

New Jersey Court of Errors and Appeals

THE ESTATE OF
JOHN BRINSKO, Deceased,
Petitioner-Respondent,

vs.

LEHIGH VALLEY RAILROAD
COMPANY OF NEW JERSEY,
Defendant-Appellant.

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BRIEF OF ADRIAN LYON, COUNSEL FOR APPELLANT.

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This case was brought under the New Jersey Employers' Liability Act to recover compensation for the death of John Brinsko. He was a brakeman in the employ of the defendant company and was injured while at his work so that he died shortly after.

The only question that is raised by this appeal is whether or not the deceased was engaged in interstate commerce when he was injured.

The determination of the Judge who heard the case in the Court of Common Pleas on this subject is set forth in paragraphs five and six (pages 15 and 16) of his determination, and is as follows:

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"5. I further find that the cars upon which the said John Brinsko was riding had been used several days previous to his death for the transportation of coal from Pennsylvania to the City of Perth Amboy in the State of New Jersey, and that they were thereafter placed by the defendant company on a railroad siding or storage track to be thereafter taken to

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a shop of the defendant company at Perth Amboy for repairs; that while lying on said storage track or siding the cars extended over a roadway and were removed by the drilling crew with which the decedent, John Brinsko, was working at the time of his death; that the said cars, and particularly the one upon which the said John Brinsko was riding at the time of his death, were returned to the State of Pennsylvania.

10 6. I further find and determine that it is not necessary to decide whether said cars were engaged in Interstate Commerce at the time the said John Brinsko met his death, for the purpose of this suit."

The Supreme Court held on certiorari (bottom of page 88) as follows:

20 "The next question is whether the deceased, at the time of the accident, was engaged in interstate commerce. The Court held that it was unnecessary to determine whether the car was engaged in interstate commerce. With this we disagree, but the award is not vitiated on that account, because on the finding of facts by the Judge the car was not engaged in interstate commerce, nor was the deceased. The car had finished its interstate trip and was in a repair yard, and so the case comes directly under the rule in the case of Moran vs. Central Railroad Company, 96 Atlantic Rep., 1023. If the car was not engaged in interstate commerce, the deceased was not. This also disposes of the last point, which is also predicated on the interstate commerce theory. The judgment will be affirmed."

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It is respectfully submitted that the opinion of the Supreme Court was erroneous in finding that "the car had finished its interstate trip and was in a repair yard, and so the case comes directly under the rule in the case of Moran vs. Central Railroad Company, 96 Atlantic Rep., 1023."

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FACTS

The cars on which the deceased was working were used for the transportation of coal from the mines in Pennsylvania to tide water at Perth Amboy. They would come down loaded and be sent back empty and were not used for any other purpose. (Page 68).

He was working on a car which was being pushed down with other cars on to the storage track to await their turn in being taken into the shop for some slight repairs. The conductor, who was a witness, testified that the particular car on which Brinsko was working had a worn journal box but that nothing else was the matter with it. Joined and hooked to this car were two other cars also engaged in the same kind of traffic, and also requiring some slight repairs. The three cars were numbered, respectively, L. V. 26173, Penn. 693771 and P. & R. 80024. 10

The movement of said cars was as follows:

L. V. car 26173 came from the mines in Pennsylvania loaded with coal on December 4th (page 53) and returned empty to the mines in Pennsylvania on December 17th (page 53); Pennsylvania car 693771 came from the mines loaded with coal in Pennsylvania on December 11th (page 55) and returned empty on December 18th (page 57); P. & R. car 80024 came from the mines loaded with coal in Pennsylvania on December 11th (page 59) and returned empty on December 18th (page 57). The accident happened on December 16th. 20 30

The two Pennsylvania and P. & R. cars were joined and hooked to the Lehigh Valley car on which Brinsko was working so that the operation of the brakes on the Lehigh Valley car would have controlled the other two cars.

There is nothing in the testimony which indicates that these cars were taken or intended to be taken out of their customary use of transporting coal from the mines to Perth Amboy and being sent back empty. 40

It is true while they were at Perth Amboy they were inspected and some slight repairs were made before they were sent back. This was nothing more than is ordinarily performed on every object of interstate commerce and made no difference because it was performed at the end of the journey eastward rather than at a point in the progress of the trip either going or coming. It could, of course, be most conveniently performed in the manner in which it was.

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THESE FACTS DIFFER FROM THE FACTS IN THE
CASE OF MORAN vs. CENTRAL RAILROAD.

In the last mentioned case in the statement of the trial judge, upon which the court based its opinion, the facts are therein stated to be as follows:

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“This car when it had discharged its cargo at East Ferry Street, had then been taken back to Brill’s Junction, **to be left there awaiting an order for cars, and that order was given to Mr. Hastings**, who was the general yardmaster, then the nature of the order was manifested; the order was that he was to give a certain amount of tonnage in cars, and **it was his function to select what cars should comply with that order**, and that order was not given until half past 5 or 6 o’clock on the day of the accident, and the accident happened at 3 on that day.”

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The conclusion of said trial judge was entirely warranted by the facts as stated by him and was as follows:

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“I think the interstate character of that car ceased, and I so decide, when the function that the car was performing in the interstate commerce was ended; that is, it was engaged in the purpose of carting coal from Mauch Chunk to Newark, from a consignor to a consignee. When it had taken the last vestige of coal off of the car, and had delivered it to

the consignee, I think at that point its character as an interstate commerce car ceased, and that it did not acquire a new character as an interstate commerce car until the intention on the part of the railroad company to use that car had been in some way manifested, either by act or by word."

This is entirely different, however, from the case at bar. In the **Moran** case the car "was engaged in the purpose of carting coal from Mauch Chunk to Newark, from a consignor to a consignee." In **this** case the cars were used generally by the railroad company in transporting coal from the mines to Perth Amboy, to be shipped back empty. In the **Moran** case the car had been taken back to a place "to be left there awaiting an order for cars." In **this** case there was no such order, or any act showing any intention that the car should not go back again to the mines from whence it came. In the **Moran** case the car was left to the discretion of Mr. Hastings as to the selection of certain cars to comply with an order for a certain amount of tonnage. In **this** case there was no thought of the car being used for anything else except to be sent back to the mines to be shipped back again filled with coal. In the **Moran** case the accident happened at 3 o'clock and the determination as to the future use of the car was not given until 5 or 6 o'clock, so that the car at the time of the accident had no character whatever as between interstate and intrastate commerce. In **this** case the accident happened when the car was being sent down to the shop so that it could be repaired for the purpose of sending back to the State of Pennsylvania.

DETERMINATION OF JUDGE.

It is respectfully submitted that there is nothing in the determination of the Judge, or in his finding of facts, inconsistent with the theory that the deceased

was engaged in interstate commerce. In the sixth paragraph he expressly says that he does not find it necessary to decide the question. In the preceding paragraph the facts as he has found them are not at all inconsistent with an employment of the cars in interstate commerce.

BURDEN OF PROOF.

10 I quote from a brief filed by eminent counsel in a similar case:

20 “In order to entitle the petitioner to recover, it is of course necessary to show that the case comes within the New Jersey Statute; the burden of proof on this point, as on all other essential points, rests upon the petitioner. Hence it may well be said that when it appears that a railroad company is engaged generally in interstate commerce, the burden of proof is on the petitioner to show that at the time of the accident the Federal Statute did not apply, rather than upon the defendant to show that it did; or rather, the burden is on the petitioner to show that the State law does apply, and as incidental to that proof, it is of course essential to show that the Federal law does not apply.”

30 THE CARS ON WHICH DECEASED WAS EMPLOYED WERE ENGAGED IN INTERSTATE COMMERCE.

In *Montgomery vs. Southern Pacific Co.*, 131 Pac. 507 (Oregon) held, that the members of the switching crew engaged in switching and spotting of cars **to be loaded** and already loaded with interstate commodities, and in hauling cars up the mountains to the station from which they could be taken by a regular interstate train, come within the protection of the Federal
40 Act.

In *Perry vs. Illinois Central R. R. Co.*, 143 N. W. 724 (Minnesota) plaintiff was a conductor whose regular run was between two points in the same state. The trains in his charge were almost wholly, but not entirely composed of interstate shipments. Plaintiff was injured while on the "return" trip, and on this particular trip it so happened there were no loaded cars to be taken and all that the conductor had on the train were some flat cars on which was loaded a pile driver belonging to the Company. Held that he was engaged in interstate commerce. 10

In *Zikos vs. Oregon, etc., R. Co.*, 179 Fed. 893, held that one who was engaged in repairing a track by driving spikes in the ties for the purpose of tightening the rails was engaged in interstate commerce.

In *Central R. Co. vs. Colasurdo*, 192 Fed. 901 (Circuit Court of Appeals, Second Circuit), held that the Federal Statute applied to a case where a track foreman was repairing a switch in defendant's terminal, over which interstate and intrastate commerce was continually transported. 20

In *Lamphere vs. Oregon, etc. R. Co.*, 196 Fed. 336 (Circuit Court of Appeals, Ninth Circuit), the statute was applied to the case of a locomotive fireman who was ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who was killed by the negligence of another crew while he was approaching the station. 30

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

In *Northern Pacific R. Co. vs. Maerkl*, 198 Fed. 1 40

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

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

In the case of *Pedersen vs. D. L. & W. R. R. Co.*, 229 U. S. at page 146, the court in reversing the lower court says:

- 30 "We are concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars: and sound economic reasons unite with settled
- 40 rules of law in demanding that all of these

instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Here is cited a large number of cases). Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where the work was to be done some of the

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materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce.''

10 It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

ADRIAN LYON,

Attorney for Defendant-Appellant.

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Stanislau Duzinski,	
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Walter M. Blocker,		
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Supreme Court
of the
State of New Jersey

Affidavit for Writ

State of New Jersey, }
County of Middlesex, }^{ss:}

Adrian Lyon, of the City of Perth Amboy, in
said County, being duly sworn according to law,
on his oath deposes and says that he is the at- 20
torney for the Lehigh Valley Railroad Company
of New Jersey, the defendant in the suit herein-
after mentioned, and the person actually entrusted
with the conduct of said suit; that one Susan
Brinsko, who is the widow of John Brinsko, filed
in the office of the Clerk of the Court of Common
Pleas of Middlesex County a petition under the
New Jersey's Employers' Liability Act to recover
compensation for the death of John Brinsko, who
was an employee of said Lehigh Valley Railroad 30
Company and was killed while in the course of
his employment; that said petition set forth that
the said Susan Brinsko was the widow and next
friend of said John Brinsko, and at the hearing
thereon was amended to state that she was also
a dependent of said John Brinsko, also that at
the time of his death his heirs and next of kin
were his said widow and six children therein
named; that no guardian has been appointed of 40

Writ

the said infants, and no suit brought on their behalf by their next friend or any other person representing them in any capacity; and that no administrator of the estate of John Brinsko has been appointed.

10 And deponent further says that on the hearing of said matter before the Judge of said Court of Common Pleas testimony was taken which this deponent believes proved that the said John Brinsko at the time of his death was employed in Interstate Commerce.

That after hearing the witnesses in said matter the said Judge made the determination of facts and rule for judgment herewith presented.

ADRIAN LYON.

20 Subscribed and sworn to before me this second day of October, A. D., 1915.

Chas. M. MacWilliam,
Attorney at Law.

A true copy.

WILLIAM C. GEBHARDT,
Clerk.

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Writ

New Jersey, to wit:

The State of New Jersey to Bernard M.
Gannon, Clerk of the Middlesex
(Seal) County Court of Common Pleas,
GREETING:

40 We being willing for certain reasons to be certified of a certain determination of facts and rule

Writ

for judgment made by the Honorable Peter F. Daly, Judge of the Court of Common Pleas of Middlesex County on the twenty-seventh day of August, A. D., nineteen hundred and fifteen, wherein Susan Brinsko is the petitioner and Lehigh Valley Railroad Company of New Jersey, a corporation, is defendant. 10

We do command you, the aforesaid determination and rule for judgment with the petition filed in the said matter, and the testimony taken therein, together with all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the twenty-sixth day of October, inst., you certify and send, together with this writ, that therein may be done what, of right and according to the laws of this state, should be done. 20

Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this sixth day of October, A. D., nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

Adrian Lyon,
Attorney.

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I do hereby send to the Justices of the Supreme Court of Judicature, the determination with the petition filed in the said matter, together with all things touching and concerning the same, as within commanded, as by the transcript under my hand and seal hereto certified and annexed more fully appears.

BERNARD M. GANNON.

(Seal)

40

Petition

Jersey, died in said city on or about the sixteenth day of December, nineteen hundred and thirteen, as a result of the accident hereinafter mentioned and set forth.

That at the time of his death, his only heirs at law and next of kin were the following persons, 10
to wit:

Susan Brinsko, widow

Susan Brinsko, daughter, aged nineteen years

Michael Brinsko, son, aged sixteen years

Annie Brinsko, daughter, aged eleven years

Mary Brinsko, daughter, aged nine years

Joseph Brinsko, son, aged seven years

Elizabeth Brinsko, daughter, aged five years.

That on the twenty-fifth day of November, eighteen hundred and ninety-three, the said John 20
Brinsko was employed by the said Lehigh Valley Railroad Company of New Jersey, a corporation, at its railroad yard in the said City of Perth Amboy, as a brakeman or trainman, and was receiving as wages for said work the sum of three dollars and forty cents (\$3.40) per day.

That while in the course of his employment as said brakeman or trainman in the railroad yard of the defendant company on the said sixteenth day of December, 1913, the said John Brinsko, 30
while riding what is known as the "Head end" of a car of said company, the brakes and its connections on said car being defective and out of repair, the said John Brinsko when about to apply said brakes on said car, because of the want of repair, was thrown and precipitated from said car to the ground, and then and there run over by said car, thereby severing the legs of said John Brinsko, 40

Petition

from which injuries he died shortly after the same were sustained.

10 And your petitioner further says that subsequently your petitioner caused to be served upon the Lehigh Valley Railroad Company of New Jersey, a notice of which is hereto annexed, by mailing the same to said company at its office in the City of Perth Amboy, County of Middlesex, and State of New Jersey.

And your petitioner further says that the said Lehigh Valley Railroad Company of New Jersey, had actual notice of the injuries sustained by the said John Brinsko which resulted in his death.

20 And your petitioner says that under the act of the Legislature above referred to your petitioner is informed and believes that said company is obligated to pay as and for compensation for the injuries resulting in the death of the said John Brinsko fifty per centum of the wages received by the deceased John Brinsko at the time of his death and not to exceed the maximum compensation of ten dollars a week for a period of three hundred weeks, which is equivalent to the sum of at least three thousand (\$3,000) dollars, but that the Lehigh Valley Railroad Company of New Jersey, denies the liability to pay the said compensation or expense, but on what ground your petitioner is unable to state, and your petitioner has been unable to agree upon a claim for compensation with said company.

30 Your petitioner therefore prays that this court will fix a time and place for the hearing on the matters and things herein contained that by the judgment of this Court the said Lehigh Valley Railroad Company of New Jersey, may be com-
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Petition

pelled to pay the compensation aforesaid and such reasonable costs, charges and counsel fee as they may be charged with and required to pay according to law.

And your petitioner further prays that any amounts payable periodically as compensation, if such there be, may be commuted to one or more lump sum payments by this Court, provided the same be in the interest of justice. 10

And your petitioner will ever pray, &c.

her
SUSAN X BRINSKO,
mark
Petitioner.

State of New Jersey, }
County of Middlesex. }^{ss:}

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Susan Brinsko, of full age, being duly sworn, according to law, on her oath says, that she is the petitioner named in the foregoing petition; that she is the widow of the deceased John Brinsko, and that the matters and things set forth in the foregoing petition are true so far as they relate to this petitioner's acts and she believes that they are true so far as they relate to the acts of others. 30

her
SUSAN X BRINSKO.
mark

Sworn and subscribed to before me, this
14th day of November, 1914.

Edna M. Wittnebert,
Notary Public of N. J.

(Seal.)

40

Notice Attached to Petition

Lehigh Valley Railroad Company of New Jersey,
Perth Amboy, N. J.

10 You are hereby notified that personal injuries were received by John Brinsko who was in the employ of your company at Perth Amboy, New Jersey, while engaged as a trainman, on or about the sixteenth day of December, 1913, which injuries resulted in the death of said John Brinsko on the same day they were sustained, and that compensation is claimed by the dependents and next of kin of the said John Brinsko.

Dated, January 19th, 1914.

(Signed) THOMAS BROWN,
Attorney of Susan Brinsko.

20

Order on Petition

(Filed November 16, 1914)

MIDDLESEX COUNTY COURT OF COMMON
PLEAS

30	<p>THE ESTATE OF JOHN BRINSKO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>LEHIGH VALLEY RAILROAD COM- PANY OF NEW JERSEY, a cor- poration, Defendant.</p>	}	Order.
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40 This matter being opened to the Court by Thomas Brown, attorney for and of counsel with the dependents in the estate of John Brinsko, and

Order on Petition

upon the presentation to this Court of the duly verified petition in this cause of Susan Brinsko, pursuant to an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder, approved April 4th, 1911", and the several supplements thereto and acts amendatory thereof. 10

It is thereupon on this sixteenth day of November, nineteen hundred and fourteen, Ordered that the said petition be filed with the clerk of this Court and that on the 7th day of December, nineteen hundred and fourteen, at the Court House in the City of New Brunswick, New Jersey, at the hour of ten o'clock in the forenoon be and the same is hereby fixed as the time and place for the hearing thereof. 20

And it is further ordered that a copy of the said petition, together with a copy of this order be served upon this defendant as a summons in a civil action within four days from the date hereof. 30

PETER F. DALY,
Judge.

Order to Amend Petition

MIDDLESEX COUNTY COURT OF COMMON
PLEAS

10	SUSAN BRINSKO, <div style="text-align: center;">vs.</div> LEHIGH VALLEY RAILROAD COM- PANY, a corporation, 	}	Petitioner, Respondent. On Petition for Com- pensation.
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20 This matter coming on to be heard in the pres-
 ence of Adrian Lyon, attorney for the respondent,
 and on motion of Thomas Brown, attorney for the
 petitioner;

30 It is, on this fourth day of June, 1915, Ordered
 that the petition in the above entitled cause be
 amended as follows: That the petition in said
 cause be entitled in the name of Susan Brinsko,
 petitioner, and that the petitioner file said peti-
 tion as the widow and dependent of John Brinsko,
 deceased, on behalf of herself and the other depen-
 dents of the said John Brinsko; that the petition
 be also amended so as to show that the said John
 Brinsko left at the time of his death as dependents
 the petitioner, his widow, and the children en-
 umerated in the original petition filed in this
 cause, of which children the following are depend-
 ents: Annie Brinsko, Mary Brinsko, Joseph Brin-
 sko, and Elizabeth Brinsko.

PETER F. DALY,
 Judge of the Court of Common
 Pleas of the County of Middlesex.

Answer

Let the foregoing order be filed as of its own date, June 4, '15.

PETER F. DALY,
Judge.

Filed June 4/15.

B. M. Gannon, Clk.

10

Answer

MIDDLESEX COUNTY COURT OF COMMON
PLEAS

THE ESTATE OF JOHN BRINSKO,
Plaintiff,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation,
Defendant.

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The answer of the Lehigh Valley Railroad Company of New Jersey, the defendant in the above entitled cause, to the petition of Susan Brinsko, the petitioner therein:

1. Defendant admits the employment of the said John Brinsko by it, the rate of wages received, the accident which resulted in his death and his next of kin as set forth in said petition. 30

2. It denies the said accident was occasioned as therein set forth or that said brake and its connections on said car were defective and out of repair.

3. Defendant denies the right of the said Susan Brinsko to bring the said action as the widow and next friend of John Brinsko, deceased. 40

Answer

4. Defendant says that at the time of the said accident the said John Brinsko was employed in moving cars engaged in interstate commerce, and that, therefore, this defendant is liable only as provided by the act of Congress of the United States, and is not liable under the act mentioned
 10 in the first paragraph of the said petition.

LEHIGH VALLEY RAILROAD Co., OF NEW JERSEY,
 By T. N. Jarvis,
 Vice President.

State of New York,
 City and County of New York. }^{ss}:

T. N. Jarvis, of full age, being duly sworn, according to law, on his oath deposes and says, that
 20 he is the Vice President of the Lehigh Valley Railroad Company of New Jersey, the defendant in the above entitled cause; that the matters and things set forth in the foregoing answer are true to the best of his knowledge and belief.

T. N. JARVIS.

Subscribed and sworn to before me this
 27th day of November A. D., 1914.

William F. Gleeson,
 Notary Public,
 30 Kings Co., No. 72,
 Certificate filed in N. Y. Co., No. 92
 New York Register No. 6187.

(Seal.)

Filed Nov. 30, 1914.
 B. M. Gannon,
 Clerk.

Record of Trial

MIDDLESEX COUNTY COMMON PLEAS

June 4th, 1915.

Court met:

Present: HON. PETER F. DALY, Judge.

10

<p>THE ESTATE OF JOHN BRINSKO, vs. LEHIGH VALLEY RAILROAD COM- PANY, a corporation.</p>
--

The court ordered the above case do now come
on for trial.

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ADRIAN LYON,
Atty. of Deft.

Thomas Brown,
Atty. of Plntf.

Witnesses sworn:

Susie Brinsko
Stanislaw Dninski
Walter Marks

Witnesses sworn:

Walter W. Blocker
William Bacon
Owen Tulton
David Honiker
George Houser
Otto Anderson

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Re-called:

Walter Marks
Leander W. Schoonover

The evidence being adduced and argument sub-
mitted by the respective counsel, decision reserved
and case continued until June 11th, 1915, for
briefs.

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(Book 12 C. P., page 98.)

**Determination of Facts and Rule for
Judgment**

(*Filed Aug. 27, 1915*)

MIDDLESEX COUNTY COURT OF COMMON
PLEAS

10

SUSAN BRINSKO,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY OF NEW JERSEY, a cor-
poration,

Defendant.

} On Petition
for Com-
pensation.

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A petition having been filed in the above stated matter praying for compensation to which the petitioner and the dependents of John Brinsko, deceased, are entitled by virtue of the terms and provisions of an act of the legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, established an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder, approved April 4th, 1911", and a time and place for the hearing on the petition and answer thereto having been fixed, and the matter coming on to be heard in the presence of Thomas Brown, attorney for the petitioner, and Adrian Lyon, attorney for the defendant, and after hearing the testimony of the witnesses produced on behalf of

30 the petitioner and the defendant company, and

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Determination of Facts and Rule for Judgment

having heard the argument of counsel and read the briefs filed therein, I do find as follows:

1. That the said John Brinsko was employed for a number of years as a trainman for the Lehigh Valley Railroad Company, the defendant in the above entitled cause, and that he was so employed on the sixteenth day of December, 1913. 10

2. That the said John Brinsko as trainman at the time of his death was engaged in riding an empty car on a railroad siding of the defendant company at the City of Perth Amboy, for the purpose of clearing a roadway or crossing; that while in the course of his employment with said company, on the 16th day of December, 1913, in riding said cars, he fell therefrom to the ground and was run over by the car upon which he was riding, causing his death within a few hours thereafter. 20

3. That at the time of his death the said John Brinsko was receiving wages at and after the rate of \$3.40 per day.

4. That the defendant company received due notice of the injuries resulting in the death of the said John Brinsko as hereinbefore referred to, and as required by the act hereinbefore set forth, and the supplements thereto and amendments thereof. 30

5. I further find that the cars upon which the said John Brinsko was riding had been used several days previous to his death for the transportation of coal from Pennsylvania to the City of Perth Amboy in the State of New Jersey, and that 40

Determination of Facts and Rule for Judgment

they were thereafter placed by the defendant company on a railroad siding or storage track to be thereafter taken to a shop of the defendant company at Perth Amboy for repairs; that while lying on said storage track or siding the cars extended over a roadway and were removed by the drilling crew with which the decedent, John Brinsko, was working at the time of his death; that the said cars, and particularly the one upon which the said John Brinsko was riding at the time of his death, were returned to the State of Pennsylvania.

6. I further find and determine that it is not necessary to decide whether said cars were engaged in Interstate Commerce at the time the said John Brinsko met his death, for the purposes of this suit.

7. I further find that the said John Brinsko died intestate, leaving him surviving as dependents, according to the act of the State of New Jersey hereinbefore referred to, the petitioner, Susan Brinsko, who was the widow of John Brinsko, at the time of his death; a daughter named Annie Brinsko, aged eleven years at the time of the death of the said John Brinsko; Mary Brinsko, daughter, aged nine years at the time of the death of the said John Brinsko; Joseph Brinsko, son, aged seven years at the time of the death of the said John Brinsko; and Elizabeth Brinsko, daughter, aged five years at the time of the death of the said John Brinsko; that all of said children and the petitioner were actually dependent on the said John Brinsko at the time of his death.

Determination of Facts and Rule for Judgment

I further find that the said petitioner would be the person entitled to administration of the estate of John Brinsko, deceased, and that she is entitled to receive from the defendant company compensation for herself and said minor children, to be computed for five dependents at and after the rate of fifty-five per centum of the weekly wages of the said John Brinsko at the time of his death, for a period not exceeding three hundred weeks, beginning two weeks after the death of the said John Brinsko; that said fifty-five per centum of said wages being in excess of the maximum amount payable under the act hereinbefore referred to, I do find and determine that the maximum amount of Ten (\$10) dollars a week as provided by said act be paid by the defendant to the petitioner, as compensation for herself and said minor children.

It is, therefore, on this twenty-seventh day of August, 1915, on motion of Thomas Brown, attorney for the petitioner, Ordered, that the respondent herein pay or cause to be paid to the said petitioner, Susan Brinsko, as such person as would be appointed administratrix of the estate of John Brinsko, deceased, for the benefit of herself and said four minor children, without the giving and filing of a bond for the proper application of such compensation payments, the sum of Ten (\$10) dollars per week, for a period not exceeding three hundred weeks, beginning two weeks after the date of the death of the said John Brinsko.

It is further ordered that the said defendant company herein pay to the petitioner the costs of these proceedings to be taxed, and it is further

Determination of Facts and Rule for Judgment

ordered that the petitioner pay to Thomas Brown, her attorney and legal adviser in this proceeding, as compensation for his services therein, the sum of One hundred (\$100) dollars.

10

PETER F. DALY,
Judge of the Court of Common
Pleas of Middlesex County.

Filed August 27, 1915,
B. M. Gannon, Clerk.

State of New Jersey, }
County of Middlesex. }^{ss:}

I, Bernard M. Gannon, Clerk of the County of Middlesex, do hereby certify, That the foregoing
20 is a true, full and correct copy of a certain order, petition, consent, answer, order to amend petition and determination of facts and rule for judgment, as the same are on file in my office.

In Testimony Whereof, I have hereunto set my hand, and affixed my seal of
(L. S.) said County, this eighth day of October, A. D., 1915.

BERNARD M. GANNON,
Clerk.

30

Revenue stamp 10¢.

Reasons*(Filed Nov. 4, 1915)*

NEW JERSEY SUPREME COURT

LEHIGH VALLEY RAILROAD COM- PANY OF NEW JERSEY, vs. SUSAN BRINSKO.	}	On Certiorari.	10
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The said prosecutor, by Adrian Lyon, its attorney, comes and prays that the judgment entered in the Court of Common Pleas of Middlesex County, on the twenty-seventh day of August, 1915, in the cause wherein Susan Brinsko is the petitioner and the Lehigh Valley Railroad Company of New Jersey is defendant, be set aside, reversed and for nothing holden for the following reasons: 20

1. Because the said petition was filed by Susan Brinsko as the widow and next of kin of John Brinsko, deceased, and was subsequently amended as filed on behalf of herself as dependent and the other dependents of the said John Brinsko, and that the other dependents were infants under the age of twenty-one years. 30

2. Because the said petition was filed on behalf of the infant dependents of the said John Brinsko by the widow of said John Brinsko and not by a guardian of said infants.

3. Because the Judge of the said Court determined that the said defendant in said cause

Reasons

should pay to the said petitioner, Susan Brinsko, for the benefit of herself and her four minor children the sum of Ten (\$10.00) dollars per week for a period not exceeding three hundred weeks.

10 4. Because the Judge of the said Court determined that the said defendant in said cause should pay to the said petitioner, Susan Brinsko, for the benefit of herself and her four minor children the sum of Ten dollars (\$10.00) per week for a period not exceeding three hundred weeks, without the giving and filing of a bond for the proper application of such compensation payments.

20 5. Because the said Susan Brinsko could not lawfully recover a judgment for compensation against the defendant in said cause on behalf of herself and the infant dependents of the said John Brinsko as widow and one of the dependents of the said John Brinsko.

30 6. Because the testimony taken before the Judge of the said Court upon the hearing of said cause showed that the said John Brinsko at the time of his death was employed in interstate commerce, and the said Judge determined that it was not necessary to decide whether said cars on which the said John Brinsko was working were engaged in interstate commerce at the time he met his death for the purposes of the said suit.

ADRIAN LYON,
Attorney for Lehigh Valley,
Railroad Company of New
Jersey, plaintiff.

Testimony

COURT OF COMMON PLEAS

MIDDLESEX COUNTY

April Term, 1915

10

JOHN BRINSKO, <div style="text-align: right;">Petitioner,</div> <div style="text-align: center;">vs.</div> LEHIGH VALLEY RAILROAD COM- PANY OF NEW JERSEY, <div style="text-align: right;">Respondent.</div>	}	Petition Under Employers' Liability Act
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Transcript of stenographer's notes of evidence 20
 taken in the above entitled cause, before Hon.
 Peter F. Daly, Judge, at the Court House in the
 City of New Brunswick, N. J., on the fourth day
 of June, A. D., 1915, at 11:00 a. m.

Appearances:

Thomas Brown, Esq., for the Petitioner.

Adrian Lyon, Esq., for the Respondent.

Mr. Brown: This is a liability case, a case
 brought under the Employer's Liability act. 30

This case was before your Honor once before
 and was discontinued before there was a hearing
 had. The petitioner is a Mrs. Brinsko, of the es-
 tate of John Brinsko against the Lehigh Valley
 Railroad company, defendant.

The facts are that Mr. Brinsko, the decedent,
 was employed by the defendant railroad company
 from about the twenty-fifth day of November,
 1903, to the time of his death. which was about 40

Argument

the sixth day of December, 1913, a period of over ten years. He was employed as a railroad train man and he was receiving at the time of his death wages \$3.40 a day. He was working on the shifting engine in the yard at the time he was
10 killed, and moving empty cars from one part of the yard to the other, and while riding on what is known as the head end of several cars, the brake gave way and he was precipitated to the ground, the cars ran over him and caused his death. He left a widow and seven or eight children. This action is brought for compensation, accordingly.

Mr. Lyon: Before the merits of the case are gone into, I desire to make a motion to dismiss
20 the proceedings on the ground that they were not properly brought by the proper parties. The deceased, as Mr. Brown has said, was John Brinsko, who was injured on the Lehigh Valley Railroad, and from which injuries he died a few days afterward, or a week afterward. He left a widow, Susan Brinsko, and the children who are enumerated in the petition, six in number. The action is brought by Susan Brinsko, widow and next
30 friend of John Brinsko, deceased, and in no other way. The distribution, of course, will go to the widow and to the children as provided by law as it should go in such cases, and the persons who had the right to compensation provided by the act are the widow and these six children. The six children are not parties to the petition in any respect. The widow does not bring the action as next friend of the children, or as guardian of the children, or as a person whom under the law
40 might be made administratrix, or anything of the

Argument

sort. She brings it in her personal capacity as widow, and as next friend of the deceased. Of course, there is not any such thing in law as the next friend of a dead man, and, therefore, the action, the parties to this action are Mrs. Brinsko in her individual capacity as petitioner, and the Lehigh Valley Railroad Company, the defendant 10
The Statute, paragraph twenty, says, "Petition shall be verified by oath," etc. "Proceedings on behalf of an infant shall be instituted and executed by a guardian, and payment, if any, shall be made to such guardian."

Now, the petition shows that other persons than Mrs. Brinsko have the right to this compensation, namely the children of the deceased, but they are not the parties to the petition, and no action is brought on their behalf. Now, I apprehend, that the way that that would work out would be this, and for that reason I respectfully submit that my motion is not technical purely, by any manner or means: the children who have the rights, by virtue of the compensation act, to compensation, because of the death of their father, have rights as against the company, under that act, but they are not precluded by this proceeding in any respect because they are not parties in any way either personally, or by representation, and there will be nothing to hinder some guardian appointed by these children from bringing another action against the company for this same injury, after this action was— 20 30

The Court: Is this widow the mother of the children?

Mr. Lyon: Yes, sir. This widow is the mother of the children. But she does not say that she 40

Argument

brings the action as the mother of the children and for the benefit of the children, or anything of the sort. This is not a point suddenly sprung on the plaintiff, because this case was before the Court, as Mr. Brown states once before; it was brought in the same way, and the same objection was made in the answer; this objection was set forth in the answer in the former case, and there was plenty of time for the petitioner, in the second suit, which was afterwards brought, to have had a guardian appointed, or to have had this Court designate the mother as the next friend, which has been the custom and the practice as cited in numerous cases, but it was not done. The second case was brought and the petition was filed verbatim with the petition in the first case, and this has been set up as an answer, and the case has been pending before this Court, the two cases, for a year and a half; there has been no attempt to bring it in the proper way. I submit that the proceedings are so informal in this petition that they will have to fall, on the ground that this petition is without jurisdiction.

Mr. Brown: If this case is driven out of Court at this time it means that there is no redress to this widow under the act, as the time has expired within which to file a new petition. I do not know what the first answer was in the case exactly, but I do know this, that the contention at the last hearing was made upon the—in fact, it was nothing but an argument of counsel, there were no witnesses sworn at all. It was made, it was the point that the defendant was engaged in interstate commerce, and there was a lengthy discussion ensued, and the petitioner thereupon with-

Argument

drew her petition. There was much weight in some of the things Judge Lyon says, but I do not think it is so material that it is not written within the jurisdiction of this Court to permit an amendment. The petition sets out the act under which the petition is filed, it sets out the relation of the decedent to the petitioner, as being his widow. It sets out the relation of the other children, and the simple interpolation or amendment of the word "a dependent," in the first clause of the petition or designation in the petition, I think will cure the whole thing: "That your petitioner is a resident of the City of Perth Amboy, in the county of Middlesex and State of New Jersey, and the widow a dependent." The decedent was John Brinsko. And then also an allegation that—if a further description is necessary, that the petition is filed under the act for the benefit of heirs and dependents. The act does not require that there should be a next friend appointed, and it has been the prevailing practice for the mother to file the petition and for the Court afterward to make an order of distribution, if it were necessary.

The Court: Apparently there are a number of of dependents. That being true any one of them has a right to file a petition, and if this woman his widow, is one of the dependents now, she presumes to be next friend of the deceased or alleges herself. I suppose that is an irregularity. She has a right to be heard so far as her own interest is concerned. And as I understand the Employer's Liability Law, that when any one of the dependents brings in a petition for relief it throws upon the whole subject to the Court to

Argument

determine who are the dependents and what is the amount to which each of them is entitled. It was suggested by you, Judge Lyon, that there was a distribution which would follow, and I took from that that you took the position that the distribution would follow the statute of distribution. But there is a recent enactment that provides that the Court may determine the respective shares of the total liability upon the part of the respondent that shall go to the different dependents respectively. But coming back again, suppose she is wrong in saying that she is next friend of the deceased, suppose she is wrong in saying that she brings this action, only for herself as widow, but also as the mother of these children; suppose she should have first obtained guardianship for these children; still she has a right to file a petition for herself, if she is one of the dependents. Besides that, I think that where there was a widow and minor children, dependents, that there is something in the law that provides the mother, as the mother, has a right.

Mr. Lyon: Their is a case in eighty-four law which holds that the mother may set in motion an action, but the children or child is the petitioner. She does it for the child as the petitioner, and that is the nearest case that I can find to it.

The Court: I hold this, Judge Lyon; that where there are more than one dependent, that any one of those dependents may have the matter determined by the Court. And when there is such a case exists, then the Court will see that all of the parties in interest are given an opportunity to be heard as to their respective claims upon the compensation, if any, that is due from the defend-

Argument

ant, or respondent. In this case, even assuming that she is in error in alleging that she is the next friend of the deceased, and that she brings this action not only for herself as widow, but also for herself as the mother of these minor children—

10

Mr. Lyon: She does not say that.

The Court: No, but she does say that she is the widow, and if she is the widow and can prove that she is one of the dependents, then, as I said before, it throws the whole thing upon me to determine, if there is any compensation at all due, to whom it belongs. I hold that I have jurisdiction, and that this widow has the right to file the petition, and then it is the duty of the Court to determine liability, if any, and the respective shares of compensation, and to whom these respective shares belong.

20

Mr. Brown: Will you grant an amendment to the part of the petition where the description of the petitioner is alleged, by inserting the words: "a dependent of the decedent."

The Court: Who?

Mr. Brown: "That your petitioner is a resident of the City of Perth Amboy, County of Middlesex, and State of New Jersey, and a widow and a dependent of John Brinsko."

30

The Court: You have not that in?

Mr. Brown: No.

The Court: Have you any objection to that, Judge Lyon?

Mr. Lyon: I do not know of any authority in the law.

The Court: Isn't there a presumption of dependency in the case of a widow?

40

Argument

Mr. Lyon: That might be. I don't think there is any authority in the law for an amendment of a jurisdictional petition like this. If Mr. Brown can show any authority for it, it is not necessary for me to consent.

10. Mr. Brown: The act says that you shall proceed the same as in any other cases, and the authority of the Court in other cases is to allow the amendment up to time of getting judgment of verdict, and the same power is vested in the Court in cases of this kind, in case of amendment, as in other cases, and the Court can permit an amendment at any time.

Another description that is made about the proceedings, it says, "at the time fixed for hearing, or any adjournment thereof, said Judge shall hear such witnesses as may be presented by either party, and in a summary manner." A summary proceeding under our law is one that is not taken within the strict rules of pleading, and it is made primarily to ascertain just what the dispute is, or what the merits of the case are; and the very purpose of the act itself indicates the Court can exercise great latitude in determining just what the case is about.

- 30 The Court: "Legally adopted children shall, in every particular, be considered as natural children; provided, however, that dependency shall be presumed as to a widow who was living with her husband at the time of his decease." I will permit the amendment.

Mr. Lyon: Prays exception.

Exception allowed, sealed accordingly,

Susan Brinsko—Direct

The Court: Are you waiving the ground of it being interstate commerce?

Mr. Lyon: That is the only defense.

That he was injured while he was on the road and died from the effects of it, there is no question about that.

10

SUSAN BRINSKO, a witness produced on behalf of the petitioner being duly sworn on her oath, according to law, saith:

Direct-examination by Mr. Brown:

(Through interpreter Stephen F. Somgyi.)

Q. Where do you live? A. Perth Amboy.

Q. What is your name? A. Susan Brinsko.

20

Q. What was your husband's name? A. John Brinsko.

Q. Where did John Brinsko work during his lifetime? A. Lehigh Valley Railroad Company.

The Court: What is the object of this, Mr. Brown? Judge Lyon says he admits that this man met his death in the course of his employment. The only question, or defense, is that I have no right to hear this, because he was working for a company at the time of his death, which company was engaged in interstate commerce. Is that true, Judge Lyon?

30

Mr. Lyon: Yes, sir. The words of the first paragraph of the answer, are, the defense admits the employ of the said John Brinsko by it, the rate of wages received, the accident which resulted in his death,

40

Susan Brinsko—Direct

and the next of kin as set forth in said petition.

The Court: Your object is, Mr. Brown, to show the character of his employment at the time?

10 Mr. Brown: Yes, that is the one thing and the number of dependents I want to show by testimony.

The Court: That is admitted, isn't it?

Mr. Brown: It may be that there is a mistake in the petition.

The Court: All right, proceed.

Mr. Brown: There is one boy known as Johnnie, and he is known as Joseph. I just want to show that.

20 The Court: Proceed.

Q. Where is your husband now? A. Dead.

Q. When did he die? About how long ago? A. I can't tell you. I don't understand those things.

Q. Well, how long ago was it that your husband died?

Mr. Lyon: I will admit that he died December 16th, 1913.

Q. How many children did your husband leave at the time he died? A. Six.

30 Q. What is the name of the oldest one? A. Susie.

Q. How old was she at the time your husband died? A. I can't tell you. I am so frightened that I can't speak.

Q. How old is Susie now? A. She will be twenty years old.

Q. What was the next oldest child? A. Mike Brinsko, the boy who is sitting there.

40 Q. How old is he? A. Seventeen years.

Susan Brinsko—Direct

Q. At the time of your husband's death, or now? A. No. He wasn't that old when his father died.

Q. He is seventeen now? A. In the fall he will be seventeen. I can't tell you the date.

Q. What is the next child? A. Annie Brinsko. 10

Q. How old is she? A. Eleven years old.

Q. How old was she when your husband died? A. She was not ten.

Q. And how old is the next child? A. Mary Brinsko. She will be nine years in June of this year.

Q. What is the next child's name? A. Joe. Seven years old going on eight.

Q. That is his age now? A. He was four years and eight months old at the time of his father's death. 20

Q. That is Elizabeth—

The Court: Are these facts alleged in your petition?

Mr. Brown: Yes, they are.

The Court: Then there is no need of going into this testimony now, because the petition is admitted. Everything alleged in the petition is admitted except the question of jurisdiction. 30

Q. Is that all of your children? A. Yes.

Q. Did all your children live at home with you and your husband at the time of his death? A. Yes.

Q. Who made the living for you and your children at the time your husband died?

The Court: Why is this necessary? I have asked that three times now. The answer admits all those things. 40

Stanislaw Duzinski—Direct

Mr. Brown: Except the dependency. The dependency is not admitted.

Mr. Lyon: Certainly, I admit it.

The Court: The dependency is admitted. Everything is admitted excepting the question of my right to hear this.

10

Mr. Brown: That is all.

The Court: The only thing I can see that is necessary is to let me know what was the particular character of the employment of this man. That may become a very pregnant question in determining whether or not I have jurisdiction.

Mr. Brown: That is all of this witness.

20

STANISLAW DUZINSKI, produced as a witness on behalf of the Petitioner, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Brown:

(Through interpreter Stephen F. Somgyi.)

30 Q. Where were you working on the sixteenth day of December, 1913? A. Lehigh Valley.

Q. At Perth Amboy? A. Yes, Perth Amboy.

Q. Did you know John Brinsko at that time? A. Yes, he was a brakeman there.

Q. Did you see John Brinsko on the sixteenth day of December? A. I saw him in the morning going on the car.

40 Q. Where were you at the time that he was killed? A. I was working at the time.

Stanislaw Duzinski—Direct

Q. You still work for the Lehigh Valley Railroad Company? A. Yes.

Q. How far away from Mr. Brinsko were you at the time he was injured? A. I was on the ninth and he was on the sixth line.

Q. What was he doing at the time he was injured? A. I don't know. I simply saw him covered up lying on something. 10

The Interpreter: I think he means a stretcher.

A. There were many people over there, I didn't see him.

Q. What was there that you saw? A. I didn't see anything except him lying on a stretcher and covered with a sheet.

Q. Did you see any cars there? A. No, I did not. I was at work. I didn't see anything. 20

Q. Did you see the car he was riding on? A. I didn't see what kind of a car it was. The track was obstructed by two other lines. I couldn't see.

Q. Well, there were no cars in your way that you couldn't see? A. Two lines were blocked with cars, I couldn't see. I couldn't see.

Q. What is your employment with the Lehigh Valley Railroad Company? A. Carpenter. Repairing cars. 30

Q. Didn't you repair the car that Mr. Brinsko was riding on at the time he was injured? A. No.

Q. Didn't you tell Mr. Mike Brinsko and his mother that you were working the next track to the track upon which Mr. Brinsko was riding cars and that you saw him twist the brake and the chain give way and he fall off?

Mr. Lyon: I object.

The Court: Objection sustained. 40

Walter Marks—Direct

WALTER MARKS, a witness produced on behalf of the petitioner, being duly sworn on his oath, according to law saith:

Direct-examination by Mr. Brown:

10 Q. Mr. Marks, did you know John Brinsko in his lifetime? A. Yes, sir.

Q. Where were you the day he was injured or killed? A. I was working with him the day he got killed.

Q. Who do you work for or whom did you work for on that day? A. Lehigh Valley Railroad.

Q. What was the nature of your employment? A. Conductor.

20 Q. You were conductor of the train upon which Mr. Brinsko was riding? A. Yes, sir.

Q. What were Mr. Brinsko's duties? A. Duty as a brakeman.

Q. And you were on the same train that he was on at the time he was injured? A. Yes, sir.

Q. Were you with him all that day? A. Yes, I was with him that morning.

Q. What time of the day was he injured? A. Five minutes to nine.

30 Q. And from the time you went to work that morning until he was injured he was in your crew? A. Yes, sir.

Q. And had been in your crew how long? A. Well, about six months.

Q. What kind of an engine did you have that day? A. Shifting engine, a yard engine.

Q. A yard engine? A. Yes, sir.

40 Q. What was the work that you did that morning? A. Why, I shifted shop cars.

Walter Marks—Direct

Q. Shop cars, what kind of cars are they? A. Cars that go in the shop to be repaired.

Q. And you were doing that all morning? A. Yes, sir.

Q. Where did you come from at the time just before Mr. Brinsko was injured? A. I came out of the North of Sea. 10

Q. What is North Sea. A. Place where they keep box cars.

By Mr. Lyon: Q. It is a track, isn't it, known as "Sea Track?" A. Yes.

By Mr. Brown: Q. Mr. Brinsko was in the crew with you? A. Yes, sir.

Q. What kind of cars did you pull out of North Sea? A. Box cars.

Q. And were they crippled cars or good cars? A. Good cars. 20

Q. Loaded or empty cars? A. Empty cars.

Q. What time of the day was that? Was that the first work in the morning? A. No, that was about eight-thirty.

Q. Where did you put those cars? A. We were putting them down in "Y 6".

Q. What is Y six? A. Place where they keep shop cars.

Q. And shop cars, you mean the crippled cars? A. Yes. 30

Q. Why do you put those box cars on Y six? A. Well, the track was full and we had to shove it in.

Q. Full of crippled cars? A. It got full of crippled cars before we got back there.

Q. And then after you shove them in you pull those cars off? A. No, sir.

Q. What did you do? A. We left them there. 40

Walter Marks—Direct

Q. Were they to be repaired? A. They were to be fixed.

Q. So they were out of repair, the box cars which you put in there? A. What is that?

Q. They were put in there to be repaired, on Y six? A. Yes.

10 Q. "Y six" is a track, isn't it? A. Yes.

Q. A crippled track leading to the shop? A. Yes.

Q. And the track upon which you put crippled cars to be repaired? A. Yes.

Q. What did you do after that, you and Mr. Brinsko and the remainder of the crew? A. Well, that is when he got hurt then.

Q. Putting that "Y six" in? A. When he was 20 shoving Y six down, yes.

Q. Box cars? A. Well, the cars ahead of that.

Q. How many cars ahead of that were there? A. Oh, about fifteen.

Q. And where was he? A. Why, he went down to shove them down below the crossing there.

Q. That is a side track, isn't it? "Y six?" A. Yes, a yard track.

Q. A yard track that leads into this crippled shop? A. There is where they keep the shop cars 30 on that track.

Q. Was he on the head end of the train, or where was he? A. I don't know. He was in the middle of the train.

Q. Middle? A. Yes.

Q. That was about how far from you? A. Oh, about, I guess about five hundred yards. I was about five hundred yards away from him.

Q. And you were there? A. Coming from the 40 "North of Sea."

Walter Marks—Direct

Q. Were you on your train? A. Yes, part of it.

Q. What part were you on? A. I was on the part that went back.

Q. How many cars from the engine? A. Well, they all went off but one car next to the engine.

Q. Next to the engine? A. Yes.

10

Q. And you were riding on that car? A. No, the "bill" went back I was on, and one car next to the engine that was going down to the shop.

Q. How many cards did you have in that train going into the crippled track? A. Two.

Q. Will you just describe how you put the cars in? And where Mr. Brinsko was all the time?

A. Why, yes. We had two cars come down there. the way it stood, the first one was to the shop.

And when we got the car out of "North of Sea," the way it stood, the first one was to the shop, then there was about twelve to go back, and the one next to the engine was to go to the shop. Brinsko rode the one next to the engine, and I took the "bill" back.

20

Q. What is the "bill?" A. That bunch of twelve cars.

Q. They were all crippled cars? A. No, they were good cars. Then when I took back "bill," now, we left one car next to the engine.

30

Q. Those twelve cars were not put on the track? A. No. They went back where they come out of.

Q. So that you came back with one then, did you? A. The engine went down with one car.

Q. And what did you ride down, the good cars? A. The good cars.

Q. And you were not on the train that Brinsko was on when he was injured? A. No.

40

Walter Marks—Direct

Q. How far do you say, five hundred yards away? A. About five hundred yards.

Q. In what direction were you, next to him, could you see him? A. No, I could not see him.

10 Q. When did you see Brinsko last? A. Well, the last time I seen him I seen him sitting on the ground alongside of the tracks.

Q. How did Brinsko come to ride down on those crippled cars? A. I don't know. The only thing I figure out was that he was before the road crossing there, he was going to shove down to clear the road crossing. Outside of that I don't know what he was doing.

20 Q. I know, but that was his duty, wasn't it, to ride the empty cars into the shop? A. They were not going to the shop. Just the shop track there, which he must have been shoving down to clear that crossing. There is a road crossing going across there.

Q. That was the crippled track? A. Yes, sir.

Q. And those cars that went in there were being put in there for repairs? A. They were going in part of the day; some of them wasn't going in just then.

30 Q. How long had those cars that were on that track, how long had the longest of them been there before they were put in the shop? A. Oh, just a day or so, that is all.

Q. And you say there were fifteen cars in that string? A. Yes.

Q. And they were all to go in the shop to be repaired? A. Yes.

40 Q. Did they repair fifteen cars off that track, each day, about? A. Oh, they repair more than that, according to how many there are.

Walter Marks—Direct

Q. And did you go to where Brinsko was when you saw him sitting on the ground? A. Yes, sir.

Q. And what did you see there? A. Well, I seen him sitting there on the ground.

Q. And did you examine the car? A. Yes.

Q. What was the number of the car? A. The 10 car number? Lehigh Valley 26,173.

Q. Did you put that car in there, or your crew? A. No, sir.

Q. With Mr. Brinsko on it? A. No, sir.

Q. Well, don't you put all the crippled cars in there? A. No, sir, we don't put no crippled cars in there at all. They get put in there by other cars and we take them out of there and put them in the shop.

Q. Well, this what do they call it, "Y six?" 20 A. "Y 6."

Q. That is a track where you put the crippled cars to store then until they are ready to put them in the shop for repairs? A. Yes, sir.

Q. And the car that you have mentioned here was in there, prepared to be taken into the shop to be repaired, is that right? A. That is right.

Q. And those other cars that you were moving in at the same time were put in for the same purpose? A. Yes, sir. 30

Q. This Lehigh Valley car that you mentioned, that was the car that he was riding on, was it?

A. That is the first car he was on.

Q. And after you examined the car what did you find? A. I see some blood on the wheels.

Q. On the wheels? A. Yes.

Q. Is that all you looked for? A. I looked around the car to see if there was anything the 40

Walter Marks—Direct

matter with is, and the only thing there was the matter with it, it was going to the shop for a cut journal.

Q. Did you examine the brake? A. Yes, sir.

Q. What was the matter with it? A. Nothing
10 the matter with it.

Q. Well, you know what caused it to fall, don't you? A. No, sir.

Mr. Lyon: I do not suppose that is important. I have no objection to it, except it is spending time.

Mr. Brown: If you have no objection, I would like to have it.

Q. Will you please tell what caused him to fall?

A. I don't know what caused him to fall.

20 Q. Well, you saw there, didn't you?

Mr. Lyon: He already said he did not see him fall.

Q. Well, you were there when you went up?

A. I was there when I went up?

Q. Yes, when you went up to where he was, you saw what was there? A. I saw him sitting on the ground.

Q. You saw him with the brake stick? A. No, sir.

30 Q. Didn't have any brake stick? A. He might have had it, but he didn't have it when I seen him.

Q. Well, will you say he didn't have a brake stick? A. Not when I seen him.

Q. Will you say that you don't know what caused him to fall from that train? A. Yes, sir. It is a mystery. I couldn't tell what made him
40 fall.

Walter Marks—Cross

Q. Was he conscious when you got there? A. Yes, sir.

Q. This 26,173, you don't know how long it was in there before it was repaired, do you? A. No, sir, it might have been put in there the night before, or it might have been put in there that same morning. 10

Q. Was it a loaded car, or an empty car? A. Empty.

Q. What kind of a car, a box car? A. Coal car. Steel coal car.

Mr. Brown: That is all.

CROSS-EXAMINATION by Mr. Lyon:

Q. There were two other cars there connected with this Lehigh Valley 26,137, weren't there? 20
A. Yes, sir.

Q. There were three cars together? A. Yes, sir.

Q. That you were pushing down toward the shop, and on one of those three cars that were hooked together, Mr. Brinsko was riding immediately before his injury? He was operating one of those three cars, wasn't he? A. Yes, sir. He was on the head end of that Lehigh Valley 26,173, and then a P. and R. and Pennsylvania car right 30 behind.

Q. Did you know the number of the Pennsylvania and the P. & R? A. The P. T. R. was 80,024, and Pennsylvania line 693,771.

Q. When you saw him sitting here on the ground by the car, did Mr. Blocker, the yard master, come there? A. Yes, sir; he come right down after I went up and told him. 40

Walter Marks—Cross

Q. Did he take the numbers of the cars too?

A. I give him the numbers of the cars.

Q. When was the first you saw these particular three cars you have mentioned that morning?

A. That same morning.

10 Q. You don't when they came into the yard? A. No, sir.

Q. And you don't know when they were taken out? A. No, sir.

Mr. Lyon: That is all.

By the Court: Q. What kind of a yard was this that you are speaking about? What was the purpose of that yard? A. Storing cars.

Q. Simply storing cars? A. Yes, sir.

Q. For repair purposes? A. Yes, sir.

20 Q. Then this man as brakeman had no duty of running cars on the main line of any railroad, did he? He didn't go beyond the yard, did he, he as brakeman? A. No, sir.

Q. And his duties, as I understand you, see if I do understand you correctly, were as brakeman in the handling of cars within the yard that were sent there for the purpose of being repaired, is that right? A. That is right.

30 Q. And he did not have to go outside of the yard at all? A. No, sir.

Q. And you were the conductor for that purpose were you? A. Yes, sir.

Q. And he was working under you? A. Yes, sir.

Q. How long had he been working for you? A. Well, he was on that job with me about six months.

40 Q. And all the time within the yard as brake-

Walter Marks—Cross

man for cars that were sent there for the purpose of being repaired? A. Yes, sir.

Q. Is there a shop there? A. Yes, sir.

Q. Who owns the shop? A. The Lehigh Valley Railroad.

Q. That is a regular repair shop, is it? A. 10
Yes, sir.

Q. And there are no cars sent to that yard excepting cars that are sent there to be repaired?

The Court: That is all I have.

By Mr. Lyon: Q. Didn't he, in the course of his employment, work on other cars than those that were sent to the shop? A. Before he worked with me?

Mr. Brown: I object to that.

Q. No, during that day. During that time? 20
Didn't he ever handle cars in that yard except cars that were to be repaired? A. Oh, sure he did.

Q. This was the general terminal yard of the Lehigh Valley Railroad, wasn't it? A. Yes, sir.

Q. At Perth Amboy? A. Yes, sir.

Q. Where the cars come in from the coal regions and are dumped, isn't that so? A. Yes, sir.

Q. And where they are sent back empty? A. 30
Yes, sir.

Q. And cars that need some repairs to them as they come in and are dumped are repaired right there in that yard, aren't they? A. Yes, sir.

Q. At the shop which is in the general yard, isn't that so? A. Yes, sir.

Q. So that frequently he did handle cars that 40

Walter Marks—Cross

did not go to the repair shop, isn't that so? A. Yes, sir.

By Mr. Brown: Q. But on this particular morning you were handling, the time he was injured, they were all repair cars, cars to be repaired that you were handling? A. Not all.

10 Q. Well, at that particular time the cars you had were on that track? A. The cars were on that track, on "Y six" track was cars to be repaired.

Q. And the cars that were moving at that time, that you were engaged in moving, were cars to be repaired? A. Yes.

Q. And that was not on the main line, was it, that track? A. No, it wasn't on the main line.

20 Q. That is what they call a storage track, as you said before? A. Yes.

Q. Your answer is yes? A. Yes.

Q. And as storage when they got time they took the cars from that track and you shoved them into the shop? A. Yes, sir.

Q. And that is what you were doing at that time? A. No, sir.

Q. Well, you were putting them on the storage track to be left there to be shoved into the shop? A. The track had to be shoved down a little.

30 Q. That was what you were doing, so as to put other cars in there? A. Shoving them down to clear the crossing there.

Q. And that is all you were doing at that time? A. Yes, sir.

Q. And he was injured while you were shoving those crippled cars on the storage track down so as to clear the crossing? A. Yes, sir.

40

Walter M. Blocker—Direct

Q. And preparatory to sending them to the shop?

Mr. Lyon: Now, I have not objected to Mr. Brown's leading questions.

Mr. Brown: That is all.

Mr. Brown: That is all we have at this time.

10

Respondent's Testimony

WALTER M. BLOCKER, a witness produced on behalf of the respondent, being duly sworn according to law, on his oath, saith:

20

Direct-Examination by Mr. Lyon:

Q. Mr. Blocker, where do you live? A. Perth Amboy.

Q. What is your business? A. General Yard Master, Lehigh Valley Railroad.

Q. How long have you been General Yard Master of the Lehigh Valley Railroad? A. Fifteen years.

Q. Are you yard master of the yard that was referred to by the last witness, Mr. Marks? A. Yes, sir.

30

Q. What sort of a yard is that? A. Particularly light car yard. The designated track referring to is a track where we assemble the shop cars from all directions and from there they are taken, when room offers, in the shop, placing the different tracks in the shop for repairs.

40

Walter M. Blocker—Direct

Q. Mr. Marks said in his testimony that he gave you the numbers of the cars which he pointed out as the cars on which Brinsko was working. Did you take—

10 Mr. Brown: I object to that. That is not the testimony. He said three cars, and he took the numbers of them. It appeared by his testimony that he was only on one car that he had to the engine. He mentioned those three cars that they pulled off, he gave the numbers of them.

Q. Well, the three cars then that Mr. Marks referred to as having given you the number, did you take the numbers? A. I did, yes, sir.

Q. And have you the memorandum you made 20 at the time? A. I have, yes, sir.

Q. Will you produce it and say what the numbers of the cars were?

Mr. Brown: How is this material?

The Court: I do not know, and I will admit it.

Mr. Brown: And how can you be bound by numbers that Mr. Marks gave this man? Isn't that hearsay testimony?

The Court: It is.

30 Mr. Brown: I object to that for that reason.

The Court: I will admit it. This is a summary investigation.

Mr. Lyon: I respectfully submit it is not hearsay testimony. It is for the purpose of identifying the cars, because the witness said that he gave to this man the numbers. I am asking this witness what those numbers were his witness said he gave to him. 40

Walter M. Blocker—Direct

The Court: How can that prove from the lips of this man what the numbers were except by hearsay?

Mr. Lyon: By identifying the cars. This man Marks pointed out to this witness the cars. 10

Q. Where did you take the numbers from, from the cars, or from Marks? A. First took the numbers from Marks. Afterwards went there and looked at the cars. Looked them over.

Q. How did you know which cars they were that injured Brinsko? A. From the numbers that he had given me. I went there and checked them up.

Mr. Lyon: Simply a method of identifying the cars. 20

The Court: I know, but he is relying upon his identification from what someone said to him.

Mr. Lyon: The cars are identified.

The Court: By the other witness?

Mr. Lyon: Yes.

Q. What are the numbers?

Mr. Brown: Just one minute. As I understand there is only one car, the car he was riding on, and that is the car number, Lehigh Valley 26,173. 30

The Court: I will admit it. When we argue it, I will consider the weight to be given to this testimony. As I recall it, the last witness said there were certain cars, giving the numbers. Now, then, this witness is practically being asked did you look at cars numbered so and so, and so 40

Walter M. Blocker—Direct

and so. For the purpose of being further asked what kind of cars they were, as I understand it?

Mr. Lyon: Yes.

10 Q. What were the numbers of the cars, Mr. Blocker? A. Lehigh Valley, 26,173, followed by Pennsylvania Line 693,771, followed by Philadelphia and Reading 80,024. The cars that he had come out from under, the third car.

By the Court: Q. How do you know that that is the car he came out from under? A. From what the man told me.

Q. Which man?

Mr. Brown: I move that be stricken out.

20 Mr. Lyon: Well, which man? If he says it is the last witness, I think it is competent, because the last witness has identified the cars by number.

Mr. Brown: He said he was injured on 26,173.

The Court: This man does not say what car he was injured under, because he did not see him under.

30 Mr. Lyon: I know it, but that is not my point. I am simply connecting up the identity of the cars with the testimony of the last witness. Of course, but for the testimony of the last witness it would not be competent.

40 The Court: It is perfectly competent, Judge, for you to ask this witness what kind of cars were cars of certain number, who they belonged to, that is proper and I am admitting that.

Walter M. Blocker—Direct

Q. What sort of cars were these three cars, Mr. Blocker? A. Coal cars.

Q. You knew Brinsko, did you? A. I did.

Q. What was his business generally in the yard there? A. Trainman, or more commonly known as brakeman.

Q. Brakeman on what class of cars? A. On all classes of cars.

10

Q. Where did these cars, speaking generally, come from, that come to your yard?

Mr. Brown: I object to that. If there is a record of where they came from we ought to have the record.

Mr. Lyon: We will produce it, Mr. Brown. I am trying to show the character of the yard generally.

20

The Court: Proceed.

A. Presumably from the mines, or connecting roads.

Q. Well, now, this is the terminal yard, isn't it, of the Lehigh Valley? A. Yes, sir.

Mr. Brown: I think that is very leading.

The Court: Of course it is leading. but this is a summary investigation.

What kind of a yard was this?

30

Q. As to the character of cars that come in and go out, Mr. Blocker? A. The character of cars coming in and out?

Q. The character of yard as to the cars that come in and go out? A. At this particular spot?

Q. No, the yard generally.

Mr. Brown: I object to that.

The Court: Objection sustained. You under-

40

Walter M. Blocker—Cross

stand that question. You say that you are general yard master there. What kind of a yard is it? That is the question.

A. A switching yard and receiving yard.

Q. General receiving yard. For what purpose?

10 All classes? A. All classes of commodities, coal, freight and everything.

CROSS-EXAMINATION by Mr. Brown:

Q. But this place where he was injured is not the general receiving track? A. Known as the receiving track for crippled cars.

Q. What you mean by that, it is a storage track to put cars on until you are ready to repair them? A. Receiving track for crippled
20 cars; yes, sir. Assembling them on the track.

Q. It is a side track, or storage track, isn't it? Isn't it a storage track to store crippled cars on until you can repair them? A. Yes, sir.

Q. And that is where this man was injured, at the time he was injured, as far as you know, was on that storage track?

The Court: He does not know where he was injured.

Mr. Brown that is all.

30 Mr. Lyon: That is all, Mr. Blocker.

By the Court: Q. Was this man's work confined to work upon this storage track, Mr. Blocker? A. Yes.

Q. Altogether at all times? A. Oh, not at all times, on this particular track in that particular territory. On the numerous tracks.

Q. Was his duty to protect crippled cars, or
40 was it his duty to take care of all kinds of cars

Walter M. Blocker—Cross

that came in the yard? A. All kinds of cars that come in that particular territory under his part of the work.

Q. Yes, but was his part of the work confined, when you talk about territory, was it confined to that territory which was used for crippled cars? 10
A. Not altogether. He was all over the yard.

Q. He was all over the yard? A. All over the yard, yes, from—three or four or five or six different sections of the yard.

Q. Taking care of all kinds of cars, be they in poor condition, be they loaded or unloaded, is that right? A. Yes, sir.

Q. But at the particular time of the accident, or injury, he was engaged in working on this storage track, which was a track for storing crippled cars, is that right? A. Yes, sir. They were putting cars on that particular track. 20

Q. You had a repair shop in this yard, did you? A. Yes, but not connected with this track. It is an auxilliary track where we assemble them and from there we took them and delivered them to the different shop tracks.

By Mr. Brown: Q. Those shop tracks are side tracks too, aren't they? A. No.

Q. The shop tracks are switch tracks that go into the shop? A. Yes. 30

Q. On this particular day, that is, from the time he went to work in the morning until the time he was injured, he was working on the crippled storage track, wasn't he, putting cars there?

A. That I cannot say.

Mr. Lyon: That is all, Mr. Blocker. 40

William Dagon—Direct

WILLIAM DAGON, a witness produced on behalf of the Respondent being duly sworn on his oath, according to law, saith:

Direct-Examination by Mr. Lyon:

10 Q. What is your business, Mr. Dagon? A. Working for the Lehigh Valley Railroad Company.

Q. In what capacity? A. Trainman and extra conductor.

Q. Were you employed by the Lehigh Valley in December, 1913? A. Yes, sir.

Q. In what way? Between what points? A. Why from Easton, Jersey City, Lehigh, Perth Amboy.

20 Q. Did you handle Lehigh Valley car number 26,173 on or about the sixteenth of December?

Mr. Brown: I object to that. We ought to have the date, if he has got it. If there is a record of it, the record is the best evidence.

A. On or about December sixteenth?

Q. Yes? A. I handled it in December.

Q. What date? Have you got your record?

A. Yes, sir; the fourth day of December. De-
30 livered to Amboy on the fourth day of December.

Q. Where did it come from? A. Packerton?

Q. Did you handle it after that? A. No, sir.

Q. What was it loaded with? A. Coal.

Q. Came from where? A. From Packerton.

Q. Packerton where? A. From Pennsylvania. well I suppose it originated from some of the mines, but that is where I got it from, from
40 Packerton.

Owen Culton—Direct

- Q. On what date did you get it at Packerton?
 A. I got it on the night of the third and I left there at 9:05 p. m.
 Q. When did you arrive in Perth Amboy? A. 11:25 on the fourth.
 Q. Did you see the car after that? A. No, 10 sir.

Mr. Lyon: Cross-examine.

Mr. Brown: No questions.

OWEN CULTON, a witness produced on behalf of the Respondent, being duly sworn on his oath, according to law, saith:

20

Direct-Examination by Mr. Lyon:

- Q. Mr. Culton what is your business? A. Conductor.
 Q. For what company? A. On the Lehigh Valley.
 Q. How long have you been such? A. Since eighty-eight.
 Q. Were you such in December, 1913? A. Yes, sir.
 Q. Did you handle on or about December 16th, 1913, Lehigh Valley car No. 26,173? A. Yes, sir; on December seventeenth. I took 26,173 from Perth Amboy to Packerton. 30
 Mr. Brown: I object to that. I move the answer be stricken out.
 The Court: Why?
 Mr. Brown: For the reason that it is after the date of the accident, and we are not bound by it. 40

Owen Culton—Direct

The Court: When was the accident?

Mr. Brown: On the sixteenth.

The Court: He says he handled that car on the seventeenth.

Mr. Brown: Yes.

10

The Court: I do not know what evidential value that has, Judge.

Mr. Lyon: It surely shows that this car was engaged interstate traffic. It came from the mines a few days before.

The Court: Why don't you show that he knows what that car was used for before the time of the accident?

Q. What sort of a car was this? A. Steel coal car.

20

Mr. Lyon: The last witness testified it came in.

The Court: I know, but you are trying to get from this witness the use that car was put to before the accident. And if he knows what use it was put to before the accident, then it is competent testimony as to what use it was put to after the accident, as corroboration.

30

Mr. Lyon: On that I have an offer that I would like to submit to your Honor on this line.

The Court: I will admit the question for what it is worth.

(Question repeated by the stenographer.)

Q. Packerton where? A. Packerton, Pennsylvania.

Q. What sort of a car was it? A. Coal car, 40 steel.

David Hornecker—Direct

Q. Was it loaded or unloaded? A. Empty.

Mr. Lyon: That is all.

Mr. Brown: That is all.

10

DAVID HORNECKER, a witness produced on behalf of the Respondent, being duly sworn on his oath, according to law, saith:

Direct-Examination by Mr. Lyon:

Q. Mr. Hornecker where do you live? A. Lehighon, Pennsylvania.

Q. What is your business? A. Conductor.

Q. For the Lehigh Valley Railroad? A. Yes, sir.

20

Q. How long have you been such? A. About fifteen years.

Q. Were you conductor for the Lehigh Valley Railroad in December, 1913? A. Yes, sir.

Q. Did you handle Pennsylvania car, No. 693,771 on the Lehigh Valley road, on or about the sixteenth of December, 1913?

Mr. Brown: I object to that.

The Court: I will admit that question.

A. I brought the—

30

Mr. Brown: We are not concerned about that car.

The Court: I will admit that question.

A. I brought that car from Packerton to Perth Amboy on December eleventh.

Q. Packerton where? A. Packerton, Pennsylvania, to Perth Amboy.

Q. On December eleventh? A. Yes, sir.

Mr. Lyon: Cross Examine.

40

David Hornecker—Cross

By the Court: Q. Which car? A. Pennsylvania Line car.

Mr. Lyon: The one I numbered.

The Court: You only numbered one?

10 Mr. Lyon: Yes, sir, I am confining myself to the three cars which were hooked together which this man was operating.

20 Mr. Brown: I object to that. There is an assumption there that is not correct. And I corrected it when Judge Lyon first drew the witnesses' attention to it. There was only one car fastened to the engine. This man went into a line and got three cars. Two of them were good, I believe his testimony was, and that he took this other car, and pushed the string of cars that this was working on, and pushed them down the storage track, and he was killed or run over by 26,173.

Mr. Lyon: Your Honor has admitted the question. That is all. As I understand the testimony of this witness, and as admitted by the Court is that he moved Pennsylvania 693,771.

30 The Court: On December eleventh, from Packerton, Pennsylvania.

CROSS-EXAMINED by Mr. Brown:

Q. Perth Amboy was its destination, and that is as far as it was to go? A. Yes, sir.

By the Court: Q. Was the car loaded or unloaded on December eleventh? A. Loaded.

40 By Mr. Lyon: Q. With what? A. With coal.

George Houser—Direct

GEORGE HOUSER, a witness produced on behalf of the Respondent, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Lyon:

Q. Mr. Houser where do you live? A. Wyess- 10
port, Pa.

Q. Pennsylvania? A. Yes, sir.

Q. What is your business? A. Conductor.

Q. Of what? A. Lehigh Valley Railroad.

Q. And were you such in December, 1913? A.
Yes, sir.

Q. On or about December 16th, 1913, did you
handle Pennsylvania car number 693771? A.
Yes, sir.

Mr. Brown: I object to that. We ought 20
to have the date, if they have a record of
it, and there is no use of speculating.

The Court: I will admit it.

Q. On what date? A. I handled it on the
eighteenth of December.

Mr. Brown: I object to that and move
the testimony be stricken out as not rele-
vant.

The Court: I will admit it.

Q. Where did you move it on December eight- 30
eenth? A. From Perth Amboy to Packerton.

Q. Pennsylvania? A. Yes, sir.

Q. Was it empty? A. Yes, sir.

Q. What sort of a car was it? A. Coal car.

Q. Did you on or about December Sixteenth,
1913 handle P. & R. car number 80024?

Mr. Brown: I think we ought to have
the date.

A. Not on the 16th; on the 18th. 40

Otto Anderson—Direct

Q. Where did you move it on the 18th? A. From Perth Amboy to Packerton.

Q. Packerton, Pennsylvania? A. Packerton, Pennsylvania; yes, sir.

Q. What sort of car was that? A. Coal car.

10 Q. Was it loaded or empty? A. Empty.

Mr. Lyon: Cross-examine.

CROSS-EXAMINATION by Mr. Brown:

Q. You don't know where either of those cars came from, do you? A. No, sir.

Q. You don't know whether they were used for any other purpose, or stored, anywhere, or anything of that kind, do you? A. No, sir.

20 Q. The only thing that you know is that on this particular date you took them in a train to Packerton, light? A. Yes, sir.

OTTO ANDERSON, a witness produced on behalf of the Respondent, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Lyon:

30 Q. What is your business, Mr. Anderson? A. Conductor.

Q. Where do you live? A. Perth Amboy.

Q. Were you a conductor on the Lehigh Valley Railroad in December, 1913? A. Yes, sir.

40 Q. Did you on or about December 16th, 1913, and if so, on exactly what date, handle P. & R. car number 80,024? A. Yes, sir. I moved P. & R. 80,024, from South Plainfield to Perth Amboy.

Otto Anderson—Cross

By the Court: Q. On what date? A. December 11th.

By Mr. Lyon: Q. Did you handle it in any other place? A. No, sir.

Q. What was it loaded with, if anything? A. Coal. 10

Q. Where did you get it? A. At South Plainfield.

Q. Did you get it from any other train? A. No, sir.

Q. Was it standing there? A. It was standing there.

Mr. Lyon: Cross-examine.

CROSS-EXAMINATION by Mr. Brown:

Q. This car that you speak of—South Plainfield 20 is a storage yard, isn't it, for the Lehigh Valley Railroad Company? A. They have a storage yard, but this car wasn't stored there. It was drilled out of South Plainfield and was repaired—

Q. Did I ask you anything about repair? A. No, sir.

Q. You don't know where this car came from, do you? A. Know it came from Pennsylvania 30 somewheres.

Q. You don't know that, do you? A. Somewhere out of the state. I don't know where it came from.

Q. You went to South Plainfield and there are a number of tracks there that cars are stored on? A. Yes, sir.

Q. And when you get an order to go up and get a certain car, you go up and get it? A. Yes, 40 sir.

Otto Anderson—Cross

Q. And sometimes the cars stay there for a long time before you get them, don't they? A. Well, they do sometimes.

Q. Sometimes they are stored there to await the rise of price in coal, or for some other reason, before they are taken, is that right?

10

Mr. Lyon: I do not suppose this witness knows.

A. Well, they store some coal there. They don't store it all.

Q. They store coal there? A. Yes.

Q. They have dumping piles there too, don't they? A. Yes, they have dumping piles.

Q. Sometimes they take it out of the cars and dump it there, is that right? A. Yes, sir.

20

Q. And sometimes they leave it in the cars and store it there? A. Sometimes they do that.

Q. And this was one of the cars they left their coal in and stored it there and then you went there and got it? A. I might say that.

Q. Well, do you know or don't you? A. That was a foreign car.

Q. I didn't ask you whether it was foreign car or domestic car, or whether it was an allied car.

30

A. It came off a foreign road.

Q. I know, but they use those cars, don't they, around in their business from place to place? A. It was soft coal, bituminous coal.

Q. Well, they used them from place to place? A. Yes, but they don't store only bituminous coal at South Plainfield.

Q. They don't? A. No, sir.

Q. They use that for their engines, do they?

A. This was an individual car for Perth Am-
40 boy.

Walter Marks—Direct

Q. Perth Amboy? A. Yes, sir.

Q. Did you ship it to anywhere or where did you bring it to? A. I didn't ship it. I just brought it in from South Plainfield and put it in the receiving yard.

Q. And then you left it there? A. Yes, sir. 10

Q. The Lehigh Valley don't use soft coal? A. Oh, they use it, but they use it for their engines.

Q. You don't know where this car went to or what its destination was, do you? A. Destination was Perth Amboy.

Q. And when it was brought there that was all of it? A. Yes, sir.

Q. That was the end of that trip, is that right? A. Yes.

Mr. Brown: That is all. 20

WALTER MARKS, re-called:

Direct-examination by Mr. Lyon:

Q. Mr. Marks, you say that the deceased, John Brinsko, was a brakeman? A. Yes, sir.

Q. What was his duty on this morning when he was injured, as to braking cars? What did he actually do as to braking cars? A. Why, his duty was, if there was brakes on the cars to take the brakes off. 30

Q. Was there a brakeman for each car? A. No, sir.

Q. How many cars, if more than one, did Brinsko work on and control with his brake? A. One car. 40

Walter Marks—Direct

Q. Were there any cars connected with that car? A. No, sir.

10 Q. Didn't you say on your former testimony that there were two other cars hooked together with that car? A. The way it was we got—the car he got cut off with was one car, it was a box car. And then there was a "bill" to go back on the same track, and I took that back, and that left one car next to the engine. He was backing down with the two cars with the engine down on the shop track.

Q. How is that? A. I say he got cut off with one box car.

20 Q. He got cut off with one box car? A. Yes, sir. There was a bill to go back to the "North of Sea," and I rode that "bill" back. There was one car next to the engine that we had, and Brinsko was backing down this shop track with two cars, and the shop track had to get shoved in a little, and that is what he was doing when he got hurt, shoving the shop track in a little.

Q. In what position at the time that he was injured were these two other cars, Pennsylvania and P. & R.?

30 Mr. Brown: Haven't we been all over this?

Mr. Lyon: You have on your direct-examination. I am examining him now as my witness.

Mr. Brown: I know, but you examined him on cross-examination. I think that exhausts the witness.

40 Mr. Lyon: Oh, no, it does not.

Walter Marks—Direct

The Court: Proceed. I will admit the question.

Q. In what position were these other two Pennsylvania and P. & R. cars at the time he was injured.

Mr. Brown: He did not say they were 10
Pennsylvania and P. & R., and I object to
the question.

Mr. Lyon: He did too, and gave the num-
bers.

Mr. Brown: Not on this examination,
and that is just where the confusion arises.

Q. You mentioned on your examination when
you were called for the Petitioner that there were
two other cars, Pennsylvania and P. & R.? A.
Yes. sir. 20

Q. Where were they in reference to the Lehigh
Valley car at the time he was injured? A. Why,
they were the second and third car behind the
Lehigh Valley car.

Q. Were they right next to the Lehigh Valley
car? A. Yes, sir.

Q. Were they joining it? A. Yes, sir.

Q. Were, or were they not hooked together,
with the Lehigh Valley car? A. They were all
hooked together with the Lehigh Valley car. 30

Q. Well, did Mr. Brinsko's controlling the Le-
high Valley car with the brakes have anything
to do with the Pennsylvania and the P. & R.? A.
What do you mean by putting the brake on the
Valley car?

Q. Yes? A. No, sir.

Q. Why not, if those other cars were hooked
together with the Lehigh Valley? A. Well, the 40

Walter Marks—Direct

way I looked at it, there wasn't no brakes necessary to be put on there.

Q. Well, suppose there were necessary brakes to be put on, and he had put the brakes on the Lehigh Valley car, would that have controlled also
10 the Pennsylvania and the P. & R. car? A. Yes, sir.

Q. Why? Because they were hooked together?

Mr. Brown: I object. This is leading, and it is based on direct-examination.

The Court: He is a practical man. He is a railroad man.

Mr. Brown: It is a presumption that does not exist.

Mr. Lyon: Very well, I will withdraw it.
20

The Court: No. I will admit it. This man is a railroad conductor. He knows why the three cars were together, and each car, as I understand his testimony, has its individual brake. If the brake is worked on the car ahead, and there are two behind it, necessarily that stops the three cars, or impedes the progress of the three cars. However, I will admit the
30 question.

Q. Now, will you answer the question? You say that by putting the brakes on the Lehigh Valley car it would have controlled the other two cars. Now, why would it have done so? A. Why, it stands to reason, you put the brake on the head car it will hold the two behind it.

Mr. Lyon: That is all.
40

Walter Marks—Cross

CROSS-EXAMINATION by Mr. Brown:

Q. There were two tracks, you say, a "Y 6," the storage track, and some other track?

Mr. Lyon: Let me ask one other question along this line?

By Mr. Lyon: Q. Were there any other cars 10 hooked with those three cars? A. Behind them?

Q. No. At that time? Either side of them? A. Yes, there was some more cars behind them.

Q. How many more cars were behind them? A. I don't know. I didn't count them. Ten or twelve, I guess, behind them.

By Mr. Brown: Q. And they were all cars that were stored there to be repaired? A. Yes, sir.

Q. Brinsko got injured on the Lehigh Valley car? A. Well, the Lehigh Valley car was the 20 first car to injure him.

Q. When you say those cars were together you mean that they were all in that cross track? A. Yes, all coupled together.

Q. With ten or twelve cars behind them, and those two cars in there, and this other Lehigh Valley car ahead of it? A. Yes, sir.

Q. And still cars ahead of that again? A. Yes,

Q. And he was riding the head end of the car 30 at the time that he was injured? A. Yes.

Q. And the cars were being pushed down on this storage track at this time so as to make room to clear the crossing? A. Yes.

Q. That is the only reason you went in there was to push them down on the storage track so as to make room for the crossing? A. That is all. 40

Leander W. Schoonover—Direct

LEANDER W. SCHOONOVER, a witness produced on behalf of the Respondent, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Lyon:

10 Q. Mr. Schoonover you live in Perth Amboy?

A. Yes, sir.

Q. And have for how many years? A. Thirty-nine years.

Q. What is your business? A. Shop foreman.

Q. For what company? A. Lehigh Valley railroad.

Q. Can you tell from your records, Mr. Schoonover, of the movement of Lehigh Valley car 26173, Pennsylvania car 693,771, and P. & R. 20 80024 in December, 1913, between December 4th and December 18th? A. These cars were on track—

Mr. Brown: I object. That is not an answer.

Q. Do you know what was the movement, do you know of your own knowledge what was the movement of these three cars at those dates?

Mr. Brown: I understand he has got a record of it. He says he has got a record of the movement.

30

Mr. Lyon: I do not know whether he has or not. I am asking him to tell the movement from his own knowledge, or from any record.

A. The first we moved one of those cars we found, they were found as crippled cars on the storage track number six. Number six storage 40 track, the cars are taken off and put on the

Leander W. Schoonover—Re-direct

proper repair tracks at the shop; adjoining this track is number seven, number eight, number nine, and then two other tracks along the lumber sheds where the cars are taken from the storage tracks as they are needed, and we have room for them and put on there and repaired. These three 10 cars were placed on our proper repair track and repaired on the 17th day of December, 1913.

Q. Now, have you any record, or can you tell in any way when they came in from the nine and onto these tracks? A. I have no record of that; no, sir.

Q. Do you know? A. No, sir.

CROSS-EXAMINATION by Mr. Brown:

Q. Those cars were first placed on a storage 20 track, weren't they? A. Yes, sir.

Q. And then you take them and put them on a repair track? A. Yes, sir.

Q. And then you repair them? A. Yes.

Q. And then wherever you are directed to put them you put them after that? A. Then our shop engine takes them all and they are placed on the tracks on the movement orders, under the orders of the yard master.

Q. They may be sent to South River, Jersey 30 City, or you don't know where? A. I am not familiar, I am not advised where they go beyond that point.

RE-DIRECT-EXAMINATION by Mr. Lyon:

Q. Are you familiar with the operation of the cars there in the yard that come in from the coal mines? A. Generally; yes, sir. 40

Leander W. Schoonover—Re-direct

Q. Is it the sustom to use those cars for any purpose except the transporting of coal between the mines in Pennsylvania and Perth Amboy?

Mr. Brown: I object. That is clearly leading.

10 Mr. Lyon: Oh, no.

Mr. Brown: Oh, I should think it was. it excludes his answering under any condition if he cannot answer yes or no to that.

Mr. Lyon: I withdraw it.

Mr. Brown: What is the custom, ask him that.

Q. What is the custom as to cars that come in loaded from the mines, as to their use? A. Gen-
20 erally they are taken to the dock and coal is removed for shipment, or taken from the local factories, if they are consigned from those points for use at the factories, and if the cars are in good condition, and pass our inspection ready for movement orders, then they are put in trains and moved west.

Q. Are they or not ever used for local traffic? A. Rarely, if ever. There is a few cases, but
30 rarely. Possibly for loading uses, but not any foreign cars. We don't use any foreign cars for loading uses in the yard. Sometimes the Lehigh Valley coal cars are used for that purpose, but very rarely.

Q. Do you know whether or not these three cars in question were used at any time in the month of December for local traffic? A. No, sir; I do not.

40 Q. You don't know whether they were or

Leander W. Schoonover—Re-cross

not? A. I don't know whether they were or not; no, sir.

Mr. Lyon: That is all.

RE-CROSS-EXAMINATION by Mr. Brown:

Q. Mr. Schoonover, the Lehigh Valley has business all through the state here doesn't it? Jersey City, and Plainfield, and South River, and send their cars all over, do they not? A. I don't know about South River. 10

Q. Well, they send their cars all over wherever there is any—A. Wherever it is consigned to; yes, sir.

Q. So that when a car comes in, no matter from what quarter, after it has reached its destination, that is the end of it? A. I suppose that 20 is the end of it for that trip.

Q. So that when they put it in motion again for any other business it depends upon where they send it to? It may be local, or it may be out of the state, or it may be in Jersey City, the foreign cars? A. No, no, not coal cars. A coal car would go back to mines for proper loading.

Q. Don't they use coal cars for anything else but coal? A. They do sometimes, but rarely. 30

Q. You won't say that those cars could not have been used for any other purpose than for coal, would you? A. No, I couldn't say positively.

Q. And when the cars came into your place you didn't know where they were going, did you? A. Well, really after we repair the cars, then our part of the operation ended, yes.

Q. So that those cars, from the time that they 40

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had come in with coal, and had ceased that track, after that they were placed in storage for repairing, and you didn't know where they were going to be sent? A. No. I had reasonable knowledge that they would go back to the mines, although
10 I wasn't positive of that.

Q. If they came in on a train and went right out again, and were used in the traffic, you would see that surely, wouldn't you? A. Yes.

Q. But being placed in the storage line you didn't know where they were to be sent? A. Well, storage was simply held for repairs, you know, until we had an opportunity or room on the shop tracks to move them in.

Q. And then after they were repaired you
20 were to send them wherever directed? A. That movement was under the orders of the yard master. Of course, we just simply moved them away from the shop.

Mr. Brown: That is all.

Mr. Lyon: That is our case.

Respondent rests.

The Court: Anything further?

30 Mr. Brown: That is all.

Mr. Lyon: I have a number of authorities, but not in such state that I would like to present them to your Honor as a brief this morning, because they have other matters connected with them.

I want to say however, in support of the defendant's case, that the testimony shows that these cars on which Brinsko was working were
40 cars engaged in interstate commerce.

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The testimony is, at this point, that they came in from the mines loaded with coal, a few days before the accident, two of them which the deceased was operating came in on the 11th, and went back to the mines the next day, I think it was. Lehigh Valley car number 26173, on which he was injured, came in from the mines on December 4th and went back on December 17th to Pennsylvania, engaged in interstate commerce. The Pennsylvania car 693,771 came in on December 11th and went back December 18th. The P. & R. car 80,024 came in December 11th and went back December 18th. And the testimony shows that they were engaged in this interstate commerce business. No doubt about that. The fact that the cars were sent to the shop for some temporary repairs in the meantime does not affect their standing as interstate cars. The cases are numerous which indicate that the switching of a car, or doing anything that is necessary to it in the course of its movement, does not, of course, change its character as an interstate commerce car. There was a case decided by the United States Supreme Court, Johnson vs. the Southern Pacific Railroad, which is reported in 196 U. S., page 1, where the injured was a brakeman engaged in interstate commerce, and the particular act that he did when he was injured was the shifting of an empty dining car in the yards, to go back to the place from whence it came. It was not occupied by anybody. And the Court held that he was engaged in interstate commerce.

There was a case in the Court of Common Pleas of Jersey City—I do not suppose it is a

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precedent, because it was held by Judge Tennant in Jersey City. I have a full report of the case and facts and determination, where the case was much like this one, as a matter of fact. The man was engaged in working with a yard engine
10 known as the Constable Hook extra, and was used for transferring cars on the West Shore connection on the National Docks branch of the yards of the Constable Hook extra. I will not read this, because it may be that Your Honor would prefer me to submit these authorities upon this question. It is a sharp point as to whether or not this man was engaged in interstate commerce, and whether these cars, about which there is no doubt now as to their dates, did
20 constitute interstate commerce.

The Court: In that case that you cite, Judge, about the dining car, where the man met an accident and was injured while shifting that car in the yards, did his duty embrace work that carried him outside the state?

Mr. Lyon: No, sir; he was a yard man.

The Court: Simply a yard man?

Mr. Lyon: Yes, sir. Same as this man exactly.
30 That is my point. I will not go into the authorities. Providing your Honor will allow me permission to submit the authorities?

The Court: Yes.

Mr. Brown: The authorities in regard to cases of this kind have all been decided since the year 1906, and those decisions have been rendered because of the seeming conflict between commerce that is intrastate and commerce that is interstate. The Federal Employer's Liability Act,
40

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which is the only act which can be offered as a defense in this case and as controlling on the petitioner, or the decedent, as to his line of employment, that Act was declared unconstitutional, because of its far reaching provisions, and one of the provisions was that it contemplated, 10
or intended, or did actually seek to regulate intrastate commerce, and the cases since that time have been quite numerous and they all go to the point of whether or not the person who is seeking a remedy was engaged at the time in interstate commerce at the time he was injured. The Court will find that there has been a very close distinction drawn. Not only must the thing itself, for instance, be engaged in that line of business, but also the man himself, or person, must 20
be engaged at that time, and at the particular time that he was injured. One of the leading cases is the case of Pederson vs. Delaware, Lackawanna & Western Railroad, that seems to be one of the cases that established the relation, and in the case of Pierson against New York & Susquehanna Railroad Company, which is a Court of Errors and Appeals case in this State, decided in 1912 by Justice Gummere, that was a case in 30
which the defendant railroad company had—this is answering the point of the instrument being put up for repair—that was a case in which the defendant railroad company was engaged in interstate commerce. The tracks of the railroad ran from a place in Pennsylvania, or New York state into New Jersey, and the defendant company had purchased rails in the State of New York and had them shipped in its cars from New 40

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York State into New Jersey for the purpose of repair, that is, repairing the tracks, the interstate commerce tracks. That the cars came in loaded with those rails. I do not know whether your Honor is familiar with that case or not.

10 The cars came in loaded with these rails and were put on a side track, and a few days afterward they were taken from that track and put over on another track for the purpose of unloading the rails to repair the interstate commerce line. Justice Gummere in that case said this: "The first"—

The Court: Where is that reported, Mr. Brown?

Mr. Brown: I have that in 85 Atlantic Reporter at page 233. After Justice Gummere reviews the effect of the act of 1906, and the purpose of the act of 1908, he points out the distinction, and he decides this case, and his contention in this case, the decision, although seemingly overcome by a later case, if you read the present case in the light of the Pederson case, which was afterward decided by the Supreme Court, it might be taken there was a conflict in the decisions, but if your Honor reads one of the last cases decided by

30 the United States Supreme Court, the case of the Illinois Central Railroad Company against Behrens, your Honor will find Justice Gummere's reasoning in that case has controlled the United States Supreme Court's ruling, because they have recently in the same case gone along the same line of reasoning that he has, and in that case of the Illinois Central Railroad Company, within the Circuit Court of Appeals of the United States, stated

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that the particular switchman or yardman was engaged in interstate commerce, but the Supreme Court of the United States said, no, you are going too far with this, you have got to show that not only was the car engaged in interstate commerce, and the instrument for that purpose, but at that time that the man was injured that it was, and that he was working as a connecting link at that time. The instrument and the man and everything else must, at the time of the injury, be all engaged in interstate commerce, because otherwise, if the Court gives the far reaching effect that is intended by the argument of my opponent, there would not be such a thing at all, unless a car goes into a through line, as being in any other condition than interstate commerce, and could be designated as an instrument used in that particular business. Justice Gummere says this, referring to the Act of 1908, or 1906, and I say it was overruled: (Reading case).

My opponent would have the Court impressed with the idea that in the repair of the tracks, or the cars—it is true that there are cases where you can show that the instrument, like a bridge is constantly used, or something of that kind that in those cases, where the instrument is kept right in the traffic; and has to be used for nothing else, and while it is engaged in that commerce they make the repair, then it might be said that it was incident to the business, and those men are employed for that purpose, and the instrument was too. But in this case you have a man who was not employed for that purpose. You have a man who was locally situated, although sometimes he did business engaged possibly in the

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link of interstate commerce, but in this particular moment he was not. The cars had reached their destination. They were placed on a storage track. Their interstate commerce journey was finished. It had been put an end to. They were then to be repaired. Where they were to go after that, the fact that some of them did go back, or they all did go back, does not connect the link with the original termination of the traffic. As the Court says in this case, when the rails came in and the cars came in, commerce had ceased as far as these cars were concerned. And the same was the case with those particular cars, and this man, at the time he was moving them. They were on a storage track, and then they were removed over to a repair track, and then they were put somewhere else. It cannot be said that those cars were exclusively, at that time, engaged in interstate commerce. My idea of it is—although it may not impress the Court—that those cars had ceased at that time to be an instrument of any kind. They were to be repaired. That they had ceased their journey. They had been taken out of commerce. And that after they were repaired and fixed up, then they were to be put back in commerce. It cannot be said that they were absolutely designated and submitted at all times, during the time of repair and everything else, to interstate commerce. They were taken out of commerce. By chance they went back in commerce, but by chance, according to the testimony before your Honor; there is nothing exclusive about that interstate commerce trade,

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they may have been used for a thousand other purposes. They may never have been repaired again, for that matter. I say that that ended at the time they were put in, and that their commerce, as far as interstate commerce was concerned—and that after this man got hold of them, that they were dead features, out of all commerce, and that they were put there in storage until they got a chance to repair them, and then they were to repair them. Where they went after that, there is no evidence, except that they were put in this train and went back to the mines. And whether they went back to the mines to go back to the destination from where they came, or other use, that is left to inference. But the point we make is that those cars were put in storage and taken out of trade, and that this man, at the time, was not engaged as a link in interstate commerce. 10 20

The Case of Illinois vs. Behrins, that is a very close case, and the Circuit Court of Appeals of the United States, deciding this case, stated that the man, or switchman who was engaged in switching cars in the yard, was engaged in interstate commerce, and the Supreme Court overruled it. And they all refer to the Pederson case. The facts in the case were these: (Reading case.) 30

I contend that under these decisions that Brinsko, in this case, was not engaged at the time in interstate commerce. The proof is and the Court can so find it from the hand of this conductor, that these cars were put there for no other purpose on that track. That on that particular morning they were working at nothing else. 40

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There is no testimony that he worked at anything else at all but intrastate commerce, and not interstate commerce, and that he put those cars on that track for storage, and that at the very time that he was shunting those cars down, that the
10 only reason that he was doing it, not as a connecting link in interstate commerce, but to shove those crippled cars down to clear a highway. That is all he was doing at that time. Not as a connecting link. I submit that Brinsko was not engaged in interstate commerce, and we should have our remedy. The Court should be quite jealous. The power of Courts has been extended very much. I may say to my mind it is against
20 Democratic principles to extend it so far and take away from the states the control of acts that are, as was this one, because it leaves us absolutely without a remedy. And if your Honor reads those cases you will find that the Supreme Court of the United States, and the State Courts are viewing those employer's liability acts with liberal construction. The Court must look into the purpose of the act, and in this last Behrins case, the Court says that the judges should look
30 into the purpose of the act. It is not to hold strictly that Congress passed this act to hold strict account over the railroads in regard to the regulation of traffic. They did pass an act during November in regard to that, where the railroads have got to make repairs, and the like of that, but in this particular employers' liability act that is said now to be a defense, the Federal Employer's Liability Act, that act does away
40 with all the common law defenses, and many

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things of that kind. You have got to show some negligence. In this case it seems we would have a hard time showing that, and if the case is thrown out, this lady and her children are without remedy. So that is one more reason, I say, that the Court should not construe the act strictly, but liberally, and this man, engaged as he was in the major part of his time, and particularly all this day, and the particular act he was doing at that time, that it cannot be said, in view of the conductor's testimony, and the absence of any connecting testimony to show that those cars were connected at all times in interstate commerce traffic, that we should receive the benefit of the employers' liability act. If your Honor wants those citations sent in, or if the refreshment I have already made is sufficient, I will not send them in. 10 20

The Court: Well, Judge Lyon has expressed the desire to file a brief and his desire will be acceded to. I would like to get it very promptly. And then you may also file yours. You will interchange your briefs, and let me have them within a week. I believe the Supreme Court has this specific question up before it now. It has been argued from some case in Elizabeth. 30

Mr. Lyon: I think here is the sharp distinction between these cases upon which Mr. Brown so strongly relies, and that is, that after the car in question in those cases had been engaged in interstate commerce, that they then were immediately subsequently engaged in intrastate commerce. That they came into the state in pursuit of interstate commerce, and then the acci- 40

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dent occurred, and then they were used within the State.

Mr. Brown: There is no reference of that kind at all.

Mr. Lyon: Yes, I think so, in that case you referred to.

Now, in all cases a car must be engaged in one of two sorts of commerce, in commerce between the states, or in commerce within the states. Our cars on which this man was operating, were engaged in interstate commerce, between the states. We have proved that they came in and that they went out, and there cannot be any statement that they were engaged in commerce within the state, when they were being moved in the yard, that was not commerce.

The Court: Is that the test, gentlemen?

Mr. Lyon: I think it is.

The Court: Is not the test, what was the extent of the duties of the man? Did his duty extend beyond the state, or was it purely local? It has always been my impression that that is the question upon which the Supreme Court would have to pass. Now, I have not any doubt at all that these cars were interstate, were used in interstate commerce. There is no question in my mind about that. The evidence shows that they were coal cars, and that this particular car had been brought from the mines in Pennsylvania. It also had been brought back to Pennsylvania. And it certainly was used in interstate commerce and I would have to find that as a matter of fact from the evidence. Now, it is true, that it was brought there to this yard and was in a condition that

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needed repair, but this man's work was entirely confined to that yard. Now then, take this as an illustration and see if there is any analogy: A man is employed as a painter by the Pennsylvania Railroad Company and his work is to do whatever painting is necessary between Rahway and Princeton Junction, and that is all, Judge. The railroad stations are included in the scope of his employment. They are used in interstate commerce. People use them to get a train to go to Philadelphia, to go to Chicago, but that man's work is purely local and does not extend beyond the state, and it is necessary, to make the interstate commerce complete, that the stations be painted, for appearance sake and also for preservation of the building. Now, could it be held that that painter would not be entitled to compensation under the employers' liability act? 10

Mr. Lyon: I think he would, but I think the distinction is here, that when the workman is operating upon objects, cars, all of these cases have to do with cars that are sometimes in one state and sometimes in another, and it is the traffic those cars that are moving between the states, that it is actual work upon those objects of traffic between the states that makes the distinction. All of the numerous cases have been decided by Courts where the particular work being done is by a man who never works outside of the state. Here is a case of Ridge against the St. Louis Railroad; it says (Reading case): 30

I think the point is, as I read the cases, as to whether or not the objects that occasioned the injury are such that are engaged in interstate 40

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commerce. Now, here were cars passing back and forth between the mines and Perth Amboy, go to Perth Amboy and they unload. Of course, any repairs are made at the terminal. They were shoved on to a track awaiting repairs, to be repaired, and sent back to Pennsylvania. They were just plying between the two states. And while working on that car, or in moving that car, which could not have been engaged in other but interstate commerce, the injury occurred, and I think that there is where the distinction is. However, I shall accept your Honor's leave to file a brief.

The Court: Yes. How long do you want?

Mr. Lyon: I will do it as soon as possible. I will not take but a few days.

Mr. Brown: I would like to ask the Court to reserve the determination as to whether this car—

The Court: I have not made any determination. I have only given my impression.

Mr. Brown: For this reason: After your Honor reads the cases your Honor will find quite a distinction, and one of the distinctions which I have not reverted to before is the fact whether the car was located or not. The Pederson case is a car that was right on the main line, and a bolt was put in. This case about the sleeping car, that car was always engaged, and those particular cars we have here in question, the Pennsylvania car and the other car, it cannot be said that even those cars would be used by this railroad in that same thing all the time, and they have left the case in such a condition that they may be

Argument

used anywhere. The Court is not positively bound by the testimony. It happened that they were sent out to Pennsylvania, so they say, but that was a re-consignment of the cars, by the testimony that is before your Honor. It was not in the original consignment. When they came to Perth Amboy they were ended. 10

The Court: That is my present impression, that these cars were used in interstate commerce, but it is not at all a positive conclusion, and I largely make it so that you may, in your brief, disabuse my mind of that impression, if I am wrong.

Mr. Brown: It is a very close point.

The Court: Of course, the fact that the car was there for the purpose of repairs, cannot, in my judgment determine negatively as to its use, whether it was interstate or not, because there could not be any other interstate commerce unless the cars were repaired. 20

Mr. Brown: Yes, but how about taking a car out of commerce?

The Court: Simply for the purpose of making such repairs that the car would be useful for interstate commerce?

Mr. Brown: When the car came in there with its load, that consignment was ended. 30

The Court: I would have to find from the evidence in this case, the testimony of this man who had the handling of this car, that that car was used for the purpose particularly, if not exclusively, of carrying coal from the mines in Pennsylvania to the yard at Perth Amboy. That it was a coal car. That rarely, if ever, was it 40

Argument

used for any other purpose excepting the carrying of coal. The car in course of time, and as the natural, inevitable result, needed repairs, and when it was brought to the yard on this particular day, it was seen that repairs were necessary. Repairs necessary for what? To make that car serviceable in the continued use to which it had been submitted before. However, I am only amplifying this now so that you may have the full notice, Mr. Brown, of what my present mental attitude is, so far as that point is concerned. I have always thought in these cases that if the matter ever goes to the Supreme Court on the specific issue like this, that will resolve the question, not so much what Judge Lyon says, the use of the instrument itself, but rather the extent of the employment of the man. Was it a local employment, or was it an employment that carried him in and out of the State? What was his employment?

Mr. Brown: The reason this particular car, the Lehigh Valley car—the other two cars, I believe it cannot be said that those cars would be used by the Lehigh Valley all the time for that purpose, the P. & R. car and the Pennsylvania Railroad car.

The Court: Here is a man, Mr. Brown, who has worked there thirty-nine years as a shop foreman, and he said this was a coal car that might have been used for carrying ashes, but if it was, it was most rare.

Mr. Brown: They shift coal from one place to the other. From Plainfield and from Perth Amboy to points in the state.

Argument

The Court. Yes, surely. Suppose the car was engaged in both interstate and intrastate?

Mr. Brown: Could not this car be so employed?

The Court: Suppose it was?

Mr. Brown: Yes.

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The Court: Would that determine this question?

Mr. Brown: Well, unless it can be shown that they were used exclusively in the interstate commerce traffic. They were put back into the trade, but my point is that when they came into Perth Amboy it ended, and when the Company, by its act, wished to send them somewhere, they could. They could have loaded them with ties and sent them to some place. They could have sent them out to Plainfield and got a load of coal and brought it back to Perth Amboy. They could have sent the P. & R. car over to the Pennsylvania yards. They could have made all those shifts which would be within intrastate commerce. They did not do it, it is true. That is a point that militates against us, but the hiatus, the break that comes in between the time the car comes in and when it goes back in traffic, that is one thing.

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The Court: If I determine this case on the question of the use of the car, I feel that I will be constrained to find that the car was engaged in interstate commerce. According to the pleadings in this case my jurisdiction has been attacked, or the jurisdiction of this Court has been attacked, properly and legitimately questioned. That being so, the burden of proving jurisdiction is on you.

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Argument

Mr. Brown: The burden of showing that you have not jurisdiction is on the one that asserts it.

The Court: Oh, no. The burden of proving that this car was in—

10 Mr. Brown: The interstate commerce is on me?

The Court: The burden of proof does not shift.

Mr. Brown: There is no burden of proof on the other side then of anything? When they allege a thing don't they have to prove it? Don't they have to carry the burden of it?

The Court: Well, cite an example.

Mr. Brown: Well, any example. Suppose I come into Court tomorrow and I say, this Court
20 has no jurisdiction, we will say, in a case that is clearly within the Court of Chancery, for instance, a matter of an accounting, and I allege that fact, or to set aside, we will say, a deed, and I come in and I prove my case and the other side then sets up this matter that it is not within the Court's jurisdiction to try it; the party who alleges the fact of want of jurisdiction, by purely announcing that the Court has not jurisdiction,
30 or by making a *prima facie* case, does not prove it. As I understand the law, the only exception—(Further argument).

The Court: I have very frankly stated my present mental impression, and I have done so largely for the reason that you will be fully conscious of the necessity of combatting that, Mr. Brown.

Opinion of Supreme Court*(Filed, June 8, 1916)*

NEW JERSEY SUPREME COURT

SUSAN BRINSKO, <div style="text-align: right;">Petitioner,</div> <div style="text-align: center;">vs.</div> THE LEHIGH VALLEY RAIL- ROAD COMPANY, <div style="text-align: right;">Prosecutor.</div>	}	February Term, 1916	10
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Submitted March 16th, 1916. Decided June 1916.

Certiorari to award in workmen's compensation case. 20

Before JUSTICES PARKER, MINTURN and KALISCH.

For petitioner, Thomas Brown.

For prosecutor, Adrian Lyon.

Per Curiam.

This is a workmen's compensation death case. The deceased was employed as trainman on the Lehigh Valley Railroad Company, and was injured by falling off of a coal car and run over and afterwards died. The first point made is that the proceeding is improperly brought, the petition being filed by Susan Brinsko as widow and next friend of John Brinsko, deceased, which was afterwards amended to read: "as widow and dependent of John Brinsko, deceased, on behalf of herself and other dependents of said John Brinsko." The argument is that so far as relates to 40 30

Opinion of Supreme Court

the infant children the petitioner should
as their guardian because of the provision in section 20 of the act, as amended in 1913, chapter 174 which says that: "proceedings on behalf of an infant shall be instituted and executed by a guardian and payment, if any shall be made to such guardian." This amendment relates to cases where the injured employee is an infant. The present case is covered by Section 19, relating to cases of death, and is within the rule of *MacFarland vs. Central Railroad Company*, 84 N. J. L. 435, which holds that the statute in effect provides for a special administrator *ad litem* in cases where no executor or administrator has qualified.

The next point is that paragraph 19 of the act requires the Court on awarding payment to the party who would have been appointed administrator "upon like terms as to bond for the proper application of compensation payments as are required of administrators;" and that the Court directed that no bond need be given. It is not made to appear, however, that any bond for the application of compensation payments is required of administrators. The administration bond provided in Section 45 of the orphans' court act is apparently inappropriate, and does not seem to be intended by this section. There is no mention of an administrators bond in any other part of the workmen's compensation act. So we fail to discern error in not requiring a bond where there is nothing to which to assimilate it.

The next question is whether the deceased, at the time of the accident, was engaged in interstate commerce. The Court held that it was unnecessary to determine whether the car was engaged in

Notice of Appeal

interstate commerce. With this we disagree, but the award is not vitiated on that account, because on the finding of facts by the Judge the car was not engaged in interstate commerce, nor was the deceased. The car had finished its interstate trip and was in a repair yard, and so the case comes directly under the rule in the case of *Moran vs. Central Railroad Company*, 96 Atlantic Rep., 1023. If the car was not engaged in interstate commerce, the deceased was not. This also disposes of the last point, which is also predicated on the interstate commerce theory. The judgment will be affirmed. 10

Notice of Appeal

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(Filed, June 27, 1916)

NEW JERSEY SUPREME COURT

SUSAN BRINSKO,	}	Petitioner,
vs.		
LEHIGH VALLEY RAILROAD COMPANY,	}	Defendant.

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To Thomas Brown. Attorney of Petitioner:

Please take notice that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

ADRIAN LYON,
Attorney for Defendant. 40

Grounds of Appeal

(*Filed, July 6, 1916*)

NEW JERSEY COURT OF ERRORS AND APPEALS

10	<p style="text-align: center;">SUSAN BRINSKO, Petitioner-Respondent, vs. THE LEHIGH VALLEY RAILROAD COMPANY, Defendant-Appellant.</p>
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The appellant states the following grounds of appeal:

- 20 1. The Court held that, on the finding of facts by the Judge of the Court of Common Pleas the car was not engaged in interstate commerce, nor was the deceased, whereas the said Court should have held that on the finding of the said facts that the said car and deceased were engaged in interstate commerce.
2. The Court held that the car on which the deceased was working was not engaged in interstate commerce, nor was the deceased, whereas said
- 30 Court should have held that the said car and deceased were engaged in interstate commerce.
3. The testimony taken before the Judge of the Court of Common Pleas upon the hearing of said cause showed that the said deceased at the time of his death was employed in interstate commerce and the said Court should have held that the said Judge should have so determined.

ADRIAN LYON,
Attorney for Appellant.

New Jersey Court of Errors and Appeals

SUSAN BRINSKO,
Petitioner-Respondent,

vs.

LEHIGH VALLEY RAILROAD
COMPANY, a corporation,
Defendant-Appellant.

Brief for Re-
spondent.

Case No. 57.

November Term,
1916

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STATEMENT.

It will be noticed that the only point that the counsel for the appellant raises in his brief and argument, is "whether or not the deceased was engaged in Interstate Commerce, when he was injured." It may be taken then that the appellant abandons all other points raised in the Court below, including the point whether or not the car upon which the defendant was riding at the time of his death, was used in Interstate Commerce.

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The statement of facts in the brief of the Appellant is not complete in that it fails to show the nature of the occupation of the decedent, John Brinsko, and also the actual route and disposition of the car upon which he was riding at the time of his death.

The decedent was employed on the shifting yard

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10 engine (page 34) and on the morning of his injury, was occupied solely in shifting "crippled or shop cars." The three cars referred to in the Appellant's brief, were on a storage track for several days. After finishing their consignment in the transportation of materials from Pennsylvania, the cars in question were then taken from the storage track and placed upon a cripple siding. Brinsko's sole duty was to work as a brakeman on the shifting engine, on the morning that he met his death, in shifting or removing cars that had finished their Interstate Commerce journey, to a storage track and thence from the storage track to a cripple or shop track, before being put again into service. It was while riding on the head end of one of these cars for the purpose of clearing a roadway, that intersected the storage or cripple track, that the decedent was killed.

20 The movement of the car upon which the deceased was riding at the time of his death was as follows:

1. Left Pennsylvania loaded with coal December 4th.
 2. Arrived at Perth Amboy, was unloaded and finished its Interstate Commerce journey on December 11th. It was then placed upon a storage track to await repairs before being again consigned to any route or business. On December 17th, was again consigned for use in the transportation of coal.
- 30

All of the cars referred to in the Appellant's brief, had finished their Interstate Commerce journey when they arrived in Perth Amboy, and were thereupon placed on a storage track and repaired and thereafter waited "movement orders," or further consignments. (Page 68-69 State of Case).

**THE APPELLANT DID NOT PLEAD NOR PROVE
IN THE COURT BELOW THAT THE DECE-
DENT, JOHN BRINSKO, WAS ENGAGED IN
INTERSTATE COMMERCE.**

On page 12, the answer of the Appellant in the Court below, is as follows:

“Defendant says that at the time of the said accident the said John Brinsko was employed in moving cars engaged in interstate commerce, and that, therefore, this defendant is liable only as provided by the Act of Congress of the United States, and is not liable under the act mentioned in the first paragraph of the said petition.”

10

The Court can readily see that the Appellant did not properly plead the matter upon which he is endeavoring to set aside—the judgment of the lower Courts—in that he failed to plead and prove:

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1. That the defendant was a common carrier engaged in interstate commerce, and that the cars used were so engaged.

2. That at the time of his death, John Brinsko was employed by the defendant in connection with such interstate commerce.

The party pleading any act must set out sufficient facts to prove the case within the act, if he does not refer to the act itself.

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Missouri R. R. Co. vs Wolf, 226 U. S. 570.

St. Louis Railway Co. vs Hessler, 98 Ark. 240.

T. H. Surra vs Great Northern Ry. Co., 108
Pac. Rep. 774.

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THERE BEING NO NEGLIGENCE PLEADED NOR PROVEN WHETHER OR NOT JOHN BRINSKO WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME HE WAS KILLED, SHOULD HAVE NO BEARING ON THE DECISION IN THIS CASE.

10 The Federal Employers' Liability Act, 1908, Section 1, requires that before an action can be brought under that act, or the defense of that act interposed, there must be negligence or the defect alleged that the caused the injury, must be due to negligence. The pleadings and the proof in this case are barren of any allegation or proof that there was any negligence on the part of either the decedent or the appellant that resulted in the death of the decedent. There being no negligence pleaded nor proof of negligence, the Court below had jurisdiction to award compensation.

20 Roundsville vs Erie R. R., 94 Atl. Rep. 392.
West Jersey Trust Co. vs Philadelphia & Reading R. R., 95 Atl. Rep. 753.
Winfield vs Erie R. R., 88 N. J. Law 619.
Winfield vs N. Y. Central R. R., Anno. Cases 1916-A, 821.

30 **NEITHER THE DECEDENT NOR THE CAR UPON WHICH HE WAS RIDING WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME THE DECEDENT MET HIS DEATH.**

40 Walter Marks, the conductor who worked with the decedent at the time of his death (page 34), testified that the car upon which the decedent was working at the time he was injured, was a car that had finished its journey, and was on the car tracks of the company awaiting repairs; that the decedent was engaged in shifting shop cars; that the place that the car was situated was a place where they keep crippled or shop

Hefting
 cars (page 36); that the place where the car was kept was a track for storing cars for repairing purposes (page 42); that the decedent was exclusively employed in ~~shipping~~ the crippled cars on the storage tracks at the time he was injured (page 50); that the storage track is an auxiliary track not connected with the main Interstate Commerce line (page 51); that when the cars upon which the decedent was riding came from the mines in Pennsylvania, they had ended their Interstate Commerce journey (see testimony Leander W. Schoonover, pages 68-69, State of Case).

10

The trial court and the Supreme Court were correct in their conclusion in finding that the cars in question were engaged in interstate commerce at the time Brinsko met his death; consequently the cars not having been engaged in interstate commerce, the case comes directly within the case of Moran vs Central R. R. of New Jersey, 96 Atl. Rep. 1029, and the case therein cited.

20

If the Appellant is held strictly to the point that he raises in his brief; that is to say, whether or not the decedent was engaged in interstate commerce at the time of his death, this Court should affirm the decision of the Supreme Court, as there is no proof that Brinsko was engaged in interstate commerce at any time during the day that he was killed.

Respectfully Submitted,

THOMAS BROWN.

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