That is track number 2? A. Number 2.

Q. At the point where you took Fireman Smith on to your engine how far could you see down along track number 2 towards the east? A. See about five hundred feet, I should judge.

20 Q. What kind of a day was this? A. Clear day.

Q. Any other engines around in that vicinity besides those two, yours and Clearwater's? A. Not as I see.

Q. Anything to distract attention? A. No.

Q. Or anything as far as you know to shut off the view of Clearwater's engine coming up the track? A. No, sir.

Q. During the year 1913, what if anything did the firemen do who were going out on an engine,
30 with respect to putting tools, firemen's tools, on to the engine? A. Well, that is out of my—I am an engineer, you know, and that comes under the fireman's agreement? I never seen no fireman put any tools on the engine. Got a tool boy for that.

Q. How about the engineer's tools? A. The tool boy put them on.

Q. Was that the practice during the year 1913? A. Yes, sir.

*John F. Kathan, for Defendant—Cross**Cross Examination by Mr. Simpson:*

Q. When you left this man and passed on he was behind your engine, wasn't he? A. Who? When he started to walk up he was ahead of me walking up. I was behind him, yes.

Q. When you started away with Smith on your engine was the man behind you or were you going away from him or was he in front of him—did you have to pass him? A. No, sir; I was going away from him. 10

Q. Going away from him? A. Yes.

Q. Then you were leaving him behind you, weren't you? A. Yes.

Q. You were going in what direction? A. Going east.

Q. In what direction? A. Towards the roundhouse, towards Weehawken.

Q. Is that towards the roundhouse? A. No, sir. 20

Q. Is it towards the Y. M. C. A.? A. Yes, towards the Y. M. C. A.

Q. You were going towards the Y. M. C. A. with the rear of your engine first? A. Yes.

Q. Or front of your engine first? A. The rear of the engine.

Q. Your natural place then was to look toward the Y. M. C. A., wasn't it, to look what was in front of you, where you were going? A. Yes, sir.

Q. Why did you turn around and look in back of you? A. That is something I cannot answer; I never done it before in my life. 30

Q. But you did this time? A. I did this time.

Q. You turned around and looked in the opposite way to where you were going for the first time in your life? A. Yes, sir.

Q. Now when you turned for the first time in your life and looked behind you where did you see Hanson? A. I saw Hanson on the eastbound track. 40

John F. Kathan, for Defendant—Cross

Q. That was the track you were on? A. Yes, sir.

Q. How far behind you was he? A. He was about a hundred and fifty feet away from me.

Q. Did you see him first or the Clearwater engine first? A. Clearwater engine passed me first, as I say.

10 Q. Did you see Hanson first or Clearwater's engine first? A. I saw the Clearwater engine first.

Q. Then didn't it pass you before you saw Hanson? A. Yes, and then I turned my head.

Q. And then you turned around? A. Yes, sir.

Q. Then you turned around and looked and saw Hanson, did you? A. Yes, sir.

Q. And he was walking along your track? A. No, he was going along—stepped from the—stepping over on the westbound track.

20 Q. Stepping from your track? A. Yes, sir.

Q. There was a path on the other side of the westbound track, what they call a path, wasn't there? A. No, sir, not on the westbound.

Q. Where was this path? A. This path was over on the shop track, between the shop track—

Q. He had to pass the westbound track to get to the path? A. Yes, sir.

Q. You saw him then in the direction of the path? A. Yes, sir.

30 Q. How far behind you was he when you saw him stepping back? Was he five hundred feet, did you say? A. I think pretty—no, that is five hundred feet from the time we found his body.

Q. No, no; when you looked at him you say there was nothing to stop your seeing for five hundred feet. Was he that five hundred feet away from you? A. No, sir, he was not.

Q. How far was he? A. Pete Hanson was about two hundred feet away from me.

40 Q. That is only a guess on your part? A. Well, I guess that, yes.

John F. Kathan, for Defendant—Cross

- Q. About two hundred feet away? A. Yes, sir.
- Q. That is when you last saw him, isn't it? A.
- A. That is when I last saw Peter.
- Q. Didn't see him get struck? A. I did not.
- Q. And had the Clearwater engine passed him when you blew your whistle? A. No, sir.
- Q. It had not got up to you when you blew your whistle? A. No, sir. 10
- Q. How far was the Clearwater engine from you when you blew your whistle? A. His front end was even with my front end when I whistled.
- Q. Did you blow a pretty loud blast? A. Just blowed—
- Q. Did he seem to pay any attention to it at all? A. No, sir, he did not.
- Q. Kept right on going, didn't he? A. I lost view of him, yes.
- Q. No; I am talking of Clearwater's engine. 20
- Q. Did Clearwater stop when you blew this loud blast? A. No, sir.
- Q. He kept right on going, did he? A. Yes, sir.
- Q. Was it a shrill blast you blew? A. Yes, sir.
- Q. What side did he pass you on, your side or the fireman's side? A. On my side.
- Q. How close to you? A. About four—about four feet between them.
- Q. Was that an alarm that you blew? A. Yes, sir. 30
- Q. Pretty loud? A. Yes, sir.
- Q. Clearwater kept right on going? A. Yes, sir, but the front end of his engine—
- Q. He kept right on going, that is what I want know? A. Yes, sir.
- Q. Then you turned around, and where was Hanson the last you saw of him alive? A. Stepping from the eastbound to the westbound track.
- Q. You lost sight of him then? A. Yes, sir.
- Q. Did you see the engine hit him? A. I did 40 not.

John F. Kathan, for Defendant—Redirect

Q. That is all you know of the accident? A. That is all I know of the accident.

Q. You have told us all you saw? A. Yes.

Q. That is all right. A. Yes, and I am not ashamed of it.

Q. Why did you throw in that little persiflage?

A. Because I am telling the truth when I tell you.

10 Q. I think you do. Did you ever get off and get tools for the engine when the tool boy was shy? A. Me? I will get off and get my tools any time.

Q. You will? A. Yes; I am engineer.

Redirect Examination by Mr. Carey:

Q. Mr. Kathan, at the time you blew the whistle of your engine how far was the Clearwater engine from Mr. Hanson? A. Well, about a hundred and fifty feet, I should judge. I couldn't
20 judge for sure. One hundred and fifty to two hundred feet.

Q. You spoke of having a view of five hundred feet from the place where you took Fireman Smith on— A. Yes.

Q. —which direction was that view? A. That five hundred feet—the way I took it, you asked me how far I can see down towards New Durham.

Q. Down towards what? A. Down towards the
30 Y. M. C. A., the way I took your question.

Q. Y. M. C. A.? A. Yes.

Q. How far could you see the other way, up towards the— A. The other way I could see the pit.

Q. See the ashpit? A. Clean to the ashpit.

Q. So that this distance of five hundred which you saw had no relation to how far you could see towards the engine house? A. No, sir.

Charles Brusle, for Defendant—Direct

CHARLES BRUSLE, recalled.

Direct Examination by Mr. Carey:

Q. Mr. Brusle, you are clerk to Mr. McCoy, the superintendent? A. Yes, sir.

Q. Chief clerk? A. Yes, sir.

Q. Prior to the time you became chief clerk what were you? A. Timekeeper.

10

Q. Timekeeper for what? A. I kept the time of the engineers and firemen; I kept those personally and I was responsible for all time kept on the division—engineers, firemen, conductors, brakemen, yardmen, signalmen, station men.

Q. Were you the timekeeper at the time of Hanson's accident and death? A. Yes, sir.

Q. You were subpoenaed to produce the records showing what engine Mr. Hanson worked on for certain days, I think, prior to the accident? A. I was.

20

Q. Have you produced those? A. Yes, sir.

Q. Have you them with you? A. Yes, sir.

Q. Are those the sheets from which the time of the men was made up? A. Yes, sir.

Q. On which they were paid? A. Yes, sir.

Q. Will you tell us what engines Mr. Hanson worked on during the month of July, 1913? A. He started on July 1st, with Engineer Kathan, on Engine 25; he ran from Weehawken to Kenwood Junction and returned. On July 2nd, he was with Engineer Kathan on 465, the 1751 and the 3119, between Weehawken and Scranton.

30

Q. You are speaking now of the engine numbers, are you? A. I will give the engine numbers.

Q. When you say 25, does that refer to the pony engine? A. That is the pony engine, yes. On the 3rd day of August he was with no engineer, but we have a time slip from him showing that he worked on engine 25 for ten hours. That is July 3rd.

40

Charles Brusle, for Defendant—Direct

Q. Did he ever work on Engine 25 or the pony engine after that date, according to your records?

A. No, sir.

The Court: What was the date?

The Witness: I should have said July 3rd. That is the last day he worked on the pony engine.

10

Q. When did he next work? A. He did no work on the fifth day—the 4th, 5th or 6th.

Q. Go on? A. The 7th he worked with Engineer Cuddy, on the 2159, on the pick-up between Weehawken and Kingston. He returned from Kingston to Weehawken on July 8th, with the same Engineer and same engine. On July 9th he worked with Engineer Carpenter, on Engine 2082, the pick-up, Weehawken to Kingston. On
20 the 10th, Engineer Carpenter, engine 2082, pick-up, Kingston to Weehawken, July 11, Engineer Carpenter, engine 2159, pick-up from Weehawken to Kingston. On the 12th Engineer Carpenter, pick-up, Kingston to Weehawken, engine 2159. On the 14th Engineer Carpenter engine 2166, pick-up, Weehawken to Kingston. On the 15th, Engineer Carpenter, engine 2166, pick-up, Kingston to Weehawken. On the 16th, Engineer Carpenter, engine 2166, pick-up, Weehawken
30 to Kingston. 17th, Engineer Carpenter, engine 2166, pick-up, Kingston to Weehawken. On the 18th Engineer Savage, engine 2076, pick-up Weehawken to Kingston. On the 19th, engineer Savage, pick-up, Kingston to Weehawken, engine 2076. 21st Engineman Savage, engine 2082, pick-up, Weehawken to Newburgh. On the 22nd, Engineman Savage, engine 2082, pick-up, Newburgh to Weehawken. On the 23rd, Engineman Savage, engine 2082, pick-up, Weehawken to Kingston. On the 24th, Engineman
40

J. F. Kathan (Recalled), for Defendant—Direct

Savage, engine 2082, pick-up Kingston to Weehawken. 25th, engine man Savage, engine 2082, pick-up, Weehawken to Kingston. On the 26th, engine 2082, engineman Savage, pick-up, Kingston to Weehawken. 28th, engineman Savage, engine 2105, pick-up, Weehawken to Kingston. 29th, engine 2171, engineman Savage, pick-up, Kingston to Weehawken. 30th, engine 2076, engine-
man Griffith, pick-up, Weehawken to Kingston. 10
31st, engine 2076, engineman Griffin, Kingston to Weehawken. August 1st, engine 2105, engineman Griffith, pick-up, Weehawken to Kingston. August 2, engine 2105, engineman Griffith, Kings-
ton to Weehawken, pick-up.

Q. Won't you tell us how many different engines he worked on? Won't you count them up and tell me how many different engines he worked on during that period. From July 7th to August 20
2nd? A. I should say ten, roughly.

Q. About ten engines.

JOHN F. KATHAN, recalled.

Direct Examination by Mr. Carey:

Q. After you had talked with Hanson and started your engine toward Weehawken, can you
state whether or not Mr. Hanson was at all times
between you and the roundhouse at New Dur- 30
ham? A. Yes, he was between the roundhouse
and me at all times.

Cross Examination by Mr. Simpson:

Q. Did you work on this pony engine on the 3rd of July? A. I don't know whether we were—
I don't think we were out. I think she was tied
up then. 40

John F. Kathan (Recalled), for Defendant—Cross

Q. They have a time slip here showing that Hanson worked seven hours on the pony—worked ten hours on the pony on the 3rd of July. What was he doing on it? A. Well, Hanson took care of that engine—took and cleaned her and done all the cleaning on the engine.

10 Q. What was he doing on her after she was laid up and you never ran her after the 3rd of July? A. He didn't have anything to do with her laid up.

Q. What is this time slip for, working on the engine ten hours? A. He was laying in Weehawken with her.

Q. Well, it says working on engine 25 ten hours? A. He was in Weehawken taking care of the engine.

20 Q. Was he engaged to her, or what? A. No, he was cleaning the engine.

Q. Cleaning it how; what would he do? A. Brass and everything for him to clean on her.

Mr. Carey: I object to this line of inquiry unless the witness knows the facts.

By the Court:

Q. Did you see Mr. Hanson on July 3rd? A. I did not.

30 Q. Were you on the pony engine July 3rd? A. No, sir; I never went on the pony when she went out.

By Mr. Simpson:

Q. When was the last time you went on the pony? A. I forget. I haven't any book with me.

Q. How long before the accident? Was it a month before the accident?

Mr. Carey: The slips are right there; he can tell from the slips when he was there.

40 Mr. Simpson: These slips do not show.

J. F. Kathan (Recalled), for Defendant—Redirect

A. I made them at the time. Made out my own.

Q. Show me by these slips when was the last day you were on the pony? A. There is the seventh month and the first.

Mr. Carey: That would be July 1st, would it?

A. Seventh and first, seventh and second. 10

By Mr. Carey:

Q. The seventh means what? A. Seventh month.

Q. That is July? A. Yes, sir. That is the last.

By Mr. Simpson:

Q. That is the last day you were on it? A. Yes, sir.

Q. Let me have those, please. You don't know anything about this slip, do you? You had nothing to do with making that out? A. No, sir; Mr. Hanson made his own slips out. 20

Q. That was made out by him? A. Yes.

Q. When you left the engine on the second of July, is that the time she was laid up? A. That is the time she was laid up in July. She was laid up—that is the time I think she was got through with in July.

Q. You never worked on it after that? A. Not after that; not when they take her out of service. 30

Redirect Examination by Mr. Carey:

Q. When you say you never worked on her you mean what? A. I mean from the time she was taken out of service until she was put back in service.

Q. What do you mean by working on her, running her? A. Running her.

Q. Yes, subsequent to the time you stopped run- 40

J. F. Kathan (Recalled), for Defendant—Recross

ning her did you do anything on her at all? A. Yes, sir, I did.

Q. And that was what? A. I took the furniture out the front end—out of the official house and took it to Weehawken and put it in her car.

Q. What about the tools? A. The tools I took—my little tool box—I took it and put it in the
10 storehouse and stored her until the engine came back from Albany.

Recross Examination by Mr. Simpson:

Q. What day did you take this furniture out? A. Along in July sometime.

Q. What day in July? A. I couldn't give you the date.

Q. Any records that will show in the possession of the company? A. I didn't keep no records
20 of it.

Q. Did you get paid for it? A. Sure I got paid.

Q. Yes. A. I done it in my time and kept the time.

Q. Did you get paid for taking the furniture? A. I done that in my time when I was working.

Q. Will it show a record of what you— A. No, sir.

Q. No record of any kind? A. No, sir.

30 Q. You don't remember? A. No, sir.

Q. You can't tell what day it was in July? A. I said I could not.

By Mr. Carey:

Q. After you had got through taking these things off the engine were there any tools at all on the engine? A. None as I know of.

Defendant rests.

Miss Anna Tucker, for Plaintiff—Direct

PLAINTIFF'S TESTIMONY IN REBUTTAL.

MISS ANNA TUCKER, SWORN.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mrs. Tucker? A. 292 State Street, Brooklyn?

Q. You are a friend of Mrs. Hanson, aren't you? A. Yes. 10

Q. You were such when her husband was killed? A. Yes, sir.

Q. After her husband was killed did you have a conversation with Smith, the fireman, about the accident? A. I did.

Q. And where did you have that conversation? A. In Mr. Smith's home.

Q. When, and how long after Mr. Hanson's death, about? A. On Tuesday morning, the day 20 of the funeral.

Q. What did Smith say to you about what he saw or heard of the accident? A. I asked him if he could give me any information, tell me how it happened. He said no, he didn't, he couldn't. I said, "Well, did you see or hear the engine?" And he said no, he neither saw nor heard it.

Q. Heard what engine, did he say? A. No, sir.

Q. What engine were you talking about? A. The engine that killed Mr. Hanson. 30

Q. Did you say that to Mr. Smith? A. I asked him if he didn't see the other engine, or—

Q. Oh what? You have to give the conversation. I can't tell it. A. I said, "Mr. Smith, I said, "How did it happen?" I said, "Can't you tell me just exactly how?" And he says, "No, I couldn't." He says, "I don't know." I says, "Well, didn't you see any engine?" He says, "No." He said he didn't. He said he neither heard nor saw another engine. 40

Miss Anna Tucker, for Plaintiff—Direct

Q. Did he say anything else to you about—particularly directing your attention to the fact, did he say anything about having seen Hanson's hat fly in the air and he remarked to Kathan, "Well, they have clipped him"? Say anything like that to you? A. Yes.

Q. Well, tell us. You have to tell us what he
10 said? A. He said the first he knew he turned around—

Mr. Carey: I object to it as entirely immaterial. It has nothing to do with the issues in this case.

The Court: I understand the purpose is in furtherance of a foundation which was laid during fireman Smith's testimony, when he was asked whether or not he had had a certain conversation with this particular witness.

20 Mr. Simpson: I laid the foundation for all this with the purpose of contradicting him.

Mr. Carey: I further object there is no proper foundation laid for this testimony.

The Court: I will overrule the objection.

Mr. Carey: Objection noted.

Q. Will you give us all the conversation. Do not repeat it.

30 The Court: Pardon me, the proper way, is—you placed before the witness Smith certain alleged conversations which you allege he had with this witness. Now the way to contradict, if you can, is to place before her the same thing.

Mr. Simpson: I will withdraw the question.

Q. Did he say to you, Smith, in addition to what you have said, that he saw Hanson's hat fly in the air and remarked to Kathan, "Well, they have
40 clipped him." Did he say that to you? Yes or

James Holt, for Plaintiff—Direct

no. A. He didn't say clip. He says, "They have got him."

Q. "They have got him"? A. Yes.

Q. What did he say in reference to that particular thing? A. He says, the first he knew he saw his hat fly and he said to the engineer, whoever he was, I don't know, he says, "My God, they have got him."

Q. Did he say to you that the engine was going swiftly? A. He did not. 10

Mr. Carey: I object.

Q. He did not? She says he did not. That is all.

(No cross examination).

JAMES HOLT, sworn. 20

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Holt? A. I live in West New York.

Q. Were you tool boy in the roundhouse at Granton when Mr. Hanson was killed, covering that period of time? A. Yes, sir.

Q. How long had you been tool boy there then, about? A. Well, I should judge about three or four months, I couldn't say for sure how long it was. 30

Q. In the period of time can you tell me whether it was the practice of firemen to get off the engines and get small tools to put on the engines, such as monkey wrenches, chisels and hammers—the fireman? A. They would sometimes, if I happened to be behind, they would come and help themselves sometimes, and sometimes they would ask me, according to how big a hurry they happened to be. 40

James Holt, for Plaintiff—Direct

Q. And at about the period of his death did you have enough of these small tools or was there a shortage of small tools? A. Well, we were kind of short—

10 Mr. Carey: I object. That is going too far entirely. The question is whether the engine on which he was to go out was properly equipped, not whether there was a general shortage or not.

(Discussion.)

The Court: Well, I will overrule the objection.

Mr. Carey: There is nothing in their pleadings which alleges a shortage of tools at all.

Mr. Simpson: We do not have to. There is a very interesting case on that, about the pleadings, which I came across.

20 The Court: I do not care to go back to that. They have been content with their pleadings as to that.

Mr. Carey: My objection noted.

Q. What do you mean by kind of short? What do you mean by that? A. Well, didn't have very good ones—very many.

30 Q. What would that result in before his death,—how would the foremen act about the tools, what would they do about tools?

Mr. Carey: I object to it as incompetent and immaterial.

Mr. Simpson: They have offered their proof to show the firemen took no tools.

Q. Small tools?

The Court: The latter part is the important part,—what would the firemen do if anything with regard to the small tools.

James Holt, for Plaintiff—Direct

Q. Monkey wrenches, hammers and chisels?

A. They would come and ask me for them.

Q. If you went out what would they do; how would they get them? A. Well, they go and look for them themselves.

Mr. Carey: I object.

By the Court:

Q. How do you know that, if you were not there? 10

(No answer.)

By Mr. Simpson:

Q. What happened when you came back? A. They would be gone.

Q. Your small tools would be gone? A. Yes, sir.

Q. Now you knew the deceased in his lifetime, didn't you? You knew Hanson when Carpenter was his engineer, didn't you? A. I was slightly acquainted with him. 20

Q. Did you have a discussion with him about the condition of a hammer when Carpenter was on the engine before his death? A. Yes.

Mr. Carey: I object to it as entirely irrelevant and incompetent.

The Court: How would the discussion show anything? 30

Mr. Simpson: It would show what the fireman did about his tools—what this dead man, who was a fireman, what he did about a tool that he complained about, a hammer.

The Court: Yes, how long before he was killed did this thing take place?

Q. How long before he was killed did this thing take place? A. About a week.

Q. What occurred about a hammer between you and him? 40

James Holt, for Plaintiff—Direct

Mr. Carey: I object, unless the hammer is testified to as being related to this pick-up train, or to number 25.

(Discussion.)

The Court: Very well, go ahead.

Mr. Carey: Note an objection.

10 Q. What occurred between you and him? A. Why, the hammer I gave him wasn't much good, had a poor handle into it, and he started hollering at me about it, and of course we got into an argument about it and I got up on the engine and the engineer parted us.

Q. What was the matter with the hammer that you had given him? A. The handle wasn't no good into it.

20 Q. Why did you give him that kind of hammer that was no good? A. Didn't have much—

Mr. Carey: I object to it as immaterial.

(Discussion.)

The Court: All right. I will overrule the objection. Take your exception, Mr. Carey.

A. Didn't have no—many good ones.

30 Q. Do you know what was the practice about the engineers and firemen trying to keep possession of their small tools during the time you were working there? What did they do about trying to keep possession of their own small tools? A. Why, they tried to get tool boxes—

Mr. Carey: I object.

The Court: I will overrule it, and take your exception.

(Answer repeated.)

A. (Continuing)—to put their tools into.

40 Q. How would they keep possession of them then? A. Lock up.

James Holt, for Plaintiff—Direct

Mr. Carey: Who is "they"?

Q. How would the engineers and firemen keep control of these small tools?

Mr. Carey: I object. It has not been shown as yet that Hanson had a tool box.

The Court: I realize that, and if he wishes to pursue it I am going to give you the benefit of an exception. I believe you are right. 10

Mr. Simpson: I think we shall take it. I think I can convince your Honor I am right on the motion when we get to it.

The Court: I am not going to discuss it. I will overrule the objection. Take your exception.

Mr. Carey: May it be understood I am objecting and my objection goes to all testimony at this time, and I won't be obliged to repeat it? 20

The Court: Yes, whatever else, I suppose that is in line with the testimony that is now being pursued.

Q. How did engineers and firemen keep control of these small tools, as you say they did? A. The engineers—

Mr. Carey: Nobody says they did yet. He hasn't said anything about firemen keeping possession. 30

Q. How would the men, engineers or firemen that worked on locomotives keep control of their small tools? A. The engineers would take small tools and lock them up in a box.

By the Court: What about firemen? Are you speaking only of engineers? A. Yes.

Q. Only of engineers? A. Yes, sir.

James Holt, for Plaintiff—Cross

By Mr. Simpson:

Q. In that way they kept control of the tools for the locomotives? A. Yes.

Q. Were there regular crews there where the firemen and engineer always worked together—regular crews? A. Yes.

Q. Did you have to put on the gauge lights? A. Yes.

Q. Who would get on the engine first, the fireman or the engineer? A. The fireman generally would.

Q. What would he do with the gauges when you put them on? Would he fasten them on? A. I generally put them on myself and he would light them.

Q. He would light them? A. Yes.

Q. Have you seen the firemen filling the lubricating cups on the engines? A. Yes.

Q. Was that the general custom?

Mr. Carey: I object.

Q. Had you seen it done often? A. Yes.

Q. How would they do it? How would they fill the oil cups on the engine, the firemen? A. Just one little valve they screwed entirely out.

Q. Did they use anything to screw the valve? A. Use a monkey wrench.

Q. Monkey wrench? A. Yes.

Cross Examination by Mr. Carey:

Q. You say you had worked as a tool man there three or four months before Mr. Hanson was killed? A. I should judge, as near as I could judge.

Q. Are you working there yet? A. No, sir, I am not.

Q. Where are you working now? A. Working at the Remington Arms, in Hoboken.

James Holt, for Plaintiff—Cross

Q. You attended to putting tools on the engines as they were going out? A. Yes.

Q. Taking tools off the engines as they came in? A. Yes, sir.

Q. And that was the regular practice when the engine came in, you stripped it of tools? A. Yes.

Q. When it went out you equipped it with tools? A. Yes. 10

Q. And the tools, the monkey wrench, chisel and hammer, and so forth, were the engineer's tools, were they not? A. Yes.

Q. And the firemen had as tools a hook and shovel? A. Yes, sir.

Q. And shaker rod? A. Yes, sir.

Q. And then he also had some flags which were used on the engine? A. Yes.

Q. And the gauge lights? A. Yes.

Q. That was all he had? A. Yes. 20

Q. Now a shovel would be used on one engine one day and on another engine another day, would it not? A. Yes.

Q. Made no effort at all to keep the shovels with the same engines? A. No, sir.

Q. Or the hooks with the same engines? A. No, sir.

Q. Or the shaker bar with the same engines? A. No, sir.

Q. They were all standardized and were used interchangeably upon all the engines, were they not? A. Yes, sir. 30

Q. Now you say that when you got behind sometimes the fireman would help you? A. Yes.

Q. It was one of those occasions that he would help you, wasn't it? A. Yes, sir.

Q. Were you there on the night of August 3rd? A. I don't remember.

Q. Were you working there on August 3rd? A. Yes, must have been. 40

James Holt, for Plaintiff—Cross

Q. Well, must have been; why do you say must have been? A. I was working every night.

Q. Worked nights then, did you? A. Yes, I did work nights.

Q. You didn't know what engine was going out on the pick-up until away along toward eleven or twelve o'clock at night, did you? A. No, sir.

10 Q. And then you would put the equipment on the engine for the pick-up? A. Yes, sir.

Q. As soon as you found out about it?

(No answer.)

Q. The small tools were tools which belonged to the engineer? A. Yes, sir.

Q. And which the engineer used? A. Yes, sir.

Q. Some of the engineers had boxes for their small tools, did they not? A. Yes, sir.

20 Q. Those boxes had the engineers' names on them? A. Yes, sir.

Q. Then when you found the engine on which an engineer was going out you would, if he had a tool box of his own, put that on for him? A. Yes, sir.

Q. Otherwise you would do what? A. I would furnish him with other tools; loose tools.

30 Q. You would furnish him with other tools, and those tools you would get from the storehouse or from the tool car? A. From my tool car.

Q. But where he had a tool box of his own then you put that tool box on? A. Yes, sir.

Q. And the engineers were the only ones that had the tool boxes, were they not? A. Yes, sir.

Q. The fireman's tools were used interchangeably all the time? A. Yes, sir.

Q. Now you say that when you would go out sometimes that when you came back you would find that some small tools had gone? A. Yes.

40 Q. Well, somebody else took charge while you were out, didn't they? A. No, sir.

James Holt, for Plaintiff—Cross

Q. Eh? Didn't the roundhouse foreman take charge there? A. No, sir.

Q. Didn't he have supervision there? A. Yes, sir.

Q. Yes; and men were not allowed indiscriminately, to go and get tools for themselves, were they? A. No, sir.

Q. No; so that if tools were taken while you were out, why, it was under the supervision of somebody connected with the roundhouse there wasn't it? Wasn't it? A. I suppose so. 10

Q. Yes. And you wouldn't know whether the engineer got the tools or whether the fireman got them? A. No, sir.

Q. Now, as a matter of fact, Mr. Holt, if there were tools lacking on an engine, did not the engineer come right to you and report to you? A. Yes, sir. 20

Q. And didn't you then go and get the tools yourself? A. Yes, sir.

Q. A fireman didn't come to you to report tools lacking, did they? A. Sometimes.

Q. Sometimes? A. Yes, sir.

Q. If some of their tools were lacking the fireman came to you? A. Sometimes the fireman would come when the engineer's tools were not there.

Q. Came for the engineer? A. No; the fireman lots of times would come for the engineer's tools, say they were missing, and lots of times came to me—he would be on the engine first and see what was missing. 30

Q. Then you would get the missing tools and put them on the engine? A. Yes, sir.

Q. Now do you know of your own knowledge whether there was any shortage of tools for the engines that were going out on August 3, 1913?

A. I am quite sure there was. 40

James Holt, for Plaintiff—Cross

Q. Well, what was the shortage? A. On hooks and scoops. On hooks and scoops and hammers, we most always was short of.

Q. You are sure on this August 3rd, there was a shortage? A. On some of the tools, I couldn't say all.

Q. On some of the tools; you couldn't say whether firemen's tools or engineer's tools? A. No, I couldn't.

Q. You couldn't say on what engines the shortage occurred? A. No, I couldn't say; I never kept track of the engine.

Q. You don't know whether on the second or third of August there was any shortage on engines that were to go out on the pick-up train?

A. I know there was a shortage on hammers.

Q. On that engine? A. On the pick-up engine, 20 yes.

Q. On the pick-up engine at that time? A. Yes, sir.

Q. On what day? A. Well, I couldn't say. The day I had trouble with Pete Hanson.

Q. Oh, yes, that was some time before, wasn't it?

Mr. Simpson: A week before.

The Court: He said a week before.

30 A. The time I had trouble with Pete Hanson, then I know there was a shortage.

Q. Was that shortage made good? A. I couldn't make it as good as it ought to have been.

Q. Was that shortage made good? A. Yes.

Q. When, on that very day? A. I couldn't say.

Q. Did you get a good hammer for him on that very day? A. We got as good as I had. It was no good one, no, I didn't have no good one.

Q. Did you get another hammer for him? A. 40 Yes.

James Holt, for Plaintiff—Cross

Q. And handed it to him? A. Yes.

Q. Who was the engineer at that time? A. I couldn't say; don't remember the engineer's name.

Q. Was Carpenter there? A. I think it was Carpenter, but I wouldn't swear who the engineer was; I don't remember.

Q. The engineer came, did he? A. The en- 10
gineer came.

Q. And parted you and Hanson? A. Yes, sir.

Q. Then another hammer was provided? A.
Yes.

Q. Any everything was satisfactory? A. Yes.

Q. Now that is the last shortage which you have any definite recollection of prior to the time Mr. Hanson died? A. That is the only time.

Q. That is the only time? A. That I know of.

Q. Only time that you know of? A. Yes, sir. 20

Q. These shovels and hooks and so forth, were all kept by you in the storage house or the tool car, were they not? A. Yes, sir.

Q. Whenever there was a shortage, that is where they came for them? A. Yes, sir.

Q. Now you speak about the effort to keep possession of the small tools; that was the effort which the engineer made, was it not? A. Yes, sir.

Q. And that related to the tools which the en- 30
gineer kept when he had a private tool box in his own private tool box? A. Yes.

Q. And to no other tools? A. No, sir.

Q. Was there anybody else on as tool boy while you were there? A. Not as tool boy. They had a headlight boy.

Q. Headlight boy? A. Yes.

Q. You were on nights at that time? A. Yes, sir.

Q. And then they had somebody who was on 40
day time? A. Yes, sir.

James Holt, for Plaintiff—Redirect

Q. Same time? A. Yes, sir.

Q. Did they have only one at night and one at day? A. Yes, sir.

Q. When did you see the firemen attend to lubricating an engine? A. Why, different times.

Q. Where? A. On the right hand side—the lubricators.

10 Q. Where was the engine? A. Right there when I was putting tools on them, right opposite the tool car.

Q. Whom did you see do it? A. I couldn't mention any names.

Q. You can't mention any names? A. I can't mention the names; I know I seen them do it.

Q. Not a single fireman can you name that did it? A. There was different firemen. I seen my own brother do it, I have seen lots of others do it.

20 Q. Your brother a fireman? A. Yes, sir.

Q. You remember you have seen him do it? A. Yes, I seen several of them. A good many of them does it when the engineer is behind.

Q. When the engineer is behind? A. Yes; if he happens to be busy.

Q. Done it at other times? A. Yes, lots of times they do it, other times.

30 Q. But it was your duty to attend to taking the tools off of all the engines and putting tools on all the engines when you were on duty there? A. Yes, sir.

Redirect Examination by Mr. Simpson:

Q. When these firemen would come for the engineer and complain about the small tools not being ready or not in there, would you give them to the firemen? A. Yes, sir.

Q. Give them what they wanted? A. Yes, if I had them.

40 Q. And they take them on the engine? A. Yes, sir.

James Holt, for Plaintiff—Redirect

Q. Now you said that there was a shortage there about a week before he was killed. How long was it before that shortage was made good? A. I couldn't say.

Q. Well, how long did you work as tool boy after he was killed? A. Why, I should judge about six months anyway.

Q. Was that shortage ever made good while you worked there? Was it ever made good? A. Oh, it was made good afterwards. 10

Q. How long after he was killed? A. I couldn't say; I suppose a week, maybe.

Q. A week? A. Maybe less; I couldn't say how long.

By the Court:

Q. Do you know whether it was made good before he was killed? A. Sure, there was lots of times when it was short—had lots of tools, and lots of times we were short. 20

By Mr. Simpson:

Q. Just try and fix your mind on something. You say there was a shortage about a week before he was killed. How long were you there after that? You had told him about this bad hammer and you told him you couldn't give him any, you didn't have any; how long was that after that that the shortage was made good? 30

Mr. Carey: He testified it was made good the same day.

Mr. Simpson: He hasn't testified to that.

Q. How long was it according to your memory before that shortage was made good after you had the argument; was it a week or two weeks or three weeks; how long was it? A. I think it was around a week. 40

James Holt, for Plaintiff—Recross

Q. About a week? A. That they got new tools in.

Q. You remember when he was killed, don't you? A. I remember it.

Q. Hearing about it? A. Yes, hearing about it.

Q. That is in your mind? A. Yes.

Q. You remember the new tools came in, don't you? A. I remember new tools coming in.

Q. Did they come in after he was killed or immediately at the time he was killed or two weeks before he was killed; when did they come in? A. Well that, I can't remember.

Q. What is your best memory on it? You remember the man being killed and you remember the tools coming in; was it after he was killed or when was it? A. I can't say exactly when it was.

Q. You couldn't say exactly? A. I couldn't say.

Q. What is your best judgment? A. Afterwards—my best judgment.

Q. That is your best recollection, although you can't say positively? A. No, sir, I cannot.

Recross Examination by Mr. Carey:

Q. This shortage of which you have the definite recollection was only the shortage of a hammer, wasn't it? A. Yes, and some scoops.

Q. And that was made good on that day—some scoops? A. Yes.

Q. On that day that you had an argument with Hanson? A. Yes.

Q. Who complained of the shortage of scoops on that day? A. I couldn't say who.

Q. Hanson did not? A. No, he didn't complain of scoops, no, sir.

Q. And he never complained to you of a shortage of scoops, did he? A. Why, he might have

James Holt, for Plaintiff—Recross

before that, I don't remember, but that is the only real argument I had with him.

Q. That is the only time you ever remember his complaining of a shortage to you? A. Yes, of his hollering out.

Q. You don't recall whether there was any other shortage on that day or not, do you? A. No, sir.

Q. Eh? A. I think there was scoops short— 10

Q. You think, but do you know? A. I wouldn't swear to it.

Q. You know that there was a shortage of scoops from that time on until after Hanson died?

A. I know there had been a shortage of scoops.

Q. You know there was a shortage of scoops from that time on after you had the argument with Hanson, about the hammer, until the time of his death? A. They was quite short of scoops. We picked up old scoops like that, and 20 give them the best we could find.

Q. Did that occur between the time you had the argument with the hammer and the time when Hanson died? A. Yes, we were short; had often been short before.

Q. Did that occur after the time you had the argument with Hanson and the time when he died?

The Court: This shortage of scoops?

A. Sure; we was short often before that. 30

By the Court:

Q. You are asked if there was a shortage happening in scoops, not having enough scoops, between the time of the question you spoke of with Hanson about the hammer and the time of his death? A. Yes.

By Mr. Carey:

Q. You remember that distinctly? A. Yes, sir. 40

Q. Who complained about it? A. Different firemen.

James Holt, for Plaintiff—Recross

Q. Who? A. I couldn't mention no names. I didn't keep track there. Something I never kept track of.

Q. Yet you are prepared to testify that those inquiries occurred after—

Mr. Simpson: Do not answer.

10 Q. —the time of the argument with Hanson and between that time and his death?

Mr. Simpson: I object to the form of that question, whether the witness is prepared to testify.

The Court: I suppose that portion could be well be left out and say he does so testify.

Q. Do you then testify that after the argument about the hammer and between that time and the
20 time of Hanson's death there were shortages of scoops? A. Yes, sir.

Q. That you know positively, do you? A. Yes, sir.

Q. Now when the shortage occurred they would come to you about it? A. Yes, sir.

Q. And you would get the shortage from the storehouse? A. If they had them.

Q. And from the tool car? A. Yes, sir.

Q. That is the only place you had to get them,
30 wasn't it? A. From my tool car. If I didn't have the tool car I had the storeroom, and I had to go to the storeroom, and lots of times we didn't have them in the storeroom, and I would scrape up what I could find and give them the best I had.

Q. Where would you go for them then? A. Run around in the roundhouse and see if I can find any there, pick them up wherever I could find them.

*James Holt, for Plaintiff—Redirect**Redirect Examination by Mr. Simpson:*

Q. When you came back and lost these tools who did you complain to?

Mr. Carey: I object. He has not testified he complained at all.

By the Court:

Q. Did you complain to anybody? A. Yes, I 10
complained to the foreman.

By Mr. Simpson:

Q. And when you tried to get tools you went, you say, to the storehouse? A. Yes.

Q. And the tool car? A. Yes. If I didn't have them in the tool car I would go to the storehouse.

Q. If you didn't have them in either place where would you get them? A. Wherever I could find them. 20

Q. If you couldn't find them who would you try to go to to get them, to get an order for them? A. The foreman.

Q. What would the firemen do if you couldn't get tools for them?

Mr. Carey: I object. He hasn't testified—

The Court: Let's have if it ever occurred.

By the Court:

Q. Did it ever occur that you could not get tools 30
before a train or engine went out? A. No, sir; I got them, but they went out late.

Q. Now Mr. Holt, did I understand you to say that you were on duty on Sunday, August the 3rd?

A. Yes, sir.

Q. What were you on, day duty? A. Night duty.

Q. When did you go on? A. Went on seven o'clock at night.

James Holt, for Plaintiff—Redirect

Q. Went on at seven P. M. and went off— A. Seven A. M.

Q. I understand you to say also that it was your duty to place upon engines that were to make runs tools, that is tools such as scoops, hooks, grate shakers and also what have been called small tools such as hammers, monkey wrenches, chisels and

10 so forth? A. Yes, sir.

Q. That was part of your work there? A. Yes, sir.

Q. Now then, when, with respect to the time when an engine was to start its run, would you place those tools upon the engine? A. When the hostler would pull him out of the roundhouse and get him out opposite the tool car, then I would put them on.

Q. That would be how long before the engine
20 would start the run? A. Why, around fifteen, maybe twenty minutes, and sometimes a half hour, according to how early the hostler brought him out.

Q. It would be encompassed, you think, within anything from fifteen minutes to a half hour before the engine would actually be started on its run? A. Yes, sir.

Q. Would not do it, of course, until the engine was brought out of the roundhouse by the hostler
30 and placed opposite the tool car? A. No, sir.

Q. As I understand you also, these tools which you have spoken of that they would try to keep, were the small tools, that is hammer, monkey wrench and chisel and such like? A. Yes.

Q. That did not refer to the scoops and hooks, and so forth? A. No, sir.

Q. And who was it that would do anything with regard to keeping of such tools? A. The engineer.

40 Q. The engineer only? A. Well, the fireman would see that he have them when he got out.

James Holt, for Plaintiff—Recross

Q. When would the fireman see that these small tools were either on or not on the engine? Where would the engine be when he would do that? A. Be outside, opposite the tool car.

Q. How long would that be, as a rule, before the engine would be started on its journey? A. About, around fifteen minutes or so.

10

Recross Examination by Mr. Carey:

Q. Then you would not know yourself whether there was any shortage of tools on a particular engine until about fifteen or twenty minutes before they started out, would you?

The Court: From ten minutes to a half hour.

A. No, sir, I would not.

By the Court: Would you know what engines were going to take runs until they were placed by the hostler on the track in front of the tool house? 20

A. Yes, sir.

Q. You would have notice of what engines were to go? A. Yes, sir.

Q. How would you have notice? A. I would go and ask my engine dispatcher who was going out on the engine and what engine was going out, the number of it, and what they were to go on.

Q. When would you do that with respect to the time you started work? A. Went that night and see what was there. 30

Q. When you were working on night duty you would go to whom? A. To the engine dispatcher.

Q. What would you ask him? A. Ask him what engines was going out.

Q. What would that refer to, all the time that you would be on service from 7 A. M. to 7 P. M.? A. Couldn't go for them only a little while ahead of time. 40

James Holt, for Plaintiff—Recross

Q. How far ahead of time? A. Couple of hours.

Q. A couple of hours? A. Yes—who the engineer and firemen were.

Q. Did you hear this? So that you had information a couple of hours in advance of the time that the engines were going to be placed in front
10 of your tool house? A. Yes.

Q. How often during the night or your service there would you do that, that is, between 7 P. M. and 7 A. M.? A. After I get engines fixed up that had to be there I would go in again.

Q. Do you mean about two hours ahead again? A. Yes; and after they came out I would go again.

Q. I understand.

By Mr. Carey:

20 Q. About what time would you go in to inquire about the engine that went out on the pick-up?

A. Well, that was a regular run. I don't remember all the time I would go in. I suppose I would go in maybe around one o'clock and find out. I don't remember it. I couldn't say for sure.

Q. Went out about 3.45 from the house; then you would go in about one o'clock? A. Somewheres around there.

30 Q. And find out what engine was going out and who was going on it? A. Yes.

Q. Was there any shortage of tools of any kind for the pick-up engine on the morning of August 4, 1913? A. August 4th?

By the Court:

40 Q. I may help you, Mr. Witness. You say you were on duty Sunday, August 3rd, from 7 in the evening until 7 the next morning, which was the morning of August 4th. You say the pick-up went out about 3.45 the morning of the 4th. That is the schedule time. Now read the question.

James Holt, for Plaintiff—Recross

(Question repeated as follows: "Was there any shortage of tools of any kind for the pick-up engine on the morning of August 4th, 1913?")

A. The only time I remember the shortage for the pick-up—

The Court: No. No. 10

Mr. Simpson: I submit we are entitled to that answer.

The Court: I think— Listen to the question.

Mr. Simpson: The question is was there any shortage on the morning that that train went out on the 4th of August, and he begins to say the only shortage I remember. Suppose he continues and says, "is on the 4th of August"? 20

The Court: All right. Go on and finish what you were going to say.

A. —is when I had the trouble with Mr. Pete Hanson.

Q. That is what I thought you would say. Which was a week before his death? A. Yes, the only time I know for sure.

The Court: I will let the answer stand.

By Mr. Carey: 30

Q. Was he going out on the pick-up train at that time? A. Yes, sir.

By Mr. Simpson:

Q. You don't know whether there was or wasn't a shortage on the morning of August 4th, 1913, do you; don't remember anything about it? A. I only remember about the time when I had the trouble with Pete. I know there was a shortage. 40

Charles Brusle (Recalled), for Plaintiff—Direct

CHARLES BRUSLE, recalled.

Direct Examination by Mr. Simpson:

Q. Can you tell me what this indicates as to what work Hanson did on the pony engine on the 3rd of July, 1913? A. Yes. When not on the road with the pony engine he done the work of cleaning on the pony engine.

10 Q. That means cleaning of machinery as well as the exterior? A. That I don't know. I am not in a position to answer.

Q. It was shop work of some kind? A. No, sir; I believe he cleaned the exterior and the interior, that is, it is something on the style of a passenger car, and they cleaned the outside of it, cleaned the windows and cleaned the cab, and such things as that. Even got a fire ready in case there was a short call.

20 Q. There was nothing running, that is, the engine was standing still? A. Yes.

The Court: That refers to what date?

The Witness: July 3, 1913.

Cross Examination by Mr. Carey:

Q. Do you know whether at that time the firemen did any work on the regular engines during off hours? A. During off hours?

30 Q. Yes. A. No, sir; I do not believe they done any cleaning, if that is what you mean, off hours or on hours.

Q. There was a difference between the pony engine and the regular engines? A. Yes.

Q. In that respect? A. Yes, sir.

Mr. Simpson: I believe I have offered all my exhibits.

Mr. Carey: I offer in evidence this map which has been testified from.

40 The Court: That may be marked.

J. F. Kathan (Recalled), for Defendant—Direct

(Marked considered Exhibit D-6.)

The Court: Everything has been offered?

Mr. Simpson: The book of rules, the green paper, the map, the keys; that is I think all that we offered.

The Court: That closes the case as far as the testimony is concerned then, does it?

Mr. Carey: I will call Mr. Kathan. 10

JOHN F. KATHAN, recalled.

Direct Examination by Mr. Carey:

Q. Mr. Kathan, did Mr. Hanson to your knowledge have any special tools of his own on the pony engine? A. No, sir, not as I know of.

Q. Did he have anything on that engine except the regular tools of the fireman? A. That is all he had. 20

Q. This fireman's hook which was used on the pony engine, was that a hook which could be used on any other engine? A. No, sir.

Q. Why not? A. Too short.

Cross Examination by Mr. Simpson:

Q. The pony engine had a locked tool box, didn't it? A. Locked tool box, yes.

Q. And he had—you have one of the keys to that tool box, haven't you? A. Yes, but it ain't there. 30

Q. Now wait, don't be so quick with your answers. You have seen the key, haven't you, of the tool box? A. Yes.

Q. Where are they now? A. The keys are down to the roundhouse foreman—no, the foreman's office, Weehawken.

Q. Why didn't you produce them to show this jury that they are not the same keys? A. You didn't ask me to. 40

Motion to Direct Verdict

Q. You know those keys were furnished him by the defendant company? A. Yes.

Q. You knew that all you had to do was to produce the other keys to show that they were not the same as these, didn't you? A. If you had asked me I would have brought them.

Q. Didn't you know that? A. They are not
10 my property to produce.

Q. You didn't try to get them up here? A. I would if I had been told.

Q. You haven't got them with you? A. No, sir; I have got no right to carry company property.

Q. There were keys to the tool box on the pony engine? A. Yes, there were keys.

Both sides rest.

20

Motion for Direction of Verdict.

Mr. Carey: If the court please, before proceeding with the summing up I wish to move for a direction of verdict on behalf of the defendant on the same grounds as were stated in the motion for nonsuit.

30 (The jury was excused until to-morrow morning at ten o'clock, pending the motion for direction.)

The Court: Now, Mr. Carey, I guess we are ready. As I understand you, you are now moving a direction of verdict on the same grounds that you urged in your motion for nonsuit?

40 Mr. Carey: Yes, sir.

Motion to Direct Verdict

The Court: No objection to that.

Mr. Carey: And also the further ground that it appears affirmatively from the testimony in the case that if this decedent was on his way to get tools from the pony engine to put them on to any other engine he was doing that which was not within the scope of his employment, and consequently at that time the relation of master and servant did not exist between him and the defendant. 10

Mr. Carey: Before I begin the argument, perhaps I better make a motion with reference to the striking out of certain testimony, because that may have an important bearing upon the question of what testimony remains upon which the court will make its ruling as of the question of a direction of verdict.

The Court: Of course, if you are going— 20
there is testimony which you have already directed the court's attention to, in other words, with reference to these conversations, and I have already passed upon them.

Mr. Carey: I want to put it to the court a little different way than I did before in view of what has come out now. My motion is that that part of the statements showing expressions to the effect that he was going to the roundhouse for the purpose of getting tools from the pony engine and putting them on the pick-up and for the purpose of getting his overalls should be stricken out, because that declaration is self-serving—those declarations are self-serving, they are hearsay, and they are not part of the *res gestæ*, and further, that these expressions are not competent evidence of the truth of the assertions contained in them—they are not to be admitted for the purpose of establishing the truth of assertions contained in them. 30
40

Motion to Direct Verdict

(During the discussion on the motion Mr. Simpson offered to file an amended complaint, to which offer Mr. Carey objected.)

(Adjourned to October 31, 1916, at 10 A. M.)

10

Jersey City, New Jersey, October 31, 1916.

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The Court: In the case at bar, Hanson vs. The New York Central & Hudson River Railroad, we had concluded an argument on a motion to direct, last night, I think that argument or that motion was a two-fold motion: One was to strike out certain testimony, comprehending declarations made by the intestate, and the other part was a motion directed purely to a direction of verdict.

I will decline to strike out the evidence or testimony which was requested to be stricken out, and I will also decline to direct a verdict.

30

I put it in that manner, Mr. Carey, because I understand that preliminary to your motion to direct there should have been considered the motion to strike out the testimony, which I am referring to, so my answer to your motion should be in that two-fold shape also. I therefore decline to strike out as well as decline to direct a verdict.

Mr. Carey: The motion that I stated to the testimony also comprehended a motion to limit the effect of the testimony if it was permitted to stay in.

40

The Court: Let me hear that, Mr. Kelley. I think, however, I understand the situation. I do not know how I am going to look at it

Motion to Direct Verdict

in any other manner except as I may charge the jury upon that point. My mind has not changed from what I had to say to you at the time of the argument. I think its value and its limit is entirely encompassed by what facts may be established, if they have been established, in connection with what would be necessary to have completed the act which the declaration or declarations seem to have contemplated. That is, for instance, if it has not been established that there was this pony engine, why, of course it could not be stated then, nor could these declarations be usable to establish the fact that there was a pony engine, in other words that must be established aside from the declaration. They also allege that they are not only on the pony engine at or about the roundhouse, but that the pony engine contains certain tools. The declaration standing alone is not the establishment of the fact that there were tools on the pony engine, but that fact must be established by other evidence, and until it is established the value does not go to the point which I have just suggested as to establishing the fact that there were tools. I do not know how else I am going to limit it upon this answer to this motion.

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30

Mr. Simpson: That is the only thing your honor can say when you charge the jury, to tell them the effect of it. That is the testimony.

The Court: The best I can say to you is what I have said and what I have said during the argument. Of course there is this to it, if you desire to present to me the requests to charge upon that line—you have presented certain requests to me already—if there are

40

Motion to Direct Verdict

requests which are desired to direct my attention to this particular matter, why, I will be very glad to have those requests, and of course that will put you in a position then that if I do not charge them you may have your exception to my failure to charge.

10 Mr. Carey: I hand the court some additional requests to charge.

(Hands the court a paper.)

The Court: Very well. I think request number four clearly indicates what your contention is with regard to these declaratory statements, because on a casual reading of it it is in the form of my expression yesterday, and if it is, as I digest it more thoroughly, I will accede to your request to so charge, and if it is not, then of course not do so.

20 Mr. Carey: My idea being that the declarations which have been admitted in evidence are not sufficient and do not tend to prove the position of this pony engine, that tools were on it, that those tools are suitable for use on the pick-up engine, that it was the duty of Mr. Hanson to procure these tools and place them upon the pick-up engine, nor anything relative to the substantive facts which are necessary to establish those contentions.

30 Mr. Simpson: I made a motion yesterday to file an amended complaint on the ground we had tried the case thoroughly on the facts and if there was any question about the complaint had a short complaint drawn up that I wanted to file as an amended complaint, on the ground that there possibly could be no surprise now, because Mr. Carey took two days to prepare his case and prepared to meet the case of the plaintiff as proven.

40 The Court: Mr. Simpson, I do not think I should permit that now.

Judge's Charge

Mr. Simpson: All right, sir.

The Court: But you have the fact that I gave you full and ample opportunity to make the amendment.

Mr. Simpson: All right, sir.

The Court: And for the further reason—I don't know, but I am fearful that if I permit it some other question would arise again. 10

Mr. Simpson: I will withdraw the request. I think your honor is quite right.

The Court: Which would embarrass us and delay the completion of the trial at issue.

(The jury returns to the court room and resume their seats.)

Argument Omitted.

20

Court's Charge to the Jury.

Gentlemen of the jury:

This is an action brought by Rose Hanson, as administratrix of the estate of her deceased husband Peter Hanson. The action is brought under what we commonly know as the Federal Employers' Liability Act, and the damages sought to be recovered are those permitted to be recovered, if a recovery may be had, under what we commonly know as the Death Act. Both of those acts will in their proper place and in the proper time in my charge to you be brought to your attention. 30

It is entirely fitting in my estimation, gentlemen, that I should at the outset say to you that this case is one which is likely to give you greater difficulty in its proper solution than most other cases which would come before you. It is a case, 40

Judge's Charge

because of the circumstances, because of the testimony and the character and kind and class of the testimony which will require your best thought and consideration. I must assume, not knowing, of course, what your thoughts are or having any way in which I can ascertain them, rightly and correctly, that you have up until this time formed
10 no exact and positive conclusion and that you will not reach that point until you have had before you that which you already have, namely, the testimony in the case and the rules of law which are applicable to a case of this character, because you see unless you have both before you, that is, the testimony and the law applicable, you are not in a position to have arrived at a conclusion; in other words, you are in a position where you have a
20 piece of work to do requiring tools and materials, and you have a part of each of them or you have the materials and not the tools; until you have all, you will agree with me I am sure that you could not properly perform the work you set out to do. That is the situation in this case.

The Federal Employers' Liability Act, as far as it is necessary to bring it to your attention, provides in this manner—and I am omitting from the reading of the text of the sections of the act those words and phrases which are not pertinent to
30 the case in hand. Section two of the act provides that every common carrier by railroad engaged in interstate traffic or commerce—that is, commerce carried on between the different states of the Union, for instance, as between the State of New Jersey and the State of New York, or the State of New Jersey and the State of Pennsylvania—shall be, Congress has said, liable in damages to any person suffering injury, while he, that
40 person is employed by such carrier, that is, such railroad, in any of such jurisdictions; or in case of

Judge's Charge

the death of such employee, to his or her personal representatives for the benefit of the surviving widow or husband or children of such employee, resulting—meaning the injury or the death resulting (and this is important) in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment. 10

You can easily gather from that reading that there are three things, three primary things that must be established before a recovery can be had: first, that the carrier—or, making it more pertinent to the case you have before you, the defendant in this action, the railroad company—was engaged in interstate commerce. Admittedly, that is so in this action. Secondly, that at the time of the happening, whether it resulted in injury without death or injury with death, the party injured must have been engaged in interstate commerce for the carrier or railroad company. Thirdly, that the thing complained of by which or through which the injury was brought about or the death was brought about was the proximate result of negligence chargeable or attributable to the defendant company or its servants or agents. 20

On the second point, as to whether or not, generally, Hanson was engaged in interstate commerce, there seems to be no controversy, because it seems to me undisputedly clear that his work was that of a fireman upon a train known as a pick-up train, which was a train used in interstate commerce, that is, its business carried it from and through the State of New Jersey into the State of New York. 30

The first controversy in this action, or the first question of dispute, seems to arise upon this point, 40

Judge's Charge

as to whether or not Hanson at the time of the happening in question was so engaged in such work as constituted a work in interstate commerce. Understand now, gentlemen, and do not be confused about this, it is admitted that his general work was that of a fireman upon a train used in interstate commerce, that is, upon an engine used
 10 to draw a train or trains engaged in interstate commerce. The controversy is not about that. The controversy is was he at the time that he was killed engaged in or about the doing of an act within the line of his employment and which was an act which, if performed, would, under the Federal Act which I have read to you from, have been an act in interstate commerce.

It is alleged by the plaintiff that this is the situation, that Hanson was upon his way proceeding through the yards of the defendant company at Granton, in this county, to the roundhouse, that the purpose upon which he was bound was to go to an engine at or near the roundhouse which has been variously designated as the pony engine or engine 25, for the purpose of taking therefrom certain tools to be used by and to be placed upon the engine which was to draw this pick-up train the next morning—the casualty happening about
 20 11:52, I believe, on the morning of August 3rd; and further, possibly, that he was to go to a locker which it is alleged he had in the roundhouse for the purpose of removing therefrom soiled overalls for the purpose of bringing them home for the further purpose of having them cleaned or something of that character.

I will deal immediately, gentlemen, with the overall question, as I may term it, and I will deal with it in this manner, that if that was what he was about to do, the doing of it was a matter of

Judge's Charge

indifference so far as interstate commerce was concerned; or, putting it another way or in another manner, it was not the doing of such a thing which was a matter of such concern or so necessary to the operation of trains engaged in interstate commerce as to warrant you in saying that if that was what he was doing, if that was what he was about to do, that he was at the time of the happening engaged in interstate commerce. 10

So that, then, sends us back to the other allegations of the plaintiff, and that was that he was about to go to the pony engine to remove therefrom tools, to remove them to an engine which was to be used the next day in interstate commerce. The fact is that he had not reached the roundhouse, that he had proceeded from the building known as the Y. M. C. A., toward the roundhouse for some distance. The distance and the comparative distances you have before you and you will recall from the testimony. It is true that in this case there is much of what may be denominated or termed circumstantial evidence. There is other evidence or other testimony which, if it is believed, as well as the circumstantial evidence is believed, is what we would denominate as direct evidence. What you are being called upon, gentlemen, to do, is this, to consider all of the evidence that there is in the case, to weigh 30 it, determine what weight it is entitled to have, what credibility is entitled to be accorded to each and every part of it, and then determine whether or not it is reasonable for you to draw the conclusion that the fact and the facts and the truth are these, that there were tools upon the pony engine, that they were tools that could be used and were proper to be used upon the engine upon which Hanson would have to work the next day, and that what he was doing, as is alleged, was 40

Judge's Charge

a thing which he was called upon to do or was permitted to do in the performance of a duty which he owed to the defendant company. Keep in mind, gentlemen, that the burden that is cast by law upon plaintiffs in actions of this character is not shifted or changed because of this class of testimony, that is, the circumstantial testimony, but
10 always remains the same, and the burden is upon the plaintiff to satisfy you of the truth of those things by a fair preponderance of the evidence. That is the reason why I said at the outset, gentlemen, that the task before you is probably more difficult than that in the ordinary case. The degree of force that the evidence is to have in order to permit you to arrive at a given result is not different. It is that it must be established by the fair preponderance of the evidence. The situation is,
20 taking the evidence both for and against those propositions and weighing them up, after giving them proper and due consideration and weight to which each part may be entitled, do you then say that it is reasonable that we should find that those things alleged by the plaintiff are true and they are the things that did actually exist.

Now that brings me to this point, gentlemen—and it is necessary for you to be careful in the use of this bit or part of the testimony which I
30 am about to draw your attention to; it is quite difficult enough for those who are, or presumed to be, trained in the law, to be able to properly apply it, and I must concede that in my estimation it must be still more difficult for men who have no legal training to be able to apply it—I am referring to this evidence or testimony which has been called declarations or statements made by Hanson to his wife before he left home and the statement or declaration made to Kathan, the en-
40 gineer, while he stood alongside of the engineer's

Judge's Charge

locomotive in the yard. The wife says, finally, that this is what he said to her as he left his home, and that was, she says, about somewhere about eleven o'clock in the morning of Sunday, August the 3rd: "I am going up to the roundhouse and take the tools off number 25, to put on the pick-up and to get my dirty overalls off—out of the locker to bring home." Kathan says what he said to him as he stood alongside of his locomotive was—or, rather, Kathan says, "I said to him, 'Peter, where are you going?' and Hanson replied, 'I am going to the roundhouse.'" Kathan says he then said to him, "What are you going for, Peter" And Hanson replied, "I am going for my overalls."

That testimony, gentlemen, is only valuable and usable to describe and denote the purpose for which Hanson was proceeding. It is not evidential of the fact that there were tools upon the pony engine. It is not evidential of the fact that those tools were proper and suitable tools or tools necessary and proper to be used upon the pick-up engine. It is not evidential of the fact that the doing of those things or of that thing was a thing which Hanson was called upon to perform as a part of the duty which he owed the company, and is only of value to describe or to indicate to you the purpose of Hanson, provided you have been satisfied by a fair preponderance of the evidence upon the part of the plaintiff or have been satisfied by the plaintiff by a fair preponderance of the evidence that those other facts of which I have just spoken to you actually did exist, and those facts are, principally, that there were tools upon the pony engine, they were suitable and proper and necessary tools to be used upon the pick-up engine, and that it was a part of the duty that Hanson owed to the defendant company that he

Judge's Charge

should provide such tools for the engine upon which he was to work the next morning.

10 Now I will not pretend, gentlemen, or undertake, nor can I undertake to bring to your attention all of the matters which you may consider, pro and con, in favor of and against the substantiation, or to aid you in determining the truth from
10 all of the evidence as to these questions which I have brought to your attention. They are some of the things, and because I name some does not exclude others which you may find.

It is proper and legitimate that you should take into consideration the time of the happening of this accident with respect to the time when Hanson otherwise would have gone upon duty. The evidence undisputedly is, I think, that the accident happened at 11:52, or eight minutes of twelve,
20 on Sunday morning, the 3rd. Mrs. Hanson says that ordinarily he would have left his home about two o'clock in the morning of Monday to undertake his work for that day. It also appears that the engine upon which he would have worked on Monday, the 4th, would have been sent out of the roundhouse at about 3:30 o'clock in the morning, and would have been expected to or was scheduled to have commenced its run at 3:45 in the morning. Another matter which you may take into con-
30 sideration is that the engine which actually did go out upon the pick-up train on the morning of August 4th was registered in—you will remember from the testimony what that means—on the afternoon of Sunday, August the third, at 2:22. Again, there are the keys which have been offered in evidence. You will remember from the testimony what the testimony is which would go in substantiation of the fact, if it is a fact, that they were keys of lockers or of tool boxes upon the
40 pony engine. I have no further comment as to

Judge's Charge

that than to say that the burden as to that, as to all other things which the plaintiff asserts, is upon the plaintiff, and she must establish it by a fair preponderance of the evidence.

You may also take into consideration these agreements or copies of agreements which are introduced in evidence. As you may find, if you find, that they have any bearing upon the controversy, it is for you to decide. 10

Now I have said, gentlemen, that there may be other things, there may be other facts, there may be other circumstances which you may find, which you may recall from the evidence, aside from these which I have brought to your attention, which you will find useful in aiding you to arrive at a proper conclusion as to these matters in issue which I have brought to your attention. Of course, if you find such, gentlemen, use them, and do not understand that I am bringing to your attention these few matters rather than any others which you may so use. If you find—and that is the reason I am bringing this matter to your attention—if you find that the plaintiff upon this matter, upon this point which I have just brought to your attention has not made out her case by a fair preponderance of the evidence, then you need not go any further, because then she is not entitled to a verdict. If she has, then your attention must go in another direction, and that is in the direction as to whether or not she has borne the burden which the law places upon her in establishing the fact, if it be a fact, that the death of her husband was due as a proximate result to some negligent act upon the part of the defendant company or its agents or servants, because you will remember, gentlemen, in my reading from the act under which this suit is being maintained that it is only the event that the thing complained 40 20 30

Judge's Charge

of was the result of negligence upon the part of the defendant company or its agents that there may be a recovery.

The duty that rests upon a defendant company, or did rest upon the defendant company and its agents and servants, so far as I understand is asserted and alleged by the plaintiff, is that they
10 were to use reasonable care in the propulsion and in the driving of their engines and trains over the tracks in the yard in question so as not to bring harm to those who were lawfully and of right there and reasonably to be expected would be there. In other words, the duty was that of reasonable care, the care which the courts of our State have said may be described in this manner: that care which a reasonably prudent person would or should use considering time, place and
20 circumstances.

It is alleged by the plaintiff that the engineer and fireman, either both or one, did not exercise the care required by that rule in keeping a proper lookout and of giving warning of the approach of their engine. The thing for you to decide—and I am trying, gentlemen, to use such plain language as will not permit you to be mistaken as to my meaning—the thing for you to decide as to that point, as to whether or not there was
30 negligence is, from all of the evidence, from all of the circumstances as they have been portrayed to you, did the company's servants, the engineer and fireman, transgress the rule which I have just given to you. If they did not, and the plaintiff has not satisfied you by a fair preponderance of the evidence that they did, then there cannot be a recovery, because then she has not established that other essential thing which must be established in order to have a verdict at your hands,
40 and that is, that the thing that happened happened

Judge's Charge

as the result, the proximate result, of a negligent act upon the part of the defendant company. If she has established that, and established it in the manner which I have indicated, then your attention must go in still another direction before you can determine upon what the amount of any verdict is to which she may otherwise be entitled, and that is, you must examine into and consider the acts of the decedent himself, Hanson, because the law places a rule in front of him to guide him in his actions, and that rule is that he was required to use that care which a reasonably prudent person would or should have used, time, place and circumstances considered, so that he would not bring harm to himself. 10

I think it needs no argument, gentlemen, that to the ordinary person a place of the character which has been described here is a place of danger. Hanson was a man who was accustomed, apparently, to railroad work, because of his length of service thereat. The real question and the exact question for you to determine upon the point I am just bringing to your attention is this: considering all of the facts, all of the conditions and all of the circumstances, did he, Hanson, live up to that rule which the law, as I have stated, placed in front of him for his guidance as to his own actions? If he did not, if he transgressed it, and what happened to him was in part the result of negligence upon his part, then under this present statute he or his administratrix is not defeated or is not prevented from having a verdict, but as to a verdict then this is the situation: "At common law there could be no recovery in such a case"—that is, if you find that Peter Hanson was guilty of negligence in his acts which contributed to the thing which happened to him, then at common law, that being established—and I 40 30

Judge's Charge

might say right here the burden of establishing that is upon the defendant, and it must be established by a fair preponderance of the evidence— if it had been under the common law, then the administratrix of Peter Hanson would have been absolutely barred and deprived of any verdict at all. Under the act under which we are working,
10 as applicable to a case of this character, here is the situation:

“At common law there could be no recovery in such a case, the contributory negligence being a complete bar or defense, but this statute rejects the common law rule and adopts another, by declaring” (quoting now from the act, Sec. 3) “the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury
20 in proportion to the amount of negligence attributable to such employee.”

Then the Court, from an opinion from which I am now quoting, says as to that provision in the act:

“It means and can only mean, as this Court has held, that where the casual negligence is attributable partly to the carrier and partly to the injured employee, he, that is the employee, shall not recover full damages, but only a diminished sum
30 bearing the same relation to the full damages that the negligence attributable to the carrier, the railroad company, bears to the negligence attributable to both—that is, both to Hanson and the railroad company—the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employee's contribution to the total negligence.”

That is the rule to guide you, gentlemen, if the fact be and if you find that otherwise the plaintiff
40 would be entitled to recover and you find under

Judge's Charge

the rules which I have given you and the evidence that Peter Hanson was himself guilty of negligence which contributed to his death.

If you get to that point, gentlemen, where you find that the plaintiff in this action is entitled to a verdict, then what that verdict may be, aside from what the facts may be in the case, will be controlled by what we know in this State as, and which I have already designated in the opening of my charge as the Death Act, and it is the only guide, it is the only rule which you have for the admeasurement or fixing of the amount of damages in a case of this character, because I may say briefly that without the act in question there would be no method at your hands by which a verdict in a case of this character could be measured or fixed. The act, or at least that part of it which would be applicable and useful to you in this case, is this:

“That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.”

“Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in proportion provided by

Judge's Charge

law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

10 I may say at this point that the persons interested, and as far as the testimony shows, the only persons interested are the widow and the child of Peter Hanson. Our courts, in construing that act, so far as the question of what damages may be given for, have said this:

20 "What the plaintiff"—and this is important, gentlemen, that you should give this your very careful consideration, because as I have indicated to you, it is the only rule which you have for the admeasurement of damages. If you go beyond it, why, you see, then you have employed an improper rule and necessarily your verdict will be an improper one—"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which falls upon the widow and next of kin by the premature taking off of the intestate"—that is Peter Hanson in this case, the husband and the father. That fund is ascertained by taking into consideration
 30 all of the possibilities. The intestate, that is, Peter Hanson, may have died by the course of nature shortly after the happening of the accident, and of course, if he had, his support and the contributions to his widow and child would then have ceased. He might have, had he lived, suffered financial reverses, and in that manner, of course, his contribution would have been entirely cut off or lessened. The wife and likewise the daughter, had the husband lived, might have died, and of
 40 course their contribution then would have been

Judge's Charge

shut off. "Nothing is to be added for loss of society or wounded feelings or anything else which cannot be measured by money and satisfied by pecuniary recompense. The damages are to be determined by reference to the pecuniary injury," that is, the money injury, the financial injury, "resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been thus defined to be the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased, compensation for such deprivation is therefore the sole measure of damage."

The testimony is that at the time of his death Peter Hanson was slightly over thirty-three years of age. The testimony is that his widow, I think at this time—you will recall whether at this time or at the time of the accident—was thirty-eight years of age, and the testimony, as I remember it, is that the child will be, if it lives to that time three years old in December coming. I say, gentlemen, if I misstate the testimony, you will of course correct that misstatement by your recollection of what the testimony is. There is also testimony before you as to the sum of money that Peter Hanson was earning at the time of his death. There is also testimony which will aid and assist you in determining what amount of earnings or income the wife received for her own benefit and her own use. While it is true, gentlemen, that the testimony is that probably his entire earnings were turned over to his wife, it is not upon that basis you are to base your verdict, because, you see, what is entitled to be recovered for is that probable contribution which Peter Hanson would have

Judge's Charge

made to his wife and to his child during their lifetime and during his lifetime had he lived or had he not been taken off by this occurrence. Stripped entirely, gentlemen, of all sentiment and of all feeling of every kind and character, you will see that the rule laid down by the statute in question and by our courts in construing it makes it
10 a hard matter of fact, financial proposition that you are to deal with in determining what the damages, if any, are to be, and it is not, gentlemen, for you and I to say that that rule is a harsh one or otherwise; it is not for you or I to say that it is such a rule that you or I, had we had the opportunity of fixing it and making it, would have made, that it is either too scant or too broad, that is not for either you or I to say. Your duty and my duty, or rather, putting it the other
20 way, in the order in which it comes, my duty is to lay before you the law and the rule as it is and as it has been construed and direct you that you are to apply it to the facts in the case in that manner. Your duty is to use it and to apply it as I direct you to, and when you have done that, then you will have arrived at a verdict which in that respect will be a proper verdict.

Now you see the words "capital fund" or
30 "present worth" have been used throughout my reading from the statute and from the findings of our courts. The reason for that is this: had Peter Hanson lived and had he earned whatever he earned, whether the moneys which it is said he was earning at the time of his death or earning more than that as he may have been successful and have advanced and been successful in obtaining employment, or were he earning less because of any reason, he would have been earning those sums and he would have been contributing them
40 to his widow and to his child and for the benefit

Judge's Charge

of his widow and for the benefit of his child as and when and throughout the time he earned them. That is, if he lived for a period of years, whatever it might have been, you see those earnings would have come to him as he was paid, month by month or week by week, or as it may have been, and they and he both would have had the benefit, —he of the money to contribute and they of the contributions,—as they were earned by him. 10

Now if they are entitled to a verdict, their ver-
dill be as of this date when you will render it, and they will be getting the damages which they may have shown, if they have shown, they will have suffered, not only for the time since the accident, but for such time in the future as you will find, or if you do find, it is reasonable to assume that he would have contributed. So that they will be get-
ting all of the verdict, if they get a verdict, for 20
future cutting off of contributions, something in hand now that otherwise they would not have had, you see, until some time in the future; and therefore, the law says that it is not that total sum which you may find they would have lost in the way of contributions for the future, because that would be giving them more because of the fact it is being given them as of this date, than they would be entitled to have, but that sum which you find for the future is to be capitalized, or, in other 30
words, you are to find that lesser sum which represents the present day worth of what you find their whole loss would have been. I cannot describe it to you under the rules under which I am required to work any more clearly than that.

Now, gentlemen of the jury, I have tried to cover every matter and everything which has occurred to me to be of importance for you to have before you. I have tried to do so in as plain language as I am able to command. I cannot, as I view the 40

Judge's Charge

case now, say anything further to you, except that I may say in conclusion this: First, that the mere fact that this thing happened to Peter Hanson, the mere fact that he met his death in this yard, the mere fact that it was by and through the instrumentality of an engine of the defendant company, raises no presumption of negligence against the

10 defendant company. Secondly, if throughout the summing up of this case by counsel to you, or if at any time during the charge of the court there has been reference made to what purports to be the testimony and those references are not true and correct, as you remember the testimony, then you will disregard those things which you find incorrect and go back to what your recollection of the testimony is, because, after all, that is your

20 guide. You are, gentlemen, to take all of the testimony in the case as you find it, and you are to judge of it and determine what is the truth, what weight, what credibility is to be given to each and every part of it, and you are to judge of it impartially, without sympathy, without passion, and without prejudice, and when you have done that, weigh up and determine whether or not it bears the fair preponderance which I told you it must bear in respect to the things to which I have referred, and when you find that, you are to apply

30 the rules of law which I have given to you as best you are able to, and when you have done that, you will have arrived at a verdict which is a proper and legal verdict as far as human beings can arrive at such a result. Anything short of that process, gentlemen, will not reach an end of that character, but would undoubtedly result in a verdict which does not present and does not have upon it the stamp of legality, and that would be an improper verdict.

40 I have had certain requests to charge presented

Judge's Charge

and those thereof which I am willing to charge are these—and I am charging them, gentlemen, in connection with whatever else, if anything, I have said upon the subjects to which they respectively relate, not for the purpose of enlarging or intensifying anything I have said, but simply in addition thereto:

“If Mr. Hanson crossed engine track number 10 two, for a purpose not connected with his employment by the defendant, the plaintiff cannot recover in this action.”

The next I am not charging in the language in which it is presented to me, but with an addition of language and words:

“If the crossing of the track on which Mr. Hanson was struck was the proximate cause of the accident, plaintiff cannot recover, provided you find that the defendant was not guilty of negligence, which either in whole or in part caused the accident.” 20

I mean by that this, gentlemen—of course, I have said to you if the plaintiff has not established that this accident happened because of negligence upon the part of the defendant company, then there cannot be a recovery. On the other hand, if there was no such negligence upon the part of the defendant company and the thing which caused the accident was the negligence of Hanson entirely, 30 in which the defendant railroad company, by its agents or servants, did not contribute or add because of negligence upon its part, then you see the casual negligence, the entire negligence was that of Peter Hanson, and in that case, of course, he could not recover at all, but the act says that, if the thing complained of happened because of negligence, either in whole or in part, of the defendant company, then he may recover, subject to the right of diminution because of contributory 40

Judge's Charge

negligence upon his part, if it has been established.

"Unless plaintiff has proved the case set out in the complaint, she cannot recover."

"If decedent went to a dangerous place for purposes not connected with his employment, he was a mere licensee and there can be no recovery."

10 "The mere intent on the part of decedent to go to the roundhouse to get tools from the pony engine and place them on the pick-up engine, did not, under the evidence in this case, constitute interstate commerce, unless there were tools on the pony engine which were needed for the pick-up engine and which might be properly transferred to the latter engine, nor unless it was the duty of the decedent to make the transfer at the time when the accident happened, nor unless it was permissible for him in making the transfer to go to the
20 place where the accident happened."

With that, gentlemen, you may take the case.
(The jury retired.)

30 The Court: The requests to charge which I have declined to charge are numbers one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, eighteen, nineteen, and that one marked "Additional request," number two, which I declined to charge in the language in which it is presented, or in any other manner than that which I have already charged and in the language which I have already charged upon the subjects to which they refer.

40 Request number twenty I charged in the language in which it was presented, modifying or enlarging upon the request. It was not

Judge's Charge

charged in the exact language in which it was requested. The exact language, so there will be no mistake about it, of the request, is this:

“If the crossing of the track on which Mr. Hanson was struck was the proximate cause of the accident, plaintiff cannot recover.”

All in addition to that is an addition upon my part.

10

DEFENDANT'S EXCEPTIONS.

Mr. Carey: I desire to note an objection to the refusal of the court to charge in each case the requests to charge which the court declined to charge.

Also an objection to the modification of number twenty as made by the court.

20

Also the latter part of your Honor's charge in which, in substance, you instructed the jury that the declarations which were admitted in evidence might be used to denote the purpose of Hanson so far as that purpose relates to his intention to get from the pony engine tools and transfer them to the other engine.

Also to so much of the charge of the court as relates to, in substance, the fixing of damages by the amount of contribution which Mr. Hanson would have made to his widow and next of kin; and in which your Honor referred to the earnings contributed by Mr. Hanson to his wife and next of kin. It appearing that he contributed all his earnings and all of the expenses of living both of himself and his wife and the running of the household were paid by the wife.

30

Also to that part of the charge of the court which relates to the present day worth of the

40

Judge's Charge

contributions made by Hanson to his wife. The error being, as I understood the charge, in this, that they were to give such a sum as would amount to the total contributions which he would make if put out at interest from the present time.

The Court: No, no. I didn't say that.

10 Mr. Carey: Well, to the charge as delivered on that subject.

DEFENDANT'S REQUESTS TO CHARGE.

1. The statements of Mr. Hanson, as testified to by Mrs. Hanson and Mr. Kathan, that he was going to the Round-House, taken either by them-
20 selves or in conjunction with the other evidence in the case, are not legal evidence that he intended to go to the Round-House.

2. There is not sufficient legal evidence in the case to warrant the jury in finding to what place Mr. Hanson intended to go when he left his home on August 3rd, 1913.

3. The statements made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in conjunction with the other evi-
30 dence in the case, are not legal evidence that he intended to transfer tools from No. 25 or the pony-engine and put them on any other engine.

4. The evidence in the case is not sufficient to warrant the jury in finding that Mr. Hanson intended on the 3rd day of August, 1913, to take tools from No. 25 or the pony-engine and put them on the engine of the pick-up train.

5. The evidence in the case is not sufficient to warrant a finding that when the accident hap-
40 pened Mr. Hanson was on his way to get tools

Judge's Charge

from No. 25 or the pony-engine and put them on the engine of the pick-up train.

6. The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken by themselves or in connection with the other evidence in the case, are not sufficient to warrant a finding that at the time of the accident he was on his way to the engine-house for the purpose of getting his over-alls. 10

7. The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in connection with the other evidence in the case, are not sufficient to warrant the finding that at the time of the accident Mr. Hanson was acting within the scope of his employment.

8. The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in connection with the other evidence in the case, are not sufficient to warrant a finding that at the time of the accident Mr. Hanson was engaged in interstate commerce. 20

9. The evidence in the case is not sufficient to warrant a finding that at the time of the accident Mr. Hanson was acting within the scope of his employment.

10. The evidence in the case is not sufficient to warrant a finding that at the time of the accident Mr. Hanson was engaged in interstate commerce. 30

11. The declarations made by Mr. Hanson to Mrs. Hanson, as testified to by her, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that there were any tools on No. 25 or the pony-engine.

12. Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that at 40

Judge's Charge

the time of the accident Mr. Hanson intended to transfer tools from No. 25 or the pony-engine to any other engine.

13. Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that it was either necessary or proper that tools should
10 be taken from No. 25 or the pony-engine and transferred to any other engine.

14. Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that the transferring of tools from No. 25 or the pony-engine to any other engine, was the duty that Mr. Hanson owed to the defendant or that, if he had done so, he would have been acting within the scope of his employment, or in interstate com-
20 merce.

15. On the evidence in the case, if Mr. Hanson had transferred tools from No. 25 or the pony-engine to any other engine, he would have been doing that for which he was not employed, and while so doing, as well as while going to and from the place of making such transfer, the relation of master and servant would not have existed between Mr. Hanson and the defendant.

16. There is not sufficient evidence in the case
30 to warrant a finding that Mr. Hanson crossed engine track No. 2 (being the track on which the accident happened), for any purpose within the scope of his employment.

18. If Mr. Hanson went upon engine-track No. 2 without looking for the approach of the engine which struck him, he was guilty of contributory negligence and plaintiff cannot recover.

19. If Mr. Hanson went upon engine-track No. 2 under such circumstances that, if he had used rea-
40 sonable care, he would have seen the engine ap-

Judge's Charge

proaching, which struck him, and have avoided it he was guilty of contributory negligence and plaintiff cannot recover.

ADDITIONAL REQUESTS TO CHARGE.

2. Under the evidence in this case the employees used the paths through the railroad yard as mere licensees, and there can be no recovery against defendant, except for wilful injury.

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30

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Exhibit P-1.

Defendant's Book of Rules.

Exhibit P-2.

3d. Series.

10 New York Central & Hudson River R. R. Co.
Albany N. Y. 2, 10, 1913.

Mr. W. H. Strauss,
Master Mechanic.

Dear Sir:

The following Firemen from the River Division completed their Examination this P.M.; their standing is as follows:

	Name	Mechanical	Air Brake	Compound
20	Hans Peter Hanson			
	1st trial...	96%	97½%	%

Yours truly,

C. W. Stark,
Supr. of Examinations.

Copy to:
C.H.H.
W. K. M.

30

Exhibit P-3.

Results of Eye Examination of Hans Peter Han-
son.

40

Exhibit D-1.

New Durham. Tracks known as Nos. 1 and 2, just east of the Coal Trestle, will be used by light engines between New Durham and Granton Engine house; No. 1 for outbound and No. 2 for inbound engines. Engines arriving at and departing from New Durham will be directed by the signalman at that point, and signals have been installed to govern movements. No engine will cross these tracks without affording proper protection. 10

Engine crews will take engines to ash pits, or engine house, and from engine house to point of departure of train.

Speed of engines using these tracks must not exceed 6 miles per hour between engine house and crossover at New Durham station.

20

Exhibit D-2.

New York Central Lines.
New York Central & Hudson River Railroad Company.

Certificate of Examination.

This Is to Certify That, Samuel Craig of Kingston State of New York, who has been in the service of the N.Y.C. and H.R.R.R. Company since July 17th, 1905, acting as Locomotive Fireman has been examined with reference to his knowledge and understanding of the Locomotive and the operation of it and the appliances used in connection with the Locomotive and we declare him, in our judgment, to be qualified to act as a locomotive engineer, and we recommend him for promotion to that position. 30

Date Aug.2nd,1911.

40

Exhibit D-2

W.J.Hurlig, Chairman Examining Board.

W.J.Hurlig, Secretary Examining Board.

He has been examined also on the Rules of the Operating Department and has been found, in our judgment, to be proficient in them and we recommend him for promotion to the position of Locomotive Engineer.

10 Date Dec.3rd,1911.

F. D. Murphy, Train Master.
Title.

W. K. McCoy, Supt.
Title.

The foregoing recommendation is approved and permission is given for the appointment of Samuel Craig to be a Locomotive Engineer.

20 Dated at New York
July 26, 1912.

E. J. Wright, General Superintendent
John Howard, Superintendent of
Motive Power.

Exhibit D-3.

30 Cleaning Headlights. The Company shall furnish men to fill and clean headlights and markers on all pooled and double crewed road engines and men to perform similar service on single crewed engines, pusher and helper engines where practicable, and will have supplies placed on engines where practicable and consistent to do so.

Exhibit D-4.

Cleaning. Firemen on switch and work train engines shall scour figures on number plates and clean above running board.

Company will furnish men to do all wiping and cleaning on pooled and double-crewed road engines, except inside and outside of cab windows and inside of cabs, and will furnish men to perform similar service on single-crewed road engines, 10
pushers and helpers where practicable.

Firemen shall not be required to clean flues, wash paint work or wipe off tanks; paint, clean or blacken front ends of doors or smoke arch; this to apply to all classes of engines.

Exhibit D-5.

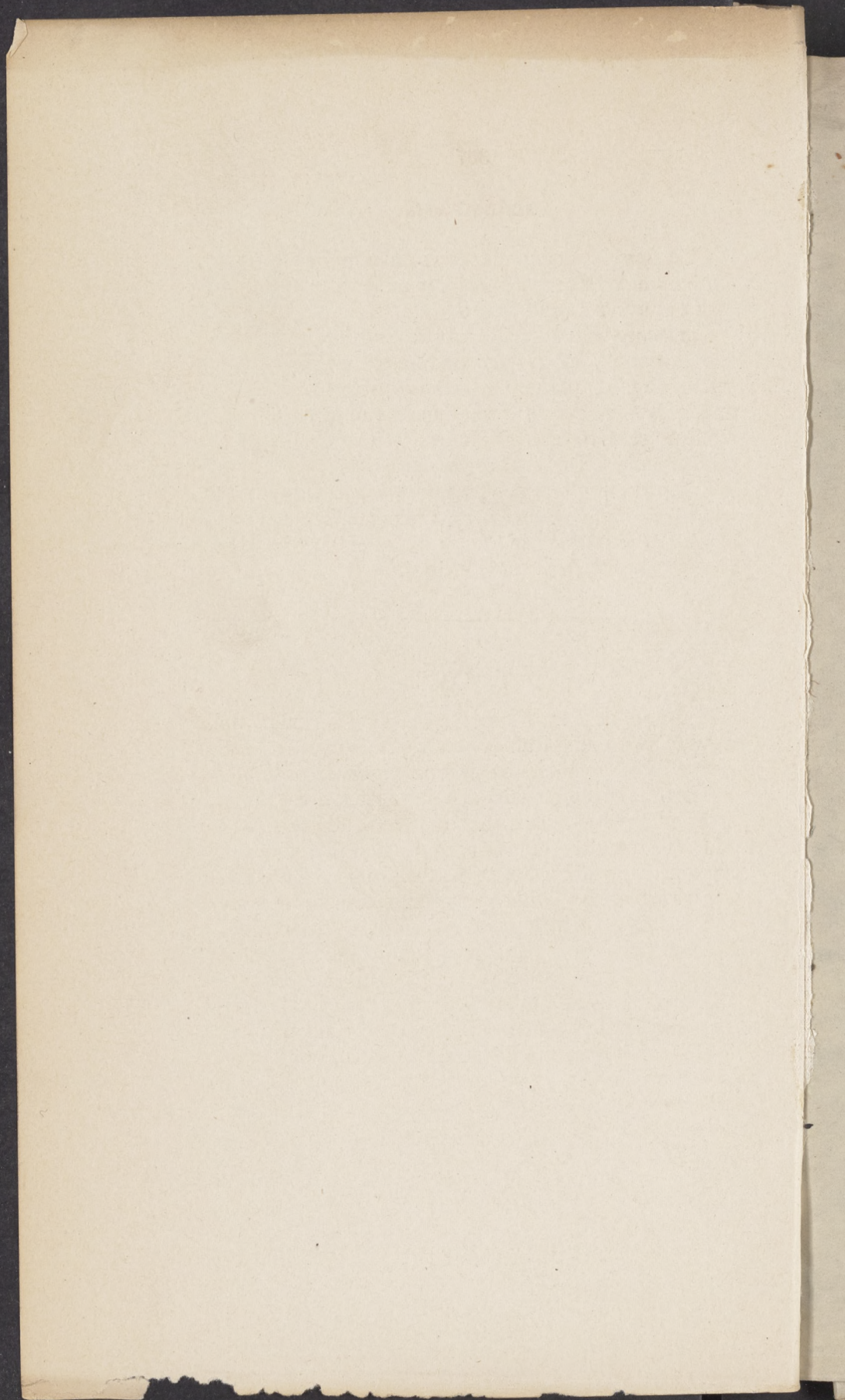
20

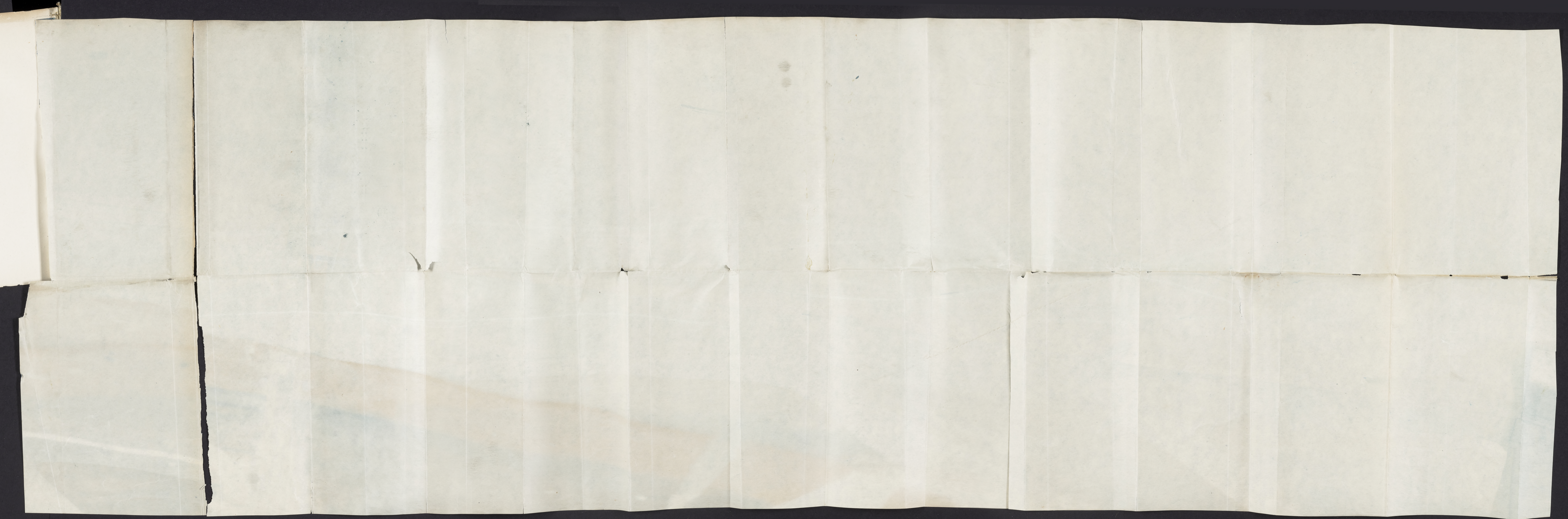
Wanted on Lay Over Day. The Firemen on regular runs are wanted on their lay over day, they will be notified the day previous, if possible.

Regular Firemen will not be used on Sundays or holidays for extra service where there are a sufficient number of extra or pooled Firemen to perform the work. At small terminals, where the service would be liable to suffer by reason of firemen leaving their lay over terminal on Sunday, 30
firemen shall first give notice to Engine House Foreman of such intention.

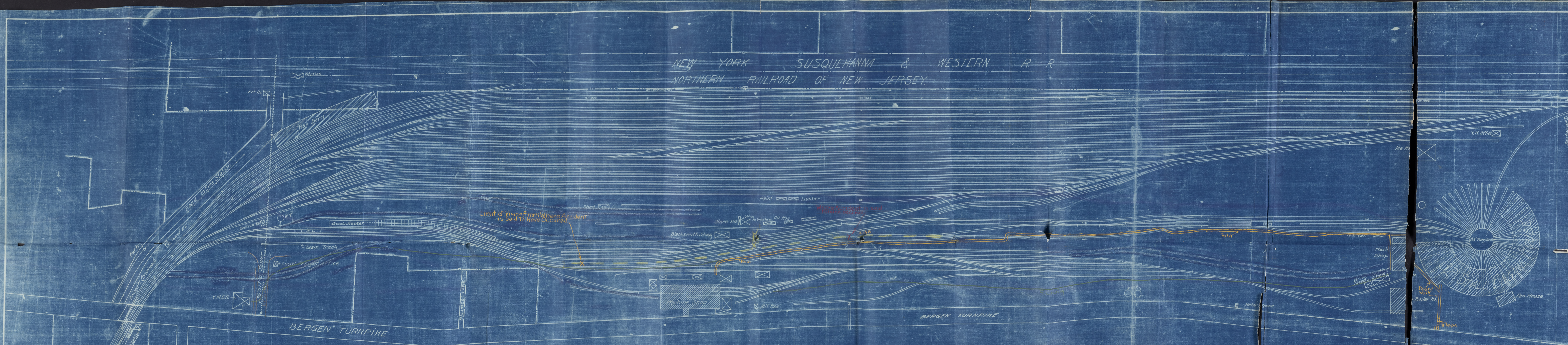
When it is found on arrival at other than Home Terminal that Firemen will not be required for a considerable time, and it will be possible and consistent with the service to allow them to go home and return by the time their services will be required, the Engine House Foreman will grant such permission.

40





NEW YORK SUSQUEHANNA & WESTERN R. R.
 NORTHERN RAILROAD OF NEW JERSEY



PROPOSED STEEL STORAGE TRACKS
 WHERE HANS P. HANSEN WAS KILLED
 MEASUREMENTS TAKEN MAY 18, 1916

NEW DURHAM

Track No.	Center Line	Right Hand	Left Hand
1	100.00	100.00	100.00
2	100.00	100.00	100.00
3	100.00	100.00	100.00
4	100.00	100.00	100.00
5	100.00	100.00	100.00
6	100.00	100.00	100.00
7	100.00	100.00	100.00
8	100.00	100.00	100.00
9	100.00	100.00	100.00
10	100.00	100.00	100.00
11	100.00	100.00	100.00
12	100.00	100.00	100.00
13	100.00	100.00	100.00
14	100.00	100.00	100.00
15	100.00	100.00	100.00
16	100.00	100.00	100.00
17	100.00	100.00	100.00
18	100.00	100.00	100.00
19	100.00	100.00	100.00
20	100.00	100.00	100.00

Scale: 1" = 100'

New Jersey Court of Errors and
Appeals.

~~Hudson Circuit Court~~

ROSE HANSEN, Admx.,
Plaintiff-Respondent,

vs.

NEW YORK CENTRAL & HUDSON
RIVER R. R. Co.,
Defendant-Appellant.

**BRIEF OF PLAINTIFF-
RESPONDENT.**

This was an action brought under the Federal Employers Liability Act, governing the relation of carriers and their employees engaged in interstate commerce. The plaintiff was the administratrix of one Peter Hansen, who was killed by reason of the negligence of the defendant.

The decedent was a locomotive fireman, he was engaged in interstate commerce, his work was to fire an engine, which took out what is called a pick-up train running between New York and New Jersey, and, conversely, in taking freight cars from different stations, and it was admitted that this work of running a train was interstate commerce. He was killed on Sunday morning under the following circumstances: He was going to one engine in the railway yard to get the tools to put on the pick-up engine, which was the engine he was usually employed on, he was also going to get some overalls used by him in his work, he was walking through

the yard, when two locomotives passed each other and one of them without giving him any signal or warning or without any lookout ran into him and killed him. The jury returned a verdict of \$20,000.00 which was reduced by the trial Court to \$16,500.00.

Argument.

The intestate was engaged in interstate commerce at the time of his death, the intestate before recited was in the railroad yard trying to get tools necessary for him to use in his work on the engine, which engine was exclusively used in interstate commerce. He had no other employment, his employment was solely to do with this interstate engine, and the task which he was about when he was killed was getting tools which would aid him in his work and get him overalls which was essential for him to have in his work. Under the decisions of U. S. Supreme Court it is by no technically artificial distinction that a man is declared to be or not to be declared in interstate commerce; if as a general proposition it can be said at the time he was killed, he was engaged of some act for the benefit of the defendant, in interstate commerce, then whether he was going to or returning from work or whether he was engaged upon his engine, is not conclusive. The broad rule is lately laid down by the United States Supreme Court in the case of *Winfield v. New York Central Railroad*, where the true test is said to be:

“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. R. Co. v. Zachary*, 232 U. S., 248, 260. 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."

Also the true test is said to be by the United States Supreme Court in the case of *Pedersen v. The Delaware, Lackawanna & Western Railroad*, 229 U.S. 146 was the thing he was doing at the time of the matter of indifference to interstate commerce.

He was getting the tools for the engine, or getting overalls, if getting the overalls was essential for his proper performance to work, as a locomotive engineer it was not a matter of indifference to interstate commerce. *Walbert v. Trepler*, Pa. Sup. Ct. 27 Atl. 65

See also

Padgett v. Southern Railway, 236 U. S., 668. 83 S. E. Rep. 632

Plaintiff's interstate was engaged in interstate commerce.

Baltimore v. Whitacre, 92 At., 1063, subsequently affirmed by U. S. Sup. Ct. 61 *Advance Sheets, Law*

P. W. & B. R. R. v. Tucker, 35 App. Div., Wash., Dist. of Columbia, subsequently affirmed by U. S. Sup. Court, holding obligation of master commences when servant in pursuance of his contract is rightfully and necessarily on premises of master.

aff. by U. S. Supreme Ct. 220 U. S. 608. Edition P 33.

Zachary v. North Carolina Railroad, 232 U. S., 24, 248; here plaintiff was held engaged in interstate commerce, although on a personal errand to his boarding house when killed. All these cases show the law as laid down by the highest authority is based on a liberal construction of the act and not on mere logic chopping.

The declaration made by the decedent to his wife was properly admitted, they were a part of the *res gestae* and were admitted, as declarations of his intention immediately prior to the time that he was killed. There were admissible under the following cases:

Hunter v. State, 40 N. J. L. 425;
Wigmore on evidence, section 1725.

The law as laid down in *Hunter v. State*, has been applied in many civil cases in this state.

Negligence.

The jury might have found that the locomotive engineer of the engine that ran over him gave him no signal or kept no lookout, although he knew that the yard was used by employees; there was a beaten path near the point where he was killed which was used generally by employees in going to and about their work and about their tasks. Under these circumstances it was a jury question whether operating an engine without a signal or lookout was negligence.

See the following cases: Running a switch engine through the yard held negligence.

Koennecke v. Seaboard, 239 U. S., 352;
Willever v. Delaware and Western, 99
at 321.

Request to Charge: The request not charged by the Court, if charged would have been direction to a verdict, and if that was a jury question it was not error to refuse this request.

Charge of the Court: The alleged error in the court's charge was as to the statements made by defendant. The court charged that they were not to be considered evidence of the fact that tools were on the engine but only to be taken as declaration of his intention, to explain his presence in the yard, and this was not error if the evidence was admissible, it was admissible for this purpose.

See cases before cited. Even if at the time he was killed no tools were on the engine, but he had reason to believe they were and it was the custom of the work, and he was in the place to work, intending to do a task which would benefit interstate commerce, if so the tools were removed from the engine to which he was going, he would nevertheless be engaged in work which would further interstate commerce; by this case he was only employed by interstate commerce, and had no other duties, and had no other business with the Railroad Company, only with appurtenances, but was something connected with his work as a locomotive engineer of an interstate commerce train.

Risk.

Decedent did not assume the risk of the master's negligence. He had no reason to suppose that an engine would be propelled against him without warning. Reference may be made to the *Aerkfetz* case, but in this case, decision was put on the ground of contributory negligence, and this

is an old decision out of harmony with the modern utterances of the Supreme Court of the United States.

Risk is a jury question if a question at all.

Koennecke v. Seaboard, 239 U. S., 352;
Horton v. Seaboard 233 U. S., 490.

Respectfully submitted,

ALEXANDER SIMPSON,
Attorney for Plaintiff-Respondent.

CASES ON INTERSTATE COMMERCE.

Bumstead v. Missouri Pacific Railroad Co. (Supreme Court, Kansas), 162 Pacific Reporter, 347,

cited on Mr. Carey's brief distinguished. It follows the decision of *Prior rec'r. against Bishop*, 234 Fed., 8. The *Bishop* case was decided in the Seventh Circuit, but the Sixth Circuit has ruled to just the contrary, in *Grand Trunk Ry. Co. of Canada v. Knapp*, 233 Fed. Rep., 950.

Erie Railroad Co. v. Welch (Supreme Court of the U. S., Dec. 18, 1916), p. 116 in the Advanced Sheets.

N. Y. Central & Hudson R. R. Co. v. Carr, 238 U. S., 260. Whether employed in interstate commerce a question for the jury.

Pennsylvania R. R. Co. v. Donat, 230 U. S., 40;

Bumstead case and *Prior v. Bishop* in appellants' brief contrary to.

Also

Winfield v. N. Y. Cent. R. R. Co. (U. S. Supreme Court, May, 1917);

Louisville & Nash. R. R. Co. v. Parker, (Supreme Court of the U. S., Nov. 13, 1916, Advanced Sheets).

The duty to warn.

Van Zandt v. P. B. & W. R. R. Co., 248 Penn. State, 276;

Waina v. P. R. R. Co. (Supreme Court of Penn.), 96 Atlantic, 461;

Saunders, Administrator, v. Southern Ry. Co., 167 North Carolina, 375;

B. & O. R. R. Co. v. The State (Court of Appeals of Maryland, 1871, 33 Md., 542);
Louisville & Nashville R. R. Co. v. Johnson's Administratrix, 161 Ky., 824; s. c. 171 Southwestern, 847;
Seaboard Air Line Ry. Co. v. Koennecke, 239 U. S., 352, at 355.

Duty to keep a lookout for switchman or trackman in the yard.

Southern Ry. Co. v. Smith, 205 Fed. Rep., 360;
Southern Ry. Co. v. White, 232 Fed. Rep., 144;
Southern Ry. Co. v. Cook, 226 Fed. Rep., p. 1.

If the Railroad undertakes to warn in any particular yard or at any particular place, it becomes the duty to warn, and in order to warn in a sufficient space of time, to keep a lookout. It depends on rule or custom.

Willever v. D. L. & W. R. R. Co., 99 Atlantic Rep., 321, at 324;
D'Agostino v. Penn. R. R. Co., 72 N. J. Law, 358;
Germanus v. Lehigh Valley R. R. Co., 74 N. J. Law, 662.

Prior to the Federal Employers' Liability Act and where there was a failure to give the customary warning, it was the negligence of a fellow servant, for which now the carrier is responsible by the terms of the Federal Act.

Konoski v. D. L. & W. R. R. Co., Court of Errors, 1909, 74 Atlantic Rep., 516.

(This case was not brought under the Act.)
 Holds duty to warn duty of fellow servant. Under act of Congress defendant is responsible for act of fellow servant.

DIGEST OF EVIDENCE.

Page and line numbers refer to the state of case.

Decedent Hansen was an employee of defendant Railroad Company. (Alluded to and admitted throughout the entire testimony, but see especially Exhibit P: 2.)

Defendant was an interstate carrier by railroad.

Brusle, p. 65.

Hansen was regularly engaged from July 7th up to his death as fireman on the Kingston "Pick-up," dragging freight cars and freight between Weehawken, New Jersey, and Kingston, New York. The "pick-up" was a regular run. (*Holt*, p. 270. ll. 20-25.) Records show Hansen was regularly on "Pick-up" from July 7 to date of his death between Weehawken and Kingston, N. Y. (*Brusle*, p. 244; *Griffen by the Court*, p. 212, l. 30 to p. 213, l. 10.) The "pick-up" went to Kingston, N. Y. the next morning after Hansen's death. (*Griffen*, p. 48. ll. 15-20; *Holt*. p. 270, ll. 20-40.) Before that he had been on Pony Engine used by officials to inspect the Whole Road from Weehawken to Albany, N. Y. (*Kathan*, p. 35, ll. 10-12; *Griffen*, p. 133, ll. 1-15.) Hansen had the "pick-up" as his regular run, p. 192, ll. 13-15. Hansen was employed on Company business when killed—to wit, going to get his dirty overalls to take them home

and get them washed and to get tools from a box on the Pony Engine, to take to his engine. Hansen kept the overalls in his locker in Round-house. (*Griffen*, p. 50, l. 38 to p. 51, l. 25; *Sounders*. pp. 105-106). His statement to his wife when left home Sunday morning as to why he was going to Railroad yard, p. 109, l. 32 to p. 110, l. 30; p. 120, l. 25 to 121, l. 23. At all or any times the getting of tools for and the use of tools on locomotives was the duty of a fireman.

Getting: *Kathan*, p. 35 ll, 3-10; *Craig*, pp. 231-232, 233. Duty of fireman to get tools: *Sounders*, pp. 204 and 205: Engineer also, as well as fireman and not exclusively tool-boy would get tools, p. 242. ll. 8-15. See also testimony of *Holt*, p. 251 et seq.

Firemen using tools:

Kathan, p. 29; *McCartney*, p. 93; *Craig*. pp. 231, 232, 233; *Griffen* p. 213, l. 10 to p. 214, l. 8.

Some duties of a firman, p. 130, ll. 12-40:

Fireman attends to lights on engine when on road. *Craig*, p. 129, ll. 39-40. To make light repairs on road, *Sounders*. p. 206, ll. 15-32.

Fireman must have practical knowledge of an engine to be an engineer. *Brusle*, p. 138, ll. 30-38. *Smith*, pp. 170-171, pp. 165-168.

Hansen was a pool man, and always on duty; p. 59, ll. 29-36: Mrs. Hansen, p. 120, p. 112, ll. 20-31. *Sounders*, p. 121, l. 30 and p. 122.

Custom of employees to use the route through the yard Hansen used: *Smith*, p. 156. l. 40 and p. 157; *George*, p. 194, l. 20 to p. 195, l. 12, p. 180.

Employees always around Roundhouse and Yard: p. 106, ll. 28-40.

Duty to warn and keep lookout. (*Craig*, p. 81;

Craig, p. 228, ll. 1-10; By rule p. 83, l. 20 to 85. l. 20). (Book of Rules put in evidence p. 23). Book of Rules changeable by order Craig 127.)

Custom to warn in *this* Yard. Smith, p. 160, l. 20 to p. 161. l. 20.

Lights to warn in tunnel under Palisade. Craig, p. 128, ll. 30 and 31; Craig, p. 131.

Clearwater's engine was going backwards: Craig, pp. 81-84. Engineer Clearwater had 150 to 200 feet to stop his engine in from the time Hansen walked on track

Smith, p. 152, ll. 20-30;

Kathan, p. 239 et seq.

on which Clearwater's engine was running.

Clearwater was driving his engine backwards. Craig, pp. 81-84.

Clearwater died before the trial of the case (p. 76, ll. 34-40).

No lookout on back of tender; Craig, 81. End of tender obscured view of track from cab. Craig, p. 128, ll. 32-40. Fireman Craig saw no one. He was busy firing Clearwater's engine, and Clearwater was inside the cab. Craig, p. 81. Fireman Craig on Clearwater's engine which killed Hansen did not see Hansen's hat fly off. p. 230, ll. 20-25. Track was straight at the point Hansen was killed and there was a good view of it from locomotive: p. 87, ll. 38-40.

Hansen was on porch of Y. M. C. A. and walked up path toward Round House with Smith, p. 149. He talked to Kathan two or three minutes by K's engine, p. 162, l. 10. He was deliberately run down by Clearwater's engine running backward according to Defendant R. R. Co's own witness after Kathan testifying for R. R. Said he had whistled an alarm. Clearwater had 150 or 200

feet to stop his engine which should not have gone over six miles an hour in this yard.

Smith, p. 152. ll. 20-30.

Kathan, p. 239, et seq.

Keys—(Mrs. Hansen) p. 108. 36-40. There are keys to tool box on Pony Engine. *Kathan*, pp. 97-102. Keys to tool box on Pony Engine resembled keys produced at trial which Hansen took with him. *McCartney*, p. 92 and p. 94.

Admission by witness that Clearwater's locomotive blew no whistle or gave any other warning, p. 162 to bottom p. 164.

Weather: Good clear day.—No wind. *Craig*, p. 86, ll. 25-30; *Smith*, p. 156, ll. 1-10.

Locations of Round House, Coal Pocket and Y. M. C. A. Building, p. 172.

Hansen left home Sunday at about 11 A. M., p. 115, ll. 32-34.

His watch taken from his dead body had stopped at 11:52, p. 109, ll. 32-34.

James Holt's testimony:

Holt was tool boy for the R. R. at the Round House before, at the date of, and after Hansen was killed (p. 251, ll. 20-30).

He testifies it was the practice of firemen, despite his tool boy's function to handle the tools, to get at many and various times their own tools, (p. 251, ll. 30-40); also that there was an insufficiency of tools there (p. 252 to l. 10, p. 253). Incident of quarrel over a poor hammer (p. 253 to p. 254, l. 27; p. 260, l. 30, to p. 261, l. 15). The enginemen strove to keep good tools when they had them already on their engines, and would put them under lock and key in tool boxes (p. 254,

l. 27 to p. 256, l. 3). Firemen often would come for engineer's tools (p. 259, ll. 25-35). There was a shortage of tools May 3rd, 1913, date of Hansen's death (p. 259, ll. 35-40, p. 260, ll. 1-20). Shortage of tools was made good a week after death of Hansen (pp. 263 et seq.).

Exhibits go in at p. 273.

Craig was fireman on Clearwater's engine at the time Hansen was killed (p. 74, l. 35). Smith was the fireman on Kathan's engine which passed Clearwater's engine just before Clearwater's engine killed Hansen (p. 70, l. 25).

New Jersey Court of Errors and Appeals

ROSE HANSEN, as administratrix
of Hans Peter Hansen, de-
ceased,

Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD
COMPANY,
Defendant-Appellant.

On Appeal. 10

BRIEF FOR APPELLANT.

This appeal brings up for review a judgment of
the Hudson Circuit Court, entered January 19, 20
1917, in favor of the plaintiff, for damages arising
out of the death of her intestate, Hans Peter
Hansen.

For about 7 years prior to the accident, Mr.
Hansen had been employed continuously by de-
fendant as a locomotive fireman (p. 111, line 10).

The accident occurred in the Granton Yards of
defendant, in Hudson County, on Sunday, August
3, 1913, at about 11.50 o'clock A. M.

In the northerly end of the Granton Yards is 30
a large round house. Running southerly from the
round house through the yards are two engine
tracks, known as Track No. 1 and Track No. 2.
All engines going south from the round house to
Weehawken use Track No. 1, and all engines going
north from Weehawken to the round house use
Track No. 2. Track No. 1 is the westerly one of
the two tracks. (Kathan, pp. 30-32).

Mr. Hansen was struck by an engine backing 40
northerly through the yards on engine track No. 2.

These engine tracks are very active. There are 70 or more movements over them every day. (Craig, p. 85, line 28; George, p. 192, line 28).

To the east of the engine tracks, and between them and the Bergen Turnpike (or the Hackensack Plank Road, as it is sometimes called in the testimony) a public street which bounds the Yards on the easterly side, are several inactive tracks, used for storage purposes, and for shop connections. (Kathan, p. 34, line 12; Craig, p. 86, line 30).

To the west of the engine tracks are many active tracks used for drilling, making up trains etc. (Craig, p. 85, line 28).

Mr. Hansen was killed while attempting to cross engine track No. 2, in an easterly direction. The place where his body was found is marked with a red "X" on the map Ex. D-6. He had walked to the place of the accident from the Y. M. C. A. building, located at the southeasterly corner of the Yards (See Map Ex. D-6). The point of the accident was about half way between the Y. M. C. A. building and the round house.

Hansen was not on duty on the day of the accident. The train on which he worked never ran on Sunday.

The action is brought under the Federal Employers' Liability Act of April 22, 1908.

The complainant, with a good deal of repetition and surplusage, charges that defendant is liable for the death of Mr. Hansen, because:

WHILE plaintiff's intestate was employed in interstate commerce as such fireman, and

WHILE he was engaged in such work of firing and caring for his engine over the tracks and roadbed of defendant, used in such commerce, and

WHILE he was engaged in removing tools from one engine to another to be used in caring for his engine in such commerce, and

BY REASON of the unsound, unsafe and defective condition of the engines, cars, tracks, road-beds, tools and appliances, which had been allowed to be and remain out of order for a long space of time, and

BY REASON of the unsafe place furnished by defendant in which plaintiff's intestate was required to perform his work, and

BY REASON of defendant's failure to guard plaintiff's intestate and warn him of the ap- 10
proach of all trains and engines that might pass over said track while he was lawfully employed thereon, and

JUST AFTER plaintiff's intestate *had stepped from an engine to one of the tracks* of defendant, an engine running backwards in a northerly direction over one of said tracks, at a *high and dangerous rate of speed*, without ringing any bell and improperly 20
manned, there being but one of the crew thereon and no man on the rear of said engine and tender, ran foul of and struck plaintiff's intestate, etc. (p. 4, line 20 to p. 5, line 12).

Eliminating repetitions and surplusage, it will be seen that the charge against defendant is that

WHILE Mr. Hansen was acting in the course of his employment, and

WHILE firing and caring for his engine en- 30
gaged in interstate commerce over defendant's tracks and road bed, and

WHILE he was engaged in removing tools from one engine to another to be used in caring for his engine used in interstate commerce, and

JUST AFTER he had stepped from an engine to one of the tracks of defendant, an engine running backwards, at a dangerous rate of speed, without ringing a bell, improperly 40

manned, and without a man on the rear of the tender, struck and killed deceased.

Defendant's answer sets up:

1. A general denial of the complaint.
2. Contributory negligence of plaintiff's intestate in walking about defendants' yard while not on duty, and without looking, listening or exercising ordinary care for his own safety.
- 10 3. Assumption of the risks attending the crossing of defendants' tracks.
4. That neither plaintiff's intestate nor defendant were engaged in interstate commerce at the time of the accident (p. 7, lines 1 to 30).

At the trial the jury returned a verdict for \$20,000. On a Rule to Show Cause, in which objections were reserved, the trial court reduced the recovery to \$16,500. Plaintiff accepted the reduction, and judgment was entered for that amount.

Briefly stated, the questions involved in this appeal are:

1. Was defendant guilty of negligence for which damages are recoverable in this action?
2. Was plaintiff's intestate guilty of contributory negligence?
- 30 3. Did plaintiff prove the case made by her pleadings.
4. Should the rights and liabilities of the parties have been determined under Chapter 95 of the Laws of 1911 of the State of New Jersey?

Involved in questions No. 1 and 2, are the further questions—

- A. At the time and place of the accident, was plaintiff's intestate acting within the

scope of his employment, or engaged in the performance of any duty which he owed to the defendant?

B. At said time and place was he engaged in interstate commerce?

C. At said time and place was defendant engaged in interstate commerce?

D. At said time and place was defendant a trespasser or at best a mere licensee?

10

The defendant specifies the following grounds of appeal, each of which it urges and relies upon—

1. The Court admitted the following evidence against defendant's objections—

Q. (to the witness Kathan) Just tell us what he said.

A. I asked Mr. Hansen where he was going.

Q. Go on.

A. He told me he was going to the round house.

20

(p. 41, line 18).

Q. Continue that conversation. What else was said by you and by him?

Mr. Carey: This is under my objection.

The Court: I understand you have your exception, and the exception goes to the entire answer, unless I strike it out.

A. I says to Peter, I says, 'Peter where are you going?' He said, 'I am going to the roundhouse.' I says, 'What are you going for, Peter?' and he says, 'I am going for my overalls.' There is all that was."

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(p. 42, line 35).

Q. (to the plaintiff) What did he say?

Mr. Carey: I object to it as being hearsay and incompetent, and a self-serving statement.

(Discussion).

The Court: I shall overrule the objection.

You may have your exception, Mr. Carey. 40

Of course, I may strike it out. It may not be relevant.

Mr. Simpson: That will appear when we get it.

Q. What did he say as he left the house?

A. He was going up to the round house.

Q. What did he say? Give us his language not what you think he said. Give us his exact words.

10 A. 'I am going up to the roundhouse and take the tools off the engine to put on the pick-up and get my dirty overalls out of the locker.'

Q. Take the tools off the engine; did he say what engine?

Mr. Carey: I object to what engine.

The Court: I will give her one more opportunity. It is very important. You want to tell him the exact language.

20 Q. Tell us everything he said.

The Court: Tell us exactly what he said and all he said without having your attention directed any further to the subject.

A. 'I am going up to the roundhouse and take the tools off of number 25 to put on the pick-up and to get my dirty overalls off—out of the locker, to bring home.'

(Page 109, line 20).

30 2. The court denied defendant's motion to strike out the foregoing testimony with respect to decedent's declarations as to his purpose in going to the round house.

(pp. 134-135).

3. The Court overruled defendant's motion for a non-suit.

(pp. 135-136).

4. The Court overruled defendant's motion to direct a verdict for the defendant.

40 (p. 274-276).

5. The Court declined the following requests to charge made by the defendant—

(1) The statements of Mr. Hansen, as testified to by Mrs. Hansen and Mr. Kathan, that he was going to the round house, taken either by themselves or in conjunction with the other evidence in the case, are not legal evidence that he intended to go to the round house.

(2) There is not sufficient legal evidence 10
in the case to warrant the jury in finding to what place Mr. Hansen intended to go when he left his home on August 3rd, 1913.

(3) The statements made by Mr. Hansen to Mrs. Hansen, as testified to by her, taken either by themselves or in conjunction with the other evidence in the case are not legal evidence that he intended to transfer tools from number 25 or the pony engine and put them on any other engine. 20

(4) The evidence in the case is not sufficient to warrant the jury in finding that Mr. Hansen intended on the 3rd day of August, 1913, to take tools from No. 25 or the pony engine and put them on the engine of the pick-up train.

(5) The evidence in the case is not sufficient to warrant a finding that when the accident happened Mr. Hansen was on his way to get tools from No. 25, or the pony engine, 30
and put them on the engine of the pick-up train.

(6) The declarations made by Mr. Hansen to Mrs. Hansen, as testified to by her, taken by themselves or in connection with the other evidence in the case, are not sufficient to warrant a finding that at the time of the accident he was on his way to the engine house for the purpose of getting his overalls.

(7) The declarations made by Mr. Hansen 40

to Mrs. Hansen, as testified to by her, taken either by themselves or in connection with the other evidence in the case, are not sufficient to warrant the finding that at the time of the accident Mr. Hansen was acting within the scope of his employment.

10 (8) The declarations made by Mr. Hansen to Mrs. Hansen, as testified to by her, taken either by themselves or in connection with the other evidence in the case, are not sufficient to warrant a finding that at the time of the accident Mr. Hansen was engaged in interstate commerce.

(9) The evidence in the case is not sufficient to warrant a finding that at the time of the accident Mr. Hansen was acting within the scope of his employment.

20 (10) The evidence in the case is not sufficient to warrant a finding that at the time of the accident Mr. Hansen was engaged in interstate commerce.

(11) The declarations made by Mr. Hansen to Mrs. Hansen, as testified to by her, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that there were any tools on No. 25 or the pony engine.

30 (12) Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that at the time of the accident Mr. Hansen intended to transfer tools from No. 25 or the pony engine to any other engine.

40 (13) Said statements, taken either by themselves or in connection with the other testimony in the case, are not sufficient to warrant a finding that it was either necessary or proper that tools should be taken from No. 25 or the pony engine and transferred to any other engine.

(14) Said statements, taken either by themselves or in connection with the other testimony in the cases, are not sufficient to warrant a finding that the transferring of tools from No. 25 or the pony engine to any other engine, was the duty that Mr. Hansen owed to the defendant or that, if he had done so, he would have been acting within the scope of his employment, or in interstate commerce. 10

(15) On the evidence in the case if Mr. Hansen had transferred tools from No. 25 or the pony engine to any other engine, he would have been doing that for which he was not employed, and while so doing, as well as while going to and from the place of making such transfer, the relation of master and servant would not have existed, between Mr. Hansen and the defendant.

(16) There is not sufficient evidence in the case to warrant a finding that Mr. Hansen crossed engine track No. 2 (being the track on which the accident happened), for any purpose within the scope of his employment. 20

(18) If Mr. Hansen went upon engine track No. 2 without looking for the approach of the engine which struck him, he was guilty of contributory negligence, and plaintiff cannot recover.

(19) If Mr. Hansen went upon engine track No. 2 under such circumstances that, if he had used reasonable care, he would have seen the engine approaching, which struck him, and have avoided it, he was guilty of contributory negligence and plaintiff cannot recover. 30

(20) Under evidence in this case the employees used the paths through the railroad yard as mere licensees, and there can be no 40

recovery against defendant, except for wilful injury.

(Pages 300-303).

6. The Court modified defendant's request to charge that—

10 “If the crossing of the track on which Mr. Hansen was struck was the proximate cause of the accident, the plaintiff cannot recover”.

By adding thereto the following:

“Provided you find that the defendant was not guilty of negligence, which either in whole or in part caused the accident”.

(Page 297, line 15).

7. The Court charged the jury as follows:

20 “I am referring to this evidence or testimony which has been called declarations or statements made by Hansen to his wife before he left home and the statement or declaration made to Kathan, the engineer, while he stood alongside of the engineer's locomotive in the yard. The wife says, finally, that this is what he said to her as he left his home, and that was, she says, about somewhere about eleven o'clock in the morning of Sunday, August the 3rd; ‘I am going up to the round house and take the tools off of No. 25, to put on the pick-up and to get my dirty overalls off—out of the locker to bring home.’ Kathan says what he said to him as he stood alongside of his locomotive was—or, rather, Kathan says, ‘I said to him, ‘Peter, where are you going?’ and Hansen replied, ‘I am going to the round house.’” Kathan says he then said to him, 30 ‘What are you going for, Peter?’ and Hansen replied ‘I am going for my overalls.’ That 40

testimony, gentlemen, is only valuable and usable to describe and denote the purpose for which Hansen was proceeding. It is not evidential of the fact that there were tools upon the pony engine. It is not evidential of the fact that those tools were proper and suitable tools or tools necessary and proper to be used upon the pick-up engine. It is not evidential of the fact that the doing of those things or of that thing was a thing which Hansen was called upon to perform as a part of the duty which he owed the Company, and is only of value to describe or to indicate to you the purpose of Hansen, provided you have been satisfied by a fair preponderance of the evidence upon the part of the plaintiff or have been satisfied by the plaintiff by a fair preponderance of the evidence that those other facts of which I have just spoken to you actually did exist, and those facts are, principally, that there were tools upon the pony engine, they were suitable and proper and necessary tools to be used upon the pick-up engine, and that it was a part of the duty that Hansen owed to the defendant company that he should provide such tools for the engine, upon which he was to work the next morning."

(p. 284, line 35 to p. 286, line 2).

The evidence shows that Hansen had been in the employ of the defendant company for about seven years. He had been a locomotive fireman during all this period. (Mrs. Hansen, p. 111, line 12, p. 114, line 20).

For about two years prior to July 1, 1913, he had been fireman on an engine known as No. 25, also called the "pony engine." During that period Mr. Kathan was the engineer on that engine.

(Kathan, p. 29, line 12; p. 34, line 32).

The pony engine had been laid up for repairs for some time prior to the accident.

(Kathan p. 34, line 28).

The last run of that engine prior to the accident was on July 1, 1913.

(Brusle p. 243, line 28).

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On July 2nd, Mr. Hansen was fireman on Engines No. 465, 1751 and 3119, running between Weehawken and Granton. Mr. Kathan was Engineer.

(Brusle p. 243, line 27).

On July 3rd, Mr. Hansen worked for ten hours cleaning the pony engine at the round house.

(Brusle, p. 243, line 37; p. 272, line 5).

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From July 2nd until after the accident, the pony engine was laid up on one of the spur tracks on the westerly side of the round house.

(Kathan p. 32, line 8; p. 33, line 15).

After the pony engine was laid up, Hansen became fireman on the engine of a local freight train known as the "pick-up". This train ran from Weehawken to Kingston, N. Y., going out one day and returning on the following day. Hansen's first trip on the pick-up was on July, 7th. Thereafter he worked every day, except Sundays, on the engine of the pick-up train up to and including August 2, 1913.

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(Mrs. Hansen, p. 120, line 10; Brusle p. 244, line 10).

The pick-up train never ran on Sunday (Mrs. Hansen, p. 120, line 15; Griffin p. 52, line 20;

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George p. 67, line 10).

On Saturday, August 2, the crew of the pick-up engine registered in at Granton at 6:30 P. M.
(Griffin p. 47, line 20).

Mr. Hansen reached home between six and seven on Saturday evening.
(Mrs. Hansen, p. 111, line 18).

The engine of the pick-up train was due to leave the round house at Granton, at 3:45 on the following Monday morning, and the engineer and fireman were due to register for that trip at 3:30 o'clock Monday morning. 10
(Griffin p. 47, line 25; p. 48, line 15; George p. 189, line 30).

When working on the pick-up train, Mr. Hansen left his house about 2:15 in the morning, every other day.
(Mrs. Hansen, p. 120, line 22). 20

But for the accident, Mr. Hansen would have gone out on the pick-up engine Monday morning, August 4th.
(Griffin p. 54, line 35).

Mr. Hansen was not called for any service on Sunday, August 3.
(George p. 67, line 10).

On Sunday, August 3, at about 11 o'clock, Mr. Hansen, dressed in his good clothes (p. 115, line 30), took from his working clothes which hung in the closet off the kitchen, a bunch of keys, and told his wife where he was going and what he was going to do. 30
(Mrs. Hansen, p. 108, line 25).

Her first version of his statement is: "I am going up to the round house and take the tools off the engine to put on the pick-up and get my 40

dirty overalls out of the locker". (p. 109, line 35). Asked by counsel to state what engine, the court cautioned the witness to state exactly what Mr. Hansen said and all he said, without having her attention directed any further to the subject. She then gives his statement as follows:

10 "I am going up to the round house and take the tools off of No. 25 to put on the pick-up and to get my dirty overalls off—out of the locker to bring home".
(p. 110, line 10).

On page 120, line 35, the witness gives a somewhat different version of Mr. Hansen's statement.

Mr. Hansen was next seen at the railroad Y. M. C. A. building by Fireman Smith. The Y. M. C. A. building is located at the corner formed by the Bergen Turnpike and a driveway
20 into the Granton Yards.
(See Map Ex. D-6).

Fireman Smith was on his way to meet an engine in charge of Engineman Kathan who had gone to the round house to bring the engine. Smith intended to join Kathan on the engine on its way through the yard and go with him on it to Weehawken.

(p. 71, line 1).

30 Fireman Smith first saw Mr. Hansen on the porch of the Y. M. C. A.
(Smith p. 68, line 1; p. 149, line 1).

Hansen said to Smith "Wait a minute and I will go right with you."

(p. 149, line 12).

40 Mr. Hansen then went into the Y. M. C. A. building and soon came out and joined Smith,

walking in a northerly direction through the yard.
(Smith p. 68, line 15; p. 149, line 20).

The two men walked along the easterly side of the dump track (marked "team track" on the Map, Ex. D-6), to a point opposite the machine shop. From that point a path is shown in yellow extending northerly to the round house. After reaching the path indicated in yellow, they walked along that path until they met Kathan coming south with his engine on track No. 1. The point where they met the Kathan engine is indicated on the map by a cross, and the letter K. There Kathan stopped his engine and took on Fireman Smith. 10

(Smith p. 68, line 15; p. 70 line 15 to line 40; Kathan p. 27, line 25; p. 33, line 20).

Between the path on which Smith and Hansen were walking and engine track No. 2, there was an inactive track shown as the "shop track". When Kathan stopped his engine, Smith had to cross first the shop track and then engine track No. 2, in order to reach and board the Kathan engine on track No. 1. (Smith p. 71, line 10; Map Ex. D-6). Hansen followed him across these two tracks, and standing between engine track No. 1 and engine track No. 2, talked for a moment or two with Kathan. 30

(Kathan, p. 27, line 37; p. 46, line 1; p. 234, line 20. Smith p. 71, line 34; p. 72, line 15; p. 73, line 25; p. 151, line 1 to line 22; p. 172, line 22).

Up to the time that Kathan stopped his engine to take on fireman Smith, neither Smith nor Hansen had crossed either engine track.

(Smith p. 71, line 10; p. 72, line 15; p. 72, line 25; p. 150, line 38, to p. 151, line 22; p. 172, line 22). 40

While Hansen stood between engine tracks Number 1 and Number 2 the conversation between him and Kathan was as follows:

"I says to Peter, I says, Peter, where are you going? He says, 'I am going to the round house.' I says, 'What are you going for Peter?' and he says, 'I am going for my overalls. There is all that was'".

(Kathan p. 43, line 1).

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At the time Hansen stood between the two engine tracks and had this conversation with Kathan, Smith *and not Hansen* was Kathan's fireman, and had been since the pony engine was laid up. (Kathan p. 36, line 14; p. 45, line 28).

At that time Hansen was not employed about the Kathan engine and had nothing to do with it. He was not under Kathan's authority or subject to his direction. Neither had any connection
20 whatever with the duties of the other. Kathan had not asked Hansen to do anything for him.

(Kathan p. 36, line 1; p. 37, line 5).

Hansen said nothing to Kathan about tools either engineer's or firemen's, and nothing about the pony engine or the pick-up engine or about transferring tools from one engine to another (Kathan p. 235, line 1).

After this brief conversation between Kathan
30 and Hansen noted above, Kathan started his engine south and Hansen started north. At first he appeared to have walked along engine track No. 1, the same track Kathan's engine was on.

(Kathan p. 236, line 23).

After Kathan started south he met an engine driven by engineer Clearwater moving north on engine track No. 2. After this engine passed Kathan he looked back and saw Hansen just step-
40 ping from engine track No. 1 to engine track No.

2. Hansen was then about 150 to 200 feet from Kathan and was walking with his hat on the back of his head looking west toward the round house. He (Hansen) did not look back to see if anything was coming on track No. 2. He was just about stepping on the west bound engine (No. 2) track. Kathan blew his whistle and hollered to Hansen but he paid no attention. The tank of the Clearwater engine then hid Hansen from Kathan's view. The next that Kathan saw was Hansen's hat on the east side of track No. 2 and between that track and the shop track. He stopped his engine, reversed it and ran back and found Hansen's body. 10

(Kathan p. 234 to 242).

The body was lying between the rails of engine track No. 2 at about the place indicated by the X in red on the map. (Kathan p. 45, line 20; p. 238, line 12. (Craig p. 75 line 23). 20

Engineman Clearwater and fireman Craig were on the engine that struck Hansen. They were taking the engine from Weehawken to the round house after completing the trip from Albany to Weehawken.

(Kathan p. 29, line 10; Craig p. 75, line 20).

The engine was running about 6 miles per hour. 30

(Kathan p. 28, line 11; Craig p. 76, line 10).

Engineman Clearwater died prior to the trial. (Kathan p. 36, line 38).

The place where Kathan stopped his engine, took Fireman Smith on and talked with Hansen is 1900' from the Y. M. C. A. Building and 2500' from the round house. The space between the 40

adjacent rails of the two engine tracks at that point is 8.39'.

The distance from the place where the body was found to the Y. M. C. A. Building is about 2200' and about 2100' to the round house. The distance between the adjacent rails of the two engine tracks at this point is 13.1'. Between that point and the ash pit the distance between these tracks varies from 38' to 0.

10 (Freleigh p. 144 to 148).

The clear view southerly from the point where Kathan talked with Hanson is about 400' to 500'. From the point where the body was found the clear view to the south is 970'.

(Kathan p. 238, line 15; Freleigh, p. 178-179).

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I.

The Trial Court erred in admitting in evidence Mr. Hansen's statements to Mr. Kathan and to Mrs. Hansen. Defendant's motion to strike out these statements should have been allowed and the requests to charge with respect thereto should have been granted.

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The statement to Mr. Kathan is found on p. 43, line 1. Objection was noted on p. 40, line 22, p. 41, line 5, p. 42, line 38.

The different versions of the statement to Mrs. Hansen as testified to by her are found on p. 109, line 32 to p. 110, line 15, and p. 120, line 35.

Objections were noted at p. 109, line 22.

The motion to strike out this evidence is found on p. 134, line 1. Objection to the ruling of the Court is found on p. 135, line 22.

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These declarations were admitted in favor of those claiming under the declarant and for the purpose of establishing a claim and right of action on their behalf. They were admitted as primary evidence of that claim, and not by way of rebuttal of a defence interposed in the action.

We find no case in which declarations of this character have been admitted for that purpose.

In *Hunter v. State*, 40 N. J. L. 495, declarations of the decedent were admitted on behalf of the state. No interest of the declarant or of any one claiming under him was served thereby. The cases of the nature of the *Hunter* case constituted a distinct class in which such declarations are admitted. 10

In *State v. Kane*, 77 N. J. L. 244, the state had proved that the defendant Kane had gone to a particular place at a particular time, and claimed that the purpose of his going there was for a meeting with one Gerry, who was claimed to have been a participant in the crime for which Kane was on trial. It was held that the motive with which Kane went to the place in question was vital and that Kane's agreement to meet a friend at that place for the purpose of attending church was admissible in Kane's favor. This was in rebuttal of the claim of the state. 20

Statements are also admissible if they accompany provable acts material to the issues and tend to explain or give legal character to the acts. Thus, in *Fromme v. Dennis*, 45 N. J. L. 515, it was held that the conversation of defendant with a third party at the time of receiving a chattel into his possession was legal evidence as indicative of the character of the possession which he acquired at that time, and of his intention in connection with taking possession of the chattel. 30

In *Hunter v. State*, the question discussed was whether statements made by the murdered man, Mr. Armstrong, prior to his going to Camden 40

with Mr. Hunter, were legal evidence. On this question Chief Justice Beasley, said:

“I think it is obvious that, with reference to general legal principles, such communications were no part of the matter in controversy, unless they were so connected with the act of the deceased in going to Camden, as to be, in a reasonable sense, part of such act.”

10 (p. 536).

On p. 537, Chief Justice Beasley continues—

“The declaration and the act must make up one transaction. The theory justifying this course is that, when such declarations are thus coupled with a provable act, they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their credence on the veracity of the utterer, and thus conditioned, they are pure hearsay and inadmissible.”

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In *Wigmore on Evidence*, Vol. 3, Sections 1774, the author says:

“The utterances serve merely to assist in completing and giving legal significance to the conduct. Hence, it is not needed when the conduct is already complete and definite in itself. *The conduct must be equivocal or incomplete.*”

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In this case the declarations *cannot be supported by acts of the decedent*. As testified to by Mrs. Hansen, his declarations were that he was going to the round house to get tools from the pony engine, and put them on the pick-up, and to get his overalls. To Mr. Kathan his declaration was that he was going to the round house to get his overalls.

40 Mr. Hansen lived on the easterly side of the

Bergen Turnpike. In going to the round house he would necessarily go to the turnpike. The only way to reach the round house was by way of the turnpike, and the stairway leading therefrom to the round house. He does not go that way. He takes a course through the railroad yards. This is a departure from his declaration which renders the declaration inadmissible.

Even if it be held that his going through the yards in the direction of the round house was a 10
provable act in support of his declaration, yet when he left the path and crossed the railroad tracks and thereby received the injury resulting in his death, he clearly departed from the intention expressed in his declaration. The act of crossing the track was the crucial act in the case, and was the act which resulted in his death. That was not an act performed pursuant to his declaration, and therefore his declarations could in no way characterize this act and this act could in no way support the declaration. 20

The questions involved in this case are whether Hansen was acting in the course of his employment, and whether he was engaged in interstate commerce at the time the accident happened. The intent with which he proceeded in the direction of the roundhouse was not material in determining either of these questions. Both questions are to be determined *by acts done and whether a duty was imposed upon Mr. Hansen with respect to doing them.* 30

Interstate commerce consists in performing acts in connection with interstate transportation or acts which are so closely related thereto as to form a part thereof.

Mr. Hansen could not engage in interstate commerce by merely *intending to do certain things*, which, by the way, he was not required to do, and which constituted no part of his duty to the defendant, and which he might or might not be able 40

to accomplish. In other words, engaging in interstate commerce *consists in acts and not in intentions*.

Under the rules governing the admission of evidence of this character, these statements should have been excluded, and having been admitted, they should have been stricken out, and defendant's requests to charge with respect thereto should have been granted.

10 Requests No. 1 and 2 (p. 300) challenge the sufficiency of the evidence to show that Hansen intended to go to the round house.

Requests No. 3 and 4 (p. 300), challenge the sufficiency of the evidence to show that Mr. Hansen intended to transfer tools from the pony engine to the engine of the pick-up train or any other engine. Clearly the declarations of Mr. Hansen are not legal evidence to show that he intended to make such a transfer. He did not
20 reach the pony engine and he took no tools from that engine to any other engine. Hence, there are no acts on his part to support his declared intentions, and in the language of the *Hunter* case, these statements "become pure hearsay and inadmissible".

Request No. 5 challenges the sufficiency of the evidence to warrant a finding that when the accident happened Mr. Hansen was on his way to transfer tools from the pony engine to the pick-up
30 engine. The same reasoning applies to this request as to requests No. 3 and 4. If Mr. Hansen had procured certain tools from the pony engine and had placed them on another engine, it is possible that such an act, indefinite and equivocal in itself, might have been explained by his statement, but under no other circumstances could the evidence be admissible.

Request No. 6 is rendered unimportant by the charge of the court to the effect that if Mr.
40 Hansen went to the enginehouse for the purpose

of getting his overalls, such act would not constitute engaging in interstate commerce.

Requests No. 7, 8, 9 and 10 (p. 301) are supported by the same reasoning as requests No. 3, 4 and 5. The argument under the second, third and sixth grounds of the motion to non-suit also supports these requests to charge, and these arguments are referred to are not here repeated.

Requests No. 11, 12, 13 and 14 (p. 301-302) are in general supported by the same argument as requests No. 3, 4 and 5. In addition it is to be noted that Hansen's declaration does not directly assert that there were any tools on the pony engine. There is no assertion direct or indirect that would warrant the inference that it was either necessary or proper that tools should be taken from the pony engine and transferred by Hansen to any other engine, nor that any duty rested upon Mr. Hansen to make such a transfer.

Outside of the declarations of Mr. Hansen there is no evidence of intention on his part to transfer tools from the pony engine to any other engine, or that he was in fact proceeding toward the roundhouse for that purpose, or that there were any tools on the pony engine, or that he had any duty in connection with transferring tools from that engine to any other engine. On the contrary, the positive evidence is to the effect that there were no tools on the pony engine; that no duty rested upon firemen to procure tools for any engine, but that men were employed to care for the tools and equip the engines therewith; that there was no necessity for transferring tools from the pony engine for use on the engine of the pick-up train on Monday morning, August 4, and at the time when the accident happened, it would have been impossible for Mr. Hansen to make such transfer because of the then inability to determine what engine would make the run on the pick-up train on the following morning.

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II.

Defendant's Motion for a Non-Suit and for the Direction of a Verdict in its Favor Should Have Been Granted.

The motion for a non-suit is found on page 135, and the motion for the direction of a verdict is found at page 274.

10 The motion for the direction of a verdict rested on the same grounds as the motion for a non-suit.

No evidence was introduced in the defendant's case, or in rebuttal, which cured the defect in plaintiff's case. Hence, the refusal to non-suit is reversible error.

C. R. R. Co. v. Smalley, 61 N. J. L. 277.

20 The first ground of the motion to non-suit was that plaintiff had failed to prove the case set out in the complaint.

The complaint in substance alleges that the accident happened while plaintiff's intestate was engaged in the work of firing and caring for his engine over the tracks and road bed of the defendant, and while engaged in removing tools from one engine to another, and just as plaintiff's intestate had stepped from an engine to one of the tracks of the defendant, and that the accident occurred by reason of the unsound, unsafe and defective condition of the engines, cars, 30 tracks, roadbeds, tools and appliances which had been allowed to be and remain out of order for a long space of time, and by reason of the unsafe place furnished by defendant for plaintiff's intestate to perform his work, and by reason of defendant's failure to warn him of the approach of an engine running backwards at a high and dangerous rate of speed without ringing any bell, and with but one of the crew thereon, and with 40 no man on the rear of the engine and tender to warn plaintiff's intestate.

The case attempted to be made at the trial was that plaintiff's intestate was on his way to the round house to get tools from the pony engine and place them upon the engine of the pick-up train and to get his overalls from his locker in the round house and take them home, and that he was killed while on his way to the round house.

The evidence produced by plaintiff to establish the facts relied upon at the trial was objected to by defendant because not within the issues presented by the pleadings. That objection was never waived, but was from time to time insisted upon. See p. 24, line 18; p. 58, line 15. Motion for Non-Suit p. 135, line 28. Motion to Direct a Verdict, p. 275. 10

Plaintiff contended that the evidence was admissible and within the issues presented for trial, and although one or more applications were made to amend, all were subsequently withdrawn, and plaintiff rested upon the pleadings as they stood. See p. 25, line 10; p. 58, line 25; p. 136, line 20

The case attempted to be made by the proofs is radically different from that set out in the complaint, both in place and circumstances. Plaintiff's intestate was not firing or caring for his engine. He was not removing the tools from one engine to another. He had not just stepped from an engine to the tracks of the defendant, and no defective condition as to engines, cars, tracks, road-beds, tools or appliances was shown. The case relied upon at the trial was not the case defendant was called upon to answer, and on this ground the motion for a non-suit should have been granted. 30

In *Excelsior Electric Company v. Sweet*, 59 N. J. L. 441, plaintiff's horse was injured by the falling of an electric lamp suspended over the highway. His declaration alleged that the lamp fell because of defective rope and pulleys by means of which the lamp was suspended. 40

The defendant pleaded the general issue.

At the trial plaintiff attempted to prove the case made by his declaration. Defendant's testimony tended to disprove this and to prove that a cleat upon the pole to which the rope was fastened, had been broken by some extraneous force immediately before the lamp fell, and thereby the rope had been loosed from its fastening.

The Judge charged the jury that they might
10 find negligence because of the defective cleat.

This Court said:

"It is a cardinal rule for the control of a trial court that the questions submitted to the jury should be within the issues raised by the pleadings.

"From what is above stated, it plainly appears that the pleadings in this case presented no issue as to the state or position of the cleat, the sole complaint being as to the
20 rotten, weak, insufficient and defective condition of the rope and pulleys. It was, therefore, erroneous for the Judge to submit such an issue to the jury under the pleadings as they stood."

In *Partridge v. Woodland Steamboat Company*, 66 N. J. L. 290, plaintiff, while a passenger on defendant's steamboat was injured by other passengers upon the boat who were drunk and boisterous and fighting. Plaintiff in no way
30 contributed to his injury.

The declaration alleged as negligence that the crew of the steamboat "made no effort to protect the other passengers from the assault and blows of the said drunken and boisterous passengers" etc.

The defendant pleaded the general issue.

The trial court charged the jury that they might find negligence in the failure of the defendant to have on board a ship officer or officers if
40

they believed that such a precaution were necessary for the proper protection of the passengers. This court said:

“The pleadings raised no such issue as that. The declaration did not pretend that the boat was not properly manned, or that there was any insufficiency of crew or men to protect the passengers in any emergency. The sole issue made by the pleadings was ‘that the master and the crew * * * * disregarding their duty in the premises made no effort to stop and quell said brawl and fight or to protect the passengers from assaults,’ etc.” 10

In *Murphy v. North Jersey Street Railway Company*, 71 N. J. L. 5, plaintiff was injured while attempting to board a car of defendant. The declaration alleged that while the car was standing at the station, plaintiff attempted to board it; that while so doing defendant’s employees negligently started the car, throwing the plaintiff to the ground. 20

The defendant pleaded the general issue.

At the trial plaintiff’s proof tended to support the allegations of the declaration. Defendant’s proof tended to show that the car had already started when plaintiff attempted to board it; that he missed his hold and fell to the ground, thereby receiving the injuries for which he sued.

The trial judge charged the jury that “even if they believed the accident to have occurred in the way testified to by defendant’s witnesses, they would nevertheless, have a right to find a verdict for the plaintiff, if they concluded that the defendant was guilty of negligence.” 30

The Supreme Court said:

“The issue presented by the pleadings for the determination of the jury in the present case was whether the defendant had caused the plaintiff’s injury by negligently starting 40

the car while he was in the act of getting upon it. This was the claim which was set up by the plaintiff in his declaration, and denied by the defendant in its plea, and which the plaintiff was bound to establish by proof in order to entitle him to a verdict. If, at the trial, he had abandoned this position, and attempted to show that his injury was due to an entirely different cause—for instance, the defective condition of the step upon the car—he, of course, would not have been permitted to do so, for it is elementary law that a plaintiff cannot recover for a cause of action other than that set out in his declaration. And this principle is equally applicable when dealing with the case made by the defendant in contradicting the plaintiff's claim. The defendant is only required to prove that he was not guilty of the negligent act charged against him in the declaration. When he does this by showing that the accident which produced the plaintiff's injury was due to a cause entirely different from that alleged by the latter, he has relieved himself from responsibility, so far as the action then being tried is concerned. To compel him to go further and disprove responsibility for the existence of that cause, is to require him to meet an issue which the case does not present."

30 In *Merklinger v. Lambert*, 76 N. J. L. 806, plaintiff's declaration alleged that while his intestate was lawfully riding upon a bicycle on the highway, defendant's automobile ran into and collided with decedent, whereby he was violently thrown and pushed from the bicycle and run over by the automobile, sustaining mortal injuries.

Defendant's proof tended to show that in dodging from side to side of the street decedent's bicycle skidded and he was thrown to the street

and afterward run over by the automobile. The plaintiff contended that there was a right of recovery if the accident happened in the way defendant's evidence tended to show that it did, provided the jury were satisfied that there was negligence on the part of the defendant. The trial court refused to adopt that view and charged the jury as follows:

"Now, this is the allegation of the plaintiff, that his son, the deceased, was injured 10
by having this automobile collide with the bicycle, throwing the deceased on the ground and injuring him so seriously that he soon thereafter died. If the accident happened in any other way, the plaintiff cannot recover. If this bicycle slipped, and this young man fell on to the pavement without coming into collision with the automobile, he cannot recover in this action, because he has alleged in his pleadings that the accident occurred by 20
reason of the collision with the automobile, and if it happened in any other way it is not a subject for your consideration in this suit."

Following this instruction, the jury returned a verdict for the defendant. On plaintiff's writ of error, this Court said:

"Having alleged a particular act of negligence, in order to maintain his action he must prove it as laid. 30

"This rule seems well established in this state, as well as in foreign jurisdictions, as was pointed out in the well-considered brief of the defendant in error."

2. The second and third grounds for the motion to non-suit are that plaintiff's intestate was not acting within the scope of his employment when the accident occurred, and that he was not then engaged in the performance of any duty he owed to the defendant. 40

As already pointed out the accident occurred on Sunday, August 3, at about 11:50 A. M. The pick-up train never ran on Sunday. The train came in on Saturday afternoon and the crew including Mr. Hansen, registered off at 6:30 P. M. He with other members of the crew were due to register on at 3:30 A. M. on Monday (Griffin, p. 47, line 20; p. 48, line 15; p. 52, line 20. George, p. 67, line 10; p. 189, line 30. Mrs. Hansen, p. 120, line 15).

10 Hansen was not called for any service on August 3 (George, p. 67, line 10).

Thus Hansen was in defendant's yards 15 hours before his duties as fireman required him to be there. He was there of his own volition and without any call from the defendant.

There is no evidence in the case that there were any tools on the pony engine on this day.

If Hansen's statements to his wife and to Engineer Kathan were admissible in evidence they
20 were admissible solely for the purpose of showing Hansen's intention when the statements were made. The statement to Mrs. Hansen is not evidence tending to show that there were on that day any tools on the pony engine, or if there were tools there that such tools were either necessary or suitable for use on the pick-up engine, or that it was Hansen's duty to transfer them to any engine to be used on the pick-up train; and the court charged the jury to that effect (p. 285, line
30 18 to p. 286, line 2).

With reference to Hansen's statement that he was going to the round house to get his overhalls, the court charged that such an act, if performed, would not constitute engaging in interstate commerce (p. 282, line 36).

The plaintiff attempted to show that at the time of the accident there were tools on the pick-up engine. The nearest approach that was made to proving this fact is found in the testimony of
40 the witness McCartney. He testifies that at one

time he worked as fireman on the pony engine; that he stopped work on that engine about a year before August 3, 1913 (p. 89, line 35). That there were two boxes on the side of that engine (p. 83, line 40); that when he worked on the engine as fireman, the engineer's tools, consisting of hammers, chisels and monkey-wrench were kept in those boxes (p. 93, line 18). He specifically states that he could not tell what was kept in the boxes at the time of the accident (p. 92, line 35). After he ceased working on the pony engine, he was never on her and never paid any attention to her at all (p. 95, line 12). 10

The last run made by the pony engine was on July 1, 1913. It was then laid up for repairs. At that time Kathan was the engineer and he testifies that he superintended the taking off the engine of all tools and fittings, and that this was done before the accident. That he made an examination to see that everything had been removed, *and that in so doing he opened all the boxes on the engine.* (Kathan, p. 25, line 28; p. 37, line 30; p. 38, line 30; p. 97, line 35; p. 248, lines 8 to 40). 20

He further testifies that while he was engineer he had a small portable box with his name on it in which he kept his engineer's tools. That he and all engineers who had such a portable tool box kept their tools therein and took the box with their tools when they were transferred from one engine to another. He had such a box when he was engineer on the pony engine; that he kept his tools in it and took it with him when the pony engine was laid up and that he has it yet (p. 27, line 10; p. 101, line 5; p. 248, line 3). 30

As Kathan had this portable tool box in which his tools were kept while he was engineer on the pony engine, the tool boxes were used only for holding the oil cans (p. 26, line 38; p. 98, line 16).

A bunch of keys was produced at the trial, said to be the keys taken by Hansen when he left the 40

house Sunday morning. The attempt was made to show that among them were one or more keys to the boxes on the pony engine. The intent no doubt was to support the theory that there were tools upon the pony engine which Hansen intended to remove. There is, however, an utter failure to identify these keys as the keys of the pony engine. Kathan could not identify them. He said they were not the keys to the pony engine (p. 23, line 38).

10

The keys shown him had nothing to do with the pony engine (p. 35, line 25). The only key he could identify with certainty was a switch key (p. 35, line 40). The other key he thinks was the key to Hansen's locker (p. 40, line 10).

20

When the witness, McCartney was shown the bunch of keys, he testified that he would not say that it was a key belonging to the pony engine. It looked something like it, but he could not identify it. The most he could say was that the key to the pony engine was something of the style of the key shown him (p. 91, line 25).

The size of the boxes on the pony engine according to McCartney were about 36 in. by 12 in. by 12 in. (p. 96, line 18).

30

The firemen's tools were a shovel, a hook, a shaking lever, gauge lights, markers and flags (Souders, p. 205, line 10). It is evident that most of these tools were too large to be carried in the tool boxes of the pony engine.

If there was any evidence in the case from which the jury could legally infer that there were tools on the pony engine at the time of the accident, there is not the slightest evidence to indicate what these tools were, or that they were tools suitable for, or which might properly be used, on the pick-up engine or any other engine than the pony engine.

40

There was no shortage of tools for the pick-up engine on the morning of August 4th, and Mr.

Griffin, the engineer, had made no request of Hansen to procure tools and put them on the pick-up engine.

Griffin, p. 211, line 10.

Hansen had no special tools of his own on the pony engine (p. 273, line 15).

Even if there had been tools on the pony engine suitable for use on the pick-up engine and if there had been a shortage of tools for the pick-up engine, it was no part of Hansen's duty to provide these tools. And particularly it was not his duty to wander through the yards hours before his engine would be designated, looking for tools. 10

Prior to 1909 it was the duty of the fireman to place their tools on the engines prior to starting on their trips. By agreement between the firemen and the Company which became effective January 1, 1909, the firemen were relieved from this duty, and the company employed toolmen, whose duty it was to take charge of all tools on incoming engines and remove them to the tool-car or storehouse, and to equip all outgoing engines with tools taken from the tool-car or the storehouse. 20

See Ex. D-3, p. 306.

After this agreement went into effect, toolmen were provided at the Granton Round House, who attended to these duties.

Kathan, p. 101, line 9; 30
 Griffin, p. 49, line 35; p. 53, line 25; pp. 209-210;
 Smith, p. 153, line 3 to p. 154, line 20;
 Craig, p. 223, line 30 to p. 228, line 1;
 Souders, p. 198, line 31 to p. 199 line 25;
 p. 200, line 35 to p. 202, line 25;
 Holt, p. 257, line 1.

When the engineer and fireman came to the engine preparatory to going out, it was their duty 40

to see whether these tools had been properly supplied. If not, they notified the toolman and the latter provided them.

(Griffin, p. 53, line 38 to p. 54, line 20;
Souders, p. 204, line 25; Holt, p. 259,
line 15).

When the engines were brought out from the round house by the hostlers they were placed in
10 front of the tool car and while there the toolman equipped them. That was from 15 to 30 minutes before the engine left on its run.

(Holt, p. 268, line 10).

There is not the slightest evidence in the case that in case of a shortage of tools the firemen did anything more than to report the shortage to the toolman or to the foreman of the roundhouse. There is no evidence of a single instance in which
20 a fireman took tools from one engine for use on another.

In order to give plausibility to the contention that Hansen was on his way to get tools from the pony engine, evidence was introduced to show that there was at times a shortage of tools and that on one occasion when Carpenter was Engineer on the pick-up engine there was a poor engineer's hammer placed on the engine, and that Hansen got into an altercation with Holt, the toolman, on
30 account of it, but it appears that a satisfactory hammer was furnished on the same day before the engine went out.

(Holt, p. 253, line 20; p. 260, line 30 to p. 261, line 20; p. 263, line 18).

This occurred when Carpenter was engineer on the pick-up (Holt, p. 253, line 12). The last time Carpenter was engineer on the pick-up prior to the accident, was on July 17, more than two weeks
40 prior to the accident.

(Brusle, p. 244, line 30).

There is no evidence of any other occasion when there was difficulty in supplying the pick-up engine with tools.

The tools were taken from the engines by the tool man and placed in a tool car or store house indiscriminately, as the engine came in. The tools were also taken indiscriminately from the store house and tool car to equip the outgoing engines. Thus the tools were used interchangeably on the different engines.

10

(Griffin, p. 55, line 1; Smith, p. 154, line 16; Souders, p. 202, line 35; Holt, p. 257, line 20).

This was true with respect to both engineers' and firemen's tools, except as to the engineers who had private portable tool boxes with their names thereon. These boxes were removed by the tool man to the tool car, but were placed on the engines assigned to the engineers whose names appeared on the boxes.

20

(Griffin, p. 211, 212; Holt, p. 258, line 18).

Even had Hansen desired to procure tools for the pick-up engine he could not have done so at noon on Sunday, because the pick-up train had no regular engine and he would not know what engine he was to go out on until about the time he registered in at about 3:30 A. M. He would get this information from the engine dispatcher usually. Sometimes from the round house foreman.

30

(Griffin, p. 47, line 28 to p. 48, line 20; p. 52, line 40, p. 210, line 5; George, p. 189, line 10; Souders, p. 203, line 12; Holt, p. 258, line 5).

Even the engine dispatcher would not know what engine was going out on a given train until from one to four hours before it left (George, p. 189, line 22).

40

Mr. Hansen came in on engine 2105 on Saturday evening. That engine did not go out on the pick-up train on the following Monday morning, but on the contrary it went out on an extra train at 9:50 Sunday evening and returned on Monday, August 4, at 9:10 P. M.

(George, p. 190; line 30 to 191, line 25).

Furthermore, the engine which went out on the
10 pick-up train on Monday morning was No. 2076. It did not register in until 2:20 on Sunday afternoon.

(George, p. 190, line 25 to 191 line 12).

Engineers register within 5 or 10 minutes after arrival.

(George, p. 197, line 20).

The following schedule made up from the testi-
20 mony of Mr. Brusle (p. 243, 245 inclusive) shows the engines used on the pick-up train from July 7 to August 2, 1913, inclusive, and covers the whole period of Hansen's service on the pick-up train. It also shows the names of the engineers with whom he worked.

	Date	Direction	No. of Engine	Engineman
	July 7	Westbound	2159	Cuddy
	8	Eastbound	2159	Cuddy
	9	Westbound	2082	Carpenter
	10	Eastbound	2082	"
30	11	Westbound	2159	"
	12	Eastbound	2159	"
	July 13, Sunday, did not run.			
	14	Westbound	2166	"
	15	Eastbound	2166	"
	16	Westbound	2166	"
	17	Eastbound	2166	"
	18	Westbound	2076	Savage
	19	Eastbound	2076	"
	July 20, Sunday, did not run.			
	21	Westbound	2082	"
	22	Eastbound	2082	"
	23	Westbound	2082	"
	24	Eastbound	2082	"
40	25	Westbound	2082	"
	26	Eastbound	2082	"

Date	Direction	No. of Engine	Engineman
	July 27, Sunday, did not run.		
28	Westbound	2105	"
29	Eastbound	2171	"
30	Westbound	2076	Griffin
31	Eastbound	2076	"
Aug. 1	Westbound	2105	"
2	Eastbound	2105	"
	Aug. 3, Sunday, did not run.		
4	Westbound	2076	"

From this it appears that Mr. Hansen made 12 round trips on the pick-up train during that period, and that he had 6 different engines and 4 different engineers. 10

Clearly it would have been impossible for Hansen at 12 o'clock on Sunday to transfer tools to the pick-up engine.

If Hansen had been charged with the duty of providing tools for the pick-up engine, and had necessary and proper tools been located on the pony engine, he would have had ample time in the morning when registering in to procure the tools and transfer them to the pick-up engine. The pony engine was located on one of the tracks of the round house. Hansen was obliged to go to the round house to register in, and the pick-up engine would then have been in the round house or in front of the tool car. Two or three minutes time would have been all that was necessary in order to effect the transfer provided the tools were there to be transferred. Furthermore, only at that time or a short time previous thereto, could the pick-up engine for that trip have been definitely ascertained. 20 30

Hansen usually left home at about 2:15 A. M. for the pick-up run. (Mrs. Hansen p. 120, line 25). It was 5 minutes walk from his house to the Y. M. C. A. building (Smith p. 148, line 30). From that place to the round house via the Bergen Turnpike scales about 4200' on the map Ex. D-6. This distance could easily be covered in 20 minutes, or say one half hour from his home to 40

the round house where he would arrive at about 2:45 A. M. This would have given him 45 minutes to make the transfer.

- Even if it be assumed that while on the path Hansen was on his way to the round house and the pony engine in the performance of a duty owed to the defendant, yet when he departed from the path and crossed the shop track and engine track No. 2, and stood between that track and engine track No. 1, talking with Kathan, and then started to return to the path, he had, during that period left a place of entire safety and had gone into a place of great danger. He had done this, not in pursuance of his expressed purpose of going to the round house and procuring tools for the pick-up engine, *but for his own individual purpose of talking with Kathan*, his former engineer and doing that which in no way tended toward the performance of his supposed duty to his employer.
- 20 While doing this he was outside the scope of his employment, and defendant owed him no duty except to abstain from wilfully injuring him.

3. The fourth and fifth grounds of the motion to non-suit are that at the time and place of the accident Hansen was a trespasser or at best a mere licensee.

- When Hansen was at the Y. M. C. A. he was adjacent to a public highway which passes the round house and from which highway the company had provided a way of ingress and egress to and from the round house (See Map Ex. D-6). That way was open to him and he should have taken it. He choose, however, to go through the yards in company with fireman Smith, who was on his way to meet Kathan with his engine as he was coming south from the round house. Even if he had desired to go through the yards he could have taken the path to the machine shop and
- 40 thence to the round house without crossing any engine tracks.

(Kathan p. 46, line 15; Smith p. 157, line 28; George p. 181, line 1; Craig p. 228, line 9).

The path he choose to take in company with fireman Smith was not one provided by the company. It was one beaten by the feet of the men passing over it. The company never built it or repaired it, but on the contrary they paid no attention to it and even destroyed it by digging it up or covering it over in repairing the adjacent tracks. When this was done they never restored it. 10

(Smith p. 156, line 25; George p. 180, line 1).

Under these circumstances we insist that the employees of the company used the path at their own risk and at best as mere licensees.

But even if the path were used by invitation 20 of the company, yet Hansen became a trespasser when he left the path and crossed two railroad tracks for the purpose of holding the conversation with Kathan, which is set out in the testimony. While going from and returning to the path under those circumstances, defendant owed no duty of warning Hansen of the approach of its engine.

From the path to the place where he stood talking with Kathan was at least 25 feet and from the path to the place where the body was found was 30 at least 20 feet.

Under the cases in this state, there can be no recovery under such circumstances. Plaintiffs' intestate had lost his character of an employee for the time being, and had become a trespasser, or at best a mere licensee.

The following authorities support defendant's contention and the second, third, fourth and fifth grounds of the motion for non-suit.

In *Haber v. Jenkins Rubber Co.*, 72 N. J. L. 171, plaintiff was entering the building where he was employed by a way used by some of the employes, under such circumstances that the court said it might be a jury question whether plaintiff was not using it by invitation. But plaintiff deviated from this way. He saw something glittering on the ground which looked like a ten cent piece, and went to pick it up, but found it was a bit of tin.

10 While off of this customary way the injury occurred. A non-suit was granted. The Court of Errors said:

20 “Plaintiff was not passing from the gates
 “to the wing. He deviated from that course
 “and passed across to the vicinity of the
 “boiler house for no purpose of proceeding
 “to his work, but because attracted by a shin-
 “ing object upon the ground. He must there-
 “fore have passed about fifty feet out of the
 “most direct way to the door in the wing. He
 “was therefore neither working for the de-
 “fendant company at the time nor proceed-
 “ing to the place where he was to work with
 “the intention of resuming work. When he
 “deviated from the path, the use of which
 “it might possibly be considered he was in-
 “vited to make, he lost the protection of such
 “implied invitation and became either a tres-
 “passer, or, at the most, a mere licensee, to
 30 “whom the defendant company owed no duty
 “except to abstain from willful injury. Upon
 “these facts the lack of any duty due from the
 “defendant company to the plaintiff was
 “plainly disclosed, and as the liability of the
 “defendant could only be evinced by proof of
 “duty neglected the course of the trial judge
 “in directing a non-suit was entirely proper.”

In *Harris v. United Steamship Company*, 75 N.
 40 J. L. 862, plaintiff's intestate was at work on ship

board helping to unload freight. His place of work was separated from that of a coal gang working on the same deck, by a tier of barrels. It became necessary for him to have a shovel, and he asked the foreman for it. The foreman replied, "All right you will get one", and sent after it. Without waiting for it—Harris climbed over the barrels to the place where the coal gang were to get a shovel from them, and in so doing fell through an open hatch and was killed. The trial court denied a motion to direct a verdict and judgment went for the plaintiff. This court said: 10

"We think a verdict should have been directed in view of the facts which the evidence exhibited. * * * *

"It is not disputed that the defendant company had provided Harris with a safe place to perform his work as a member of the freight gang. It had provided a safe method of furnishing him with a shovel when needed, and, when he asked for it, was in the act of supplying it, of which he was informed. When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the defendant knew or ought to have known." 20 30

Clearly, no custom has been shown in this case whereby employees, when off duty, went through defendant's yard, either by its direction or permission, to get tools from one engine to place on another. When the latter engine is at the time un- 40

known, and is not in fact then in the yards, and when it will not become known or be designated for any particular service for many hours afterwards, such service would be impossible. Hence, it would be impossible to establish such a custom.

- In *Hobbs v. Great Northern Ry.*, 142 Pacific 20 (Washington Supreme Court), decedent was a hostler's helper, and was engaged in helping to prepare interstate engines to go out on their runs.
- 10 Among the engines which he helped to equip was engine No. 960. After putting some sand in the sand box he was next seen near the pilot of the engine. He stepped upon the pilot, for what purpose the evidence does not show. His presence on the pilot was hidden by steam both from the engineer and fireman of No. 960, and also from the engineer and fireman of the switch engine with which 960 afterwards collided. There was no claim that the engineer or fireman on either engine knew he was on the pilot.
- 20

Engine 960 moved forward and collided with the switch engine causing the injuries of which decedent died.

The evidence did not disclose any duties which called for decedent's presence on the pilot, and there was a rule forbidding employees to ride there. The Court said:

- 30 "One of the questions in the case is whether the deceased was injured while acting within the scope of his employment. Respondent contends that this action being under the federal Employers' Liability Act, the statute renders such question immaterial, and that the only test is, was the employee injured while employed by a carrier engaged in interstate commerce. The federal act does not give a cause of action to the employee for injuries not occasioned by negligence, and no recovery can be had under this act by simply
- 40

showing the injury, and that at the time the injured servant was engaged in interstate commerce. The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servants with a reasonably safe place in which to perform the work it requires of him, or while he is about those places which are incident to his work, and this duty is incident to all places where the employees must necessarily be in connection with his employment. But that duty is not incident to places where a servant is not required to be, nor expected to be in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all the authorities, and the federal act in no wise attempts to change it.

Unless the evidence in this case shows that the deceased was upon the pilot of this engine in the discharge of some duty required by the railway company, then the railway company owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted, and no authority need be cited to sustain it. There is no evidence in this record that the deceased was required to do any act which would place him upon the pilot of the engine. All the evidence on this subject is to the contrary. So far as we can find, whatever it was that caused him to step upon the pilot, it was his own purpose, not in any way connected with his work as a hostler's helper. If it was his purpose to engage in any task, so far as this record goes, in so doing he was a volunteer without appellant's direction or knowledge, and so far as the law is concerned the result is the same."

So in this case, if Hansen was on his way to get tools as claimed, he was a mere volunteer, and there can be no recovery.

4. The sixth and seventh grounds of the motion for non-suit are that neither plaintiff's intestate nor defendant were engaged in interstate commerce at the time and place of the accident.

Whether defendant was engaged in interstate
10 commerce at the time and place of the accident depends upon whether at the time and place of the accident plaintiff's intestate was engaged in performing services for the defendant in interstate commerce.

We have already shown that at the time and place of the accident Hansen was not engaged in the course of his employment, nor was he engaged in discharging any duty which he owed to his employer. On the contrary he crossed the tracks
20 and entered the field of danger for an object personal to himself. He then placed himself outside the scope of his employment and he remained outside the scope of his employment until the accident happened.

Having unnecessarily and for a purpose of his own brought himself within the field of danger, by an act which was in no way connected with or tended to promote interstate commerce, it certainly cannot be said that at the time he was engaged in such commerce.
30

Even if he had been injured while taking tools from the pony engine to be ultimately used on some engine which might haul the pick-up train on Monday morning and even if thereby he had been performing his duty to the defendant, still he would not then have been engaged in interstate commerce. In the language of this court in *Pier-
son v. N. Y. S. & W. R. R. Co.*, 85 Atl. 233, he
40 would have been simply preparing for engaging therein in the future.

Recent Federal decisions have materially narrowed the application of the Federal Employers' Liability Act. The test laid down by the recent cases is whether the work being done at the *precise time* of the injury constituted *interstate transportation*, or work so closely related to it as to be practically a part of it.

In *Ills. Central R. R. Co. v. Behrens*, 233 U. S. 473, plaintiff's intestate was employed as a fireman and was working on a switching engine while aiding in the moving of several cars, all loaded with intrastate freight between two points in the same state. The railroad was both an interstate and an intrastate carrier. Upon completing the movement of intrastate cars, decedent was to have assisted in moving several other cars some of which were destined to points within the state and some to points without the state. The Court said:

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

In *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556, plaintiff was injured through the negligence of the defendant while engaged in taking down and putting into a new location in the machine shop where he was employed, an overhead countershaft through which power was communicated to machinery used in repairing locomotives used by the defendant company in both interstate and intrastate transportation.

Plaintiff's work usually consisted in repairing certain parts of these locomotives. The court said:

10 “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 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 work so closely related to it as to be practically a part of it? * * * *

20 “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. What he was doing was altering the location of the fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that
30 the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act.”

40 In *C. B. & Q. R.R. Co. v. Harrington*, 241 U. S. 177, plaintiff's intestate was engaged as a member

of a switching crew in switching cars loaded with coal, belonging to defendant, which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic. None of the locomotives or cars were set apart for exclusive interstate commerce.

The defendant company was engaged in both inter and intrastate commerce. 10

The court cited the test laid down in *Shanks v. D. L. & W. RR. Co.*, and said:

“Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. *This was nothing more than the putting of the coal supplies in a convenient place from which it could be taken as required for use.*”

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In *Erie R. R. Co. v. Welsh*, 242 U. S. 303, advance sheets No. 5, Feb. 1st, 1917; the defendant was an interstate carrier and plaintiff was in their employ as a freight conductor. On the night of the injury plaintiff with the yard crew, took a freight car loaded with interstate shipment, and a caboose, to a yard called the “F. D. Yard”. There the freight car was placed upon a siding where it was to be made up into a train by another crew. Plaintiff’s crew then took the caboose a short distance farther and placed it upon another siding. Then they took the engine to a water plug and took on water and returned to the Yard from which they started. The engine slowed down at the Yard Master’s Office, so as to enable Welsh to report for further orders. All previous orders had been executed. The injury arose as he was alighting from the engine. 30

The evidence showed that the orders plaintiff would have received if he had not been injured on 40

the way to the Yard Master's office would have required him immediately to make up an interstate train. The contention was that at the moment of his injury, his acts partook of the work, which but for the accidental interruption, he would have been called upon to perform.

The Court said:

10 "In our opinion this view is untenable. By the terms of the Employers Liability Act, the true test is the nature of the work being done at the time of the injury, *and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce*, is not sufficient to bring the case within the Act." * * * *

20 "There remains the contention that plaintiff's act in stepping from the yard engine was in completion of his trip to the "F. D. Yard" with the interstate car, and hence was itself an act in furtherance of interstate commerce. This cannot be answered by saying, in the words used *arguendo* by the state Supreme Court (39 Ohio St. 88), that 'he was not then and there employed in moving or handling cars engaged in interstate commerce.' The question remains whether he was performing an act so directly and immediately connected with his previous act of placing the interstate car in the "F. D. Yard" as to be a part of it or a necessary incident thereto. *N. Y. C. & H. R. R. Co. v. Carr*, 238, U. S. 260, 264; *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, 559. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task. It turns upon no interpretation of the act of Congress, but involves simply an appreciation of the testimony and admissible inferences therefrom in

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order to determine whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error."

In *M. & St. L. R. R. Co. v. Winter*, 242, U. S. 353, U. S. Advance Sheets Feb. 15, 1917; plaintiff was injured while engaged in making repairs in 10
a roundhouse upon an engine which had been used in hauling freight trains over defendant's lines, loaded with both interstate and intrastate shipments. It was so used on October 18th, just before the accident and was again so used on October 21st, after the accident. On these facts the Supreme Court said:

"That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road 20
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 30
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 *New York Central v. White*, 243, U. S. 188, U. S. Advance Sheets, April 1, 1917; plaintiff's intestate was a night watchman, charged with the 40

duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon defendant's interstate railroad.

The Court said:

10 “The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test 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. * * * Decedent’s work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable.’”

To the same effect is *Raymond v. C. M. & S. P. Ry. Co.*, 243 U. S., 43.

20 In *H. & M. R. R. Co. v. Iorio* (C. C. A. 2nd Circuit), 239 Fed., 855; the defendant railroad company operates an underground and under-water railroad between New York and points in New Jersey. Except the trivial business between the several stations on either side of the Hudson River, it is wholly engaged in interstate transportation. Iorio was a trackman in the defendant’s employ. At one of the terminals of the road there is a pit, located between the tracks, in which new rails are stored against the time when they may be re-
30 quired for track repairing or any other purpose. Plaintiff was assisting in putting rails into this pit when by the negligence of a fellow workman, he was injured. The Court said:

40 “‘It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never occur, were at the moment engaged in, or practically part of, interstate commerce; for that commerce was going on without any present assistance, either from Iorio, or the rails on

which he was working or the men who were working with him. We, therefore, hold that the *actual employment or use at the moment of injury*, of the thing upon which the person injured was working is the test of the applicability of the statute, under circumstances such as shown here. By that test plaintiff below was not practically engaged in or a part of interstate commerce, when he was hurt, and the judgment is reversed." 10

In *Bumsted v. Mo. P. R. R.*, 162 Pacific, 347, decided Jan. 6, 1917, plaintiff was a freight conductor and after a run in which the train handled an interstate shipment, he went to bed in his caboose, as was his custom. After his rest period he was called at 7:00 P. M. to leave at 8:15 or 8:30 P. M., with a train containing interstate cars. He was required to report for duty 30 minutes before his train was to leave, or at 7:45 P. M. At 20 that time his pay began. He was injured at 7:15 P. M., at which time cars were violently run against the caboose in which he was dressing. The Supreme Court of Kansas said:

"It is difficult to see how it can be accurately said that, while dressing and getting breakfast and before the beginning of the 30 minutes' time which, according to his testimony was to mark the beginning of his actual duties, he was performing any duty for 30 the company or engaged in interstate commerce. The time preceding the beginning of his actual duties was his own and for his use in any way he chose. The collision occurred, not while he was momentarily or temporarily diverted from the duties of his employment, *but before the performance of such duties had begun*. It must be held, therefore, that he was not within the terms of the Act." 40

In *Giovio v. New York Central*, 162 N. Y. Supp., 1026, plaintiff had been engaged immediately before the accident in coaling a switch engine used solely within defendant's yards in moving cars from one place to another. These cars contained both interstate and intrastate shipments. It also hauled coal trains which came into the yard. On the day of the accident it had been used only in moving cars used in interstate commerce, and it

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was so used on the following day. Just before the accident happened, the switch engine, having finished its work for the day, dumped its fire in an ash pit, took water into its boiler and then proceeded to the coal chute to get coal. While coaling the deceased stood on the tender of the engine and another employee operated the chute from above. As soon as the coaling was finished the hostler in charge of the engine started toward the roundhouse without waiting for deceased to alight.

also, Knowles v. R. R. Co., 164 N. Y. Supp., 1, it was held that an engineer was not engaged in interstate commerce while crossing tracks in defendant's yard on his way to his switch-engine which he was to operate, though the first work assigned to that engine after the accident was the moving of interstate cars.

side of the round house. On the authority of *M. & St. L. R. R. Co. v. Winters*, the court held that the deceased was not engaged in interstate com-

Chicago &c. Ry. Co. v. Industrial Board, 115 N.E. 47, where the Illinois Supreme Court held that an engineer assisting in moving a string of cars to a storage yard where they were iced, and which were then removed by his crew to a platform where they were loaded, was engaged in interstate commerce, although most of the cars were subsequently loaded with interstate shipments. The destination of the cars was determined after they were loaded on the platform.

the following conclusions inevitably result:

The defendant was off duty. His time was his own. He was then under no obligation to do anything for the company. The company had no

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The principle involved in the cases of *Haber v. Jenkins Rubber Co.*, 72 N. J. L. 171, *Harris v. United Steamship Co.*, 75 N. Y. L., 862, and *Hobbs v. Great Northern Ry. Co.*, 142 Pacific, 20; also support defendant's contention on this phase of the case.

Applying the above cases to the present case, the following conclusions inevitably result:

The defendant was off duty. His time was his own. He was then under no obligation to do anything for the company. The company had no

knowledge of his attempted acts. He was not then under pay of the company.

The act which brought him within the danger which resulted in his death (*i. e.*, leaving the path and crossing the two railroad tracks) was an act undertaken solely for his own purpose, and it had no relation whatever to the accomplishing of anything beneficial to the company. As to that act the relation of master and servant did not exist.

Under *Haber v. Jenkins Rubber Company*, 10 there can be no recovery.

Even if decedent were considered as still on his way to the roundhouse for the purpose of taking tools from the pony engine, he "was not engaged in interstate transportation or any work so closely related to it as to be practically a part of it". Hence, he was not engaged in interstate commerce.

Even if he had reached the pony engine and had taken tools from it, which were suitable for use 20 on the pick-up engine, he would not then have been engaged in interstate commerce, for he could not at that time have placed them upon any engine which would be used on the pick-up train for the following morning, for no one knew at that time what engine would be used on that train. If he had laid the tools aside with the expectation of using them on the following morning, on the pick-up engine, he would still have been within the rule in *C. B. & Q. R. R. Co. v. Harrington*, and his 30 act would have been nothing more than putting the tools "in a convenient place from which they could be taken as required for use", or in the language of the Supreme Court in the *Winters* case, the use of the tools in interstate commerce would have depended "upon accidental later events". They might not—in fact, they would not have been needed as the event proved. They might have been diverted to intrastate use.

The tools were not Hansen's. He had no au- 40

thority to appropriate them to any particular purpose. In the language of the Supreme Court in the *Winter* case, tools as such "are not permanently devoted to any kind of traffic", and these tools, if they existed, were for use for any purpose they might be needed for.

Applying the rule laid down in *Hudson & M. R. Co. v. Iorio*, Hansen would simply have been storing the tools and not in any way assisting in
 10 interstate commerce, for that commerce would have been than "going on without any present assistance", either from Hansen or the tools which he might have procured from the pony engine.

The accident having occurred hours before he would have been called to duty, the case comes within the ruling of the Kansas Supreme Court in *Bumstead v. Mo. Pacific R. R. Co.*, 162 Pacific, 347.

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5. The eighth ground of the motion for a non-suit was that plaintiff's intestate was guilty of contributory negligence.

The evidence is uncontradicted that the engine was moving at a rate not exceeding 6 miles per hour. This was within the company's rules, of which Hansen had knowledge.

At the place where Hansen crossed the railroad tracks to talk with Kathan, he had a clear view
 30 toward the south for at least 410 feet, and from the place where the body was found there was a clear view in a southerly direction for 970 feet. (Freleigh, pp. 178, 179)

A mere glance toward the south before stepping upon No. 2 engine track would have disclosed the presence of the engine. The necessity for looking was imperative because of the fact that he had just left an engine moving toward the south and the noise of that engine would naturally drown the
 40 noise of the approaching engine.

At the rate of 6 miles per hour the engine would move a little less than 9 feet per second. Hence, Hansen must have had a clear view of the engine for more than a minute before it reached the place where he was struck.

Not having been engaged in interstate commerce his negligence defeats a recovery.

6. The ninth ground of the non-suit was that no negligence had been established against the defendant. 10

If our contention is correct that at the time and place of the accident Hansen was a trespasser or at best a licensee, when the defendant owed him no duty of giving warning of the approaching engine.

If this contention is incorrect, still no negligence alleged in the complaint has been proved. There is not the slightest evidence of any defective condition of the engine, tracks, roadbed, tools or appliances which in any manner caused or contributed to this accident. Nor is there any evidence of an unsafe place provided by defendant for Mr. Hansen to perform his work. His work did not call him to be at the place where the accident happened. There is not the slightest evidence of the failure of the defendant to give warning of the approach of the engine which struck him. Plaintiff did not attempt to show any such negligence. The evidence is that the speed of the engine was not over six miles per hour that was within the defendant's rule, and certainly was not a high and dangerous rate of speed. There were two men on the engine instead of one. That was the regular engine crew. 20 30

True, there was no man on the rear of the tender, but no rule of the company required this as Hansen well knew. In the absence of a rule requiring a man on the rear of the tender, failure to have one there does not constitute negligence. 40

There is an entire absence of evidence showing negligence on the part of the defendant.

7. The tenth ground of the motion for non-suit is the assumption by plaintiff's intestate of the risks attending the crossing of defendant's tracks.

Hansen was entirely familiar with the Yard and with the operation of the engine tracks. He had worked in the Yard since the time it was constructed, and for a year and a half he had passed
10 over these engine tracks almost daily. He knew all the risks attending what he did and assumed them.

8. The 11th ground of the motion for non-suit is that if there was any liability on the part of the defendant it should have been determined under Chapter 95 of the Laws of 1911.

It clearly appearing that plaintiff's intestate
20 was not engaged in interstate commerce, this action cannot be maintained and if any right of recovery ever existed (which we deny), it arose only under the New Jersey Compensation Act.

III.

The defendant's requests to charge numbered
30 9, 10, 15, 16, 18, 19 and additional request numbered 2 (pp. 301, 302, 303), should have been granted. The request No. 20 should have been charged without modification.

The questions involved in Request No. 9, 10, 15 and 16 were also raised on the motion for non-suit and have been argued in this brief under the second, third, sixth and seventh grounds of the
40 motion to non-suit.

Requests No. 18 and 19 should have been granted and request No. 20 should have been charged without modification because it was demonstrated that at the time of the accident plaintiff's intestate was not engaged in interstate commerce. Hence, his contributory negligence would bar a recovery.

IV.

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That part of the charge of the court objected to by defendant was erroneous.

The court charged that the statements made by Hansen were not evidential of the fact that there were suitable or necessary tools on the pony engine for use upon the pick-up engine or that there was any duty on Hansen's part to transfer the tools if there were any. This was correct, but the court added that the statements were of value and were to be considered by the jury provided they were satisfied by a fair preponderance of the evidence that there were in fact tools upon the pony engine which were suitable and proper and necessary to be used upon the pick-up engine and that it was a part of Hansen's duty to the defendant to provide such tools for the pick-up engine (p. 285, line 18).

Outside of the declarations of Mr. Hansen there was no evidence whatever with respect to these matters. It was therefore error to submit those questions to the jury.

On the whole case we respectfully submit that the judgment should be reversed.

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