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New Jersey Court of Errors and Appeals

NOTICE AND GROUNDS OF APPEAL. 10

NEW JERSEY SUPREME COURT

CHRISTINE O'BRIEN, Administra- trix of the estate of John O'Brien, deceased, <p style="text-align: center;">Plaintiff-Appellant,</p> <p style="text-align: center;">vs.</p> CENTRAL RAILROAD COMPANY OF NEW JERSEY, <p style="text-align: center;">Defendant-Appellee.</p>	}	Action at Law 20
---	---	---

*To William A. Barkalow, Esq., Attorney for De-
 fendant-Appellee:*

Sir: 30

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

1. The New Jersey Supreme Court erred in
 affirming the judgment of the Hudson County Cir-
 cuit Court whereas it should have reversed the
 same in favor of the plaintiff-appellant.

40

Motion and Grounds of Appeal

2. The New Jersey Supreme Court erred in considering the appeal before it as a Rule to Show Cause whereas the said appeal was a straight appeal.

10 Dated: May 10, 1929.

Yours, &c.,

ALEXANDER SIMPSON,
Attorney for Plaintiff-Appellant.

Service of the within Notice and Grounds of Appeal is hereby acknowledged this 14th day of
20 May, 1929.

WILLIAM A. BARKALOW,
Attorney for Defendant-Appellee.
By EDWARDS & SMITH,
Of Counsel.

OPINION.

(Filed May 8, 1929)

NEW JERSEY SUPREME COURT

No. 5, JANUARY TERM, 1929

10

CHRISTINE O'BRIEN, Administra-
trix of the estate of John
O'Brien, deceased,

Appellant,

v.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY,

Respondent.

20

Submitted January 25, 1929—Decided May 8,
1929.

Syllabus.

1. The decedent having been employed by a
common carrier as a member of a crew to gather
loaded coal cars from different parts of the rail- 30
road yard and take them to a "little yard" from
which the cars were dropped, one by one, to a de-
cline or pocket, where a different crew took them,
opened a hopper and caused the coal to be taken
by a conveyor to the storage bins, whence, as oc-
casion required, the coal was fed into both intra-
state and interstate engines; held, the decedent
was not employed in interstate commerce.

2. The decedent being employed by defendant, 40
in its railroad yards at Communipaw, having quit

Opinion

work and left the premises of his employment at two o'clock P. M., being next seen on the platform of one of defendant's trains at West Side station at five-ten o'clock P. M. just before he fell or was thrown from the platform and received
 10 injuries resulting in his death; held, that decedent, at the time of his injury, was not engaged in his employment.

An Appeal from the Hudson County Circuit Court.

Before Justices Black, Campbell and Case.

20 For the plaintiff-appellant, Alexander Simpson.

For the defendant-appellee, William A. Barkalow.

The opinion of the court was delivered by CASE, J.:

30 This case comes up on appeal from the Hudson County Circuit Court, where the plaintiff was nonsuited. Defendant is a common carrier by railroad and is engaged in interstate and intrastate commerce. Plaintiff's decedent was an employee of defendant. The action was brought under the Interstate Commerce Act for the protection of employees of common carriers by railroad. The nonsuit was granted on the ground that the decedent was not engaged in interstate commerce at the time of the injury.

Opinion

The decedent was employed as a member of a crew to gather the loaded coal cars from different parts of the defendant's yard at Communipaw and take them to a "little yard" of about forty-car capacity, from which place the cars were dropped, one by one, to a decline or pocket, where a different crew took them, opened a hopper and caused the coal to be taken by a conveyor to the storage bins, whence, as occasion required, the coal was fed into both intrastate and interstate engines. The decedent on the day of his death quit work about two o'clock in the afternoon, went to the "shanty," changed to street clothes and took the street going toward Communipaw station. He was next seen at about five-ten P. M. standing on the platform of one of defendant's trains pulling into West Side station, two or three miles from Communipaw station. He fell or was thrown from the platform and was fatally injured.

The appellant contends that there was evidence sufficient to take the case to the jury on these points—first, that the decedent was employed in interstate commerce; second, that he was still engaged in that employment at the time he was injured; and finally, that there was causative negligence on the part of the defendant in operating the train at West Side station.

The appellant argues that the coal, having come to the control of decedent's crew, went in a practically uninterrupted stream into the engines of interstate commerce and intrastate commerce, thus coming within the purview of a line of federal decisions holding employment of this char-

Opinion

acter to be within interstate commerce. *Central Railroad Co. of New Jersey v. Monahan*, 11 Fed. Rep. (2d ed.) 212; *Collins v. Erie Railroad*, 253 U. S. 77. We are unable, however, to distinguish the facts in this case from the reasoning contained in United States Supreme Court decision of *C., B. & Q. R. R. Co., v. Harrington*, 241 *Id.* 177.

Plaintiff's contention that the coal was passing practically in a noninterrupted stream into the engines of interstate commerce and intrastate commerce is not, in our opinion, sustained by the evidence. After the coal had left decedent's crew and also the intermediate crew, it went into the bins and remained there until taken out into the engines. It was in evidence that the daily haul was from twenty to twenty-five cars, that the capacity of each car was from forty to fifty tons and that the storage bins hold probably sixty cars. The capacity of the bins, therefore, was from twenty-four hundred to three thousand tons of coal. Depositing in the bins was nothing more than putting of the coal supply in a convenient place from which it could be taken as required for use.

We conclude that the case is within the application of the *Harrington* decision and that the plaintiff did not, by the evidence produced, bring her decedent within the classification of those whose work was so closely connected with interstate commerce as to be a part of it.

Furthermore, the decedent was not at the time of his injury engaged in his employment, whether

Opinion

that was interstate or intrastate. West Side station is a considerable distance from Communipaw and is not a part of defendant's yards where the decedent was employed. There is no evidence that the train on which the decedent was being carried was a work train. The fair inference from the evidence is that it was a passenger train. The decedent had left the premises of his employment and was on a public highway three hours before his injury. The facts take the case entirely out of the purview of the decision in *Erie Railroad v. Winfield*, 244 U. S. 170. 10

Our findings heretofore expressed make it unnecessary to consider whether the defendant was negligent in its operation of the train at West Side station. 20

The rule to show cause will be discharged, with costs.

RULE FOR FINAL JUDGMENT.

NEW JERSEY SUPREME COURT

10	CHRISTINE O'BRIEN, Administra- trix of the estate of John O'Brien, deceased, <div style="text-align: right; padding-right: 20px;">Plaintiff-Appellant,</div>	}	Action at Law.
	vs.		
	CENTRAL RAILROAD COMPANY OF NEW JERSEY, <div style="text-align: right; padding-right: 20px;">Defendant-Appellee.</div>	}	On Appeal

20 This matter coming on to be heard at the January Term, 1929, and the Court having considered the same and being of the opinion that the judgment of nonsuit should be affirmed, it is, on this 16th day of May, 1929,

ORDERED, that final judgment be entered in favor of the defendant against plaintiff.

30 On motion of WILLIAM A. BARKALOW, Attorney for Defendant.

Rule actually entered May 16th, 1929.

New Jersey Supreme Court

SUMMONS.

THE STATE OF NEW JERSEY to CENTRAL 10
RAILROAD COMPANY OF NEW JERSEY, a
(Seal) corporation: You are summoned to
answer the annexed complaint to
CHRISTINE O'BRIEN Administratrix of the Estate
of John O'Brien, deceased, in an action at law in
the Circuit Court of the County of Hudson. And
take notice, that unless you file your answer to
said complaint with the Clerk of said Court,
within 20 DAYS after the service upon you of this 20
writ and the annexed complaint, the plaintiff may
proceed in the suit and judgment may be entered
against you.

WITNESS, FRANK L. CLEARY, Judge of the Circuit
Court of the County of Hudson, at Jersey City,
this 19th day of November, 1927.

JOHN J. McGOVERN,
Clerk. 30

Alex. Simpson,
Attorney.

COMPLAINT.

HUDSON COUNTY CIRCUIT COURT

10	CHRISTINE O'BRIEN, Adminis- tratrix of the Estate of John O'Brien, deceased, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>	}	Action at Law
	vs.		
	CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, <div style="text-align: right; padding-right: 20px;">Defendant.</div>		

20 Plaintiff residing at No. 268 Grant Avenue, in
 the City of Jersey City, in the County of Hudson,
 State of New Jersey, says that:

FIRST COUNT.

30 1. She has been appointed General Administra-
 trix of the Estate of John O'Brien, deceased, by
 the Surrogate of the County of Bergen, and brings
 into the court letters of administration thereon
 issued to her by the said Surrogate.

2. Defendant is a corporation of the State of
 New Jersey, and is now and was at all times here-
 inafter mentioned a common carrier by railroad,
 engaged in such commerce between the State of
 New Jersey and other states and territories of
 the United States.

40 3. The intestate of the plaintiff, on the 29th
 day of April, 1926, was employed by the defend-
 ant as a brakeman, in said commerce, at Jersey
 City, in the County of Hudson.

Complaint

4. The intestate of the plaintiff, on the 29th day of April, 1926, while returning from his work on a train provided by the defendant coming from Communipaw to the Westside Avenue Station, at Jersey City, and still being engaged in interstate commerce, by reason of the negligence of the defendant, was so injured that he died from said injuries on May 5, 1926. 10

5. The negligence of the defendant consisted in this: While intestate of plaintiff was on said train, waiting for an opportunity to alight therefrom at said station, defendant did not use reasonable care to operate and control the motion of said train in a proper and safe manner, and to have the brakes and appliances in proper and safe condition but on the contrary, negligently and carelessly and without any signal or warning, caused the said train to give an unusual, sudden and violent jerk as it approached said station, causing the intestate of plaintiff to be thrown from said train to the ground and he was run over by said train, his foot was cut off and he was so injured that he died on May 5, 1926. 20

6. Intestate of Plaintiff was at all times in the exercise of due care for his safety. 30

7. Intestate of plaintiff left him surviving Christine O'Brien, widow, age 40; Michael E. O'Brien, son, age 18 years; John Francis O'Brien, son, age 16 years; Marie O'Brien, daughter, age 13 years; Malcolm O'Brien, son, age 11 years and Elizabeth O'Brien, daughter, age 7 years, who have suffered pecuniary injury by reason of his death. 40

Complaint

8. The within action is commenced within 2 years after date of death of plaintiff's intestate.

Plaintiff demands \$50,000.00 for pecuniary injury received through the death of the intestate of the plaintiff.

SECOND COUNT.

Plaintiff who resides at 268 Grant Avenue, in the City of Jersey City, in the County of Hudson, State of New Jersey, says that:

1. She has been appointed General Administratrix of the Estate of John O'Brien, deceased, by the Surrogate of the County of Bergen, and brings into court letters of administration thereon issued to her by the said Surrogate.

2. Defendant is a corporation of the State of New Jersey, and is now and was at all times hereinafter mentioned a common carrier by railroad, engaged in such commerce between the State of New Jersey and other States and territories of the United States.

3. The intestate of the plaintiff, on the 29th day of April, 1926, was employed by the defendant as a brakeman, in said commerce, at Jersey City, in the County of Hudson.

4. The intestate of the plaintiff, on the 29th day of April, 1926, while returning from his work on a train provided by the defendant, coming from Communipaw to the Westside Avenue Station of the defendant, at Jersey City, and still being engaged in interstate commerce, by reason of the

Complaint

negligence of the defendant, was so injured that he died from said injuries on May 5, 1926.

5. The negligence of the defendant consisted in this: While intestate of plaintiff was on said train, waiting for an opportunity to alight therefrom at said station, defendant did not use reasonable care to operate and control the motion of said train in a proper and safe manner, and to have the brakes and appliances in proper and safe condition, but on the contrary, negligently and carelessly and without any signal or warning, caused the said train to give an unusual, sudden and violent jerk as it approached said station, causing the intestate of plaintiff to be thrown from said train to the ground and he was run over by said train, his foot was cut off and he was so injured that he died on May 5, 1926, at Jersey City, but before his death, the intestate of the plaintiff from the 29th day of April, 1926, until the 5th day of May, 1926, suffered great pain and anguish and by reason of his injuries was compelled to undergo an operation which also caused him pain and suffering to the damage of plaintiff.

6. Intestate of plaintiff was at all times in the exercise of due care for his safety.

7. The within action is commenced within 2 years after date of death of the intestate of plaintiff.

Plaintiff demands \$10,000.00 for pain and suffering undergone by the intestate of the plaintiff before he died.

ALEX SIMPSON, 40
Attorney for Plaintiff.

Complaint

I hereby deputize John Wall to serve the within writ. Witness my hand and seal this 21 day of Nov. 1927.

10 JOHN J. COPPINGER,
Sheriff,
By Thomas J. Prior,
Under Sheriff.

Served within Summons and Complaint Nov. 25/27, on the defendant Central Railroad Company of New Jersey (A Corporation) by delivering a true copy thereof to M. A. Hulsart, Agent of the said Defendant Company.

20 JOHN J. COPPINGER,
Sheriff,
By John Wall,
S. D. S.

Filed Clerk's Office
Dec. 8, 1927.
Hudson County, N. J.
John J. McGovern,
Clerk.

ANSWER.

HUDSON COUNTY CIRCUIT COURT

CHRISTINE O'BRIEN, Adminis- tratrix of the Estate of John O'Brien, deceased, Plaintiff, vs. THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, a cor- poration, Defendant.	}	Action at Law.	10
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The answer of The Central Railroad Company 20
 of New Jersey, a corporation of the State of New
 Jersey, having its principal office for the trans-
 action of business in the City of Jersey City,
 County of Hudson and State of New Jersey, says
 that:

FIRST COUNT.

1. It has no knowledge or information sufficient
 to form a belief as to the allegations contained in 30
 paragraph 1.

2. It admits paragraph 2.

3. It denies paragraphs 3, 4, 5 and 6.

4. It has no knowledge or information sufficient
 to form a belief as to the allegations contained in
 paragraphs 7 and 8.

AS A SEPARATE DEFENSE, it alleges that the acci-
 dent mentioned in the complaint was wholly the 40

Answer

result of contributory negligence upon the part of plaintiff's intestate.

10 AS A SECOND SEPARATE DEFENSE, it alleges that the accident mentioned in the complaint was a risk which arose out of the employment of the plaintiff's intestate, and which was assumed by him.

AS A THIRD SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, plaintiff's intestate was riding on the train mentioned in the complaint under and by virtue of the provisions of a certain pass; that said pass contained the following condition and provision: "The person who accepts this pass thereby assumes all risk of accident, and, in consideration
20 of its receipt, expressly agrees that the Company shall not be liable under any circumstances, whether of negligence by its agents or otherwise, for any injury, to the person, or for any loss or injury to his or her property while using this pass." that said pass had been duly accepted by said plaintiff's intestate and that the provisions and conditions thereof were and are binding upon said plaintiff's intestate and the plaintiff herein.

30 AS A FOURTH SEPARATE DEFENSE, it alleges that plaintiff's intestate was injured by reason of his going or remaining on the platform of a car in violation of the printed regulations of this defendant posted up in a conspicuous place inside of the passenger cars of the train on which said intestate was riding, although this defendant had at the time furnished seats inside of said passenger cars sufficient for the proper accommodation
40 of its passengers including said intestate.

Answer

SECOND COUNT.

1. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1.

2. It admits paragraph 2.

10

3. It denies paragraphs 3, 4, 5 and 6.

4. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7.

AS A SEPARATE DEFENSE, it alleges that the accident mentioned in the complaint was wholly the result of contributory negligence upon the part of plaintiff's intestate. 20

AS A SECOND SEPARATE DEFENSE, it alleges that the accident mentioned in the complaint was a risk which arose out of the employment of the plaintiff's intestate, and which was assumed by him.

AS A THIRD SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, plaintiff's intestate was riding on the train mentioned in the complaint under and by virtue of the provisions of a certain pass: that said pass contained the following condition and provision: "The person who accepts this pass thereby assumes all risk of accident, and, in consideration of its receipt, expressly agrees that the Company shall not be liable under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person, or for any loss or 40

Answer

injury to his or her property while using this pass;" that said pass had been duly accepted by said plaintiff's intestate and that the provisions and conditions thereof were and are binding upon said plaintiff's intestate, and the plaintiff herein.

10 AS A FOURTH SEPARATE DEFENSE, it alleges that plaintiff's intestate was injured by reason of his going or remaining on the platform of a car in violation of the printed regulations of this defendant posted up in a conspicuous place inside of the passenger cars of the train on which said intestate was riding, although this defendant had at the time furnished seats inside of said passenger cars sufficient for the proper accommo-
20 dation of its passengers, including said intestate.

WM. A. BARKALOW,
Attorney for Defendant.

Filed Clerk's Office
Dec. 13, 1927,
Hudson County, N. J.,
John J. McGovern,
Clerk.

REPLY.

HUDSON COUNTY CIRCUIT COURT

CHRISTINE O'BRIEN, Adminis- tratrix of the Estate of John O'Brien, deceased, Plaintiff,	}	Action at Law	10
vs.			
THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, a cor- poration, Defendant.	}	Action at Law	10

Plaintiff denies the matters set forth in the 20
First and Second Count of the answer of the de-
fendant under titles A Separate Defense, Sec-
ond, Third and Fourth Separate Defenses.

ALEX. SIMPSON,
Attorney for Plaintiff.

Filed Clerk's Office,
Dec. 16, 1927,
Hudson County, N. J. 30
John J. McGovern,
Clerk.

NOTICE OF TRIAL.

HUDSON COUNTY CIRCUIT COURT

10	CHRISTINE O'BRIEN, Adminis- tratrix of the Estate of John O'Brien, deceased, Plaintiff,	}	Action at Law
	vs.		
	THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, a cor- poration, Defendant.		

20 Sir:

Please to Take Notice, that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the third day of January, A. D. 1927, at the Court House, in Jersey City, in and for the County of Hudson at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

30

Dated December 13, A. D. 1927.

Your obedient servant,

ALEX SIMPSON,
 Attorney of Plaintiff.

To:

William A. Barkalow, Esq.,
 40 Attorney of Defendant.

Rule for Judgment

Service of the within Notice of Trial is hereby acknowledged this 14th day of December, A. D. 1927.

WILLIAM A. BARKALOW,
Attorney for Defendant.

10

Filed Clerk's Office,
Dec. 16, 1927,
Hudson County, N. J.
John J. McGovern,
Clerk.

RULE FOR JUDGMENT.

20

HUDSON COUNTY CIRCUIT COURT

CHRISTINE O'BRIEN, Adminis-
tratrix of the Estate of John
O'Brien, deceased,

Plaintiff,

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY, a corporation,
Defendant.

Action at Law

30

This case coming regularly on for trial before Honorable Frank L. Cleary, Judge of the Hudson County Circuit Court, and a jury on September 24th, 1928, and the plaintiff having rested his case and defendant having moved for a judgment

40

Rule for Judgment

of nonsuit, and the Court being of the opinion that the evidence produced by the plaintiff was not sufficient to support an action against the defendant, and calling on the plaintiff to produce further evidence, and the plaintiff failing so to do,

10 It is, on this 26th day of September, 1928, Ordered, that judgment of nonsuit be entered against the plaintiff and in favor of the defendant, with defendant's costs to be taxed.

FRANK L. CLEARY,
Judge.

On motion of
20 Wm. A. Barkalow,
Attorney of Defendant.

Rule actually entered this 29th day of September, 1928.

JUDGMENT.

HUDSON COUNTY CIRCUIT COURT

CHRISTINE O'BRIEN, Administratrix of the Estate of John O'Brien, deceased, Plaintiff, Adv. CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	}	Judgment entered September 29, 1928 Damages Non-Suit Costs \$56.98 Total \$56.98 Wm. A. Barkalow, Attorney of Defendant.	10
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Judgment on verdict in the above-entitled cause was entered in this Court on the Twenty-ninth 20 day of September in the year of our Lord One Thousand Nine Hundred and Twenty-eight, in favor of the Defendant Central Railroad Company of New Jersey, a corporation, and against the Plaintiff, Christine O'Brien, Administratrix of the Estate of John O'Brien, deceased, in a plea of Action at Law for the sum of nonsuit damages, and Fifty-six Dollars Ninety-eight Cents, costs of suit.

Judgment entered and signed this 29th day of 30
September, A. D. 1928.

FRANK L. CLEARY,
Judge.

NOTICE AND GROUNDS OF APPEAL.

HUDSON COUNTY CIRCUIT COURT

10	CHRISTINE O'BRIEN, Adminis- tratrix of the Estate of John O'Brien, deceased, Plaintiff,	}	Action at Law
	vs.		
	THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, a cor- poration, Defendant.	}	

20 To:
 William A. Barkalow, Esq.,
 Attorney of Defendant.

Sir:

Please Take Notice that the plaintiff appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following ground:

30 Because the Trial Court directed a verdict against the plaintiff in favor of the defendant, whereas the Court should have submitted the issues in said cause to the jury for decision.

Dated October 9th, 1928.

Yours, &c.,

ALEXANDER SIMPSON,
 Attorney of Plaintiff.

Clerk's Certificate

Service of the within Notice is hereby acknowledged this 16th day of October, 19 .

WM. A. BARKALOW.

Filed Clerk's Office,
Oct. 16, 1928,
Hudson County, N. J.
John J. McGovern,
Clerk.

10

CLERK'S CERTIFICATE.

State of New Jersey, }
Hudson County. }ss:

I, John J. McGovern, Clerk of the County of Hudson aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein, 20

Do Hereby Certify, That the foregoing is a true and correct copy of Summons and Complaint, Answer, Reply, Notice of Trial, Rule for Judgment, Judgment Record, and Notice and Grounds of Appeal in the case of Christine O'Brien, Administratrix of the Estate of John O'Brien, deceased, Plaintiff, vs. Central Railroad Company of New Jersey, a corporation, Defendant as the same is taken from and compared with the original as filed and recorded in my office. This certificate is issued so that said cause may be removed to the Supreme Court of Judicature of the State of New Jersey, that the same may be adjudicated according to law. 30

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Courts and County, at Jersey City, this Seventeenth day of October, 1928. 40

(Seal)

JOHN J. McGOVERN,
Clerk.

TESTIMONY.

HUDSON COUNTY CIRCUIT COURT

10	CHRISTINE O'BRIEN, Adminis- tratrix of the Estate of John O'Brien, deceased, Plaintiff, vs. THE CENTRAL RAILROAD CO. OF NEW JERSEY, a Corporation, Defendant.	}	Before Hon. Frank L. Cleary, J., and a Jury.
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20 Jersey City, N. J.,
 September 24, 1928.

Appearances:

Alexander Simpson, Esq., for the Plaintiff.

William A. Barkalow, Esq., for the Defendant,
 by William F. Hanlon, Esq.

Edwards & Smith, Esqrs., Counsel for the De-
 fendant, by Edwin Smith, Esq.

30 A Jury was duly empanelled, being found satis-
 factory, they were sworn.

Counsel opened to the Jury.

Mr. Simpson: I offer in evidence the general
 administration papers issued by the Surrogate of
 Bergen County to Christine O'Brien on the 24th
 of December, 1926.

40 Accepted and marked as Plaintiff's Ex-
 hibit P-1 of this date.

Clarence S. Demarest—Direct

George Albert—Direct

CLARENCE S. DEMAREST, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Where are you employed? A. The super- 10
intendent's office, Central Railroad, Jersey City.

Q. Can you tell me the earnings of John O'Brien, who was a freight yard brakeman for the Jersey Central Railroad in 1926? A. I have prepared this statement and it takes two years—24 months. The total earnings for the 24 months from April, 1924, to March, 1926, inclusive, were \$4,872.29, which makes an average per month of \$203.01.

Q. Do you know how long he was employed on the Central Railroad? A. Why, I do not; Mr. Smith can give you that. 20

Mr. Smith: No questions.

GEORGE ALBERT, sworn for the plaintiff.

Direct-examination by Mr. Simpson: 30

Q. Where do you live, Mr. Albert? A. 44
Beach Street, Cranford.

Q. On the 29th of April, 1926, where were you employed? A. Central Railroad.

Q. What was your employment? A. Why, we supplied the chutes with coal.

Q. What were you, conductor, engineer, or what? A. Conductor.

Q. What kind of train? A. Freight crew. 40

Q. Then you had a freight crew, which carried

George Albert—Direct

coal to the coal chutes; isn't that it? A. Yes, sir.

Q. Then what was done with the coal after you put it in the chutes? A. Well, there is a crew up there that dump the coal. All we did is shoved
10 the loaded cars up there and take the empties away.

Q. Then you shoved the cars to the chutes? A. Yes, sir.

Q. And the crew would dump the cars? A. There was another crew that dumped them.

Q. What did they dump them into? A. They dumped them into the chute and the conveyor carried it to the storage bins.

20 Q. Carried it to the storage bins? A. Yes, sir.

Q. And from the storage bins, where did it go? A. Put in the engines.

Q. The day of the accident, was O'Brien in your crew? A. Yes, sir; he was.

Q. What was he doing? A. Well, his duty was as a brakeman.

Q. What did he do as brakeman? A. Why, cut the cars and rode the cars, and gave the signal to the engineer, and so forth.

30 Q. How long was your crew at work that day? A. Eight hours.

Q. How many cars did you have in the train? A. Well, we usually had from 15 to 20 cars.

Q. Where did you get the coal? A. In different parts of the yard, Jersey City yard.

Q. What do you mean, it was stored in different parts of the yard? A. Yes, stored in different parts of the yard.

40 Q. You would take it from these storage places. Why would you load it on your cars? A. On our cars.

George Albert—Direct

Q. On your cars before you moved it to this chute? A. Well, I could not tell you that.

Q. Your men did not do that? A. No.

Q. You mean your men would take the empty cars away to where the stock was there, they would load them and then you would pull them 10 to the chute? A. No, we would take loaded cars from the different parts of the yard and take them to the coal chute.

Q. How many cars a day? A. The amount of cars that we used to have would be probably 20 or 25 cars.

Q. In other words, you took the loaded cars which had come into the yard, took them to this chute, there the crew upstairs would dump them 20 into the chute; is that right? A. Yes, sir.

Q. Can you describe that chute; what was it like? A. Well, there is a little yard in back of the chute holds probably 40 cars, that is in the ways into the chute. We would shove the cars up grade up to this little yard and then would drop a car down at a time, you see, on the pocket.

Q. On a pocket? A. Well, there is a pit there, what they call a pocket. They would drop the cars, this crew that would unload the coal in the 30 cars; they would open the hopper and, of course, the coal would drop down.

Q. Where would the coal go, to drop down? A. Into the conveyer which carries the coal up to the storage bin.

Q. Is the conveyer and chute and the storage bin all part of one structure? A. Yes, sir.

Q. How large is the structure? A. How large? Well, it will hold probably 60 cars, the storage 40 bins.

George Albert—Direct

Q. What I mean, can you tell us how long this structure is? This structure to which you took your cars, what it consisted of? A wooden structure, was it? A. No, it is steel; well, it is not over 40 by 40, or 40 by 50; in that neighborhood.

10 Q. The coal, then, went from your cars to the conveyor? A. Yes, sir.

Q. Then into the chute? A. Well, you dropped it into the chute and from there they are carried out into the bin—

Mr. Smith: I object.

Mr. Simpson: I am trying to find out what it was.

20 Q. Will you tell us what this thing was? A. They would drop one car down at a time. They would open the hoppers.

Q. What do you mean by hopper; what hopper? A. Where it received the coal; it dropped out of the car into this hopper.

Q. What is the hopper? A. Well, it is a funnel shape that would carry coal on to the conveyor.

30 Q. What is the conveyor; describe that? A. An endless belt, that would carry coal up into the bins.

Q. Out of the bins, where would the coal go? A. Into engines.

Q. How many coal cars had you delivered there that day? A. Well, I can't give you the exact amount; in the neighborhood of 20 or 25 cars we took there over to it.

40 Q. How long had you been working there that day with this man in your crew? A. We worked around there eight hours.

George Albert—Direct

Q. What time did he quit? A. Two o'clock, standard time.

Q. That is not daylight-saving time? A. No, standard time.

Q. What did you do when you quit at two o'clock? A. Why, I changed my clothes and went home. 10

Q. Where did your crew go? A. Well, Mr. O'Brien went away, and another man by the name of Brick who lived at Cranford, he went with me; he went a little ahead of me.

Q. You only had two brakemen? A. Yes, sir.

Q. Where did you change your clothes? A. We had a little shanty where we changed our clothes.

Q. You say you went away? A. Yes, sir. 20

Q. How did you go home? A. I walked over to the ash pit.

Mr. Smith: I object; what difference does it make how he went home.

Mr. Simpson: At the scene of the accident is what I want to find out.

Mr. Smith: There is no proof that he was at the scene of the accident.

The Court: I don't think it makes any difference. 30

Mr. Simpson: I ask for an exception.

The Court: You may have an exception.

Q. Where was O'Brien, the last you saw him? A. About fifteen or twenty feet from the place where we changed our clothes, the last I seen him.

Q. Did you see O'Brien when he came to work that day? A. I did. 40

George Albert—Cross

Q. Where did you see him? A. I met him in the shanty. I always got ahead of him; where we changed our clothes.

Q. You didn't see him after two o'clock? A. Not after two o'clock, no.

10

CROSS-EXAMINATION by Mr. Smith:

Q. As I understand, Mr. Albert, O'Brien worked with your crew? A. He did.

Q. And you had taken cars from the storage yard up to the shoots, as you call them? A. Yes, sir.

Q. The storage yards is where the coal is stored, large cars of coal? A. Yes, sir.

20

The Court: What did you say your duty was?

The Witness: Conductor.

Q. When you took these cars, you took them up the trestle, as you call it, the car is dropped down through the hopper, and the coal is dumped into the hopper, goes down into the hopper to what you call the conveyor? A. Yes, sir.

Q. The conveyor takes it up into the storage bin? A. Yes, sir.

30

Q. There it stays until somebody wants to use it? A. Right.

Q. They load all kinds of engines there? A. All kinds is right.

Q. Now then, on this day you say you and your crew, including O'Brien, quit at two o'clock, standard time? A. Yes, sir.

Q. Then you went to the shanty? A. Yes, sir.

40

Q. The shanty is only a short distance beyond

George Albert—Re-direct

the coal chutes? A. About fifty feet, fifty or sixty feet.

Q. These coal chutes you speak of are right near Communipaw Avenue station? A. Yes, sir.

Q. Just across the tracks? A. Across the way.

Q. When you saw O'Brien last, how was he dressed, in street clothes or working clothes? A. He was dressed in street clothes.

Q. He was going away from the shanty? A. Yes, sir.

Q. Did you see which way he was walking? A. The last I seen him, he headed towards Communipaw, he had taken the street going towards Communipaw station.

Q. Communipaw station is on the west side of the tracks? A. Yes, sir.

Q. Across from the roundhouse? A. Direct north from the roundhouse.

Q. And that was about two o'clock? A. Yes, just about two o'clock.

Q. The last thing you had done that day was to put some of the cars from the storage yard— A. Put them on the shoot there.

Q. Up on the shoot? A. Yes, sir.

Q. How far is it from the shanty that you speak of to Communipaw station? A. About five or six minutes walk.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. What was the last thing you did; take cars or take empties away, or just leave them up there and have them unload them? A. No, we would take the empties away.

George Albert—Re-direct

Q. Then you waited until these cars were unloaded, and then took them away?

Mr. Smith: He didn't say that.

A. We would not wait until they were unloaded.
10 We would take them may be the first thing in the morning.

Q. Did you take these cars away that you took up there? A. We would take the empties away, yes, sir, after.

Q. You took the loaded cars up and took the other empty cars away? A. We took empties away.

Q. Did you take away the very cars that you
20 brought there from some place? A. We did not take them away that day, the following day.

Q. You took away none you brought, but took away empties that were on the track? A. Yes, sir.

Q. Empty coal cars which had previously been emptied? A. The cars we took away that day, empty cars, were brought there the day previous.

Q. How many cars were emptied a day? A. In the neighborhood of twenty or twenty-five cars.

30 Q. Do you know how much coal each coal car held? A. Well, in the neighborhood of fifty tons, forty or fifty tons.

Q. Twenty to twenty-five cars about fifty tons each? A. Yes, sir.

Q. Mr. Smith asked you if engines of all kinds were coaled there. Do you know how many engines were coaled every day? A. No, I don't know.

40 Q. How do you know engines of all kinds were coaled there? A. Well, we could see the engines

Rose Abbatiello—Direct

that would get coal there, different engines around the yard.

(Witness excused.)

It is stipulated between counsel that the defendant company on the day of this accident was a common carrier of passengers and freight from the State of New Jersey into other States and territories, and that both intrastate and interstate engines were coaled from the chute mentioned in the testimony on the day of the accident. 10

MISS ROSE ABBATIELLO, sworn for the 20 plaintiff:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 355 West Side Avenue, Jersey City.

Q. On the 29th of April, 1926, in the afternoon of that day, were you anywhere near West Side Avenue station of the Central Railroad of New Jersey? A. Yes, sir.

Q. Where were you going? A. I was going to a woman's house on Kearney Avenue and to take a short cut to my home, I cut through the Central Railroad station. 30

Q. Did you see the train come in going towards Newark? A. Yes, sir.

Q. As the train came in, did you see the engineer do anything? A. Yes, sir.

Q. What did he do? A. Waved at me.

Q. Just after you saw the train pull in the sta- 40

Rose Abbatiello—Direct

tion and the engineer waved to you, did you hear anything on the train? A. Yes; like a whistling sound.

Q. Where did it come from? A. From under the car, where the man was killed.

10 Q. A sound like whistling air from under the car under which O'Brien was? A. Yes, sir.

Mr. Smith: Don't lead her.

Q. After you heard that whistling sound, did you see the train do anything? A. Yes, sir.

Q. What did the train do? A. The train gave like a big jerk.

Q. What happened to O'Brien? A. And after
20 I had drew my attention, I just happened to look, and I saw Mr. O'Brien was thrown off, tried to hold the railing of the train, the bar.

Q. When he was thrown off, after he tried to hold the railing of the car, did any portion of his body go under the car? A. Yes, sir.

Q. What happened? A. From his ankle down, the right leg was cut from the ankle down.

Q. Did anybody go to his assistance? A. Yes, sir. I don't know if it was a passenger in the
30 train or a man out-door, pulled him away from the wheels.

Q. What did they do with him? A. Well, there is a fellow—I can point him out—gave him something to drink. They laid him comfortable on the floor of the station.

Q. You say you can point the man out. Where is he? A. There (indicating).

Q. He laid him down and gave him something
40 to drink? A. He didn't lay him down. Another man laid him down.

Rose Abbatiello—Direct

Q. He gave him something to drink? A. Yes, sir.

Q. Did you see any of the train crew after he was pulled out, looking under the cars on which he was? A. Yes, sir. I saw, I think it was two or three conductors or brakemen. 10

Q. What were they doing? A. They were looking under the car.

Q. Was this car just making the whistling? A. I don't know; but I heard whistling, like whistles, on the train.

Q. Did it sound as though air was escaping?

Mr. Smith: I object as leading.

Q. Will you describe the whistle? A. Like a very loud whistling, like air escaping. 20

Q. Did you afterwards hear the engine whistle?

Mr. Smith: I object, as directly leading.

Q. Will you state whether you heard any other sound besides this sound of escaping air? A. No, I didn't.

Q. Did you see anybody put newspaper over his leg? A. Yes, sir.

Q. Now, did you see his daughter, Marie O'Brien? A. Yes, sir. While I was running home, to tell Mrs. O'Brien, while I was going home, I met Marie O'Brien and I told her. 30

Q. As a result of what you said, did she go back to the station with you? A. Yes, sir.

Q. Did she see the man lying there? A. No, when we got around the station, some fellows pushed us back and said—

Mr. Smith: I object to what anybody said. 40

Rose Abbatiello—Cross

Q. She didn't see her father? A. No, sir.

Q. Did you wait until the ambulance came? A. Yes, sir.

Q. Were you there when Mr. O'Brien was taken away? A. Yes, sir.

10

CROSS-EXAMINATION by Mr. Smith:

Q. You live at 355 West Side Avenue? A. Yes, sir.

Q. How old are you? A. Seventeen.

Q. How long have you known the O'Briens?

A. Well, I know her by dealing in our store.

Q. In your store? A. Yes, my father's.

Q. How long? A. About a year.

20 Q. You say this day you were going somewhere? A. Yes, sir.

Q. Going where? A. To a woman's house on Kearney Avenue.

Q. What is her name? A. Mrs. Miel.

Q. How do you spell it? A. M-i-e-e-l.

Q. Where does she live? A. On Kearney Avenue.

Q. What number? A. 238 Kearney.

Q. Did you have an appointment there? A.

30 Well, I didn't. I just went up there. The woman was not home; just the children were home.

Q. You were just going up there? A. Yes, sir.

Q. You didn't have any appointment with her? A. No, sir.

Q. You were going there and she wasn't home? A. No.

Q. What time did you get there? A. I got there about five o'clock.

40 Q. On that day? A. Yes, sir.

Rose Abbatiello—Cross

Q. Was that after the accident? A. Well, I was coming from this woman's house and going through the railroad when I saw the accident.

Q. You were coming from her house? A. Yes, sir.

Q. How did you get to the railroad, from what street? A. From Kearney Avenue; I was going through where all these freight cars are. 10

Q. You mean you were going through the railroad yard? A. Yes, sir.

Q. Which way does Kearney Avenue lie from the station, north of the station or south of the station; is it towards Bayonne or Jersey City? A. Well, it is towards Jersey City, I think.

Q. How many blocks up from West Side Avenue station? A. Kearney Avenue? Well, just one. One block. 20

Q. Where is No. 238, near what other street? A. That is the last house on Kearney Avenue.

Q. The last house towards West Side Avenue or towards the Boulevard? A. Towards the Boulevard.

Q. So you were up towards the Boulevard? A. Yes, sir.

Q. On Kearney Avenue? A. Yes, sir. 30

Q. Then you went west on Kearney Avenue, towards West Side? A. Yes, sir.

Q. And some place there you cut through? A. Yes, sir; I cut through.

Q. Where was it you cut through; how far from West Side Avenue? A. How far? It was quite a distance.

Q. Quite a distance? A. From West Side.

Q. From West Side; well, it goes right across 40

Rose Abbatiello—Cross

it? A. I went up towards Kearney Avenue, cut through where all the cars were, you see I was walking towards where the train was coming in.

Q. You were walking towards where the train was coming in? A. Yes, sir.

10 Q. The train was coming from Jersey City?

A. It was going to Newark.

Q. The train was coming the way you were walking? A. Yes, sir.

Q. You were walking towards West Side and the train was coming towards West Side Avenue?

A. Yes, sir.

Q. What part of the station did you get up to?

A. Well, I happened to get half way to West
20 Side Avenue station, just about half way.

Q. Halfways where, in front of the station or between the station and the hill? A. Well, I got up between the middle of the station—

Q. Right in front of the station? A. Yes, sir.

Q. Between the station and the tracks? A. Yes, sir.

Q. You saw the train coming in? A. The train coming in, yes, sir.

30 Q. Which way were you walking? A. I was walking towards the tracks.

Q. Toward the track at West Side Avenue? A. Yes, sir.

Q. How near were you to the street at West Side? A. I was a far distance from it.

Q. About how far? A. I don't know.

Q. Were you up as far as the center of the station? A. I was right where Mr. O'Brien was hurt, between like the track and there was, like,
40 something—

Rose Abbatiello—Cross

- Q. You mean a switch? A. A switch, yes, sir.
- Q. The switch right there; were you standing right there? A. No, I was about fifteen feet away from that.
- Q. Which way; towards the street? A. Yes, sir. 10
- Q. Towards West Side Avenue? A. Yes, sir.
- Q. You were walking towards West Side Avenue? A. Yes, sir.
- Q. Is that right? A. Yes, sir.
- Q. Did you know this engineer? A. No, I didn't know him.
- Q. You didn't know him at all? A. I didn't know him.
- Q. You say he waved at you? A. Yes, sir. 20
- Q. Did you wave? A. Well, I was walking down towards West Side. He just waved at me.
- Q. How did he wave; what did he do? A. Waved like that (indicating) with his hands. I didn't pay no attention.
- Q. What do you mean by "waved?" A. I can't explain. He just waved at me.
- Q. How? A. With his hand.
- Q. Did he speak to you? A. No, he didn't. He didn't say nothing. Just waved. 30
- Q. Did he make a motion this way, to say "ta-ta?" A. No, no motion.
- Q. What do you mean by "waved?" A. Just waved.
- Q. With his hand? A. With his hand.
- Q. Which hand? A. Right.
- Q. Just show us; give us an illustration and wave with your hand? A. Like that he waved (indicating). 40

Rose Abbatiello—Cross

Q. You think he went that way, and you think that was a wave to you? A. Yes, sir.

Q. Was he smiling at you? A. Yes, sir.

Q. A broad smile? A. Yes, sir.

Q. He made a motion with his hands, up that
10 way? A. Yes, sir.

Q. What did you do? A. I didn't pay no attention.

Q. Not at all? A. No, sir.

Q. Didn't you give him a wave back? A. I didn't wave to him.

Q. Nothing at all? A. Nothing.

Q. You just went on? A. Yes, sir.

Q. Did he turn around to look at you? A. Yes,
20 sir.

Q. You didn't say anything, except smile? A. And he waved at me.

Q. You call that "waved at you"? A. Yes, sir.

Q. You kept on walking? A. Yes, sir; after, I heard that jerk like, and I stopped.

Q. After you heard the jerk, you stopped? A. Yes, sir.

Q. You didn't see any jerk? A. Yes, I did.

Q. What did you see? A. It gave a jerk and
30 knocked Mr. O'Brien off.

Q. Did you see him on the steps? A. I didn't see him; I saw him get knocked off.

Q. But did you see him on the steps? A. No, I didn't.

Q. You saw him on the ground? A. I saw when he was hurt, on the ground.

Q. What then did you see? A. I saw a fellow
40 running and they were pulling him from the wheels.

Rose Abbatiello—Cross

Q. That is the first you saw of him? A. Yes, sir.

Q. Now, you say that you heard the jerk? A. Yes, sir.

Q. That is what you heard? A. Yes, sir.

Q. Did you see anything at that time? A. I 10
saw Mr. O'Brien getting knocked off.

Q. You didn't see him getting knocked off; you saw him on the ground? A. I saw him knocked off, because I was up there.

Q. Didn't you say first you saw a man running to him? A. That is later, to pull him from under the wheels. I saw a man running to pull him away from under the wheels.

Q. That is the first you saw him? A. Yes, sir. 20

Q. You say you heard a whistling sound? A. Yes, sir.

Q. Wasn't that like a steam whistle? A. No, it was not; it was like an air whistle.

Q. It was just like you say, when Mr. Simpson asked you "Was it like air escaping?" and you say "yes?" A. Right.

Q. Then you say you saw somebody running. Then you had to turn around, didn't you? A. I saw all the passengers running out of the train. 30

Q. Then you saw them running out of the train and you turned and looked? A. I was up there when the passengers were coming out of the train.

Q. You were there already when the passengers were coming out of the train? A. They were just coming out.

Q. Then you looked to see what they were coming for? A. Yes; I saw Mr. O'Brien, how he was 40
knocked off.

Rose Abbatiello—Cross

Q. Just tell us how he was knocked off? A. Well, as I was walking down towards the Central Railroad station, the engineer waved at me.

Q. You told us that. The engineer waved at you; all right. He gave you a good wave? A. I
10 saw Mr. O'Brien knocked off the train.

Q. Where was he? A. I think he was in either the third or the fourth car.

Q. Inside the car? A. No, I just saw him.

Q. Did you see where he was? A. No, I didn't.

Q. Was he on the platform? A. I don't know.

Q. Was he coming out of the window? A. No.

Q. You don't know anything about that? A. I just saw him, just knocked right out when he was
20 trying to hold the railing or the iron bar.

Q. You didn't see where he was; you don't know even if he was on the platform? A. I saw him knocked right out.

Q. What did you see then? A. He was under the train.

Q. When he was under the train was when you first saw him? A. Yes, sir.

Q. He was then on the ground? A. Yes, sir.

Q. That is the first time you saw him; isn't that
30 a fact? A. Yes, sir.

Q. You are sure of that? A. Positively, yes, sir.

Q. You are positive of the fact that he was on the ground when you first saw him? A. Yes, sir; right.

Q. Let us have no mistake about that. Then you saw somebody running to him to pull him out? A. Yes, sir.

40 Q. Was there somebody right there with him

Rose Abbatiello—Cross

when you first saw him? A. I don't know whether it was a passenger on the train or a man out-door ran and picked him up.

Q. Did you see the man run? A. Yes, sir.

Q. Did you see Mr. O'Brien before the man ran to him? A. No, I didn't. 10

Q. Was it the running of the man that called your attention? A. It was the noise that drew my attention.

Q. Then you saw Mr. O'Brien on the ground, and you saw the man running towards him? A. Yes, sir.

Q. Now, when did you first talk to Mr. O'Brien, or anybody from Mr. O'Brien about it? A. Well, I didn't see Mrs. O'Brien or Mr. O'Brien in a long 20 time.

Q. So that you didn't talk to anybody? A. No, never did.

Q. Didn't you say a little while ago that you ran down and saw Marie O'Brien? A. When the accident happened, yes, sir, I did see Marie O'Brien.

Q. Where did you see Marie? A. I found her; I was going down West Side Avenue. I got half-ways down and I met Marie O'Brien and I told 30 her.

Q. On West Side Avenue? A. Near the station; she was coming up.

Q. She was coming up? A. She was coming to the store.

Q. Did you tell her then you had seen the accident? A. No; I just told her her father was hurt.

Q. When was it you first told anybody from 40

Rose Abbatiello—Cross

Mr. O'Brien's family that you had seen the accident? A. I first was telling Mrs. O'Brien that her husband was hurt. I was telling her about it.

Q. When? A. It was about a year ago.

10 Q. That was after the accident? A. Yes, sir.

Q. And about a year ago; is that right? A. Yes, sir.

Q. You told that to Mrs. O'Brien. You were not out to Bergen County, were you, to Hackensack?

Mr. Simpson: I object to that as not proper cross-examination. There was no mention of Hackensack on the first examination.

20

Q. (Question read as follows: You were not out to Bergen County, were you, to Hackensack.) At the time this case came on for trial in the Bergen County Circuit Court? A. No.

Q. Did you sign a statement for Mr. Simpson or his office? A. For Mr. Sinnott.

Q. When did you sign it? A. About two or three weeks ago I think.

30 Q. Isn't that the first time you told anybody about this accident? A. I didn't tell nobody.

Q. You didn't tell anybody about it at all? A. No.

Q. You are sure you didn't tell Mr. Sinnott, you hadn't told him about it before? A. No, I didn't.

Q. So that you had not told a single soul until Mr. Sinnott came to see you? A. Right.

40 Q. And that was about two weeks ago? A. Yes, sir.

Richard J. Becker—Direct

Q. The accident happened in 1926? A. Well, Mr. Sinnott was down to my house before.

Q. When? A. After it happened. I was telling Mrs. O'Brien—

Q. When? A. About a year ago.

Q. You are sure of that? A. Positive. 10

Q. Can you give us a date? A. I don't know; I don't remember the date.

Q. How many times have you seen Mr. Sinnott? A. About three times, I guess.

Q. The first time was about a year ago? A. No, it was not.

Q. When was it? A. I don't remember.

Q. Would you say it was six months ago? A. I could not say. 20

Q. Give us the first time, the first time that you remember seeing Mr. Sinnott? A. I don't know how long ago it was.

Q. You can't tell us how long ago? A. No, sir.

Q. You are sure of that? A. Positive.

(Witness temporarily withdrawn.)

RICHARD J. BECKER, sworn for the plaintiff: 30

Direct-examination by Mr. Simpson:

Q. On the 29th of April, 1926, were you an orderly in the hospital? A. Yes, sir.

Q. What hospital? A. Jersey City.

Q. Were you on duty when John O'Brien was brought in? A. Yes, sir.

Q. Did you undress him? A. I helped, yes, sir. 40

Rose Abbatiello—Cross

Q. And took the articles from his person? A. Yes, sir.

Q. What did you take from his person? A. Well, the only thing I remember taking is a watch and a couple of pennies in change. I don't just
10 remember how much.

Q. How long was he at the hospital before he died? A. I don't know how long he was in the hospital.

Q. How long did he stay there after the 29th of April, 1926? A. I don't know; about three months—

Q. Were you there when he died? A. He didn't die in the admitting room. They come to
20 the admitting room first and then they are sent out into the hospital.

Q. You don't know about the circumstances under which he died? A. No, sir.

Mr. Smith: No cross-examination.

ROSE ABBATIELLO, recalled.

30

Cross-examination by Mr. Smith: (resumed).

Q. Going back to the accident; as this train came in, you were walking along? A. Yes, sir.

Q. From West Side Avenue? A. Yes, sir.

Q. You were on the cinder path were you? A. Yes, sir.

Q. Then you say the engineer waved to you? A. Yes, sir.

40 Q. The train went on? A. Yes, sir.

George Elliott—Direct

Q. You heard the whistling noise then? A. Yes, sir.

Q. And then you saw people running? A. Yes, sir.

10

GEORGE ELLIOTT, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 84 Roosevelt Avenue, Jersey City.

Q. On the 29th of April, 1926, were you in the vicinity of West Side Avenue station of the Central Railroad of New Jersey? A. Yes, sir. 20

Q. Did you see a train coming in going towards Newark? A. Yes, sir.

Q. Where were you with reference to the station? A. The place where I am employed is right opposite the Central Railroad station.

Q. Did you see anything happen to O'Brien that day? A. I didn't see him fall off, no sir.

Q. What did you see; just tell the Jury what you saw and what you heard. Describe the movements of the train as it came in? A. As I was standing there, as I often do, when a train came in. I seen this train coming in at a somewhat faster rate of speed than they usually do. All of a sudden I heard the cars bang together, like, and brakes applied. 30

Mr. Smith: I ask that that be stricken out.

Mr. Simpson: I don't care about the brakes being applied. 40

George Elliott—Direct

Q. You heard the cars bang together; with what force? A. As you often hear when cars come to a stop.

Q. Did you hear anything else besides the backing? A. Not from where I was standing there.

10 Q. What was the next you heard? A. Then I seen a young girl and a fellow run away from the train, and then I seen other people running towards a certain car there.

Q. What did you do? A. I ran over there myself also.

Q. To what car did you run? A. It was either the third or the fourth car.

Q. What did you observe when you got there?
20 A. I first seen the man lying there.

Q. Did you hear anything? A. Not then I didn't; I was excited.

Q. How long after did you hear anything? A. After I came back, with the conductor then and called the hospital, I went and I got our first-aid kit from where it was, and took that over. While I was standing there, I heard somebody there remark—

Mr. Smith: I object.

30 Q. Did you go to the car again and hear anything? A. Yes, sir.

Mr. Smith: I object to what he heard after he came back from the hospital.

Mr. Simpson: It is perfectly proper to show this whistling from the air brake.

40 Mr. Smith: I am objecting to this as being after he came back from some place and heard something. That certainly is not evidential.

George Elliott—Direct

The Court: How long a time elapsed?

The Witness: Took me about two minutes.

Q. Two minutes later when you came back, what did you hear from this car where this man was pulled out from? A. Sizzling. 10

Mr. Smith: I ask an exception.

The Witness: Then I heard a sort of sizzling sound there at the time I was there.

Q. Where did it come from? A. Seemed to be coming from underneath the train; I could not say where.

Q. Where was O'Brien lying with reference to this sizzling sound? A. He was about ten or fifteen feet away from there at the time. 20

Q. You didn't see him come from the train? A. No, I didn't.

Q. How far away were you standing from the place where you saw him lying, when you heard this backing of cars together; about how far? A. About a hundred or a hundred and fifty feet.

Q. You could hear it plainly? A. Yes, sir.

Q. After you came back and heard that sizzling sound, what was done with O'Brien? A. Well, there was some lady there, who was a nurse from another factory right there. She gave him stuff out of this box, something to drink. I could not say what it was. Then we took a box and we laid his leg in the box; that was tied up. 30

Q. The noise you heard like escaping air from underneath the train, how far was that back of the engine? A. About the second or third car, it appeared to me. 40

George Elliott—Cross

Q. I show you a picture: is that a representation of West Side station on the day of the accident, a correct portrayal of it? (Handing witness.) A. Yes, sir.

10 Mr. Simpson: I offer this in evidence.
Mr. Smith: I have no objection to that.
Accepted and marked as Plaintiff's Exhibit P-2 of this date.

Q. Can you show on this diagram about where you were standing when you heard this noise?
A. Our place is by this line of cars, our place is over there, here (indicating).

20 Q. You were standing on a line with the cars behind here? (Indicating) A. I was not on the cars. There is the railroad tracks there. I was standing right there, opposite the station.

CROSS-EXAMINATION by Mr. Smith:

Q. Were you standing at the same place that you were working at? A. Yes, sir.

Q. Where was that? A. That was about 150 feet away from where the station is.

30 Q. Which way, north or south; towards Jersey City or towards Bayonne? A. Towards Jersey City.

Q. Well, on the north side towards Jersey City there are houses there, aren't there? A. No, sir; not where I was standing. It is a factory, William H. Luttman & Co.

40 Q. That factory is where, up towards the Boulevard or towards the station? A. No, sir; where the railroad comes in, it is to the left of the station.

George Elliott—Cross

Q. And you say you were standing there? A. That is where I worked.

Q. You say you saw the train coming in? A. Yes, sir.

Q. Then you say you heard a noise as of cars banging together, as you often hear when cars come to a stop; is that right? A. Yes, sir. 10

Q. And then you saw a girl running away from the train? A. Yes, sir.

Q. Then you saw some people running to the train? A. Yes, sir.

Q. And then you ran over? A. Yes, sir.

Q. When you got over there, you ran over to find out what was the matter? A. Yes, sir.

Q. When you got over there, you say you saw a man lying on the ground? A. Yes, sir. 20

Q. He had been taken away from the train then? A. They were just about taking him out. He was already stationed there, he has already laid down when I got over there.

Q. And then just where was he lying, near what point? A. Well, he was about, I would say, about fifteen or twenty feet from the train there.

Q. He was up towards the east from the station, wasn't he? A. From the station, yes, sir. 30

Q. About how far up, could you tell me? A. You mean from the train?

Q. From the station? A. About fifteen or twenty feet away.

Q. From the station? A. Yes, sir. From the station? I would say about fifty feet from the station.

Q. Up towards the switch? A. Yes, sir.

Q. Then you went somewhere? A. I ran back to call up the hospital. 40

John Iannello—Direct

Q. To where? A. To where I worked.

Q. You ran back to where you worked; you went there to call up the hospital? A. Yes, sir.

Q. When you came back from there, then you say you heard along the train there a sizzling
10 sound? A. Yes, sir.

Q. You don't know where it came from? A. It just came from underneath.

Q. But you don't know where from? A. No, sir.

Q. You don't know which car? A. It was about the second or third car.

Q. From the front? A. Yes, sir.

Q. Would you say it was the second or the
20 third? A. I really could not swear which one it was.

Q. It was one of these cars up there, you say you heard the sizzling sound from? A. Yes, sir.

Q. Then did you see them take O'Brien away?
A. Yes, sir.

Q. You said you were on the cars behind the station; you were towards your factory or place of work? A. Yes, sir; our office.

30

JOHN IANNELLO, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Where do you live, Mr. Iannello? A. 106 Madison Street, Newark.

Q. On April 29th, 1926, were you standing near
40 Railroad of New Jersey at about five o'clock in

John Iannello—Direct

the afternoon daylight saving time? A. Yes, sir.

Q. What train were you waiting for, or were you waiting for a train? A. 5:15 I guess it was. I don't remember the exact minute; it was after five o'clock.

Q. 5:10 or 5:11 daylight saving time? A. Yes, 10
sir.

Q. As that train came in, did you see Mr. O'Brien, the man that was afterwards hurt; did you see him? A. I see the man on the step of the car.

Q. You saw him standing on the step of the car; what was the next thing you noticed? A. I saw him fall.

Q. Well, did you notice anything about the 20
movement of the train? A. No, not really particularly that time, because I was talking to a girl; the girl and her brother were standing together.

Q. You didn't notice at that time? A. No.

Q. Didn't you make a written statement for Mrs. O'Brien, in which you said this; didn't you make this statement on August 11th, 1926:

“On April 29, 1926, I was standing near 30
the switch at West Side station, waiting for the train due at 5:10. As the train came into the station, I noticed O'Brien standing in the doorway of the car. I next noticed the train give an unusual jolt or jerk and O'Brien was thrown forward. He tried to catch his balance but missed the top step and he fell to the roadway on his knees. He had one hand on the rail and 40

John Iannello—Direct

his foot was under the train. I saw no conductor or brakeman on the platform before the accident.”

Did you sign such a statement as that?

10 Mr. Smith: I think he should be shown it.

Mr. Simpson: Sure; that is right.
(Handing witness.)

Q. That is your signature, isn't it? A. That is my signature.

Q. You made that statement, didn't you? A. Well, I signed that, yes, sir.

20 Q. Does that refresh your memory that you did notice the movement of the train and that you did notice a heavy jolt or jerk, that you did notice O'Brien thrown forward, try to catch the rail and was thrown off? A. I notice the train coming to a stop. I saw him with his left hand hold of the rail of the door, you know, coming in the stairs and I saw him fall, try to hold on with his left hand.

30 Q. Did you notice any jolt or jerk of the train, as you stated in this statement? A. Generally you got to notice the jerk of the train when it comes in to stop.

Q. Did you notice what you signed to here, or didn't you?

Mr. Smith: I object to that.

A. I noticed the train come in and stop.

Q. Did you notice him thrown forward? A. He was thrown forward, yes, sir.

40

John Iannello—Cross

CROSS-EXAMINATION by Mr. Smith:

Q. Now, Mr. Ianello, you were standing on the grass plot, where? A. Right behind the key where the conductor opens the switch.

Q. You were standing near the switch? A. Right on top of the switch. 10

Q. You were standing with Mr. Hyde and Miss Hyde? A. Yes, sir.

Q. Standing on the side? A. Yes, sir.

Q. You saw the train come in? A. Yes, sir.

Q. You saw this man standing on the step? A. Yes, that is right.

Q. You saw, as the car still proceeded, you saw him attempt to get off, didn't you? 20

Mr. Simpson: I object to that, an opinion as to how he tried to get off as improper. It is for the jury to say how he was trying to get off, not this witness.

The Court: Sustained.

Mr. Smith: Your Honor will grant me an exception.

The Court: You may have an exception.

Q. And when you saw the train coming in, you saw O'Brien standing on the step; did you see him doing anything? A. No. 30

Q. Nothing at all? A. Only see him fall.

Q. Was the train then moving? A. Yes, sir.

Q. The train was still going on? A. Yes, sir.

Q. It had not yet stopped at all? A. No.

Q. Still in motion? A. Still in motion.

Q. You saw him fall, did you? A. Yes, sir.

Q. You saw his hand slide down? A. Left hand. 40

Gertrude Hyde Veal—Direct

Q. On the hand rail? A. Yes, sir.

Q. You saw him fall? A. Yes, sir.

Q. Then what did you see happen to him? A. He went under the car, his right leg.

Q. And the train was still going on? A. Yes,
10 sir.

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

Q. As the train came in, did it come in as you have often seen them come in, in the usual manner? A. I really could not tell you how it comes in. I know it comes in and has to stop.

Q. Now, then, as a matter of fact, you don't know what caused Mr. O'Brien to fall? A. I really don't.

20 Q. You testified at the time this case was on in Bergen County, didn't you? A. I don't get you right.

Q. You were out in Hackensack when this case was on out there? A. Yes, sir.

Q. You testified there you didn't know what made Mr. O'Brien fall? A. Because I know he fall, but I don't know what makes him fall.

Q. You don't know what made him fall off and you so testified? A. Yes, sir.
30

Mrs. GERTRUDE HYDE VEAL, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 36 Baldwin Street, Newark.

40 Q. On the 29th of April, 1926, were you in the

Gertrude Hyde Veal—Cross

vicinity of West Side Avenue station of the Central Railroad at Jersey City? A. Yes, sir.

Q. About what time were you there? A. Between 5 and 5:10 P. M.

Q. Who was with you? A. My brother Theodore Hyde and Mr. Ianello. 10

Q. Did you see the train approach the station from the east going west? A. Yes, sir.

Q. Now, did you see anything happen on the train at all, in reference to the man on the train?

A. Why, I just saw the train pulling into the station.

Q. Did you see any man's body come from the train? A. I saw a man falling. I turned around and ran away from the scene. 20

Q. What caused him to fall you don't know? A. I don't, no, sir.

Q. As soon as you saw him; where was he when you first saw him, in the air or on the ground?

A. He was between heaven and earth. I could not tell you where.

Q. You turned your head, you didn't want to see what happened? A. I turned my head and ran. 30

Q. About where did the accident happen with reference to the switch? A. It was right near the switch, I believe.

CROSS-EXAMINATION by Mr. Smith:

Q. You stood there with your brother, you say? A. Yes, sir.

Q. What is his name? A. Theodore R. J. Hyde.

Q. You saw the train come in? A. Yes, sir. 40

Gertrude Hyde Veal—Re-direct

Q. It was in motion? A. Yes, sir.

Q. Then you say you saw this man fall; you saw his body in the air? A. Yes, sir.

Q. Was the train still in motion? A. Yes, sir.

Q. The train was coming in as you have seen
10 it before? A. Yes, sir.

Q. While it was coming along, you say you saw this man's body in the air? A. Yes, sir.

Q. As you call it, between heaven and earth?
A. Yes, sir.

Q. Then you say you turned and ran? A. Yes,
sir.

Q. You were excited, were you? A. Yes, sir.

Q. As the train came in there, did you see any
20 jerk or jolt? A. I could not say. I turned and
ran. I don't know what happened. I was too ex-
cited.

Q. I mean before you saw the man fall? A.
No, sir; none before.

RE-DIRECT-EXAMINATION by Mr. Simp-
son:

Q. You were not paying attention whether there
was or not. You don't know what made the man
30 come from the train; you were not watching for
a jerk? A. I was not watching for a jerk. I was
not watching for the man to fall.

Q. How far did the train go after you saw the
body in the air? A. I don't know.

Q. It only went a foot or two after you saw
the body in the air? A. I don't know; I didn't
see.

Q. You were not watching for any jerk or jolt,
40 were you? A. No, sir.

Achille Alessandro—Direct

ACHILLE ALLESSANDRO, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 117 Clark Avenue, Jersey City. 10

Q. Where do you work? A. Lehigh Valley Railroad.

Q. Where? A. Down at Communipaw Avenue.

Q. That is the same as the Central Railroad isn't it? A. No, that is a different railroad altogether.

Q. Doesn't it run into Communipaw? A. Well, we have a passenger station on Jackson Avenue; that is right across from Communipaw Avenue. 20

Q. Were you near this West Side Avenue station on the 29th of April, 1926, when O'Brien was hurt? A. No, sir.

Q. Were you on the train? A. Yes, sir.

Q. The same train with O'Brien? A. Yes, sir.

Q. Did you know O'Brien? A. No, sir.

Q. Where did you sit? A. In the last car.

Q. Did you have anything with you? A. Yes, sir.

Q. What did you have with you? A. Stock and die. 30

Q. Where did you get on the train? A. Communipaw Avenue station.

Q. How many stations is that away from West Side Avenue station? A. Communipaw, Pacific, Hunter, Jackson Avenue, West Side.

Q. Where were you going to get off? A. West Side.

Q. As the train approached West Side Avenue station, what did you do? A. Going to get off. 40

Achille Alessandro—Direct

Q. You got up out of your seat A. Yes, sir.

Q. You got on the platform? A. Yes, sir.

Q. Did you step down off the platform? A. Yes, sir.

Q. Put your hand on the guard rail?

10 Mr. Smith: I object to that as leading.

Q. What did you do when you got on the steps?

A. I stepped on the bottom step of the car.

Q. Did you feel any motion of the car? A. I didn't pay any attention to it.

Q. Didn't you make a signed statement? Is this your signature on this statement? (Handing witness) A. Yes, sir.

20 Q. Didn't you say in this statement that after you had put your hand on the guard rail,

“I next felt the car give a heavy jerk by the cars lurching. I next heard a loud noise, as if air discharge. I was about to jump off my step as the train was about to stop and then saw the man under the train.”

Did you say that? A. Yes, sir.

30 Q. That is your signature? A. Yes, sir.

Q. You work for the Lehigh Valley? A. Yes, sir.

Q. What is the next thing you noticed? A. As I got on the step of the car, I saw the man on the step, between the fourth and fifth step—

Q. What happened, what threw him off?

Mr. Smith: I object to that.

40 A. I can't say what threw him off.

Achille Alessandro—Direct

Mr. Smith: I ask that that be stricken out.

The Court: The answer is that he doesn't know.

The Witness: I was on the step; he was under the step. 10

Q. He was under the step; you never saw him on the steps at all? A. No, I didn't know the man at all. I never saw him on the train.

Q. How far did the car go after you got out?

A. When I got off the step, he must have gone about three hundred feet.

Q. From the time you got on the step of the last car until the car stopped, it went three hundred feet? A. It must; yes, sir. 20

Q. Under what car was this man that you saw?

A. He was under the fourth or fifth step from the rear end of the train.

Q. Which car, the last car? A. He was between the second and third car.

Q. How could you see the man if you got off the last car? A. Who got off?

Q. Didn't you get off the last car? A. Yes, sir.

Q. You got off? A. Yes, sir. 30

Q. The car went three hundred feet after you got off the step? A. The train went about three hundred feet from the time I got on the last step of the train, of the car.

Q. You are still working for the Lehigh Valley? A. Yes, sir.

Q. What is your work there? A. Car inspector.

Q. Did you pull O'Brien out from under the 40 car? A. I did.

Achille Alessandro—Cross

Q. What car did you pull him from under? A. Inside the fifth truck.

Mr. Simpson: I would like to have this statement marked for identification.

10 (Marked for identification as Plaintiff's Exhibit P-3 for identification of this date.)

Q. What condition was O'Brien in when you pulled him out? A. I didn't know it till a minute after I pulled him out, I noticed the foot was off.

Q. Which foot? A. I think it was the right foot.

Q. Was he bleeding? A. Very little.

20 Q. What did you do with him? A. I got a handkerchief and I tied it on his leg.

Q. Then what happened? A. Some lady came over and brought some kind of first-aid and fixed him up, gave him a drink some way. I stood there and then they took him away.

Q. After you gave him a drink of water, did you stay there or did you go away? A. I stood there. I didn't give him no water.

30 CROSS-EXAMINATION by Mr. Smith:

Q. You were on the car, were you, Mr. Alessandro? A. In the train; yes, sir.

Q. You say you were in the last car? A. In the last car.

Q. Now, as the train was coming into West Side Avenue station, you went out and got on the platform? A. Yes, sir.

Q. The train was still in motion? A. Yes, sir.

40 Q. You say you went out and got on the step?
A. Yes, sir.

Achille Alessandro—Cross

Q. Of the train? A. Yes, sir.

Q. When you got up, the train was still going?

A. Yes, sir.

Q. You say it went about three hundred feet from the time you got up to go out until it stopped? A. That is right. 10

Q. While the train was in motion you were walking up the whole of the train to get on the platform? A. Yes, sir.

Q. Then you went out on the step? A. Yes, sir.

Q. The train was still going? A. Yes, sir.

Q. Then when you got down on the step, the train was gradually slowing down; there were no jerks or jolts? A. I didn't notice any. 20

Q. You didn't notice any? A. No.

Q. While you were standing on the step, you say you saw something on the ground? A. I didn't see something on the ground. I was on the step and I saw a man on the fourth or fifth step.

Q. Of what? A. Of the car.

Q. Standing on the step? A. No, was on the ground.

Q. Was the car then in motion? A. Yes, sir. 30

Q. The car was still in motion? A. Yes, sir.

Q. The car going past the man that was on the ground? A. Yes, sir.

Q. When you saw the man on the ground, what did you do? A. I got off and I pulled him out from under the truck.

Q. Was the train still going as you got off? A. No, just stopped.

Q. Just as it stopped, you got off? A. Yes, 40
sir.

John J. Daly—Direct

Q. Then you got off; you ran over to the man?

A. Yes, sir.

Q. He was then on the ground? A. Yes, sir.

Q. And you pulled him out from under the train? A. He was not under the train. He was
10 on the right rear side of the truck, because his foot was off; his body was outside the rail.

Q. His foot was over the rail? A. Inside the rail.

Q. His body was outside the rail? A. Yes, sir.

Q. You are sure the train was in motion all the time from the time you went out on the step, and that it was still in motion as you saw the man on the ground? A. Yes, sir.

20 Q. While you were on the step, you didn't notice any unusual jerk or jar? A. No.

JOHN J. DALY, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Are you connected with the Jersey City Hospital? A. Yes, sir.

30 Q. What is your position there? A. Record clerk.

Q. Have you got the records in the case of John O'Brien, who was admitted on the 29th of April, 1926? A. Yes, sir.

Q. Will you produce them? A. Yes, sir (producing).

40 Q. What is this book? A. This contains a record of all property taken from patients when they enter the hospital.

Andrew J. Grace—Direct

Q. What does it show was taken from him?

Mr. Smith: I object.

Q. What is this other record? A. The chart.

Q. Is that the chart of his treatment and his condition and so forth? A. Yes, sir. 10

Q. What is the date of his death?

Mr. Smith: I object, if the Court please. It is not admissible. This man did not make it.

Q. Who made this chart? A. The nurse.

Q. What is the name of the nurse? A. Helen G. Clarke.

Q. Who was the doctor who attended him? 20

Mr. Smith: I object to reading from the record. He has no knowledge.

Mr. Simpson: This is a chart of the admission of this man to the hospital, kept in the ordinary course of business.

The Court: If objected to, I will sustain the objection.

Mr. Simpson: I ask an exception.

The Court: You may have an exception.

Mr. Smith: No cross-examination. 30

ANDREW J. GRACE, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. Where do you live, Mr. Grace? A. 196 Delaware Avenue.

Q. What is your occupation? A. At present, 40 engineer.

Andrew J. Grace—Direct

Q. Where? A. At the present I am stationary engineer at the Tidewater Oil Company.

Q. Were you ever a locomotive engineer? A. Yes, sir.

Q. Where? A. Pennsylvania Railroad.

10 Q. Did you give any special examination or attention to the subject of air brakes? A. I was examiner and inspector in France on the Paris-Orleans Railway.

Q. For how long a time? A. Five months.

Q. Can you describe what these air brakes are on passenger trains? A. Yes, sir.

Q. What are they?

20 Mr. Smith: I object unless this gentleman can testify as to the brakes which were on this train.

Q. Is there a general type of air brake? A. Yes, sir.

Q. Will you describe what the general type of air brake is?

Mr. Smith: I object to that.

The Court: Overruled; you may have an exception.

30 Mr. Smith: Exception.

Q. These brakes are all made by the Westinghouse people? A. Not all by the Westinghouse.

Q. They are practically all the same? A. Practically all the same principle.

Q. What is the principle? A. They are operated on what they call a triple valve, with a brake cylinder arm, and train line running from one end of the train to another.

40

Andrew J. Grace—Direct

Q. Suppose that from the vicinity where these air brakes are in the train there was a sound like escaping air, what would that indicate?

Mr. Smith: I object to that. There is no testimony that there was anything the matter with these brakes. No testimony that any escaping air came from the brakes, nothing but that somebody heard a sizzling sound. 10

(Argued.)

The Court: I will permit the question and you may have an exception.

Mr. Smith: Exception.

Q. (Question read as follows: "Suppose that from the vicinity where these air brakes are in the train there was a sound like escaping air, what would that indicate?") What would that indicate as to the condition of the air brake? A. It depends where that leak is coming from. If it comes from the train line side of the triple piston, it will cause, under certain circumstances, an emergency application of the brakes. 20

Q. What does it indicate? A. It indicates a leakage somewhere in the train line. 30

Q. Is that a defect or not? A. It is a defect.

Q. What would be the result of that defect? A. It depends on the point where the defect is.

Q. Give us all the results. A. If it is located on the train line side of the triple piston, it will cause, the moment the engineer comes to apply his brake valve in the cab, it will cause the brakes to be applied. Now, if he starts to make an application of the brakes at that time, the additional leakage, combined with the existing defect of the 40

Andrew J. Grace—Cross

brake put on in the cab, will cause an undue emergency application of the brakes.

Q. Which, in turn, will cause what to the train?

A. Well, the quick action of the brakes, in what we call an emergency application, we generally
10 refer to it; a sudden stop.

Q. I don't care what you call it; what does it cause to the train? A. A sudden stop.

Q. Like a feather? A. A complete bang.

CROSS-EXAMINATION by Mr. Smith:

Q. Let us see if I understand this. If this air leak is on the train side of the triple valve, as you call it, and there is an application of air, the
20 application of the air existing, I suppose, the leak as you say— A. No, the existing brake pipe pressure.

Q. —with the already escaping pressure or leak, would cause an emergency application of the brakes? A. Yes, sir.

Q. That would cause an immediate application of the brakes to the train? A. Yes, stop the train.

Q. Resulting in the stopping of the train; is
30 that right? A. Yes, sir.

Q. The present is what you call a sizzling sound, that might indicate to you a leak, would it not? A. Yes, sir.

Q. But that does not indicate to you the extent of the leak? A. It would have to be a very big leak.

Q. Don't you know it is a frequent thing for air brakes to leak, the air line to leak? A. We
40 grant probably a two to five per cent leakage in the normal train line.

Andrew J. Grace—Cross

Q. That will cause a sizzling? A. Yes, but if it is in one particular point, it will be a bad spot. If the sizzling is over the entire train—

Q. Yes; if the sizzling is over the entire train?

A. It don't have to be a heavy sizzling, but it will cause an emergency application of the brakes as soon as the engineer attempts to make an application. 10

Q. Suppose it is a light sizzling? A. It will be hardly noticeable.

Q. What do you mean? A. If it is a sizzling sound, was audible to the average human being, it would be an exceptionally large leak.

Q. Your idea is that if there was a sound heard by the average ear or human being, that is an exceptionally large leak? A. Exactly. 20

Q. And would cause what you call an emergency application? A. The moment the engineer applies his brakes.

Q. You are sure of that? A. Absolutely.

Q. Let us assume the train, we will say, is coming into the station, and a thousand feet before it reaches the station, the engineer begins to apply his brakes? A. Yes, sir.

Q. He begins to apply the air, doesn't he, and as soon as he begins to apply the air, if there is a leak, a crack, as you describe, there will be an application of the brakes causing a sudden stop of the car? A. Yes, sir. 30

Q. Isn't that so? A. Yes, sir.

Q. That occurs the moment the engineer applies the brakes, doesn't it? A. That depends. If the train is traveling at an exceptional rate of speed, take for instance, probably forty miles 40

Andrew J. Grace—Cross

an hour; he applies his brakes at a point probably a thousand feet beyond the point where he wishes to stop; the emergency application of the brakes will take probably three hundred to four hundred feet before he stops still.

10 Q. You mean it will take the train three to four hundred feet after he applies the brakes? A. After the brakes go into emergency.

Q. Before the train stops that is going forty miles an hour? A. Forty miles.

Q. And at twenty miles stops going? A. Going twenty, would probably stop in one-third that space.

Q. One-third of what? A. Three or four hundred feet.

20 Q. A hundred or 135 feet? A. Yes, sir.

Q. Suppose it is going ten miles? A. It will practically be a dead stop and do a whole lot of damage.

Q. What would you think would occur? A. It all depends on the engineer in that particular case. The general rule among engineers as I have seen them—

Q. You said it would do a whole lot of damage? A. Because of the crashing of the cars together.

Q. To such an extent as to damage them? A. Not necessarily damage them.

Q. What do you mean? A. Probably slide the wheels, flatten the wheels, put a flat spot, flat spots on the wheels.

Q. The wheels slide? A. They are not supposed to slide, that is, by the engineer applying his brakes.

40 Q. Your idea is, if it was going forty miles

Andrew J. Grace—Cross

an hour, it would take three hundred feet to stop?

A. Approximately.

Q. Going twenty miles, it would take one-third of that distance; going ten miles an hour, it would stop suddenly and do a whole lot of damage? A.

Yes, sir.

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Q. That is, in any event, if the hissing is audible to the human ear? A. It depends, as I said before, on if the leak is on the train line side of the triple piston. If it is on the other side of the triple piston, it would be a different case altogether. It would not mean anything at all. It would be simply a leakage off the brake.

Q. Where? A. Probably the piston of the triple valve, when the leakage is under the car and attached to and direct with the brake cylinders to the cars.

20

Q. Under each car? A. Each car has its own individual triple valve.

Q. In other words, the train line goes along under each car, with triple valves? A. Yes, sir.

Q. The air goes into it and passes through the triple valve? A. Yes, sir.

Q. Then passes on under the car? A. No; one train line that runs from the engine, right clean to the rear end of the train, from that train line, about in the middle of each car, there is a branch pipe that they call the train line branch pipe. That runs to the triple valve of this particular car and the pipe is connected to the triple valve and from the triple valve to the brake cylinder, sometimes called the auxiliary reservoir.

30

Q. If a leak is on the entrance side of the triple valve, that is nothing? A. No; if it is on the

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Andrew J. Grace—Re-direct

train line side, it is a bad affair, because it can cause an emergency application. But if it is on the auxiliary reservoir side of the triple piston, then the only fault will be that it will allow leakage off the brakes in the particular car, you won't
 10 get the full efficient condition of the braking power.

Q. What the brakes were on these cars you don't know? A. No.

Q. Nor what type? A. Except passenger equipment.

Q. And whether they had an entire air line? A. I know they have an entire line.

Q. You know that? A. Absolutely; they must
 20 have.

Q. You mean all cars? A. Every car; freight cars; passenger cars; pullmans.

Q. What kind of system there was there you don't know? A. No; that is immaterial as far as I am concerned; the principle is the same.

Q. All the same? A. The principle is practically the same on all of them.

Q. All cars have the auxiliary reservoir? A. They must have the auxiliary; they must have a
 30 brake cylinder; they must have a triple valve.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. If this hissing came between the two cars on the air brakes? A. Between cars, that would be a train line leak. That would cause, as I stated before, an emergency application of the brakes, as soon as the engineer applies, that is, puts on the
 40 brake valve. When he applied the brakes before

Andrew J. Grace—Re-direct

that, while he is in the running position; so long as excess pressure is in the main reservoir, the air will maintain pressure on the train line and it would prevent the brakes from being applied;—as soon as he applied the brake valve in that position, the brakes would begin to stop the cars. 10
 When he went to reverse the position of the brake valve, in starting, the immediately reduction of the train line pressure would immediately act—

Q. What is it, a loop? A. The point where the air, in leaving the train line, the air not going into the train line—

Q. It is a dead portion? A. A dead point.

Q. It would allow the air which should be coming into the brakes to escape? A. The effect is 20
 not to put in more pressure into his train line; the leakage on the train line allows the air on one side of the triple piston to exhaust itself through that leak, which allows the auxiliary on the other side of the triple piston to move and applying air coming over from the—

Q. That puts the emergency on without the engineer? A. No, it would be a service application unless it was a very large leak.

Q. Does that condition that you describe pro- 30
 duce an emergency application and a sudden stop? A. Not unless it is a big leak. If it is a big leak, yes. If it is a small leak, as was described just a moment ago to me, I would say it would act as a service application.

Q. You mean as described by Mr. Smith? A. Yes, sir.

Q. I am not talking about that. I am talking about a sizzling noise of escaping air between two 40

Andrew J. Grace—Re-cross

cars which you say would indicate a leak, what would that do as to the brake? A. If that is a rather small leak, I would refer to it as a service application; if it would be like blowing out a gasket, or something like that, thereby giving a
 10 loud whistling sound—

Q. A whistle like escaping air; what would that indicate, a large leak? A. That would indicate a large leak, yes, sir.

RE-CROSS-EXAMINATION by Mr. Smith:

Q. What do you call a whistling sound? A. If a gasket on the brake pipe was broken, or a leak in a connection, on the connection side, that would
 20 be a large leak.

Q. The reason you have the auxiliary on the train with the reservoir is to take up any leak, small leak, that might occur in the train line? A. Oh, no.

Q. What do you have it for? A. The auxiliary is used there, in that particular case, to apply on that particular car. When you are charging your auxiliary, that is the only time you have got connection with your train line. Otherwise it has no
 30 connection.

Q. What is that auxiliary for? A. It is used to allow air to be placed into the brake cylinders, to move the brake piston, the brake cylinder piston, and operates the valve reversed against the car, applies the brake against the wheel.

Q. Why do you need it? A. The train line itself is only an inch and a quarter pipe, running from one end of the train to the other, and really
 40 the volume, or capacity there is not enough to apply the brakes on each particular car.

Christine O'Brien—Direct

Q. So that you depend on both? A. The auxiliary reservoir pressure is what applies the brakes on your car.

Q. If there is a small leak in your train line, doesn't the auxiliary make up for it, or compensate for it? A. No, the excess pressure in the main reservoir take care of that. 10

Q. Where is the main reservoir? A. That is on the locomotive.

Q. You say if a small leak is in the air line, in the train line, the air line running from the engine back, the reservoir take care of it? A. The main reservoir, by way of the brake valve.

Q. That takes it up by way of the brake valve? A. Yes, sir. 20

Mrs. CHRISTINE O'BRIEN, sworn for the plaintiff.

Direct-examination by Mr. Simpson:

Q. You are the widow of John O'Brien, who has been mentioned here? A. Yes, sir.

Q. You are the administratrix of his estate? 30
A. Yes, sir.

Q. How old was your husband when he died?
A. Fifty-four.

Q. How old are you? A. Forty-seven.

Q. What children did you have; give the names and ages of your children? A. The oldest was eighteen when my husband died.

Q. What are their names? A. Michael Edward; John Francis, sixteen he was; Marie, four- 40
teen; and Malcolm.

Christine O'Brien—Direct

Q. How old is he? A. He is thirteen now.

Q. Any other children? A. Elizabeth, nine.

Q. The younger children are with you; where is Marie, is she home? A. Not now, sir.

10 Q. Where is Marie? A. I had to get Marie put away for the last two years.

Q. Where? A. She has gone where she is under care; she is practically insane.

Q. Your oldest son since the accident is married? A. Yes, sir.

Q. When was the first you knew of the accident; not what anyone told you, but when was the first you knew of it? A. The first I knew of the accident was Marie coming in the back door
20 to me. She told me her father was up at the station with a leg off.

Q. After that, did Marie stay home with you or go away? A. Marie had to be taken away afterwards by the sister; she took her, to try to get her round, but she could not manage her.

Q. Where is Marie now? A. She is with the sisters now, at present. I haven't seen Marie for three months. I would not be let see her.

30 Q. How much did your husband earn during his lifetime? A. I could not tell you that. I could not tell how much he earned.

Q. He brought the money home? A. He brought me home his money every two weeks; sometimes \$70; sometimes \$75; sometimes \$80; sometimes more.

Q. You ran the house and took care of the children? A. Yes, sir.

40 Q. Was he steadily employed? A. Steadily employed.

*Christine O'Brien—Cross
Motion for Nonsuit*

Q. How long had he been working for the Central Railroad? A. He is working over twenty years for the Central Railroad.

Q. How long after he was hurt did he die?
A. He died four days later. 10

Q. Where was he when he died? A. The City Hospital, Jersey City.

Q. Was he conscious at all after the accident?
A. No, I never got a sensible word from him; he never reacted except the night before he died he asked to see the baby.

Q. The night before he died, the only conscious thing was he asked to see the baby? A. Yes, sir. 20

CROSS-EXAMINATION by Mr. Smith:

Q. How old did you say Michael was? A. Michael is twenty years old in June.

Q. How old is John? A. He was nineteen in March.

Q. And James? A. There is no James; Malcolm.

Mr. Simpson: That is the case.

Mr. Smith: I now move for a nonsuit, on the following grounds: 30

There is no proof that John O'Brien was engaged in interstate commerce at the time of the accident; nor was there any proof that the last work he had been engaged in was in interstate commerce.

(I invite the Court's attention to the following citations: 241 U. S. 177; 244 U. S. 183. 208 Fed. Reporter 507.) 40

Motion for Nonsuit

Upon the ground that there is nothing in this case to show in what capacity Mr. O'Brien was on this train; only an assumption, but no proof.

10 He might have been there lawfully, but if so, he was only there as a licensee. There is, however, nothing in the evidence to show that he was not there as a trespasser.

If he was there as a licensee, there is no proof that the defendant was guilty of any wilful or wanton negligence.

Upon the ground that there is no proof of any negligence on the part of the defendant; no proof of any defective apparatus.

20 (Motion argued; and recess to 2 P. M.)

After recess, 2 P. M.

(Argument resumed.)

The Court: The motion for a nonsuit will be granted and an exception allowed.

Mr. Simpson: May I have the Court's reason for the granting of the motion?

30 The Court: On the ground that he was not engaged in interstate commerce at the time of the injury.

Mr. Simpson: I ask an objection in the nature of an exception.

New Jersey Court of Errors and Appeals

CHRISTINE O'BREIN, Adminis-
tratrix of the Estate of John
O'Brein, deceased,
Plaintiff-Appellant.

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY, a corporation,
Defendant-Appellee.

On Appeal
from Hudson
Circuit Court.

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**BRIEF IN BEHALF OF PLAINTIFF-
APPELLANT.**

This is an appeal from a judgment of affirmance
in the Supreme Court of a nonsuit, at the Hudson
Circuit. The action was brought under the Inter-
state Commerce Act for the protection of em-
ployees of common carriers by railroad. The
action was nonsuited on the ground that the intes-
tate of the plaintiff was not engaged in interstate
commerce.

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The intestate of the plaintiff was a brakeman
(S. C., p. 20) and was regularly employed upon a
train of coal cars which were engaged in bringing
coal to a chute in the yard of the defendant (S. C.,
p. 20). This coal chute was about 40 to 50 feet
long (S. C., p. 22) and was made up of bins (S. C.,

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p. 22) into which the coal was dumped and practically in a non-interrupted stream went into the engines of interstate commerce and intrastate commerce (S. C., p. 24, see S. C., p. 27). It was not a storage bin in which coal would be held for use which use was undetermined at the time of the putting of the coal into the bins (S. C., p. 24)

10 but there was a continuous stream of coal coming from the coal cars through the bins practically into the engines. The bin used up 1,250 tons of coal a day (S. C., p. 26).

The intestate of the plaintiff had finished his work on these coal cars (S. C., p. 23) and was leaving the yard on the train supplied to him for that purpose. When the train arrived at the station where he would alight, it stopped with an

20 unusual and violent jerk (S. C., p. 28, S. C., p. 34) because of defective air brakes and carelessness in the operation of the train and he was thrown from the train and killed.

POINT I.

Whether intestate of plaintiff was engaged in interstate commerce was a question for the jury.

30 The Court in nonsuiting the case relied on the case of *Harrington vs. the Railroad*, reported in U. S. Supreme Court, Vol. 241, page 177. The facts in the *Harrington* case are dissimilar from the facts in the present case. In the *Harrington* case the train crew was bringing coal to a "shed" where it would remain until wanted. It might be used in interstate and it might be used in intrastate commerce and the Court in that case, said:

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“The switching crew of which Harrington was a member did not work outside of this state, and was engaged at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed where it was to be placed in bins or chutes and supplied as needed, to locomotives of all classes some of which were engaged or about to be engaged in interstate and others in intrastate traffic.” * * * “This was nothing more than the putting of the coal supplied in a convenient place from which it could be taken as required for the use. It has been held that an employee of the carrier, while he is mining coal in the carriers’ colliery, intended to be used by its interstate locomotives is not engaged in interstate commerce within the meaning of the Federal Act (*Delaware, L. & W. R. R. Co. vs. Yurkonis*, 238 U. S., 439, 59 L. Ed., 1397, 36 Sup. Ct. Rep., 160), and there is no distinction in principle between the two cases.”

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In the Harrington case, the coal was brought to a storage shed from where it would be taken and put in chutes and was supplied to engines. In the instant case there was no storage of the coal. It was practically thrown by the coal cars right to the engines and might just as well be put directly in interstate engines as through the wooden way called a chute. This is shown by the fact that over 1,000 tons were used a day (*S. C.*, p. 21), but the trial Court charged as a matter of law that this was not supplying materials for interstate commerce and nonsuited.

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The case in the Circuit Court of Appeals in the Second Circuit, *Monohan vs. C. R. R.*, rep. in 11 Fed. (2nd), page 212, realizes in its opinion the distinction between the *Harrington* case and the case of the instant sort in the following language:

10 “The defendant especially relies upon *Harrington’s* case, 36 S. Ct., 517, 241 U. S., 177, 60 L. Ed., 941, in which the injured workman was engaged in carrying coal to bins where it was to be used in interstate and intrastate engines. This case should, however, be read with *Collins’s* case, 40 S. Ct., 450, 253 U. S., 78, 64 L. Ed., 790, and *Szary’s* Case, 40 S. Ct., 454, 253 U. S., 86, 64 L. Ed., 794. These came up together from this Court, and upon an equal

20 division of the judges who decided them. *Collins* operated a signal tower, and was pumping water to a feed tank by means of a gasoline engine, which caught fire and injured him. After some uncertain language as to how far the employment in the signal tower might color that at the pump, we understand the Court, on page 85, meant to declare that the pumping of itself was interstate commerce. *Szary* had been drying sand for engines, and

30 was engaged in carting away some ashes, when he was struck while pausing to take a drink. As we understand the case, it was thought enough that he was generally engaged in drying sand for interstate and intrastate engines; *certainly it was said to be unimportant what the next engine should be that he was to sand.* *Harrington*, on the other hand, had not yet brought his coal to any common reservoir, and this may well be the distinction.

40 If so, *Harrington’s* case does not apply here,

because some of the lumber had actually been laid in place, awaiting the carpenters. In any event, we regard the two later cases as controlling. The cases are full of casuistry which we would avoid as far as possible. We cannot see any ground for having a distinction between a sequence of activities performed by a single man and the same sequence when divided between two." 10

The proper doctrine to be followed is found in the cases of *Collins vs. Erie R. R.*, 253 U. S., 65, where the Court says:

"It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commences as were demanded, and the test of the cases satisfied." 20

When furnishing coal for interstate commerce the employee is engaged in interstate commerce. See cases in 10 A. L. R., 1215; 29 A. L. R., 634, for annotations, page 608, for a coal case. A man engaged in breaking up coal to be delivered to chutes is under the protection of the Federal Act. See also cases collected in 24 A. L. R., 634; 29 A. L. R., 1207. The page 604 case is the case of *Flatink vs. U. S. Railway Administration* in which all the authorities up till 1922 are collected. Also 14 A. L. R., page 735, page 10, A. L. R., page 1215, especially for furnishing coal. 30

It is therefore respectfully submitted that the judgment of the Circuit Court cannot be reconciled 40

with the doctrine of cases in the U. S. Supreme Court, and it was at least a question for the jury as to whether decedent was engaged in interstate commerce.

POINT II.

10 **There was evidence of negligence to go to the jury.**

It may be argued that the trial Court was right for the wrong reason and that a nonsuit should lie because of lack of proof of negligence, but the jury might have found that the decedent was leaving the place of employment in the ordinary way provided by the master, see *Winfield vs. Erie*, 244 U. S. Supreme Court, page 170, and if so leaving, then the jury could find that the instrumentalities of the train were defective, the air brakes were defective and that the train was stopped with an unusual jerk or jar which precipitated the decedent from the train and resulted in his death. If this was so, there would be evidence of negligence which required submission to the jury. See *Castonia vs. Maine Central R. R.*, 78 N. H., 348, 100 A., 601; *Burr vs. P. R. R.*, 64 L., 30; *Laycock vs. U. R. W. Co. of St. Louis*, reported in 227 S. W., 883, 21 Neg. Compensation cases annotated, page 820; *Holmes vs. Alleghany Traction Co.*, 153 Penn., 152; *Lansing vs. Coney Island B. & R. Co.*, 16 App. Div., 146; *Akersloot vs. Second Ave. Rwy. Co.*, 131 N. Y., 599, 15 L. R. A., 489; *Uffelman vs. Philadelphia Rapid Transit Co.*, 253 Penn., 394, 98 Atl., 574; *Sullivan vs. Boston Elevated Rwy. Co.*, 224 Mass., 405, 112 N. E., 1025; *Brady vs. Springfield Traction Co.*, 140 Mo. App., 421, 124 S. W., 1070; 40 *Benoit vs. Boston & N. St. R.*, 216 Mass., 320, 103

N. E., 830; Shaffer vs. Kansas City Rwys. Co. (Mo. App.), 201 S. W., 611; Goldstein vs. United R. R. of San Francisco, 202 Pac., 155; Wall vs. Union Traction Co., 196 Pac., 434; Griffin vs. Springfield St. R. Co., 219 Mass., 55, 106 N. E., 551; Mintz vs. International R. Co., 227 N. Y., 197, 124 N. E., 893; Heineke vs. Chicago Rwys. Co., 279 Ill., 210, 116 N. E., 761; Hamilton vs. Boston & N. St. R., 193 Mass., 224; South Covington & C. St. R. Co. vs. Moore, 170 Ky., 760, 186 S. W., 638; Sass vs. Chicago City Rwy. Co., 182 Ill. App., 364; Maier vs. Metropolitan St. Rwy. Co., 176 Mo. App., 29; 162 S. W., 1041; Detrich vs. Metropolitan St. R. Co., 143 Mo. App., 176, 127 S. W., 603; Bresnahan vs. Boston Elevated R. Co., 216 Mass., 114; Chester vs. P. S. Rwy. Co., 94 Atl., 953; Augusta Rwy. & Electric Co. vs. Lyle, 4 Ga. App., 113, 60 S. E., 1075; McCarthy vs. Boston Elevated R. Co., 207 Mass., 551, 93 N. E., 694; Tompkins vs. Interborough Rapid Transit Co., 88 N. Y. Misc., 20, 150 N. Y. Supp., 219; Robertson vs. Wash. Rwy. & Electric Co., 279 Fed., 180; Sweeney vs. Erving, 228 U. S., 233; Kleine vs. Pittsburgh Rwys. Co., 252 Pa., 214, 97 Atl., 395; Young vs. Boston & N. St. R. Co., 213 Mass., 267, 100 N. E., 541; 50 L. R. A. (N. S.), 450; Crawford vs. Reading Transit Co., 116 Atl., 542; McGann vs. Boston Elevated R. Co., 199 Mass., 446; 85 N. E., 570, 18 L. R. A. (N. S.), 506; Rust vs. Springfield St. R. Co., 217 Mass., 116, 104 N. E., 366; Anderson vs. Metropolitan St. R. Co., 159 Mo. App., 449, 141 S. W., 461; Birmingham Ry., Light & Power Co. vs. Mayo, 181 Ala., 525, 61 So., 289. All these cases are all reported in 21 Neg. Compensation cases annotated, starting on pages 820 to 855.

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The following cases are reported in 6 Neg. & Compensation cases, annotated page 803; Rice vs. Puget Sound T. L. & P. Co., 141 Pac., 191; Southern R. Co. vs. Brooks, 125 Tenn., 260.

- The following cases are reported in 15 Neg. Compensation cases, annotated page 594: Westling vs. Atchinson, T. & S. F. Ry., 165 Pac., 669.
- 10 In the case of Forth Worth & D. C. Rwy. Co. vs. Stalcup, 167 S. W., 279, the Court said:

20 “The question is was there a sudden stop with unusual and unnecessary force or jar, which caused the fall? The evidence is that a fall by a brakeman from a train handled in the usual and ordinary way is an unusual occurrence in such accidents under such circumstances are not usual. The evidence further shows that Brown was an experienced brakeman and conductor and one of the best. It follows therefore that the train was then handled out of the usual or ordinary way, or that Brown, the brakeman, fell in an unusual way while the train was being handled as usual or in the ordinary way. That the impact of the cars with the stop threw Brown forward and under the car is certainly fairly

30 inferable. If it was an ordinary stop, from the testimony it is not probable that he would have been so thrown. It was an unusual, sudden stop, and an unnecessary force and jar that caused the fall, is inferable from the facts proven. The evidence leaves no doubt that the occasion did not require such a stop and such unnecessary force or jar. The negligence is not inferred from the force and jar alone, but from the facts in evidence which

40 establish that there was no occasion for such

a stop or force; hence negligence is presumed from such other facts. The fall and jar we estimate by inference, from certain proven facts, and negligence is established by the facts which show no occasion for the use of an extraordinary stop, force, or jar. The engineer, conductor and brakeman all testified that the train was handled in the usual and ordinary way without any unnecessary force or jar. The jury evidently did not accept their statement.” 10

POINT III.

The Supreme Court in the opinion below, said:

“Furthermore, the decedent was not at the time of his injury engaged in his employment, whether that was interstate or intrastate. West Side Station is a considerable distance from Communipaw and is not a part of defendant’s yards where the decedent was employed. There is no evidence that the train on which the decedent was being carried was a work train. The fair inference from the evidence is that it was a passenger train. The decedent had left the premises of his employment and was on a public highway three hours before his injury.” 20 30

It is respectfully submitted that this was an inference of fact which the Supreme Court made, whereas it was fact for the jury to say under the evidence whether or not the decedent was not being carried in the usual way from his work to his station. 40

On page 25, the testimony would warrant the jury in the inference that he was proceeding on the premises to Communipaw Station, at which he could take a train either to be delivered as a part of his work, as a servant of the defendant, or as a passenger. If the Supreme Court is right that he was a passenger, why then a nonsuit was wrong because ~~it~~^{there} was evidence of negligence and an amendment of the complaint should be allowed even in this Court, because the nonsuit was not granted on the ground that he was out of his employment and finished with his work, but on the sole ground that he was not engaged in interstate commerce.

In the case of North Carolina Railroad vs. Zachary, 232 U. S., 248, there Zachary left the premises of the railroad entirely and went to get a drink of water, yet he was held still pursuing his employment.

Cases collected in the U. S. Code Annotated, Title 45, sub-title 127.

It is respectfully submitted that the nonsuit be reversed and a *venire de nove* be granted.

ALEXANDER SIMPSON,
Attorney for and of Counsel with
Plaintiff-Appellant.

decedent was an employee of defendant. He was a member of the yard crew. Part of the duty of this crew was to collect loaded cars of coal from different parts of the Jersey City Yard (at Communipaw) where they had been stored, shove them up to a little storage yard at the coal chutes and take away empty cars (20); at the little storage yard another crew took charge of the cars, the cars were taken to the chutes and dropped to a hopper, emptied into the hopper and the coal picked up by the conveyor (an endless belt) (22), and carried up to the storage bins (20) and from the storage bins the coal was eventually placed in engines as needed (20-22).

At the chutes, engines of all kinds were loaded with coal (24-26).

The storage bin at the chutes would hold about sixty cars of coal (21), each car carrying about 40 or 50 tons (26), or from 2,400 to 3,000 tons.

20 to 25 cars of coal was their daily haul from the storage yard to the chutes (21), or not over 1,250 tons of coal per day.

NOTE 1. The statements in brief of plaintiff (page 2), i. e.:

(1) that the coal "was dumped and practically in a non-interrupted stream went into the engines of interstate commerce and intrastate commerce".

(2) that "there was a continuous stream of coal coming from the coal cars through the bins practically into the engines".

(3) that "the bin used up 1,250 tons of coal a day";

are erroneous and not borne out by the evidence.

There was no evidence as to the amount the *bins used up* in a day. The testimony on page 26 is that there were in the neighborhood of 20 or 25

cars emptied per day and the cars carried 40 or 50 tons per car.

These cars were emptied into the bin. No evidence appears as to how much was used up in a day.

The bins held from 2,400 to 3,000 tons of coal.

NOTE 2. The statement in the brief of plaintiff that plaintiff's intestate, having finished his work, "was leaving the yard on the train supplied to him for that purpose" is inaccurate, erroneous and not according to the evidence.

Plaintiff's intestate was

(a) not *leaving the yard* at the time of the accident; he was several miles away from the yard;

(b) he was not on a train "supplied to him for that purpose", i. e., leaving the *yard*, but on a regular passenger train running from Terminal Station of defendant at Communipaw Ferry to Newark.

Decedent was a brakeman in the yard crew and he cut the cars and rode the cars, and gave signals to the engineer, and so forth (20).

On the day of the accident, the crew had quit work at two o'clock (23); they (including decedent) changed their clothes at a little shanty near the chutes (23-25); decedent left the shanty (25) and walked towards Communipaw Avenue, a public street, taking the public street going towards the station which is west of the railroad tracks (25); the shanty where they dressed is about 5 or 6 minutes walk from the Communipaw Station (25).

The last work done by decedent before quitting time was to take some empty cars from the chute (26); these were cars that had been unloaded the day before (26).

On this day they had delivered to the chutes about 20 to 25 cars of coal (22-26).

The next observation of decedent after he was last seen going towards Communipaw Avenue, a public highway as aforesaid, was at 5:10 or 5:15 P. M. at West Side Avenue Station in Jersey City, more than three hours after he had quit work (47). He had quit work at Communipaw at two o'clock P. M. (23).

Communipaw (where decedent worked) is some 2½ to 3 miles from West Side Avenue Station.

A train from Communipaw (proceeding west-erly) pulled into West Side Avenue Station at about 5:10 P. M.

Decedent was seen standing on the steps of a car of this train (49) as it came into the Station, and as it proceeded along he fell or jumped off (49).

The attempt of plaintiff at the trial was to prove that while decedent was riding on the steps of the train and while it was still in motion, there was a violent jerk and decedent was thrown off, and that the jerk was caused by a defective air brake of the train.

There was no proof of such alleged facts.

Comment.

The appellant writes down two grounds of appeal:

(1) A general ground of appeal, to wit:

“The New Jersey Supreme Court erred in affirming the judgment of the Hudson County Circuit Court, whereas it should have reversed the same in favor of the plaintiff-appellant.

(2) “The New Jersey Supreme Court erred in considering the appeal before it as a Rule to Show Cause, whereas the said appeal was a straight appeal.”

The second ground of appeal seems to us to be rather specious. The opinion of the Court is entitled "At Law, On Appeal". The plaintiff, appellant, is designated as "appellant" in the body of the opinion. The opinion states, "This case comes up on appeal from the Hudson County Circuit Court where the plaintiff was non-suited", and the only mention of "rule to show cause" is in the final sentence in the opinion or decision wherein the Court says "the rule to show cause is discharged."

Of course, it is apparent that the Court meant "the appeal is denied". The mis-statement, "the rule to show cause is discharged" is merely a matter of form. It has nothing to do with the merits of the case and has nothing to do with the decision of the Court.

If necessary, this Court will reframe the decision by striking out the words "the rule to show cause is discharged", and substituting therefor "the appeal is denied."

The judgment entered upon the decision in the opinion above mentioned is as follows:

"Judgment on verdict in the above-entitled cause was entered in this Court on the Twenty-ninth day of September in the year of our Lord One Thousand Nine Hundred and Twenty-eight, in favor of the Defendant Central Railroad Company of New Jersey, a corporation, and against the Plaintiff, Christine O'Brien, Administratrix of the Estate of John O'Brien, deceased, in a plea of Action at Law for the sum of (non-suit) damages, and Fifty-six Dollars Ninety-eight Cents, costs of suit.

"Judgment entered and signed this 29th day of September, A. D. 1928."

The appeal necessarily is from the judgment entered upon the decision of the Court. The judgment is in proper form. The appeal is not from

the decision or opinion, and the error inserted in the opinion of the decision, "the rule will be discharged" instead of "the appeal will be denied", is not material.

ARGUMENT.

The only ground of appeal, therefore, to be considered by this Court is the first ground of appeal, to wit, the general statement that:

"The New Jersey Supreme Court erred in affirming the judgment of the Hudson County Circuit Court, whereas it should have reversed the same in favor of the plaintiff-appellant."

That the Supreme Court did not err is apparent.

At the close of the plaintiff's case, it appeared that decedent was a brakeman of a yard crew at a yard of defendant at Communipaw, near defendant's terminal at Communipaw Ferry on the Hudson River, Jersey City (25); that the crew, of which he was a member, hauled coal from the main coal storage yard to a little storage yard in back of the coal chutes (21); this little storage yard held about 40 cars (21); that the storage bins at the chutes had a capacity of 40 cars, or from 2,400 to 3,000 tons of coal (21); that each day the crew hauled from 20 to 25 cars of coal, or at the most, 1,250 tons of coal, from the main coal storage yards to the little storage yard at the chutes (each car containing from 40 to 50 tons of coal) (26); that each day they placed the cars at the little storage yard in back of the chutes and left them there, and took away the cars which they had placed there the day before and which had been emptied by other employees at the chutes (20-21-22); that the crew of which decedent was a member did not empty the cars (20).

It further appeared that the work of dropping the loaded coal cars to the hopper, emptying them in the hopper where the coal was picked up by a conveyor (an endless belt) and carried up to the storage bins (24), from which, as needed, it was placed into engines both interstate and intrastate (24-26), was all done by employees not members of the crew of which decedent was a member (20).

Decedent's work ended, so far as the loaded cars of coal were concerned, with placing them in the little storage yard back of the chutes.

POINT I.

Decedent's work at the Communipaw Yard was not employment in Interstate Commerce.

(A) In *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556, the test of employment in interstate commerce is stated as follows:

“The Federal Employers' Liability Act speaks of interstate commerce, not in a technical legal sense, but in a practical one, and the true test of employment in such commerce in the intended sense is, ‘Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?’ ”

This is the test generally accepted in the later cases, and is used in *C. B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941; *Southern Pacific Ry. Co. v. Industrial Accident Commission*, 251 U. S. 259; *Industrial Accident Commission v. Davis*, 259 U. S. 182; and *B. & O. R. R. Co. v. Burtch*, 263 U. S. 540.

(B) Decedent's employment did not come within this test.

This is demonstrated by comparing decedent's employment with that of other workmen whose employment has been held not to be within the meaning of the Act.

In *D. L. & W. R. R. Co. v. Yurkonis*, 238 U. S. 439, it was held that an employee of a carrier, while he was mining coal in the carrier colliery, which coal was intended to be used by the carrier's interstate locomotives, was not engaged in interstate commerce within the Federal Employers' Liability Act. The Court said:

"The averments of the complaint as to the manner of the receiving of the injury by the plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when the plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce—facts essential to recovery under the Employers' Liability Act."

In the *Shanks* case cited above, it was held:

"An employee in a machine shop operated by a railway company for repairing parts of locomotives used by it both in interstate and intrastate transportation, is not employed in interstate commerce within the meaning of the Federal Employers' Liability Act, while engaged in taking down and putting into a new location in such shop an overhead countershaft through which power is communicated to some of the machinery used in repair work."

In the *Harrington* case, cited above, it was held that

“a switchman was not employed in interstate commerce while he was engaged in transferring a load of coal from storage tracks into a coal chute in the same yard where the coal, when thus placed, would thereafter be used by locomotive engines pulling interstate trains, because the work of taking the coal to the chute did not have such a close or direct relation to interstate commerce as to be, in a practical sense, a part of it.”

In *Minneapolis & St. Paul R. R. Co. v. Winters*, 242 U. S. 353, it was held that

“a machinist’s helper, engaged, while making repairs in the roundhouse, upon an engine which had been used in hauling over the Railroad Company’s lines freight trains carrying both interstate and intrastate freight, and which was used in the same way after the accident, was not then employed in interstate commerce within the meaning of the Federal Employers’ Liability Act, governing the liability of an interstate carrier for injuries to its employees when employed in interstate commerce.”

The Court said:

“This engine had been used in the hauling of freight trains over the defendant’s line, which freight trains hauled both interstate and intrastate commerce, and it was so used after the plaintiff’s injury . . . That is all we have, and is not sufficient to bring the case under the Act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might

be needed for . . . Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen . . . Its character, as an instrument of commerce, depended on its employment at the time, not upon remote probabilities or upon accidental later events.”

In *Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, it was held that

“a member of a switching crew, assisting in placing on an unloading trestle in the railway company’s yards, coal cars belonging to such company and loaded with supply coal for it, which, with their contents, had passed over its line from a point outside the State, and had remained in the yards upon sidings and switches for several days before removal to the trestle, was not then engaged in interstate commerce, within the meaning of the Federal Employers’ Liability Act, since the interstate movement of cars had terminated before they left the sidings.”

In *Industrial Accident Commission v. Davis*, 259 U. S. 184, it was held that

“a railway employee, injured while working in the general repair shops of a railway company upon an engine that had been employed in interstate commerce, and which was destined to be so employed again, was not, at the time, employed in interstate commerce within the meaning of the Federal Employers’ Liability Act, where the engine, at the time of the accident, was nearly stripped and dismantled, and had been in the shops more than a month, and was not placed in service for another month.”

In *Price v. C. R. R. of N. J.*, 99 L. 425, 123 A. 756, it was held that

“an employee of a railroad company engaged in interstate and intrastate commerce,

who met his death while engaged in repairing one of the defendant's cars, which car was not in actual use in transportation at the time the accident occurred, was not killed in interstate commerce, although the car when in operation was used both in intrastate and interstate commerce."

In *Smith v. Phil. & Reading R. R. Co.*, 288 Pa. 250, 135 A. 648, it was held that the unloading of a carload of coal for storage purposes is not service in interstate commerce, although such coal may be intended for subsequent use in engines moving in such commerce.

And it has been held that an employee working in a coal chute assisting in elevating coal, some of which would be used in filling the tenders of interstate engines, is not engaged in interstate commerce. *Zavitovsky v. Chi., M. & St. P. R. R. Co.*, 165 Ky. 256, 176 S. W. 974.

These cases clearly show that decedent's work was not interstate transportation, nor so closely related to it as to be practically a part of it. That it was not interstate transportation is shown by the Barlow case, *supra*. And that it was not so closely related as to be practically a part of it, is shown particularly well by the *Harrington* case, *supra*. In that case, the Court said:

"As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion, and the true test of employment in such commerce in the sense intended is: Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it? *Shank v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 568, *ante* 436, 438; 36 Sup. Ct. Rep. 188, and cases there cited.

Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This

was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use.

It has been held that an employee of the carrier while he is mining coal in the carrier colliery, intended to be used by its interstate locomotive, is not engaged in interstate commerce within the meaning of the Federal Act (*Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439; 59 L. ed. 1397, 36 Sup. Ct. Rep. 160), and there is no distinction in principle between the two cases."

An excellent treatment of the situation involved in this case is given in Roberts Federal Liability of Carriers. In Vol. 2, pp. 1457-1459, it is said:

"Between the removal of coal from the ground, and the dumping of the coal into the tender of an engine, for example, numerous operations must intervene. At some point along the line a given quantity of such coal will become definitely appropriated to use on interstate engines, and thus become an instrumentality of interstate transportation. Employees handling it after that time are under the act because their service takes character from the status of the coal. The question is, when does the coal acquire this interstate status? The National Supreme Court has answered the question in a negative way. It held, for example, that an employee engaged in mining coal in a colliery owned by a Railroad Company, which was to be used on its locomotives in pulling interstate trains, was not working in interstate commerce within the meaning of the act, for the reason that the fact that the coal was to be used in the future in the movement of interstate traffic after it was mined, did not make the actual work of mining the coal a part of interstate commerce. *D. L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397. And it also held that a switchman was not employed in interstate commerce while he was engaged in transferring a load of coal from storage

tracks into a coal chute in the same yard where the coal, when thus placed, would thereafter be used by locomotive engines pulling interstate trains, because the work of taking the coal to the chute did not have such a close or direct relation to interstate commerce as to be, in a practical sense, a part of it. *C. B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 941. The decision in the *Harrington* case manifestly excludes from the operation of the act employees whose work was with coal even farther removed from actual appropriation to interstate use."

That decedent's work was not interstate commerce within the meaning of the Act is further shown by the rule in cases involving the icing of cars; in such cases, although it is true that an employee filling the water coolers of interstate cars with water or ice, or icing interstate refrigerator cars, is within the Act, an employee who was injured while filling with ice a storage box from which he would later take ice to fill interstate cars, was engaged in a service too remote from transportation to claim the benefit of the Act. See *So. Ry. Co. v. Pitchford*, 253 Fed. 736. Filling the storage box in that case is analogous to filling the storage bins from the coal cars in the case at bar, and what decedent did was even more remote from interstate transportation, since he took the cars *to* the storage yard, which clearly shows that his work was not interstate commerce within the meaning of the Act.

Attention is respectfully called to the fact that the two cases upon which plaintiff mostly relied in the Supreme Court, viz, *Erie R. R. Co. v. Collins*, 253 U. S. 77, 64 L. ed. 790; and *Erie R. R. Co. v. Szary*, 253 U. S. 86, 64 L. ed. 794, do not apply to the situation in the case at bar. In the *Collins* case, the employee was required to operate a pumping station, the tank of which supplied en-

gines moving in both classes of commerce. He was injured while starting the engine used to pump water into the tank. It was held that his work was interstate commerce within the meaning of the Act. But his work would be analogous to a man dumping coal from a chute into an interstate engine, which is clearly closer to being practically a part of interstate transportation than moving coal cars from the main storage yard to the little storage yard, where another crew takes charge of putting the coal into the bins for future use.

In the *Szary* case, the employee's work was furnishing dry sand to interstate engines. The sand was dried in stoves and the ashes carried to an ash pit. After sanding some interstate engines, the employee carried ashes to the pit, and while returning was killed by an engine. It was held that his work was interstate commerce within the meaning of the Act. But this is similar to maintaining and tending to the proper functioning of a chute which feeds interstate engines, which is also clearly closer to being practically a part of interstate commerce than the work of the decedent in the case at bar. It is, therefore, apparent that the rulings in these two cases do not apply to the case at bar.

We have clearly shown by the above, that decedent's work at the Communipaw yard was not employment in interstate commerce.

POINT II.

Applicability of the Federal Employers' Liability Act depends upon employment in Interstate Commerce at the time of the injury.

In Roberts Federal Liability of Carriers, in Vol. 2, at pp. 1372-1373, it is said:

“Again, applicability of the Federal Statute (Federal Employers' Liability Act) is tested by the determination of the status of the employee with respect to interstate commerce at the time of his injury. His relation thereto either before or after that time is immaterial to the issue.”

The Federal Supreme Court, in *Erie R. R. v. Welsh*, 242 U. S. 303, 61 L. ed. 319, said:

“By the terms of the Employers' Liability Act, the true test is the nature of the work being done at the time of the injury.”

See also *Swank v. P. R. R. Co.*, 94 N. J. L. 546, 111 A. 44, where the Court said:

“The test is whether the particular work upon which the employee was engaged, at the very time of the accident, was a part of the interstate commerce in which the carrier was engaged.”

(A) DECEDENT WAS NOT SO EMPLOYED AT THE TIME OF THE INJURY.

He quit work at two o'clock. He was last seen walking toward the public street (Communipaw Avenue). The train on which he was riding at the time of the accident arrived at West Side Avenue at 5:10 or 5:15 P. M. It is common knowledge that the trip of such a train from Jersey City (Communipaw) Terminal to West Side Ave-

nue would not take over 30 minutes; it is common knowledge that there are a number of trains running from Communipaw Terminal to West Side Avenue between two o'clock and 4:30 o'clock P. M. The train on which decedent was riding when the accident happened (and from which he fell or jumped) was a regular passenger train.

In *Knorr v. C. R. R. of N. J.*, 110 A. 797, 1920 Pa., it was held:

“A Railroad’s employee, called to assist on a train made up partly of cars shipped from points outside the state, who checked out after his day’s work, transacted some personal business, and then took a train over which he had free transportation to reach his home, and was killed (while on that train), held, not engaged in interstate commerce at the time.”

Certiorari denied, 254 U. S. 644, 65 L. Ed. 454.

See also *Symonski v. C. R. R. of N. J.*, 131 A. 628 (N. J.), 102 N. J. L. 271, affirmed 103 N. J. L. 508, the headnote of which is:

“Where interstate railroad exercised no control over its employees as to their place of residence or means they should use to reach place of employment, employee, injured on tracks while walking thereon to board train at station to go to place of work, held not engaged in interstate commerce within the Federal Employers’ Liability Act.”

The facts brought out by the testimony in the case at bar show that it is not within the doctrine of the case of *Winfield v. Erie R. R. Co.*, 244 U. S. 170. In the *Winfield* case the proof was that the decedent had placed his engine where it was to remain in the yard, and was leaving the yard, i. e., crossing some tracks *in the yard* when he was injured. The important point was *that he was still in the yard limits*. The Court said:

“In leaving the carrier’s yard at the close of his day’s work, the deceased was but discharging a duty of his employment.”

It will be noticed in the *Winfield* case that the decedent at the time of the accident was still in the yard, where his work required him to be. In many of the cases involving the place of the accident in cases where the question in dispute was whether or not the injured was engaged in interstate commerce, the Courts have tested the question by determining whether the injured was in the “ambit” of his employment, i. e., the immediate vicinity of the place where he was employed. *Polloew v. Lehigh Valley R. Co.*, 190 N. Y. 867.

The case of *Winfield v. Erie*, *supra*, is not applicable here.

Nor are *North Carolina R. R. v. Zachary*, 232 U. S. 248, and subsequent cases, which hold that a man returning from work on a conveyance (train or otherwise) of his master “as part of his daily service” is still engaged in discharging a duty of his employment, applicable to the case at bar.

The evidence is absolutely devoid of any testimony or proof that the train upon which decedent arrived at West Side Avenue was supplied to decedent for the purpose of leaving the yard, or to carry him from the place of his work to his place of disembarkment. There is no proof that the train was at any time *in the yard*. There is no proof that any of the fellow employees of decedent was, or were, on the train. There is no proof as to where decedent boarded the train.

POINT III.

It hardly seems necessary to answer Point III of the plaintiff's brief, which we have just received. As we have heretofore remarked, there was absolutely no evidence in this case to show that decedent was being carried upon a work train or by a train supplied by the master to its workmen. He was on a passenger train running from the Jersey City Terminal to and beyond West Side Avenue, thence on to Newark. This train left Jersey City Terminal some three hours after the decedent quit his work. He was last seen going toward a public street. It is true that this public street ran past the Communipaw Avenue Station grounds of the defendant. It led proceeding westerly to that part of Jersey City known as Lafayette, and then on up to the Hill. It would seem absurd for one to think that decedent would go from his place of work in the yard of the Communipaw Avenue Station and wait there some three hours and then take a passenger train which proceeded along past the Station, when, as a matter of fact, he might have taken any one of a half-dozen trains.

The foregoing are not inferences but are statements of fact in the evidence.

The plaintiff's case was based upon the decedent's employment in interstate commerce, and was a case brought under the Federal Employers' Liability Act. Plaintiff's idea is that, having failed to establish a case under the Federal Employers' Liability Act, the Court should of its own motion substitute a common law action for the action brought under the Act and send the case to the jury under such circumstances. We submit this would be going a long way and would

establish a precedent which has not yet been established by the Courts of this State.

For the reasons hereinabove set forth, the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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