INDEX.

not understood, and on delayed regular trains and extra trains must keep sharp lookout for trackmen and hand cars sounding the whistle signal at short intervals where the view is obscured."

6. Because the trial court, over the objection of the defendant-appellant, permitted the plaintiff to offer in evidence and read to the jury, a certain rule known as Rule 530, which read as follows:

"Trains must proceed with caution through yards and station limits, particularly at night. Enginemen must keep in mind the location of main track switches. If a light cannot be seen on a switch where a light is usually displayed, they must reduce speed sufficiently to stop before reaching the switch, unless the track is seen to be clear. They must report all such failures to the Superintendent."

7. Because the trial court, over the objection of the defendant-appellant, permitted the plaintiff to offer in evidence and read to the jury, a certain rule known as Rule 553, which read as follows:

"They must maintain as far as practicable regular and uniform speed, avoiding excessive speed on descending grades and run with due caution where the track is under repair and at all points where there is reason to apprehend danger."

8. Because the trial court, over the objection of the defendant-appellant, permitted the plaintiff to ask of the witness Wallgren, the following question:

"To what extent, and by whom, was that pathway in use on April 25th, 1925, and prior to that time, if you know?"

9. Because the trial court refused, on the request of the defendant-appellant, to strike out Exhibit P 5.

FREDERIC B. SCOTT,
Attorney of Defendant-Appellant.

Summons.

Served April 5, 1926.

THE STATE OF NEW JERSEY,

to

DELEWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, A Corporation:

(SEAL) You are summoned to answer the annexed complaint of Josephine Noon, Administratrix, Ad Prosequendum, of George Noon, deceased, in an action at Law in the Supreme Court. And take notice, that unless you file your answer to said complaint, with the Clerk of the Supreme Court, at Trenton, within Twenty Days, after service upon you of this writ and the annexed complaint, Plaintiff may proceed in the suit, and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this nineteenth day of March, nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

DAVID A. VEEDER,
Attorney.

Amended Complaint.

Filed April 14, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

JOSEPHINE NOON, administratrix of George Noon, deceased, Plaintiff, *vs.* DELEWARE LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, Defendant.	Action at Law

Plaintiff, Josephine Noon, as administratrix of George Noon, deceased, residing in the Town of Toms River, County of Ocean and State of New Jersey, says that:

1. Said defendant now is and on and prior to April 27th, 1925, was a duly organized, incorporated and existing corporation, under and by virtue of the laws of the State of Pennsylvania, and as a common carrier of State and inter-State traffic, operated a line of railroad extending from Hoboken, New Jersey, to Scranton, Pennsylvania, passing through the Cities of Passaic, Clifton and Patterson, New Jersey.

2. That on April 27th, 1925, one George Noon, deceased, was employed by the defendant as a switchman and was one of a crew consisting of two enginemen, operating a switch or drill engine

and of one foreman, controlling, directing and responsible for the acts, conduct and safety of his crew, and of two switchmen and a flagman, whose duties, among other things, were to couple and uncouple cars and engines, signal movements of the engine, throw switches, open gates, flag approaching trains, keep a lookout for trains approaching on main line tracks and to warn one another of the approach of such trains.

3. That at or about six o'clock P. M. on April 27th, 1925, while the defendant and said Noon were switching cars into and out of the industry plant of the Athenia Steel Mills Company, located at the City of Clifton, New Jersey, and while the switch engine and cars then and there owned and operated by the defendant were on the eastbound main track, it became the duty of said Noon to signal the movement of said engine and cars, and to do so he was required to stand between the east and westbound main tracks, and while thus engrossed with his work was struck and instantly killed by defendant's passenger engine on train Number 367, running on the westbound track, at a very high rate of speed.

4. That when said Noon was struck by said engine, he was then and there an employee of said defendant, and then and there was engaged in carrying on interstate commerce between the State of New Jersey and other states and territories and that said defendant at that time and place in moving said engine and cars into and out of said industry plant, was carrying on interstate commerce between the State of New Jersey and other states and territories.

5. That the death of George Noon, deceased, was directly and proximately caused by the neg-

ligent acts and omissions of said defendant, its officers, agents and servants and resulted in injury, loss and damage to his surviving widow and children, and that the negligent acts and omissions of the said defendant, its officers, agents and servants, as aforesaid, were as follows, to wit:

6. That the defendant with full knowledge of the conditions, negligently failed to provide and maintain for said Noon, a reasonably safe place to work, in that at the time and place said Noon was killed, there existed very long sharp curves in said main line tracks, obstructing the view of trains approaching from the east and rendering it difficult for employees at work on or near said tracks to see approaching trains; that then and there the clearance between said main line tracks was unnecessarily and unusually short and did not exceed three feet in width, thereby creating unnecessary hazards to employees working between said track and that then and there said main line tracks were improperly ballasted, and in condition to trip and endanger employees working on them, and that by reason of those conditions, said Noon's place of work was rendered unreasonably dangerous and unsafe and the defendant failed and neglected to perform its duty of providing a reasonably safe place for Noon to work.

7. That at the time and place said Noon was killed, there existed east and west bound main line tracks and industry tracks, connecting therewith and leading to adjacent industries, located north and south of said main line tracks; that said main line tracks were used to their capacity in the movement of traffic east and west, very many trains passing over them each day and said industry tracks were frequently used by defend-

ant's employees in switching cars off and onto said main line tracks. All of said tracks at said place were crossed and used each day on and long prior to April 27th, 1925, by defendant's employees and other persons, including the employees of the numerous industries located in the vicinity thereof. That notwithstanding the defendant's knowledge of these facts, said defendant negligently failed to adopt any rules or regulations, requiring its enginemen on approaching trains, to give warning of their approach or to put their trains under control or to keep a special lookout for persons and employees, crossing or working on or near said tracks and said defendant then and there also negligently failed to provide any appliance to warn the public or its employees of the approach of its trains.

8. That said defendant negligently failed to warn said Noon of the approach of the train which killed him, and negligently failed to establish any rules, regulations or methods of work for his protection at the time and place where he was killed.

9. That said defendant negligently failed to supply or employ a sufficient number of switchmen in said Noon's crew to protect him from the danger of passing trains.

10. That said defendant employed and negligently continued in its service: a foreman of said crew who was incompetent and not capable of adopting methods of work to insure protection to the members of said crew from the dangers of passing trains and that said defendant knew of the incompetency of said foreman, long prior to April 27, 1925, or in the exercise of ordinary care, should have known that he was not qualified

or competent to direct the work at the time and place where Noon was killed.

11. That at the time and place Noon was killed, he did not know or appreciate the dangers of his work and that said defendant well knowing that fact, negligently failed to notify him of said dangers.

12. That on and prior to April 27th, 1925, it was the custom and practice of Noon's train and engine crews, when they were working in the yards or on or near the main line tracks to observe the whereabouts of one another, to keep a lookout for passing trains and to warn one another of the approach of such trains which custom was well known to the defendant and was relied on by Noon when he was killed. That at the time and place Noon was killed the other members of said crews negligently failed to observe Noon's position of peril and negligently failed to keep a lookout for approaching trains and negligently failed to warn him of the train which killed him, well knowing that such train was long past due.

13. That the foreman of Noon's switching crew negligently failed to keep a lookout for the approaching train which killed Noon, although he well knew that the train was past due at the time Noon was killed. That said foreman negligently failed to observe Noon's movements or position when working near said westbound track and negligently failed to warn him of the approaching train.

14. That said foreman negligently failed to adopt a method of work that would have kept one of his men watching for approaching trains to

warn the other men thereof, who were required by their work to go near said main track.

15. That said foreman negligently required the work which was being done at the time of the accident, to be done at a time and place which rendered that work specially hazardous, all of which he well knew.

16. That the rules of said defendant, in effect when Noon was killed, required enginemen on delayed regular trains to keep a sharp lookout for trackmen, sounding the whistle at short intervals where the view is obstructed and to proceed with caution through yards and station limits, and said rules also required enginemen to exercise the utmost care to avoid injury to laborers of the defendant by the movement of trains and engines: and to sound the whistle and ring the bell when approaching where men are at work; and that the engine bell must be rung when passing a train standing on an adjacent track and that under conditions not provided by the rules said enginemen must take every precaution for protection. That the enginemen of train Number 367 which killed Noon, in approaching the place where Noon was killed negligently disregarded each and all of the aforesaid rules, and then and there behind its schedule ran said train at a very high rate of speed and negligently failed to keep a lookout for employees who were working on or near the tracks where Noon was killed, or to give any warning of the approach of said train and negligently failed to have their train under control or to stop it in time to avoid killing Noon.

Amended Complaint.

17. That by reason of the negligence of said defendants as aforesaid and the death of said Noon, deceased, the plaintiff was required to and did, expend more than five hundred ($500.00) dollars in burial and funeral costs and expenses and that the plaintiff herein is the surviving widow of George Noon, deceased, and that Lydia Noon, seven years of age, and Alice Noon, five years of age, are the surviving daughters of said decedent and that she and they have suffered and sustained great pecuniary damage, injury and loss including the care, training and advice of said decedent in the amount of fifty thousand ($50,000.00) dollars, by reason of the premises and the negligence of said defendant.

18. That on March 30, 1927, Josephine Noon, the plaintiff herein, was duly appointed and qualified to act as administratrix of the estate of said George Noon, deceased, and then became the personal representative of George Noon, deceased, and that on said day letters of administration were duly granted to said plaintiff by the Surrogate of the County of Morris, State of New Jersey, to prosecute this cause of action.

19. That the cause of action alleged herein is based up the provisions of the "Employer's Liability Act" of the United States, set forth at length in Sections 8657-8665 inclusive, of the Compiled Statutes of the United States of 1918, and that this action was begun within two years after the death of said decedent.

WHEREFORE by reason of these premises, the plaintiff asks judgment against said defendant in the sum of Fifty thousand ($50,000.00) dollars, and for her costs of suit.

DAVID A. VEEDER,
Attorney of Plaintiff.

Answer to Amended Complaint.

Filed April 28, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

JOSEPHINE NOON, administratrix of George Noon, deceased,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

} Action at Law

The Delaware, Lackawanna and Western Railroad Company, answering the allegations contained in the plaintiff's amended complaint, says:

I. It admits the allegations contained in the first paragraph.

II. It denies the allegations contained in the second and third paragraphs.

III. It admits the allegations contained in the fourth paragraph as to said parties' engagement in interstate commerce.

IV. It denies the allegations contained in the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth paragraphs.

V. It has no knowledge or information sufficient to form a belief so as to answer the alle-

gations contained in the eighteenth and nineteenth paragraphs.

AND FOR A SECOND, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it, for that the said plaintiff's decedent, George Noon, was guilty of negligence resulting in his death, at the time and place mentioned in the plaintiff's complaint, which negligence was the sole and proximate cause of the plaintiff's decedent's death.

AND FOR A THIRD, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it for that the said plaintiff's decedent assumed the very risk of the accident and injury complained of by the plaintiff in her complaint, and which resulted in the death of the plaintiff's decedent.

AND FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it for that the plaintiff's decedent was guilty of contributory negligence.

WHEREFORE, this defendant prays that the above entitled action may be dismissed as against it.

FREDERIC B. SCOTT,
Attorney of Defendant.

Reply.

Filed April 29, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

JOSEPHINE NOON, administratrix of George Noon, deceased, Plaintiff, *vs.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, Defendant.	Action at Law

The plaintiff, Josephine Noon, as administratrix of the Estate of George Noon, deceased, for her reply to the defendant's second, third and fourth separate and distinct defenses of its answer denies each and every allegation contained in all and each of said separate defenses, severally and jointly, denying each and all of said allegations.

Therefore, she prays for judgment as in her amended complaint.

DAVID A. VEEDER,
Attorney for Plaintiff.

Postea.

Filed July 29, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

JOSEPHINE NOON, administratrix of George Noon, deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law

This case was tried before Judge Rulif V. Lawrence with a jury at the Ocean County Circuit on May 2, 1927.

The jury rendered a general verdict against the defendant in favor of the plaintiff, Josephine Noon, Administratrix of George Noon, deceased, for the sum of Thirty Thousand Dollars ($30,000).

RULIF V. LAWRENCE,
Judge.

I hereby consent to the filing of the above postea as if within time without order of the Court first had or obtained in the premises.

FREDERIC B. SCOTT,
Attorney of Defendant.

Rule to Show Cause.

Filed May 6, 1927.

NEW JERSEY SUPREME COURT,

OCEAN COUNTY.

JOSEPHINE NOON, administratrix of George Noon, deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law

Application having been made to this Court within six days after the rendering of the verdict in the above entitled action for a Rule to Show Cause why the verdict in said cause should not be set aside and a new trial granted on the grounds and for the reasons that the damages awarded the plaintiff in the above entitled action were excessive, inordinate and the result of bias or prejudice, but reserving to the defendant its exceptions taken upon the trial of the above entitled action, it is,

On this 6th day of May, 1927, on motion of Frederic B. Scott, Attorney of the defendant, The Delaware, Lackawanna and Western Railroad Company,

ORDERED, that the plaintiff show cause before the Supreme Court at the State House in Tren-

Rule to Show Cause.

ton, New Jersey, at the October, 1927, Term of said Court, why the said verdict in said cause should not be set aside and a new trial granted, and it is

FURTHER ORDERED, that the defendant have leave of the Court to reserve all of the exceptions taken by it upon the trial of said cause, and it is

FURTHER ORDERED, that this Rule to Show Cause act as a stay in the above proceedings until further order of the Court in the premises.

RULIF V. LAWRENCE,
Judge.

Order Dismissing Rule.

Entered April 2, 1928.

NEW JERSEY SUPREME COURT.

JOSEPHINE NOON, Administratrix of George Noon, deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law. On Defendant's Rule to Show Cause.

A Rule to Show Cause having been entered in this cause on May 6, 1927, and the matter having been submitted on Briefs at the October 1927 Term of Court by David A. Veeder, of counsel for plaintiff, and by Frederic B. Scott, of counsel for defendant, and the Court having considered the same and finding no cause for making the Rule absolute;

It is thereupon, on this second day of April, 1928, on motion of David A. Veeder, ORDERED, that the said Rule to Show Cause be, and the same is, hereby discharged with costs, and the judgment is hereby confirmed.

Entered April 2, 1928.

On motion of

DAVID A. VEEDER,
Attorney for Plaintiff.

Order for Judgment.

Entered April 2, 1928.

NEW JERSEY SUPREME COURT.

JOSEPHINE NOON, Administratrix of George Noon, Deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law. On Postea & R. to S. C.

$30,000.00
74.94

$30,074.94

The rule to show cause heretofore entered in this cause having been discharged by the court, It is ORDERED that judgment final be and hereby is entered in favor of plaintiff and against the defendant for the sum of thirty thousand dollars, besides costs to be taxed.

Entered April 2, 1928, as of July 26, 1927.

On motion of

DAVID A. VEEDER,
Attorney.

Judgment.

Entered April 2, 1928.

NEW JERSEY SUPREME COURT.

JOSEPHINE NOON, Administratrix of George Noon, Deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law. On Postea R. to S. C. Judgment Final. David A. Veeder, Atty.

$30,000.00
74.94

$30,074.94

Judgment entered this second day of April, A. D. nineteen hundred and twenty-eight as of July 26, 1927 in favor of plaintiff and against the defendant for the sum of thirty thousand dollars damages and seventy-four dollars and ninety-four cents costs.

WM. S. GUMMERE,
C. J.

Case.

NEW JERSEY SUPREME COURT.

JOSEPHINE NOON, administratrix of George Noon, deceased,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.
} Action at Law

Mr. Veeder: Your Honor, I move for the admission of Mr. James B. Sheean, a member of the bar of Illinois, and of the Eighth and Ninth Federal Districts of the Supreme Court.

The Court: Mr. Sheean will be admitted.

Mr. Scott: In response to a notice to produce, of which I may say the defendant endeavored to get the same documents before Justice Lloyd and Justice Lloyd made no order in the premises, I turned over to my opponents a map showing the condition of the tracks at the scene of the accident at the time of the accident, and I also turn over to them a train sheet of the Railroad Company for the day of the accident. The balance of the demands which they ask us to produce I refuse to do so.

The Court: Put the map on the frame.

Mr. Veeder: This map is not in compliance with the request. We asked for maps showing the main line track six hundred feet east and six hundred feet west of the place of impact.

Mr. Scott: If you do not want that map you may return it and I refuse to give any other map.

Opening of Case.

The Court: Does that show any part of the locus in quo?

Mr. Veeder: It shows part of it, but we are entitled to what we have requested. The answers to the interrogatory show that they have such maps, and having demanded them we are entitled to them.

The Court: You could have had your own map made.

Mr. Veeder: Conditions have changed.

Mr. Scott: I object at this time going into anything about changed conditions.

The Court: I think, in the circumstances, that you would not be entitled to require him to produce something which was not a matter of record but used by the defendant company for its own convenience. I do not see how you can put in a mere map prepared by the company engineers for its own use as an official record as to the present case. It may be true that they have a map referring to the locus in quo and you are disappointed that the map produced does not show as much as you expected.

Mr. Veeder: The answer went further than that.

The Court: They have produced a map, which is the only one that they are willing to produce. I assume that they have a right to do that in the circumstances. Proceed, using the map as far as it goes, and supplement it by your affirmative testimony.

Mr. Sheean: We are not precluded from showing the other conditions as your Honor suggests.

The Court: Not at all.

Mr. Sheean: We will assume that the map is correct unless it develops otherwise.

Mr. Scott: I would like to have the map marked.

Mr. Veeder: I will offer it.

The Court: The map may be received and marked P 1. (Map marked P 1.)

Mr. Veeder: We have interrogatories which I would ask to read into the record.

1. Under the laws of what State were you organized as a corporation, and of what State are you a citizen? A. Under the laws of the State of Pennsylvania, of which State the defendant is a citizen.

2. Under and by what name were you incorporated? A. The Delaware, Lackawanna and Western Railroad Company.

3. Did you on or about April 27th, 1925, have in your service a man named George Noon, and if so where did you employ him, and in what different capacities did he serve you? A. George Noon was employed by the defendant on or about April 27th, 1925, and had been so employed for some time past, being gateman at defendant's Hoboken Passenger Terminal in July, 1926, clerk in its Stationery Department September, 1916, trainman in April, 1917, until he resigned in October, 1918, to resume service as trainman in January, 1920, in which service he continued until fatally injured.

4. When you employed him, or at any time during his employment, did he execute and deliver to you a written application for employment, if so, please attach as a part of your answer a true copy of said application. A. Yes.

Mr. Scott: And you have a copy. I have no objection to that being used in evidence.

5. Mr. Veeder: When you employed Noon, or at any time during his employment, did you deliver to him a book of rules prescribed by you for the guidance of your employees? If you did, please

attach as a part of your answer a true copy of said book of rules. A. Yes.

Mr. Scott: And that has been complied with.

Mr. Sheean: I presume the book of rules would be receivable in evidence.

Mr. Scott: I admit that is a book of rules of our company at the time of Noon's service.

6. Mr. Veeder: What kind of work and in what capacity did Noon serve you on or about April 27, 1925? A. As a trainman in the freight service.

7. How long prior to April 27th, 1925, did he work for you as a switchman? A. Six years and nine months.

8. How often had Noon assisted his crew in switching cars off of and onto the industrial tracks of the Athenia Steel Mills Co., at or near the village of Clifton, N. J.? A. Noon worked six days in 1924 and five days in 1925 as a switchman on the Passaic Drill, which drill covered in its work the industrial tracks of the Athenia.

9. What work was Noon and his train crew doing on the afternoon of April 27th, 1925? A. Switching cars in and out of various industrial sidings between Passaic and Paterson, N. J.

10. What work was Noon and his train crew doing just prior to and at the time he was killed? A. Switching cars in and out of the Athenia Steel Mills Company's plant.

11. What are the names and addresses of the men working in Noon's Engine and Switching Crews at the time he was killed? A. Defendant is advised it is not obliged to answer.

Mr. Scott: Object to that question and refuse to answer. That has never been pressed.

The Court: On what ground?

Mr. Scott: On the ground that under Cohen

v. Public Service they are not obliged to give the names of witnesses.

12. Have any of the members of Noon's switching and engine crews executed and delivered to you written statements of the circumstances or causes of Noon's death? If so, please attach hereto as a part of your answer true copies of said statement? A. Defendant is advised it is not obliged to answer.

The Court: It was objectionable and they declined to answer.

Mr. Sheean: Declined to answer, made no objection. We afterwards applied for the inspection of these documents and I understood they would be here at the trial.

Mr. Scott: There was no understanding; they applied to Justice Lloyd and they did not get it.

The Court: They declined to answer and there is nothing which indicates they were required to.

13. Mr. Veeder: What are the names and addresses of the engineer and fireman who were operating the engine hauling train No. 367, which killed Noon? A. Defendant is advised it is not obliged to answer.

The Court: In the same category as that previous.

14. Mr. Veeder: Has either the engineer or fireman of train No. 367 delivered to you written or telegraphic statements of the circumstances under which Noon was killed? If so please attach hereto as a part of your answer true copies of said statements. A. Defendant is advised it is not obliged to answer.

Mr. Sheean: Plaintiff waives questions and answers 15 and 16.

17. Mr. Veeder: How far from the place of the

accident was Noon's body thrown or carried? A. Noon's body was found near by to the point or place of contact.

Mr. Sheean: Plaintiff waives questions and answers to 18.

19. Mr. Veeder: How fast was train number 367 moving when it struck Noon? A. Between 20 and 25 miles an hour.

20. Were there any other persons on the engine of train No. 367, at the time and place it struck Noon, except its engineer and fireman? A. No.

21. For what distance could the men on the engine of train No. 367 have first seen Noon if they had been looking out for him? A. 500 feet.

Mr. Sheean: Plaintiff waives the question and answer to number 22.

23. Mr. Veeder: Was train No. 367 running on its scheduled time when it killed Noon? A. No.

24. If train No. 367 was not on time, or on its schedule at the time and place it hit Noon, how many minutes late was it? A. Three minutes.

25. How many trains passed east and west at the place where Noon was killed, between one o'clock P. M. and six o'clock P. M. of April 27th, 1925? A. Fifteen trains moving west and sixteen trains moving east.

26. How many trains were scheduled to pass, on all main tracks, the place where Noon was killed during the month of April, 1925? A. Defendant is advised that it is not obliged to answer.

The Court: Too general; they declined to answer. You got a schedule of the day?

Mr. Veeder: Just the afternoon.

27. How many extra or wild trains passed on all main tracks the place where Noon was killed during the month of April, 1925? A. Defendant is advised that it is not obliged to answer.

28. Have you a map, print, or drawing or engineer's notes showing the length and degrees of curvature of the main line tracks for six hundred feet on either side of the switch points of the switch admitting engines into the works of the Athenia Steel Mills Co., as they were located on April 27, 1925? If so, please attach a true copy thereof to your answer. A The answer is "yes," no copy attached.

The Court: And this map is in response——

Mr. Veeder: To a written demand to produce.

29. Have you a map, print or drawing or engineer's drawing showing the length and degrees of curvature of the four main line tracks, for 600 feet on either side of said switch as they now exist? If so, please attach to your answer a true copy thereof. A. Yes. No copy is attached.

30. What was the distance in feet and inches between the near or inside rails of the east and west bound main tracks at the place and time Noon was killed? A. 8 feet, 6 inches.

31. What changes have you made since April 27th, 1925, in the location, curvature, ballasting and grade of the road bed and tracks extending six hundred feet east and west of the switch at or near which Noon was killed? A. No changes have been made in the location, ballasting, curvature or grade, but an additional track has been installed on the west side of the original tracks. Is that "west side" correct?

Mr. Scott: I cannot change what you have in your hand.

32. Mr. Veeder: What changes have you made since April 27th, 1925, in the location, curvature, ballasting and grade of the industrial tracks leading from said switch into the plant of the Athenia Steel Mills Company? A. The switch referred to

has been moved and replaced 175 feet west of its former position. The switch in question formerly led off the main eastbound track. In its new position it leads off the eastbound freight track. The curvature, ballasting and grade are practically the same as before said changes were made.

33. Since April 27th, 1925, how far have you widened and extended the embankment extending east and west of the switch at or near which Noon was killed? A. The embankment on the south side at the point of the accident has been widened about fifteen feet for some distance east on the south side of the main track. The embankment east of the point of the accident has not been widened. The reason for widening said embankment was due to the installation of an additional main track.

Mr. Sheean: Plaintiff waives question and answer number 34.

35. Mr. Veeder: What rules or regulations had you in effect on April 27, 1925, and what precautions had you taken, to protect your employees when working on or near your tracks extending two thousand feet east and west of the switch at or near which Noon was killed?

Mr. Scott: Your Honor, I call attention to the necessity of the reading of the prior interrogatory, for the reason that they are both rules on the same subject and both rules of the company. They are trying to pick out a rule favorable to them or disfavorable to us and eliminate the other rules. They both relate to the same subject, the rules of the company.

Mr. Sheean: I would suggest, Mr. Veeder, that it be submitted for the Court's inspection.

Mr. Scott: I will not press the motion; I will not take up the Court's time.

35a. Mr. Veeder: What rules or regulations had you in effect on April 27, 1925, and what precautions had you taken, to protect your employees when working on or near your tracks extending two thousand feet east and west of the switch at or near which Noon was killed? A. Rule R. "Employees must not place themselves in position where the movements of a car, engine or train would injure them. In the performance of their duties in connection therewith, they must know that they are fully protected as prescribed in the rules. Employees must stand outside and clear of all main tracks while trains are passing. They must not rely upon others to notify them of the approach of a train. Employees who are careless of the safety of themselves or others will not be retained in the service."

36. Where was Noon located when he was killed? A. Between the east and westbound tracks.

37. Was Noon standing or walking when killed? A. Noon was seen moving away from the track at the time he received his injuries.

38. Was Noon east or west of the switch points of the plant of the Athenia Steel Mills Co. when he was killed? A. He was about opposite the switch point of the switch which served the industrial track.

39. How far distant was Noon from the switch points of the said industrial switch when he was killed? A. The location given in the preceding interrogatory is as close as the defendant can answer the 39th interrogatory.

40. Was Noon struck between the east and west bound main tracks or was he between the rails of the westbound track when he was killed? A. Noon was struck while jumping away from the westbound main track.

41. What direction was Noon facing when he was killed? A. South according to railroad direction.

42. If Noon was standing when struck, how long had he been standing at the place where he was killed? A. See answer to the 40th interrogatory.

43. What was Noon about to do or in the act of doing when he was killed? A. Just prior to the accident Noon opened a switch and shortly prior to meeting his death called his conductor's attention to the position of the gates of the Athenia Steel Company plant.

Mr. Sheean: 44 and 45 are waived by the plaintiff.

46. Mr. Veeder: How many switchmen were working in Noon's crew at the time he was killed? A. The crew with which Noon was working at the time he was injured consisted of the conductor, two trainmen and flagmen, including Noon.

47. What were the other switchmen in Noon's crew doing and where were they at the time Noon was killed? A. Noon's foreman or conductor was in the second car from the west end of the train giving signals to the engineer which were relayed to him by one of his trainmen.

48. Where was Noon's foreman and what was he doing at the time Noon was killed? A. In the second car from the west end of train giving signals to the engineer relayed to him by one of the trainmen.

49. What is the name and address of Noon's foreman? A. Defendant is advised that it is not obliged to answer.

50. Were the gates across the tracks extending into the plant of the Athenia Steel Company

opened or closed at the time Noon was killed? A. Open.

51. Was it Noon's duty to open or close the gates extending across the industry tracks? A. No.

52. What service had Noon done just prior to his death? A. Opened switch leading from eastbound main track.

53. Did either of the engineman or the switch engine or any of the switchmen or foremen of Noon's crew see train No. 367 approaching the switch at or near which Noon was killed? A. Yes.

53a. If so, who saw said train and how far east of the switch at or near which Noon was killed was the approaching train first seen? A. Conductor 25 feet.

53b. Did any one of Noon's engine or switching crews know that train No. 367 was due to pass west at the time it did pass? A. Yes.

54. Did either of the enginemen, switchmen or foremen of Noon's crew keep a lookout for approaching trains at the time Noon was killed? A. No.

55. What precautions, warnings, or instructions did Noon's foreman take or give to insure Noon's safety? A. None.

56. At the time and place Noon was killed, were you and he then engaged in carrying on interstate commerce as a common carrier of goods and passengers? A. Yes.

57. At the time and place Noon was killed was he an employee of yours, then and there engaged in carrying on interstate traffic or commerce? A. Yes.

58. Were the industry tracks extending into the plant of the Athenia Steel Mills Co. used and

operated by you in carrying on your interstate commerce as a common carrier? A. Yes.

Mr. Sheean: These answers to our interrogatories were submitted under oath of one of the officials of the Delaware, Lackawanna and Western Railroad Company.

The Court: The interrogatories and answers will be admitted as read.

JOHN C. FELLOWS, sworn for the plaintiff.

Direct examination by Mr. Veeder:

Q. What is your occupation? A. Civil engineer and surveyor.

Q. How many years have you followed that profession? A. Sixteen.

Q. Are you a licensed engineer and surveyor of the State of New Jersey? A. I am.

Q. Have you made a survey of the tracks of the Delaware, Lackawanna & Western Railroad, at or near the Athenia Steel Mills? A. Yes, sir.

Q. Have you that map? A. Yes, sir.

By Mr. Scott:

Q. When did you make that survey? A. About two weeks ago,—it is dated.

Q. Where do you live? A. Toms River.

Q. Where do you practise your profession? A. Toms River.

Q. Were you familiar with the vicinity of where this map was taken prior to the taking of it? A. No. I am familiar with railroad work.

Q. Is that the first time you have ever been in that vicinity? A. Yes.

Q. This was taken two weeks ago? A. Yes, sir; it is dated, I think April 18th.

Mr. Veeder: April 21st.

By Mr. Scott:

Q. That was the time you made the survey in 1927? A. Right.

Q. You do not know the conditions there in April 1925? A. No.

Q. Whether similar or changed? A. No.

Mr. Scott: Object to the admission of this map on the ground that it does not show conditions as they were at the time of the accident.

The Court: If counsel will show the Court that they will connect this with the conditions at the time of the accident I will allow this testimony. The interrogatories would indicate that the only change was the laying of the western rail.

Mr. Veeder: Yes, your honor.

The Court: That will be received and marked and the engineer may explain it, with the qualification that it will be understood by the jury that there must be testimony showing that the map accurately reproduces the situation there at the time of the accident.

Mr. Sheean: We relied upon the interrogatories that the only change made was the putting in of a track and the putting in of a fill. We have to rely on the defendant's testimony for that.

Mr. Scott: The witness has shown his incompetency in the making of this map with respect to the conditions at the time the accident happened. If this map is different or other than at the time of the accident it has no relevancy whatever.

The Court: I am going to allow it, with the remark that the witness must explain it so that it may be connected with the physical conditions existing at the time of the accident; it may be that the interrogatories do supply that proof.

(Map marked Ex. P. 2.)

By Mr. Veeder:

Q. Mr. Fellows, does this map represent, beginning at the east—how far east does this map extend? A. About two hundred feet east of the station—that is the Clifton station.

Q. And showing Clifton Boulevard where it passes under the tracks? A. Yes.

Q. How far west does this map extend? A. From the station it is about twenty-seven hundred feet.

Q. What industries are shown on the map? A. The Pennsylvania Textile Mill, the Athenia Steel Company Mills, also coal pockets, and the office, and the glass factory.

Q. State where the switch is—point it out—leading into the Athenia Steel Mills? A. Right here (indicating).

Cross examination by Mr. Scott:

Q. Again I ask, whether you know what the situation was there in April, 1925? A. No, I could not say.

Mr. Scott: I ask that the map be stricken from the record.

The Court: Refuse. The plaintiffs cannot prove their case all at once. You may have an opportunity later.

By Mr. Veeder:

Q. Will you also indicate a point 175 feet east of the present switch of the Athenia Steel Mills on the map.

Mr. Scott: Object as getting facts and figures before the jury that the Court——

The Court: It was said in one of the interrogatories that the switch had been moved —is that the same switch?

Mr. Sheean: Yes.

Mr. Scott: Object because there are three switches shown on the map.

The Court: Better re-frame your question to refer to a switch on the main track 175 feet west.

By Mr. Veeder:

Q. I will withdraw that question and ask the witness to indicate a point on the map 175 feet east of the switch on the west side of the tracks, which switch leads into the Athenia Steel Mills plant. A. Right about there.

Q. Will you make a fairly large cross there.

(Witness marks map with X.)

Q. I show you a photograph, marked number one, and ask whether or not that shows the approach to the Delaware and Lackawanna tracks

at the Athenia Steel Company plant as it is at the present time?

Mr. Scott: Object to that question as leading.

Q. I show you a photograph and ask you what that is?

The Court: Did you take the photograph, Mr. Fellows?

A. No, sir.

Q. Does that photograph correctly represent the conditions there at the time you were there?

A. Yes.

Mr. Scott: Apparently these photographs were all taken on the 21st of April. They correctly represent the conditions that they purport to represent as shown by the markings on the photographs, but the photograph marked number one is immaterial and incompetent, number two is immaterial, incompetent and irrelevant, and the same applies to number three. With respect to photographs six and seven, they are immaterial, irrelevant and incompetent, and besides these reasons that I have stated, with respect to all the photographs offered, including photographs four and five, they do not show the conditions existing at the time of the accident.

The Court: I will hear you, Mr. Veeder, in regard to materiality. You purpose to show that these photographs, numbered one, two, three, and so on, reproduce and represent the location and the physical conditions

existing at the time of the accident at the point where the accident occurred?

Mr. Veeder: Here is the Athenia Steel Mills office, where we allege that the crossing is. We allege that the accident happened one hundred feet or so from that crossing. We are offering them for the purpose of showing the crossing.

Mr. Sheean: We are offering them to show special conditions under which special care should be observed.

Mr. Scott: The photographs show that somebody broke down the railroad company's fence and trespassed on the right-of-way.

The Court: These photographs may be marked, and if it appears at the close of the plaintiff's case that they do not properly represent the conditions I will strike out and instruct the jury to disregard, and the same rule applies to the other photographs. You may have this witness identify them as correctly representing conditions as of April 21, 1927.

A. Yes.

Cross examination by Mr. Scott:

Q. Mr. Fellows, I think I heard you say something in your qualification as a civil engineer about having done some railroad work? A. Yes, sir.

Q. For what railroads? A. For the Lehigh Valley and the D. L. & W.

Q. What was the character of that work? A. Construction work and railroad surveying.

Q. What construction work have you done for the Lackawanna? A. I was on the Nicholson cut-off when it was built.

Q. Looking at these photographs—in Exhibit P 3 I call your attention to a post here and a wire fence—that is the character of the Lackawanna railroad property line fence? A. It is.

Mr. Scott: You have no objection to my marking that, Mr. Veeder?

Mr. Veeder: No.

Q. Mark that with a cross—this concrete post.

(Witness marks map with an X.)

Q. In this photograph P 4 a series of these concrete posts shows in that photograph our property line fence? A. Yes, sir.

Q. And this wire is the method by which they separate their property lines? A. Yes, sir.

Q. How far—will you indicate on this map how far this road is from what you designated on your map with an X? A. That's this roadway up here, isn't it?

Q. I am asking where this road is on this map, the road shown in Photograph P 4, if you know. A. I would say it was in here where the dotted fence line is. As near as I can tell from the photograph it would show the fence line here.

Q. Mark on this Exhibit P 2 where the highway road shown on Exhibit P 4 is if you know. A. It looks to me to be right there.

Mr. Scott: There is no objection to my marking that highway?

Mr. Sheean: What is the direction of this map?

Mr. Scott: Just the reverse of the map furnished you by the company.

Q. And that is on the opposite side from the switch point that you have marked with a cross? A. Yes, sir.

Q. How far is this highway to the place where you have marked with a cross? A. I will scale it —about 320 feet.

Q. You do not know what the condition of that wire fencing was in April, 1925? A. No.

Q. The only thing you are testifying today is that on April 21, 1927, these posts and this wire fencing was as appears in Exhibit P 4? A. Yes, sir.

Q. On Exhibit P 5 I call your attention to nine concrete posts—are those the concrete property line posts of the railroad company? A. Yes, sir.

Q. Where is the property in the foreground of this picture on your map? A. Right around the office of the steel mill, right opposite where I put the cross.

Q. Indicate where this property here is on your map. A. Yes, sir.

Q. We will mark that place here Ex. P 5, that place I have indicated as the foreground of the property in Exhibit P 4, and with respect to this photograph here, you do not know what the condition of the wire fencing was in April, 1925? A. No, sir.

Q. Here is a photograph, Mr. Fellows,—on this photograph P 9 I call your attention to the fact that there are concrete posts on both sides of the railroad track running into the distance, and these are the concrete property line posts of the railroad company? A. Yes, sir.

Q. And this building here to the left in the photograph, is that the steel works? A. Yes.

Q. And the fence property line of the railroad company as shown on the photograph was all wired at the time you were there? A. There was an entrance at the plant on each side.

Q. And regarding this Exhibit P 9, you do not know what the condition was in April, 1925? A. No, sir.

Q. This P 7 shows a view from a station platform looking west—what station was that? A. Clifton. It looks very familiar.

Q. Is it Clifton? A. I would say it was Clifton station. I did not take the photograph, but I was there.

Q. There are shown in this photograph how many main tracks? A. There is a fence between the tracks—it looks like four.

Q. Is Clifton station shown on your map? A. Right here (indicating).

Q. That is D. L. & W. Clifton station? A. Yes, sir.

Mr. Sheean: I ask permission to call Mr. MacGowan out of time.

M. J. McGowan, sworn for the plaintiff.

Direct examination by Mr. Sheean:

Q. What is your residence, Mr. McGowan? A. 319 West 105th Street, New York City.

Q. What is your occupation? A. Chief train dispatcher for the Lackawanna at Hoboken.

Q. Were you occupying that position April 27, 1925? A. Yes, sir.

Q. As chief train dispatcher what records, if

any, have you, showing the movement of trains between Paterson and Passaic on that date?

(Witness produces large sheet of paper.)

Q. You have a train sheet in your hand? A. Yes, sir.

Q. This is the original train sheet, produced in response to subpoena? A. Yes.

Q. Look at that and indicate the record of Train 367 on the afternoon of April 27, 1925. A. Want me to call the time?

Q. Yes. A. Passing the west end of Bergen Terminal 4.38, Secaucus tower 4.40, Passaic tower 4.50, Paterson Junction tower at 5 o'clock.

Q. Does that sheet show what time the train went past Clifton station? A. The man working this sheet has a notation that Train 367 struck and instantly killed Trainman George Noon at the junction 4.52 P. M., two minutes after passing Passaic tower.

Q. What time was that train due at that station, if you can tell from that sheet? A. The time table shows, but we do not have the time they are due; this is the exact time they pass.

Q. What is the distance between the points you named? A. A mile and a half.

Q. What time did they make that in, according to the time sheet? A. Ten minutes from Passaic to Paterson.

Mr. Scott: Mr. Sheean asked what time they made it in, in accordance with the time sheet.

A. Passaic to Paterson is a distance of four miles.

Q. Any stop on that train between those two points? A. No, sir.

Q. Does your record show what the extra trains were that passed over that line on the afternoon of April 27th? A. Yes, sir.

Q. Please indicate the number to show the activity these tracks are subject to. A. The last through train passed there at 2.42, extra 2110 went through at 2.50, at 3.45 extra 1163.

Q. These are in addition to the regular traffic? A. That's an unscheduled train. These are westbound. Extra 367 east left Paterson Junction at 1.13, extra 967, Paterson Junction at 2 P. M., extra 1174, 1.23 P. M. at Paterson Junction. Here's 884 left Paterson Junction at 12.01 P. M., extra 536 at 12.18, 581 at 12.50, extra 311 at 3.22, extra 986 at 4.31. Here's a through freight 2139 at 1.20 P. M. eastward, the next would be 581 left Paterson at 4.40 arrived at Passaic 6.25. They are all eastward. I did not call off the passenger trains. I have given the freight trains and not the passengers, those were the extra trains not scheduled.

Q. Do you have any extra passenger trains? A. I don't see any during that time.

Q. Looking at your train sheet—were you operating under Eastern Standard Time? A. Yes, sir.

Q. Did you change on the night of April 26th? A. We did not change our time, we kept Standard right through.

Q. Do you remember whether or not the change of time occurred on the Sunday night before this accident? A. I am pretty sure it did.

Q. Are you familiar with the consist of 367, how many cars are in that train? A. Nine cars, baggage, combination and coaches.

Q. Got the type of engine? A. 1035 was the number.

Q. Is that one of those new engines where the fireman and engineer are separated, or are they both in the same cab?

Mr. Scott: Object as leading.

Q. You may state what the facts are if you know. A. It was the type where the fireman and engineer are separated.

Q. What is that type of engine called? A. I don't know as I can state.

The Court: Who makes up that sheet?

A. Three men on eight hour shifts.

Q. What did you say was the time this train made between Paterson and Passaic? A. About thirty-five miles an hour or around there.

Q. Your time sheet does not show? A. We only have a report at Passaic and Paterson.

Q. What was the time between those points? A. Passaic Tower, west of the station 4.50, and Paterson Junction 5 o'clock.

Q. What's the distance? A. From Passaic Tower to Paterson station is 4.1 miles. This was a couple of miles east of Paterson.

Cross examination by Mr. Scott:

Q. You are the chief dispatcher? A. Yes, sir.

Q. And you are not connected with the motive power department, which is connected with engines and knows the character of the engine, and if Mr. Sheean and Mr. Veeder had wanted to work out the type of engine they could have found that out from the motive power department? A. Yes, sir.

Q. With respect to 367 leaving Passaic tower at 4:50 and arriving at Paterson Junction at 5 o'clock, that was the train involved in this accident? A. Yes, sir.

Q. There is nothing on the train sheet showing how long the train lay still after this accident happened? A. No, sir.

Q. All the data you have is that the train passed east of Clifton at the Passaic Tower at 4.50? A. Yes, sir.

Q. There was what is known as the Passaic drill, was there not? A. Yes, sir.

Q. What time did they leave Paterson on the day in question? A. 4.40 P. M., extra 581.

Q. And that was moving east toward Clifton, Athenia and Hoboken? A. Yes, sir.

Q. Your sheet also shows the regular scheduled passenger trains? A. Yes, sir.

Q. Will you tell the court and jury what passenger trains you had running west on the afternoon of April 27, 1925? A. Starting at 12 o'clock—411, 12.39 at Passaic Tower, 481 at 3.12, 477 at 3.29, 375 at 4.04 P. M., 465 at 4.27 P. M., 367 at 4.50 P. M. Those were the westbound trains up to the time of the accident.

Q. How about eastbound? A. 458 at Paterson Junction 12.48 P. M., 466 at 2.53 P. M., first number four at 4.13 P. M., 462 at 5.34. That was after the accident.

The Court: Mr. McGowan, you may be excused.

Mr. Veeder: Plaintiff now requests the reading of a rule of the defendant company known as rule number ten. The foundation has been laid for these rules by admission

of counsel and a special offer is made of this rule.

Mr. Scott: I see you have a book which is the book of rules in force at the time of the accident.

Mr. Veeder (Reading from book of rules): "Employees on duty, in connection with train service; also levermen in tower-houses; switch tenders; railroad and street crossing flagmen and gatemen, are prohibited from reading, engaging in unnecessary conversation, or having their attention diverted from their duties."

Mr. Veeder: Plaintiff now offers in evidence rule 30, page 28, in the book of rules of the defendant company. (Reads) "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, when running through tunnels and yards, along the streets of towns and cities, and when passing a train standing on an adjacent track." Plaintiff also offers Rule 101, page 37: (Reads) "Trains must be fully protected"—

Mr. Scott: I object, I cannot see how this rule has any relevancy to the issues.

The Court: Let me see it. (Book is handed to the Court.) How do you say that rule is relevant, Mr. Sheean?

Mr. Sheean: The last part of it.

The Court: You do not need that. The law of the state covers that.

Mr. Sheean: We will waive the rule.

Mr. Veeder: Plaintiff offers Rule 115, page 40.

Mr. Scott: Object as immaterial, incompetent and irrelevant.

The Court: Objection sustained. Not material.

Mr. Veeder: Plaintiff offers Rule 118.

Mr. Scott: Same objection.

The Court: Objection sustained; that is in the same category.

Mr. Veeder: Plaintiff offers Rule 397.

Mr. Scott: Object to that rule as incompetent, immaterial and irrelevant. It has reference to switch tenders; no switch tender is involved in this complaint.

The Court: I understand that the gravamen of the offense is that the approaching train gave no signal. I think this rule is not material. All of these rules are subordinate and in the last analysis must be predicated on the law. I will allow 397 to go in and you may have an exception.

Mr. Veeder: Rule 397 (Reads) "They must keep the switches locked for the main track, except when passing trains to and from another track, and must watch for approaching trains and give the proper signals; see that the switches are in good condition and clear of obstructions, reporting promptly any defects which they cannot remedy. They must stand at least ten feet from switch-stand while trains are passing over the switches."

Mr. Sheean: We will strike that out as having no bearing. I addressed my remarks to four hundred.

Mr. Scott: You withdraw Rule 397 and now offer 400. I object to that on the same ground and for the further reason that there

is nothing to show that switch tenders are in any way involved in this case or in any way a class of employees involved in this case. Examination of the book of rules will disclose that.

The Court: I will allow it. It may be read and you may have an exception.

Mr. Veeder: (Reads) "Where two or more switch tenders are employed at one post they must relieve one another, and give full information regarding overdue trains."

Mr. Sheean: This was an overdue train by the admission in the interrogatory.

Mr. Veeder: Plaintiff offers Rule 402.

Mr. Scott: Object as irrelevant.

The Court: It may be read. The objection is overruled. You may have an exception.

Mr. Veeder: (Reads) "Under the title 'Conductors.' Rule 402 Conductors report to and receive—They have general charge of the train to which they are assigned and all persons employed thereon, and are responsible for the movement, safety and proper care of the train, in strict accordance with the rules and special instructions; likewise for the good conduct and vigilance and the faithful performance of duty on the part of their trainmen."

Mr. Veeder: Plaintiff offers Rule 463.

Mr. Scott: That is under "freight conductors."

Mr. Sheean: Yes, sir. There were five men in this crew.

Mr. Scott: Object as immaterial, incompetent and irrelevant.

The Court: It may be read. Exception.

Mr. Veeder: Under the heading "Freight Conductors," Rule 463. (Reads) "They must see that their trainmen are so distributed over the train as to control it most effectually and to be able to pass signals from any part of it to the engineman. In cold or inclement weather they may allow their men to ride in the caboose or on the engine, when consistent with safety, but in descending long grades and when approaching and passing through points at which the train may be required to stop, the trainmen must all be out on the train in their proper positions."

Mr. Veeder: Rule 521 is offered.

Mr. Sheean: We offer the entire rule in this case because they are all tied up in one; only a part is really pertinent, the rest is explanatory or collateral. That rule is particularly applicable to extra trains and delayed trains.

Mr. Scott: Object as incompetent, irrelevant and immaterial.

The Court: I think this rule is not material to the issues. Objection sustained.

Mr. Sheean: The plaintiff will offer to prove that rule. I will withdraw my offer and offer Rule 526.

The Court: Is there any objection to that? I will allow that to be read.

Mr. Scott: Object on the ground that the rule has no application to the parties involved in this suit. The book of rules itself will show the distinction between trackmen and trainmen.

The Court: Objection overruled.

Mr. Veeder: Under the heading "Enginemen," page 115, rule 526. (Reads) "They must stop and inquire respecting any signal not understood, and on delayed regular trains and extra trains must keep sharp lookout for trackmen and hand cars, sounding the whistle signal at short intervals where the view is obscured."

Mr. Veeder: Plaintiff offers rule 530.

Mr. Scott: Object. Immaterial, incompetent and irrelevant.

The Court: Admitted. You may have an exception.

Mr. Veeder (reads): "Trains must proceed with caution through yards and station limits, particularly at night. Enginemen must keep in mind the location of main track switches. If a light cannot be seen on a switch where a light is usually displayed, they must reduce speed sufficiently to stop before reaching the switch, unless the track is seen to be clear. They must report all such failures to the Superintendent."

Mr. Veeder: Plaintiff offers rule 553.

Mr. Scott: Object for the same reason.

The Court: This may be read and exception noted. After all, all of these rules are predicated on the theory of the duty upon the employees to exercise the care which the conditions require.

Mr. Veeder (reads): "They must maintain as far as practicable regular and uniform speed, avoiding excessive speed on descending grades and run with due caution where

the track is under repair and at all points where there is reason to apprehend danger."

Mr. Scott: With regard to that book of rules,—Mr. Veeder was not there as a witness?

Mr. Veeder: No.

GUY L. WALLGREN, sworn for the plaintiff.

Direct examination by Mr. Sheean:

Q. Mr. Wallgren, where do you reside? A. Wallington, New Jersey.

Q. With what institution are you associated? A. The Athenia Steel Mills Company.

Q. Where is that located? A. At Clifton, New Jersey.

Q. What is the nature of your work? A. Cold rolled steel.

Q. How long have you been in the employ of the Athenia Steel Mills Company? A. A little more than eighteen years.

Q. Are you acquainted with the general physical conditions surrounding the mills of the Athenia Steel Company? A. Yes, sir.

Q. And with the so-called pathway across the tracks of the Delaware & Lackawanna Railroad from the south to the north? A. To a certain extent.

Q. Describe what sort of approach there is to that track on the south side. A. To the tracks proper?

Q. Yes. From the road that leads to and from Clifton Avenue. A. There is a shop road from the main road up to the plant.

Q. Does that road continue up to the track? A. The road itself actually stops at the office of the plant, and there is a small bridge over a ditch or culvert that leads to the tracks.

Q. While you are dealing with that side I call your attention to a picture purporting to represent conditions at present at that place, marked Exhibit P 3, and ask you to look at it and state whether or not you recognize what is portrayed there? A. Yes, sir.

Q. How long has that condition existed as you saw it in that picture? A. A good many years, the exact number I could not say.

The Court: Did that same condition exist April 27, 1925?

A. To the best of my knowledge, yes, sir.

Q. And you went to the plant every day? A. Except Sundays.

Q. What were your hours? A. Seven to six.

Q. And you are very familiar with that neighborhood? A. Yes.

Q. Was there any change from the conditions there on or about the 24th of April, 1925, and the 21st of April, 1927, when this photograph was taken? A. There has been an extra track laid on the side that this picture was taken from.

Q. That is not shown in that photograph, is it? A. It does not show it.

The Court: What other changes have been made there?

A. I would say these switches have been moved.

Q. On which side of the track were they? A. On the same side.

Q. Are they shown in that photograph? A. No.

Q. So relatively the photograph portrays about the same condition as existed on the 27th of April, 1925? A. Yes. Much as shown in the picture.

Q. Describe to the jury the conditions of the approach to that crossing on the other side, the north side as I call it—what leads up to it? A. There is a dead-end street, I call it, and a sort of pathway that men, women and children use all day, and people working in the plant also go straight across the tracks and into the plant and other places.

Q. Tell us what in the way of culvert or headstone is placed there, if there is one. A. There is a ditch on the north side, but there is no covering of any kind that I know of.

Q. Is there a sort of curb goes along the edge of the right of way? A. Not that I know of.

Q. To what extent, and by whom, was that pathway in use on April 25th, 1925, and prior to that time, if you know?

Mr. Scott: Object as immaterial. Merely because people trespass on railroad property does not give any right or raise any duty on the part of the railroad company to do anything except not wantonly injure them.

The Court: I think it must have some bearing as to the knowledge which the company had as to the use by the public on foot of certain parts of the right of way. Objection overruled; you may have an exception and he may answer.

(Question repeated.)

A. That is the path across the tracks? It was in general public use.

Q. You saw it used? A. Yes, sir.

Q. What character of people used it, as to women, children and men? A. The workers in the place where I am employed going to and from work, school children going to school about half a mile away.

Q. Calling your attention to the south side of the track, what is the fact as to their being a playground in that neighborhood? A. There is an athletic field, used for baseball and football.

Q. You may state whether that was pretty generally patronized by people living on the other side of the track.

Mr. Scott: Object as leading and immaterial.

The Court: He may tell who used the path.

Mr. Sheean: I will withdraw the question.

Q. Tell us about what time in the evening the men from the plant would cross that path? A. About six.

Q. And at what time in the morning? A. Between six and seven.

Q. Could you give in hundreds approximately the number of men who crossed twice a day?

Mr. Scott: Object to the suggestion that there may have been hundreds.

The Court: Approximately how many people from the steel plant used that path morning and evening?

A. About one hundred and fifty.

Q. How long had they been doing that? A. Ever since that plant has been up; to my knowledge eighteen years.

Q. Are you familiar generally with the number of tracks and the location of the industries at and about this crossing? A. Pretty near.

Q. I will ask you whether with the exception of that track on the south side, called the eastbound track, and the removal of the switch to another point, and the change in the embankment east of the switch, I will ask you whether these conditions are about the same now as in April, 1925, with the exception of the changes I have suggested? A. Practically the same.

Q. What is located across the tracks near this path opposite the Athenia Mills? A. A small glass works and coal pockets.

Q. What is located on the north side of the tracks a few hundred feet east of the glass works? A. The coal pockets are east and below that on Clifton Avenue is the Pennsylvania Textile Mills.

Q. Do you know whether these industries are served by side tracks which lead to these main line tracks that we are discussing?

Mr. Scott: Object as immateiral, and on the ground that such testimony has no tendency whatever to prove the point that Mr. Sheean has.

The Court: I think that the topography should be made known to the jury and to that extent it is material as I view it. He may answer.

A. There is a siding into the coal yard; so far as the textile mill is concerned I could not say.

Q. Calling your attention to Exhibit P 5 I will ask you to examine it. Can you tell the jury whether that represents the conditions as they

existed at that point at this time? A. Practically the same.

Q. Tell what view that picture gives you? A. It shows the end of Clifton Place, as it is called, at the end of the street looking across the tracks to the office of the Athenia Steel Company, with a path here to the tracks.

Q. What is the character of the path with reference to being well worn? A. Pretty well worn.

Q. Is this Clifton Place the dead-end street you referred to? A. Yes, sir.

Cross examination by Mr. Scott:

Q. Will you step down to this large map on the easel, known as P 1? I ask you to look that over and familiarize yourself with it. Here the lettering says "Athenia Steel and Wire Company," and there is a track called "coal track," and another "storage track," and another "coke, or commercial track." You recognize that layout of the tracks in the vicinity of the plant, and that is as they were in April, 1925? A. To the best of my knowledge.

Q. And beyond the track marked "storage track" is one called "eastbound main track?" A. Yes.

Q. And the westbound main track and the track that was not in active service on the other side. A. Yes.

Q. And a track leading up to the coal yard—that is as they were in 1925? A. Yes, sir.

Q. This photograph P 3 shows the situation here on the map we have been talking about can you indicate about where this fence would be? A. I would say right here. That would be the end of the fence.

Q. I will mark that P 3; the fence of which you indicated the end is marked "fence" on the map, and this point here like a step is right at the end of the fence? A. Yes, sir.

Q. How far is it, would you say, from the end of that fence where the step is up until you get to the eastbound main track? A. In actual feet I could not say, but in my best judgment it is about twenty-five feet.

Q. And to get from this step shown in the photograph and marked on the map P 3 to the eastbound main track you have to cross first this coke or commercial track, the storage track, and then you had to go beyond that, and to get across the railroad tracks you had to cross the westbound main track, and this other track which you told us was not in active use, and also a switch track leading into the coal yard, and all of that time from the time you leave the fence shown in P 3 until you get past the coal yard track you would be traveling within the limits of the railroad company's right-of-way. A. I believe you would.

Q. Because from the other side the map indicates or shows a fence. A. Yes, sir.

Q. And that fence which I have indicated just now is the fence shown in this Exhibit P 5? A. Yes, sir.

Q. I will mark this fence as Exhibit P 5; after you got past the Mears coal track you came to where the fence of the railroad company was located and then you entered upon another path which you have explained was the continuation of the dead-end street. A. Clifton Place.

The Court: Was there a fence across that dead end?

A. Yes, sir. A wire fence.

Q. How long had it been there? A. It was put up after I started to work at the plant. It has been there a good many years.

Q. That was the wire fence the railroad company strung along its right-of-way? A. Yes.

Q. I do not imagine you recollect how that fence was, the condition of the wire, on April 27, 1925? A. I could not say.

Q. Know whether it was intact or not? A. I have not been over on that side of the track to see.

Q. You have never had any particular occasion to go over, your business being confined on the opposite side of the track? A. That's right.

Q. Your plant is in Clifton, N. J.? A. Yes, sir.

Q. How many people have you in that plant? A. The exact number I could not say,—about two hundred and fifty, I think.

Q. Have you a safety department there which looks after the safety of the employees?

The Court: A hospital room?

A. A first-aid room, yes.

Q. Do you have a department which instructs employees with respect to conducting themselves in a safe and proper manner? A. No, sir.

Q. Did you say that your plant employs women? A. No, sir.

Q. Children? A. No, sir, only men, outside of the office.

Mr. Scott: I desire to move to strike out Exhibit P 5, unless they have other witnesses. It has been shown that it does not represent the *locus in quo* at the time of the accident.

Mr. Sheean: I assume that Mr. Scott means that we did not show that the wire was down in 1925.

The Court: Of course in receiving an exhibit of this character it may be received with the qualification that it generally portrays conditions as they existed at the time of the accident with the exception that some part of it was not then in the same condition as when the photograph was taken. The motion to strike will be denied. You may have an exception. The jury will, of course, understand the qualification.

ANDREW J. JOHNSON, sworn for the plaintiff.

Direct examination by Mr. Sheean:

Q. Mr. Johnson, where do you reside? A. Clifton Boulevard.

Q. In what city? A. Clifton, N. J.

Q. How long have you lived in Clifton? A. Since 1922.

Q. You are employed by the Delaware & Lackawanna Railroad Company? A. Yes.

Q. You occupy what position with the railroad company? A. Section foreman.

Q. How long have you occupied that position with your territory located at Clifton? A. Right after 1922 I was in Clifton.

Q. You were employed in that territory on April 27, 1925? A. Yes, sir.

Q. Can you tell us how many main tracks there were in operation at the point in Clifton west of the station, for instance? A. Two main tracks, eastbound and westbound.

Q. Which one was the eastbound track? A. The one on this side.

Q. The eastbound track is the first track next to the mills on the south? A. Yes, sir.

Q. And the westbound track is the track next to that? A. Yes, sir.

Q. What was that third track? A. That was just a little short piece; when they was building bridges they left it for a while. They was laying foundations and they was nothing running over them.

Q. Do you know that switch there that led into the Steel Company? A. Yes, sir.

Q. Did you know that switch there that led into the Steel Company? A. Yes, sir.

Q. You may state what is the fact as to the location of that switch being changed? A. Yes, sir.

Q. Could you indicate on that map, Exhibit P 1, where that old switch, the former switch, was located? (Witness looks at map.) A. Let's see, is this the westbound side? This is the coal pocket, this would be the switch. The switch before I don't know just how far——

Mr. Scott: I do not mind your pointing out the switch to him.

Mr. Sheean: This is the old condition in 1925 at the time of the accident.

A. That was on the eastbound track, that was over on track four and then over this way there was one.

The Court: At the time of the accident, which was the 27th of April, where was that switch located?

A. It was—I don't know just how many feet, maybe one hundred feet east of the present switch.

The Court: Do you discover an old switch on that map?

A. That's cut out of everything.

Q. Does the old switch appear on that map?

Mr. Sheean: That is a map of the old situation. That switch was there in 1925.

A. Is this the eastbound track?

Mr. Scott: That's the way it was in 1925. This is the eastbound track.

The Court: And that is the switch shown on the map.

A. The switch was one hundred feet, maybe over, from the present switch.

Q. With the exception of that extra track put there, and the readjustment of the switch and the fill there, are the conditions, generally speaking, about the same there today as in April, 1925? A. Everything is changed now.

Q. What changes have taken place? A. The place was filled for one track fifteen or twenty feet.

Q. What changes in the trackage? A. Nothing except one track was laid, track four, and one track laid on the other track, three.

Q. They put down a new track and changed the switch? A. Yes, sir, to track four.

Q. With these exceptions tell us how the conditions in 1925 compare with the conditions at the present time? A. I don't see there was any real difference.

Q. Referring to the old switch as it was in 1925, was there any ballasting between the rails and ties? A. Ballast stone just like they are today. The switch rods are a little clearance so the brakemen can move the switch.

Q. What sort of ballast between the tracks? A. Cracked stone.

Q. How large are they? A. From a half inch to an inch and a half.

Q. How are they piled with reference to being level or coming up to a point? A. Half an inch below the top of the tie.

Q. I am referring to the eastbound and westbound main tracks, the stone ballasting is between the two? A. Yes.

Q. Is it laid on a level or does it pile up in the centre between the tracks? A. Every once in a while we raise the tracks and fill in. We make a new roadbed.

Q. And there is no accumulation of stone between the track? A. Everything is nice and level.

The Court: You supervise the work?

A. Since 1924 with the Lackawanna.

Q. Referring to this picture called Exhibit P 8, I will ask you to look at it and see if you recognize what is portrayed there. Which direction are you looking in that picture? A. That's Clifton Avenue, and that's the coal shed, and that's the switch into Athenia Steel as it is now.

Q. Which direction are you looking? A. Towards Paterson.

Q. Looking west? A. If I am standing near the mill I am facing towards Passaic, or Clifton, that's east. That's in this picture.

Q. I call your attention to the character of the ballasting between the tracks. Is it level or heaped up in the centre? A. There's bigger and smaller, you cannot make it level.

Q. In stepping on them explain to the jury how they give or do not give secure footing? A. I have been walking over them ever since I have been able to walk; you cannot slip because it is rough.

Q. You have just looked at this picture, can you see the Clifton Station in the distance? A. Yes, here.

Q. When was that station put in there? A. Station completed a year ago last New Year; that's the time the ticket agent moved in.

Q. How far is it from that station as now located to the switch where this accident occurred? A. I don't think it is quite half a mile; maybe, not quite.

Q. You say this is a new station built about two years ago? A. A year ago last New Year.

The Court: What was there before?

A. The old station was below the new one about two hundred feet.

Q. What are the facts with reference to the tracks being straight or curved extending westerly from Clifton Station? A. There is a curve, but there is no obstruction. When I am working by the station I can see the train above Athenia Steel. That is, if I am looking I can see.

Q. Describe to the jury how many curves. A. There is a curve to the right near Athenia Steel.

Q. State whether there are one or more curves? A. Only one.

Q. Could you tell us the degree of curvature? A. Three inches.

Q. State whether or not that is an acute curve or otherwise in railroading? A. Not a sharp curve; the lower side is three inches lower than the high side.

Q. You heard something here about a passage way or path over the tracks of the Lackawanna near the Athenia Mills. Are you familiar with that? A. Yes, sir. There's trespassers there; they fix the fence and then they cut it. They send a man to fix the fence and then they cut the top and push it down with their foot like this so people can cross over.

Q. What was the condition of the fence on April 27, 1925? A. I think it was O. K., the gang went through there that spring.

Q. How often did you put up the fence? A. I didn't handle that there but I am there every day. You cannot stop the people, they cut the top wire and then with their foot they push it down.

Q. Have you seen many people there? A. People live across the track, and if they do not go over that way they have to go a quarter of a mile around. The high school is on Clifton side and a lot of people live here and it would take them half a mile longer and they go across the tracks to save time.

Q. Where is the first crossing west? A. There is a quarter of a mile west a private crossing.

Q. I was asking for a public crossing? A. At Paterson there is a public crossing, but the station before I think it is closed now. That first public crossing west makes it a little over two miles.

Q. Looking to the east how far is it to the first public grade crossing? A. There is no crossing all the way down to Hoboken. Everything is underneath or overhead of the crossing. Passaic was done two years ago at Bloomfield Boulevard. There is subways or overhead.

Q. The public has subways or overhead crossings except this path?

Mr. Scott: Object. The public is not entitled to use this path.

A. You cannot do anything with the people, you cannot shoot them. There is signs and fence but yet they go over.

Q. Are there trespassing signs there warning the public to keep off this property? A. No, but the fence——

Mr. Scott: Object as immaterial.

A. (Continued) As soon as they fix the fence they push it down with the foot like this.

Q. Did you ever report to your officials that this crossing was being used by a lot of people and it was dangerous for them and for the company? A. No. There is no crossing there; on Saturday when there is no school the boys are crossing all over.

Q. Do you remember the occasion of George Noon being killed on the tracks—I mean about the time, day or night? A. It was Monday, April 27th, 1925. I remember that night I had all the screens to put up and my wife says to me "that train is blowing so over there" and she was blowing wide open and I seen that train was blowing a whistle and I seen it stop and it was

my duty if anything happens on the section I have to report to the company, and I went over and when I got there Mr. Noon was lying between two tracks.

The Court: Which track?

A. Westbound—the westbound tracks. There was Clifton police and a lot of people.

Q. Did you hear the whistle? A. Yes.

Q. Describe what kind of whistle? A. When they see any danger they open wide open.

Q. Is that the emergency whistle? A. I suppose so.

Q. That is the last chance a man's got? A. If it was not for that whistle I would never have known.

The Court: Was it a sharp whistle?

A. Yes.

Q. How far is your house from that point? A. As far as to the corner.

Q. How far was the engine from that switch at the time you heard the whistle? A. Oh, gosh, I was yelling and steam blowing from that engine and there was a train was stopped and just about as I got up there he stopped and I went up.

Q. Only one whistle? A. One long whistle.

Q. Tell us what if anything was done with the brakes if you could tell? A. I could not tell, I didn't know anything about the brakes.

Q. When you got over there where was 367 with reference to the switch? A. That passenger train was quite a way east coming toward the west.

Q. East or west of the switch? A. East. The switch was here and the train was away down—

Q. After the accident? A. She stopped about half way.

Q. How many feet was the rear car from the place of the accident? A. It seems to me it was half a train from the place where he was lying.

Q. How many cars were in that train? A. I don't remember.

Q. Where was the rear end of that train with reference to the switch I understood you to say was nearby? A. About half the train was west of where the body was lying and half east of it.

Q. What is the gauge of the eastbound track and the westbound track? A. You got fourteen feet six inches from the center; it would be from inside one track to the outside of the other track.

The Court: I thought the average gauge was 4.4.

A. 4.8½ or 4.9.

Q. What was it at this switch? A. 14.6.

Q. How far would it be from one rail—say the south rail on the westbound track to the north rail on the eastbound track? A. Fourteen feet six inches.

Q. Tell us how wide the equipment runs—what is the width of a car? A. The end of the ties and the car is just about coming even. It was twenty-one inches from the end of the track over.

Q. State what the fact is with respect to some cars being wider than others—merchandise cars. A. Some of them are wider and higher.

Q. How wide is the maximum? A. They got a 21-inch clearance all over the road, some companies have a higher car than others.

Q. What would be the width of a flat car? A. I never took notice.

Q. The width is printed on the side of the car? A. Yes. But I never noticed.

The Court: It is 21 inches between the rail and the end of the tie, that's 42 for the two, a little over three feet—the width between the rails is 4.9, then you have a car of a little over seven or eight feet.

Q. Many of the cars are over nine feet wide, are they not?

Mr. Scott: Object as leading.

A. For the tunnels and bridges you have seven feet standard clearance from the tracks to the walls. If they was too wide that clearance would not clear the outside of the car.

The Court: That's to a width fairly covering the end of the ties; some of them an inch or two inches wider or higher.

A. But they cannot be very wide or they would not clear the tunnels.

Q. State whether or not you have observed the width of these cars running up as wide as 9 feet 7 inches? A. I never noticed.

Q. I call your attention to Exhibit P 8 and ask, with the exception of the new track put there and the grading and the change of switch, what the fact is as to that being representative of the conditions that existed in 1925? A. I don't think there was any difference by looking at it. It is something today like it was then.

Q. State whether or not a man standing there in 1925 could see a train beyond the Clifton Station? A. If there was no train coming either way you can see more than half a mile straight away.

The Court: That's from the Clifton Station?

A. Yes, I can see a train back of it. I have to watch for trains, I have a bunch of green men.

Q. You were describing what you could see standing at the Clifton Station? A. From Clifton Station you can see beyond where that man was killed.

Q. And from the other direction? A. You can see to Passaic; it is perfectly straight track.

Q. What do you say the view is from Clifton Station west? A. You got clear sight for over half a mile.

The Court: Is there a curve?

A. Yes, but there is no obstruction.

Q. Suppose you are sitting in an engine, do you know what effect that curve would have on your vision?

Mr. Scott: Object, the witness is not qualified.

The Court: Objection sustained.

Q. I hand you photograph P 6, which purports to be taken from the station, looking what way? A. This is the station?

Q. Yes. A. That's toward Athenia Steel.

Q. State the fact as to that being, with the exception of the change of track, the condition existing in 1925. A. There is a wider distance of four tracks, but it is just the same.

Q. I hand you photograph P 7 which is stencilled as being a view from the station platform looking west—please examine it and see whether these conditions are the same as in 1925 with the exception of the new track? A. Just the same except for the new tracks. Down in Passaic they made a change, but that location had plenty of room on each side.

Q. That shows the curve as it exists? A. Yes.

Q. Here is a picture I call your attention to, Exhibit P 9, a view looking west forty paces west of the steel company switch; look at that end see if it is a fair reproduction. A. That signal bridge is way back of Athenia Steel; from there how far does it go?

Q. This photograph was taken from a point forty feet east of the switch leading into the industry. A. In this picture he turned his back around and that is pointed toward the west. You can see long big distance.

Q. You can see from that signal bridge to the tracks? A. You can see long big distance from half of that curve, you look up and you can see long big distance.

THOMAS F. GRAVES, sworn for the plaintiff.

Direct examination by Mr. Sheean:

Q. Mr. Graves, you reside where? A. East Orange.

Q. What is your present occupation? A. Engineer, D. L. & W.

Q. How long have you been so employed? A. Twenty-nine years.

Q. And you were so employed in 1925? A. Yes, sir.

Q. What was the territory in which you worked in April, 1925? A. Between Secaucus and Paterson, placing ties and taking them back, picking up freight.

Q. That is the Passaic drill train? A. Yes, sir.

Q. State to the jury whether you were one of the engine crew that George Noon was employed with? A. Yes, sir.

Q. Do you recall the accident resulting in his death? A. Yes, sir.

Q. On that day what work were you doing at or about the time this accident occurred? A. We left Paterson and had four cars with us, the cab and three cars. We came down the eastbound track working between Paterson and Secaucus. When we came down to the steel company there the conductor cut off two cars and one we placed in on what is known as the coal track at Athenia Steel. After we placed that car there we backed up one car, backed out on the main track and picked up two cars. Noon throwed the switch, what is supposed to be the main line switch, he stepped over the track on the right side of the cars and gave me a "come-ahead" signal, like this (illustrating); after I started to go ahead he stepped on the first or second car and he give me that signal again. That's what we give in the freight service for the men to know which way they want to go.

Q. Go ahead and describe what happened. A. After that I never noticed Noon any more; that was the last time I saw him.

The Court: You do not know what happened after that except that later he was found on the track dead?

A. Yes, sir.

Q. You went back and saw his body? A. Yes.

Q. Where was it lying? A. When I got stopped by the flagman I see the brakeman, Ben Hood, running east of my engine and I says, "What's the trouble?" and he says "Noon," and I got down off my engine and walked east and I saw Noon's body lying there.

Q. Where was it? A. Between the eastbound and westbound tracks.

Q. Had any train come over either of those tracks? A. There was a train going west.

Q. Did you see it? A. Yes.

Q. Where was it when you saw Noon's body? A. Standing alongside of it.

Q. Where did that train stop with reference to where Noon's body was? A. I should judge about an engine and two or three car lengths went by the body. I did not notice exactly.

The Court: How near was the switch to where Noon's body was found?

A. I didn't notice that.

Q. How long a train was 367? A. I don't know.

The Court: How many cars in that train stopped there—the train going west?

A. I did not notice.

Q. How many cars did your engine have hold of right before this accident occurred? A. I had hold of the caboose and three cars.

Q. Were you east or west of these cars? A. The cars was west of me, I was backing down from Paterson and that made my engine headed west.

Q. Were you coupled on to these cars? A. I was pushing in.

Q. Did you, or did you not, come out of the gates of the Athenia Steel Company? A. We came out from the coal track and shoved in on the commercial track and back and out of that and shoved on the main, picked up two cars, backed down, and Noon throwed the main line switch for me to go back in and place those cars. He stepped over and give me the "go-ahead" signal and after he stepped——

Q. I want to get this clear in my own mind—you had three cars and the caboose attached to the engine and your engine was headed west? A. Yes, sir.

Q. You had moved out on to the main line track? A. No, we was moving in on the commercial track.

Q. Where were you standing before you started to move in? A. On the main track eastbound; Noon throwed the switch for me to go in.

Q. And where was he standing with reference to that industry switch when he gave you the switch? A. On the right side of the cars.

Q. How near the switch? A. I didn't notice.

Q. How fast was that train going, the westbound train that passed you? A. They run pretty fast, being express trains. I was on the engine I was handling, I could not tell how fast.

Q. Were you on the right side or left side of your engine? A. Right.

Q. Which way would you be looking, south or north? A. I was looking west—southwest.

The Court: Your right would have been north or south?

A. The north.

Q. You were on the side of the engine next to the westbound track? A. Yes.

Q. Did you see this train coming? A. No, he was coming from my back.

Q. Did you hear it coming? A. Yes, and I heard him blow.

Q. What kind of whistle did he give? A. One long whistle for about three to four seconds.

The Court: What kind of whistle would you call it?

A. They use it for cars or stations, it was not the road crossing whistle, it was the signal for cars or stations.

Q. Isn't there a signal called the emergency signal? A. That's what it was.

Q. Was that the only whistle you heard? A. That's all I heard or noticed.

Q. Did you not know that this train was past due? A. Yes, it was past due.

Q. Did you or did you not know there was a change of time from the standard to daylight saving the night before this occurred? A. I don't remember.

Q. How late was this passenger train? A. I didn't notice.

The Court: Did you know its time?

A. We knowed it was due.

Q. Did you know the exact time it was due? A. Well, it hadn't passed us.

The Court: You are unable to say whether it was on time or not?

A. I didn't notice.

Q. Do you know where or how Noon was injured—what part of his body was bruised, if any? A. When I went back he had a cut on his head and by appearance his arm and legs was broken. His foot was turned and his hand turned something like that (illustrating).

Q. All on one side? A. So far as I could see.

Cross examination by Mr. Scott:

Q. The last time you saw Noon he was on the second or third box car of your train? A. Yes, sir.

Q. While he was there he gave you a come-ahead signal? A. Yes, sir.

Q. And then you started to go ahead? A. Yes, sir.

Q. And your attention was further on, beyond your train? A. Yes, sir, to the conductor and flagman.

Q. Were they further west than Noon? A. Yes, sir, the flagman was west and the conductor on the car.

Q. That flagman—how far west of the train was he? A. Probably four or five car lengths.

Q. Did he stand on the track? A. The eastbound track he was on.

Q. And his name was Simons? A. Yes, he's dead.

Q. While you were looking at your conductor and Simons did you see Simons do anything? A.

He give me a "stop" signal. He had his flag in his hand and swung his flag as hard as he could almost down on his knees waving his red flag across the track with a wide-open stop signal.

Q. What did you do? A. Reversed my engine and put my independent brake on and tried to stop and when Hood run by my engine I asked what was the matter and he said "Noon" and I went east of my engine and went down and saw Noon's body.

Redirect examination by Mr. Sheean:

Q. Was there a flagman out to the east, up towards the Clifton Station building? A. No, sir, he was towards Paterson.

Q. Where was the conductor at the time this accident occurred? A. On the first or second car.

Q. Did he give you any signals at that time? A. No, sir.

Q. What is the custom and practice of you gentlemen when you are working—to look out for one another? A. We do that—I never had a conductor on that job but one, and when new men came on he would instruct them as to that main track. They were told "Never jump off your cars till you look and see where you are jumping."

Q. What did he ever say in regard to protecting another man? A. (No answer.)

Q. You have run an engine for a good many years. A. Yes.

Q. What do you say as to the propriety and practicability of the rule which would require an engineer when he sees a switching crew working on an adjoining track, would such a rule be practicable, that he should blow his whistle a thousand or two thousand feet before he passes them?

Mr. Scott: Object on the ground that it is not redirect examination and it is not relevant.

The Court: The real reason is that he is asking the witness to give an opinion on something that is peculiarly a matter for the jury.

Objection sustained. The real issue is whether the engineer was driving the engine in the exercise of due care at that time; if he was not exercising due care then the company was negligent. I shall tell this jury that is a question of fact for them to determine, whether or not the engineer exercised the care in the immediate circumstances that was required. The engineer was supposed to use his eyes, looking ahead to see if there was anything on the track or not.

Mr. Sheean: I will withdraw the question.

Mrs. Josephine Noon appeared for the plaintiff.

Mr. Scott: If it will save Mrs. Noon any embarrassment, if counsel will state what they expect to prove by her I will consent that it go on the record.

Mr. Sheean: We expect to prove by Mrs. Noon that she is a widow, that she has two young children, giving their names and ages, and also she will give testimony showing the earning capacity of her husband. All we know is that he turned one hundred and twenty to one hundred and forty dollars a month over to his wife.

The Court: How old was he at the time of his death?

A. Twenty-nine.

Q. In a fair state of health?

Mr. Sheean: Robust health, never been sick, athletic, had been nominated for political position, taught his children, and went to church with them.

Q. How old is Mrs. Noon? A. Thirty-one.

Q. What is your condition of health? A. Very poor.

Mr. Sheean: We expect to show on the question of care and maintenance, the care, attention, instruction, advice and guidance which this decedent gave his children, his age, health, habits, character, intelligence and attention to his parental duties, and his probable expectancy of life.

Mr. Scott: He was a normal husband.

Mr. Sheean: More than that.

Mr. Scott: We will admit what Mr. Sheean has said. There is just one thing, the age of the children.

Mr. Sheean: Is he going to concede that this man had twelve years of school, including high school, that he was a man that won prizes in school, that he wrote so well he had articles accepted and paid for? This was a man with a promising future, and a pleasing personality—an intelligent man. He looked after his wife and children and he is a great loss to her. If counsel is willing to admit that we cannot ask for anything more.

The Court: What about the age of the children?

A. Eight and six.

Mr. Sheean: What about the expectancy of this man? In most states the statute fixes that.

The Court: Sometimes, in some of these cases, they call an actuary, in the absence of such testimony I usually take the Bible expectancy of three score years and ten.

Mr. Sheean: We will assume that the expectancy is something in the neighborhood of 39 and 31. We will throw off the 31 and take the 39.

Mr. Scott: I concede that the paper handed me is a proper certificate of appointment of Josephine Noon as general administratrix, but I object on the ground that it is immaterial for the reason that this is a certificate of the surrogate of the County of Morris, the application having been made to the surrogate of the County of Morris. As I recollect our practice act the action must be brought in the county where the accident occurred, or where the plaintiff resides or where the defendant may be served.

Mrs. Josephine Noon sworn for the plaintiff.

Direct examination by Mr. Sheean:

Q. Where did you live at the time your husband was killed? A. Lincoln Park, New Jersey.

Q. In what county? A. Morris County.

Q. And that is the reason you got your papers in that county? A. Yes.

The Court: When was this suit brought?

Mr. Veeder: It was brought in the Supreme Court.

Mr. Scott: I do not question that this is a proper certificate, but I question that under our practice act this suit should have been brought in Morris County.

The Court: What difference does it make? It would be before the same judge. Mrs. Noon would have had a right to bring the suit where she resided at the time.

Q. When this suit was brought where did you live? A. At Toms River.

Q. With whom? A. My father.

The Court: You came back to your father's home after your husband's death?

A. Yes, sir.

Q. How long did you remain in Morris County after your husband's death? A. One month.

The Court: These letters of administration were taken out before you had any idea of bringing this suit?

A. No, I came down here to my father.

Q. Why did you go to Morris County to take out the letters?

Mr. Veeder: Because the statute requires the letters to be taken out where the decedent resided.

The Court: If Mrs. Noon's actual residence at the time this suit was brought was in Ocean County I am of the opinion that she

had a perfect right to lay the venue in Ocean County at the time of the trial and I am further of the opinion that counsel comes late with the motion in question, for the reason that an application to change the venue should have been made before trial and to the Supreme Court. These certificates and letters of administration will be received and marked. It may appear on the record that an exception is noted as ground for appeal and allowed.

(Certificates and letters of administration marked Ex. P 10, and Ex. P 11.)

Mr. Veeder: The plaintiff rests.

Mr. Scott: I move for direction of non-suit, on the ground that no negligence has been shown on the part of the defendant railroad company.

The Court: I will hear counsel at side bar. We will go in this room.

Mr. Scott: On behalf of the defendant I move for non-suit on the ground that the plaintiff has not established any negligence on behalf of the defendant railroad company under any or all of the charges set forth in the complaint.

The Court: I am inclined to the view that a prima facie case of negligence has been made out here, putting the company on its defense. I therefore deny your motion.

Mr. Scott: We rest.

Mr. Scott: I now make a motion for a direction of verdict and urge the same reasons as urged for the non-suit.

The Court: I will refuse your motion and allow you an exception.

Charge of the Court.

Ladies and gentlemen of the jury: Feeling that there is no adequate reason why you should not now be charged on the state of the law as applicable to the facts which it is your function to ascertain in this case, I am submitting it to you this afternoon rather than tomorrow.

This action is brought by the administratrix of the estate of George Noon, who, it appears, was killed by being run over or knocked down, as you find the fact to be, on the twenty-seventh of April, 1925, while engaged as an employee of the defendant company along the right of way of such company, at a place called Clifton, in Morris County, New Jersey. It appears that at the time of his death Mr. Noon had a wife and two small children, and this action is based upon an act of Congress, the pertinent sections of which I shall read to you, it being conceded and admitted that this act does apply to the defendant company and that the plaintiff is the administratrix of Mr. Noon's estate and in behalf of his widow and children brings this action under the provisions of such act.

The first section provides that every common carrier by railroad, while engaging in commerce between any of the several states. . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any de-

fect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. That is substantially the portion of the section applicable to the present case.

Then again, the act provides that in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. That is the portion of that section which I charge is applicable to the present case.

The result is that the plaintiff must establish to your satisfaction, under the greater weight of the evidence, that the defendant company, through its employees, was negligent in such a way as to have occasioned the death of Mr. Noon.

Now I assume that the negligence alleged here is largely based upon the claim that there was a failure on the part of other employees—as for example the crew in charge of the engine and cars, of which crew Mr. Noon was a part, or of the engineer of the train which is alleged to have struck him—with the direct consequence that he was killed, and that such employees were negligent in a failure to exercise such due and reasonable care as the circumstances required. As for example, it has been suggested here by counsel for the plaintiff that there was an alleged fail-

ure of the members of his crew to protect Mr. Noon, who at the time of this accident appears to have been performing his duty as an employee of the defendant company at a switch in order to enable the engine and cars that were being drilled to enter the yard of the Steel Company immediately adjoining the tracks of the defendant company. In other words, that the members of that crew, in the exercise of the due and reasonable care required by the circumstances, should have so protected Mr. Noon that while he was engaged in the performance of his duty in turning the switch, which apparently he was at the moment doing, as to warn him in time of the approach of a train on one of the main tracks, in order to have enabled him to have gone to a place of safety and so avoid being struck by the oncoming train.

In the second place, I understand the claim to be that the engineer of the train on the engine that apparently struck Mr. Noon failed to exercise the due and reasonable care that the occasion demanded, either by not giving a signal at a time when it would be efficient to warn and notify this employee, Mr. Noon, or by ringing a bell—in other words, by resort to those facilities reasonably within the control of the engineer—to the end that Mr. Noon could have been notified that this train was approaching and that unless he moved from the position in which he was it would endanger his life. Whether the evidence in this case does warrant a charge of negligence in either aspect as I see it becomes a question of fact for you ladies and gentlemen to decide—a question for the jury.

If you find under the greater weight of the credible evidence that there is nothing to indicate that the defendant company, through its employees, failed to exercise such care of a due and reasonable character as was required by the circumstances, that would be the end of the case and you would return a verdict of no cause of action. If on the other hand you find that the employees of the defendant company were negligent and the direct result of such negligence was the death of Mr. Noon, then I charge that you would pass on to the question of awarding damages to the plaintiff here for the benefit of the widow and children under the statute.

You are to observe that under this law the contributory negligence, if there was contributory negligence, of Mr. Noon himself, does not prevent the recovery. You could still award damages, assuming you found, under the evidence in the case, negligence on the part of the railroad company through its employees with the result that Mr. Noon was killed. But the statute does provide that should you find that there was contributory negligence on the part of Mr. Noon in such a way that the injury he received was due to it and but for it he would have received no injury, then the effect of that, as pointed out in the statute, is that it shall be considered by the jury and if any damages are awarded against the defendant railroad they shall be diminished in proportion to the amount of negligence attributable to such employee—in this case Mr. Noon. You will bear that provision in mind should you arrive at the question of damages at all.

Should you find that the failure of this company, through its employees, to use the due and

reasonable care required in the circumstances for the safety of Mr. Noon was the proximate cause of his death, you would then pass to the question of damages, and on that point the interpretation of the act appears to be this—that the damages recoverable are limited to such loss as results to the widow and children (as in this case) because they have been deprived of the reasonable support of the injured employee. The damage is limited strictly to the financial loss thus suffered. A state court has interpreted a similar provision in this way—what a plaintiff is entitled to recover is a capital fund, so to speak, which would represent the present value of all pecuniary loss which shall fall upon the widow or next of kin by the prematurely taking off of the wage-earner, that is to say the husband and father. That is to be ascertained by taking into account all the possibilities. He might have died shortly after the accident, or, had he lived, suffered financial reverses. The wife might have died long before he died, so might his next of kin. Nothing is to be added for loss of society, or wounded feelings, or anything else which cannot be measured by money and satisfied by pecuniary recompense.

It appears from the testimony that Mr. Noon was turning over to his wife once a month substantially one hundred and twenty dollars, and was twenty-nine years of age at the time of his death. In cases of this character proof is sometimes put in as to the reasonable expectancy of life of the deceased had he not been killed, but I am obliged to charge you that while it is said, and I may add agreed upon by counsel, that Mr. Noon, had he lived, at the age at which he was killed had a reasonable expectancy of thirty-nine years, yet

in that connection you must take into consideration whether he would have lived during his expectancy, because the condition of his health is a factor. One of our courts has said that the mortality table, for example, is evidential irrespective of the condition of health of the person whose expectancy of life is the subject of inquiry, but that condition, namely, respecting the health of the person who was killed, must be taken into account in determining the probable duration of such life. The mortality table does not afford an absolute rule but it may be a help in the formation of the judgment of the jury. Each case stands by itself and the tables must be intelligently applied in each case. So here, should you find that the defendant company is proven under the evidence to have been negligent, with the direct result that Mr. Noon was killed, you will observe the rule as to the measure of damages in returning a sum which would be permitted under the statute.

You will also consider in that connection the question whether Mr. Noon was guilty of contributory negligence, because of the provision of the law which I read to you, which involves diminishing any sum you may find the plaintiff entitled to by reason therefore (that is, the contributory negligence, if you find it exists, on the part of the deceased).

I do not know that I have anything more to say to you ladies and gentlemen. You will bear in mind that after all sympathy cannot be translated into dollars and cents. The law provides that the widow and children are entitled to receive compensation, not for the loss of the hus-

band and father—he cannot be brought back—but a sum under the rule which will compensate them for the loss or deprivation of a financial nature—of the support or income which they would have had a reasonable expectation of receiving had Mr. Noon continued to live. That is the test, and when you observe that rule and ascertain as a primary question, of course, upon which the entire case turns, whether this defendant company is shown to have been negligent or not, then you will have done justice as between these parties.

New Jersey Court of Errors and Appeals.

JOSEPHINE NOON, Administratrix of George Noon, Deceased, Plaintiff-Respondent, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-Appellant.	Action at Law. Appeal from Supreme Court.

BRIEF OF APPELLANT.

Statement.

This is an appeal from a judgment entered in the Supreme Court on April 2nd, 1928, as of July 26, 1927, on the verdict of a jury for $30,000 rendered May 2nd, 1927, in the Ocean Circuit of that Court.

A Rule to Show Cause was allowed the appellant by the Trial Court as to damages only, reserving to appellant all exceptions taken by it on the trial. This rule was discharged on the 2nd day of April, 1928; whereupon on the 17th day of April, 1928, appellant took this appeal.

Respondent brought this action against the appellant under the Federal Employers' Liability Act.

In the refusal of the Trial Court to grant a non-suit, in its refusal to direct a verdict in appellant's favor, and in the admission of certain evidence, the appellant claims prejudicial error.

Abstract of Pleadings.

The respondent in her complaint set forth with considerable elaboration six grounds upon which she predicated appellant's negligence, to-wit:

1. Failure to provide a safe place for her decedent to work.

2. Failure to warn decedent of the approach of the train which struck him, said failure being alleged of the engineer of that train as well as of the foreman and crew of the train upon which the decedent was working.

3. Failure to adopt safe methods of doing the work in which the respondent's decedent was engaged.

4. Failure to instruct the decedent as to the dangers of his work.

5. Violation of rules promulgated to protect the decedent.

6. Failure to promulgate rules to protect the decedent.

Besides the general denial of the various allegations of negligence charged against it, the appellant set up specially, separate defenses: one, that the decedent's negligence was the sole and

proximate cause of the injuries resulting in his death; the other that the respondent's decedent assumed the risks of the injury which resulted in his death.

Appellant's Grounds of Appeal.

1. That the trial court refused its application and motion for a non-suit on the ground that the plaintiff had not established any negligence as against the defendant Railroad Company under all or any of the charges set forth in the plaintiff's complaint.

2. That the trial court refused to direct a verdict in favor of defendant Railroad Company and against plaintiff for the reason that plaintiff had not established any negligence of the defendant Railroad Company under all or any of the charges set forth in the plaintiff's complaint.

3. That the trial court, over the objection of the defendant-appellant, permitted plaintiff to introduce and read in evidence a certain rule of the Railroad Company, known as Rule 402, as follows:

> "Under the title 'Conductors'. Rule 402. They have general charge of the train to which they are assigned and all persons employed thereon, and are responsible for the movement, safety and proper care of the train, in strict accordance with the rules and special instructions; likewise for the good

conduct and vigilance and the faithful performance of duty on the part of their trainmen."

4. That the trial court, over the objection of the defendant-appellant, permitted plaintiff to introduce in evidence and read to the jury, a certain rule, known as Rule 463, as follows:

> "They must see that their trainmen are so distributed over the train as to control it most effectually and to be able to pass signals from any part of it to the engineman. In cold or inclement weather they may allow their men to ride in the caboose or on the engine, when consistent with safety, but in descending long grades and when approaching and passing through points at which the train may be required to stop, the trainmen must all be out on the train in their proper positions."

5. That the trial court, over the objection of the defendant-appellant, permitted plaintiff to offer in evidence and read to the jury, a certain rule known as Rule 526, as follows:

> Under the heading "Enginemen".
> "They must stop and inquire respecting any signal not understood, and on delayed regular trains and extra trains must keep sharp lookout for trackmen and hand cars, sounding the whistle signal at short intervals where the view is obscured."

6. That the trial court, over the objection of the defendant-appellant, permitted plaintiff to offer

in evidence and read to the jury, a certain rule known as Rule 530, as follows:

> "Trains must proceed with caution through yards and station limits, particularly at night. Enginemen must keep in mind the location of main track switches. If a light cannot be seen on a switch where a light is usually displayed, they must reduce speed sufficiently to stop before reaching the switch, unless the track is seen to be clear. They must report all such failures to the Superintendent."

7. That the trial court, over the objection of the defendant-appellant, permitted plaintiff to offer in evidence and read to the jury, a certain rule known as Rule 553, as follows:

> "They must maintain as far as practicable regular and uniform speed, avoiding excessive speed on descending grades and run with due caution where the track is under repair and at all points where there is reason to apprehend danger."

8. That the trial court, over the objection of the defendant-appellant, permitted plaintiff to ask of the witness Wallgren, the following question:

> "To what extent, and by whom, was that pathway in use on April 25th, 1925, and prior to that time, if you know?"

9. That the trial court refused, on the request of the defendant-appellant, to strike out Exhibit P-5.

History of the Case.

On April 27, 1925, about 4:52 P. M., the respondent's decedent, a trainman employed by the appellant in its freight service, was struck either by the locomotive or by the cars of an express train traveling westerly over the appellant's road in the vicinity of Clifton, N. J., on its way to Paterson, N. J., and beyond.

The plaintiff produced no eye witness of the accident, but through interrogatories propounded to the Railroad Company, established sufficient evidence to warrant an inference that contact with either the engine or cars of said westerly train was the proximate cause of her decedent's death. *How the accident actually happened was left entirely to conjecture,* as an examination of the evidence will disclose, *as well will it show that no negligent act of the appellant was the proximate cause of the accident.*

On appellant's Boonton Line running from Hoboken in a northerly direction through Secaucus, Passaic and Clifton, N. J., to Paterson, N. J., and beyond, it operated two main line tracks known to railroadmen as "westbound" and "eastbound" respectively. Of these the track farthest south (geographically west) was the eastbound track. Trains running from Paterson toward Hoboken used the eastbound track and were called eastbound trains; and those running in the contrary direction, using the westbound track, were called westbound trains.

Off both main tracks in the territory between Secaucus and Paterson ran sidings serving various industries. In the vicinity of one of these, the plant of the Athenia Steel Company, there was a drill or switching movement at or about the time of the accident here in question, which makes desirable a description of the track lay-out of this industry.

The plant of the steel company was served by a siding taking off from the railroad company's eastbound main track at a point approximately 300 feet easterly of the easterly side of the steel company's office building, at the point marked "A" in lead pencil on defendant's trial map—Plaintiff's Exhibit P-1. The switch stand and lever operating this switch and controlling movements of cars to and from the eastbound main track and the industrial tracks of the steel company were located on that side of the eastbound main track nearest the Steel Company's plant.

These industrial tracks were known, respectively, as "storage track", "commercial track" and "coal track". The storage track was a continuation of the railroad siding extending westerly toward Paterson parallel with and substantially 12 feet distant from the eastbound main track, measured from the nearest rail. The commercial track branched from the storage track at a point approximately 100 feet easterly of the easterly side of the steel company's office building, and ran in a westerly direction, diverging from the storage track toward the south. The coal track took off

from the commercial track at a point approximately 20 feet easterly of the easterly side of such office building and turned sharply to the south. Movements to and from the coal track were controlled by a switch located a few feet easterly of such office building.

It may not be amiss to here point out that these tracks are not shown on Plaintiff's Exhibit P-2, printed in the Exhibit Book, but they are shown on defendant's trial map used at the trial as Plaintiff's Exhibit P-1 which has not been printed. The latter map will be before the members of the Court on the argument of the cause.

On the day of the accident a train known as the "Passaic Drill", the function of which was to switch cars in and out of the various industrial sidings in this territory, proceeded from Paterson toward Secaucus on the railroad company's eastbound main track with three cars and a caboose. The engine of the drill, with head end to the west toward Paterson, was backing up pulling after it a caboose and three cars. As the drill approached the siding serving the Athenia Steel Works the conductor cut off two of the three cars and then the drill placed the remaining car on the coal track of the steel company above described. After placing that car on the coal track the drill backed out beyond the point of switch on the commercial track and shoved in on the latter track, picked up one car there and backed out onto the eastbound main track. Here it picked up the two cars cut out as aforesaid by the conductor and backed easterly to clear the point of switch controlling move-

ments from the eastbound main track to the industrial siding. Thereupon the decedent, Noon, threw that switch and the drill with the three cars moved onto the industrial siding for the purpose of placing on the commercial track the two cars just picked up on the eastbound main track. After Noon threw the switch to permit the movement just described, he stepped over the eastbound main track to a point between it and the westbound track and gave the engineer the "come ahead" signal, and, thereafter, as the drill started to enter the industrial siding he, Noon, stepped on to the first or second car of the train and again gave the engineer the come ahead signal. That was the last time that the engineer saw Noon alive (p. 71, ll. 16-35; p. 73, ll. 10-19).

The foregoing was all the evidence of the witnesses produced by the plaintiff-respondent as to the actions of Noon immediately prior to the accident resulting in his death. No eye witness of the accident was produced. Plaintiff-respondent endeavored to supplement this testimony as to happenings immediately prior to the death of Noon by reading in evidence certain interrogatories propounded to the defendant, and its answers thereto. The following is all that was developed and established in that way:

> "36. Where was Noon located when he was killed? A. Between the east and westbound tracks.
>
> "37. Was Noon standing or walking when killed? A. Noon was seen moving away from

the track at the time he received his injuries.

"38. Was Noon east or west of the switch points of the plant of the Athenia Steel Mills Co. when he was killed? A. He was about opposite the switch point of the switch which served the industrial track.

"40. Was Noon struck between the east and westbound main tracks or was he between the rails of the westbound track when he was killed? A. Noon was struck while jumping away from the westbound main track.

"43. What was Noon about to do or in the act of doing when he was killed? A. Just prior to the accident Noon opened a switch and shortly prior to meeting his death called his conductor's attention to the position of the gates of the Athenia Steel Company plant.

"52. What service had Noon done just prior to his death? A. Opened switch leading from eastbound main track."

Why Noon left his position on the first or second car which he had boarded and upon which he was standing when last seen by the engineer did not appear. The case closed without any evidence or explanation from which any inference could legitimately be drawn as to the reason or the necessity of Noon's leaving his place of safety on his train and getting either upon the westbound main track, or so near it as to come in contact with the westbound train. There was no evidence to show or from which it could be inferred that such

a movement was part of or in line with his duties. There was no evidence to show or from which could be inferred the point of time when he stepped upon the westbound track or took position so near thereto as to place himself in jeopardy. And the relation of that moment of time to the time and place when and where the engineer of the westbound train might first have seen him had he looked, nowhere appears.

This being respondent's case, appellant moved for a non-suit, which was denied. Whereupon appellant rested and moved for a direction of verdict for defendant, which was also denied.

ARGUMENT.

POINT I.

The Trial Court erred in refusing to grant a non-suit and also in refusing to direct a verdict for the defendant.

A.

THERE WAS NO EVIDENCE SHOWING A FAILURE TO FURNISH A SAFE PLACE TO WORK.

The numerous particulars of the respondent's charge that the decedent was not furnished a safe place in which to work, may be succinctly epitomized and answered seriatim, as follows:

a. That a long sharp curve of the tracks in the vicinity of the place where the deceased was work-

ing obstructed his view of approaching westbound trains (p. 8, l. 14 *et seq.*).

An examination of Exhibit P-2 shows the main track layout to the east of the Steel Plant, with a maximum curvature of 1° and 15′, and the respondent's witness Johnson testified that while there was a curve in the tracks to the east of the place "where that man was killed" (p. 69, ll. 15-16) from Clifton Station west, "you got clear sight for over half a mile" (p. 69, l. 20; see also p. 63, ll. 30-40).

b. That the clearance between the main line track was unnecessarily and unusually short and did not exceed three (3) feet in width, thereby creating unnecessary hazards to employees working between said tracks.

By the interrogatories propounded to the appellant and read in evidence, the distance between the near rails of the main tracks was shown to be eight (8) feet six (6) inches, p. 38, l. 31 *et seq.*, and allowing for the overhang of cars over the tracks of twenty-one (21) inches, as testified to by the witness Johnson, p. 67, l. 29 *et seq.*, p. 68, l. 1 *et seq.*, the clearance was still five (5) feet. There is not a scintilla of evidence that this clearance was unnecessarily or unusually short as charged.

c. That the main line tracks were improperly ballasted and in a condition to trip and endanger employees working on them.

There was no evidence whatever to indicate that there was any impropriety in the ballasting of the tracks and roadway at and in the vicinity of the place of accident, or any other unusual or dangerous condition existing there. This is sufficiently shown by Respondent's Exhibits P-8 and P-9. Plaintiff produced and swore the railroad company's section foreman, Johnson, in charge of this territory at the time of the accident and for three years prior thereto, and although he was interrogated as to the condition of the ballast and other conditions at the place in question, nothing was developed to show anything unusual or dangerous to employees working at that place (p. 62, ll. 10-25; p. 63, ll. 1-12). In fact it affirmatively appears from the photograph Exhibits P-8 and P-9 and the testimony of witness Johnson that the ballast, tracks and roadway at the point in question were in superb condition.

B.

ALLEGED FAILURE TO WARN.

The respondent's charges of alleged failure to warn may be divided into two classes:

a. Failure of Noon's conductor and his other fellow-employees on the drill to warn him of the approaching westbound train;

b. Failure of the engineer of the westbound train to warn him.

a.

The drill crew of which Noon was a member, consisted of his conductor, another trainman and a flagman.

The evidence showed that at the time of the accident each member of the crew was actually busily engaged in and about his duties.

The conductor was giving signals to the other trainman who was relaying them to the engineer (p. 31, l. 24 *et seq.*, also p. 75, l. 26 *et seq.*), and the flagman was protecting the drill from trains approaching on the same track from the west (p. 75, l. 29 *et seq.* and p. 76, l. 3 *et seq.*).

Noon was last seen by the only eye witness produced by the plaintiff, in a position of safety.

> He was on the first or second car of the "Passaic Drill", having just given a "Come ahead" signal (p. 71, l. 25 *et seq.*).

and the engineer, witness Graves, produced by the plaintiff, testifying as to the knowledge of himself and members of his crew including Noon regarding the westbound train which struck Noon, said:

> "We knowed it was due" (p. 74, l. 40).

Why Noon should have been warned by men themselves occupied with the drill-train operation, at a time when he was in a place of safety, and when he must also have had knowledge of the fact that such westbound train was due to arrive at any moment, is not explained.

b.

The fact that the last time the witness (Graves) saw the deceased, *he was in a place of safety,* to-wit, on a car of the "Passaic Drill" (p. 71, l. 25 *et seq.*), also shows how utterly unfounded was the second charge of negligence that the engineer of the westbound train failed to warn Noon, and that such failure was a violation of the Railroad Company's rules promulgated for the deceased's safety.

As heretofore argued, there was absolutely no evidence which showed or from which could be inferred the time when Noon left his place of safety aboard the first or second car of the drill train and went upon the westbound track or so near it as to be in a place of danger. There is absolutely no evidence in the case to show how long Noon remained upon the westbound track (if he was upon it) or in a place of danger too near the westbound track. Concededly Noon was on the westbound track or so near it that he met his death by being struck by the locomotive or one of the cars of the westbound train. But when did he get into this position of danger? How long had he been there before he was struck? Where was he when the men on train 367 might first have seen him from a distance of 500 feet "if they had been looking out for him"? For aught that appears the men on train 367 might have been able first to see Noon (if they had been looking out for him) while he was safely aboard

the first or second car of the drill train, and it might very well be, so far as appears from the evidence, that they saw him nowhere else until the very instant of the accident. It is entirely consistent with the evidence that Noon got into the position of danger only momentarily before he was struck and too late for any human agency to save him.

On this charge of failure to warn, various rules were admitted over the appellant's objection and the error thus committed constitutes a separate ground of appeal. The evidence in the case signally failed to show any breach of duty created by them. Thus under the heading of "Enginemen" Rule 526, reading as follows:

> "They must stop and inquire respecting any signal not understood, and on delayed regular trains and extra trains must keep sharp lookout for trackmen and hand cars sounding the whistle at short intervals where the view is obscured" (p. 50, l. 2);

imposed no duty to keep a lookout for the deceased, a *trainman*. The recognition of the distinction between "trackmen" and those who used "hand cars" in traveling over railroad tracks, and "trainmen" being almost universally recognized by the courts.

See distinction drawn between the two classes of employees in the following decisions:

Precodnick vs. Lehigh Valley R. R., 74 N. J. L. 566;

Germanus vs. Lehigh Valley R. R., 74 N. J. L. 665;
Hines vs. Kesheimer, Adx., 299 S. W. 1101.

Again the obligation to "whistle" "at short intervals" had reference only to situations "where the view was obscured" and under Subdivision A, Point I, *supra,* it is shown that such a situation was not present in the instant case.

Rule 530, received in evidence and reading as follows:

> "Trains must proceed with caution through yards and station limits, particularly at night. Enginemen must keep in mind the location of main track switches. If a light cannot be seen on a switch where a light is usuallly displayed, they must reduce speed sufficiently to stop before reaching the switch, unless the track is seen to be clear. They must report all such failures to the Superintendent" (p. 44, l. 19 *et seq.*).

likewise, if applicable, was not breached by the appellant. But the rule was not applicable.

The evidence signally failed to show that the accident happened in any yard or within any station limits. True, a station called Clifton was referred to in the evidence. See Plaintiff's Exhibits P-6, P-7 and P-8 (Exhibit Book). But the witness Johnson's testimony showed that the Clifton Station was about half a mile away from the switch near which the accident happened (p. 67,

l. 10 *et seq.*). Therefore the part of the rule referring to station limits is not applicable.

The accident happened on the main line westbound track of the appellant (p. 30, l. 35). Merely because industrial sidings in the neighborhood branched from main line tracks, did not make the *locus in quo* a yard. That the *locus* is not a yard in the ordinary sense of the term is clearly shown by Plaintiff's Exhibits P-1, P-8, P-9, and was not within the rule. It was not such a place as that dealt with in *Voss vs. D. L. & W. R. R. Co.,* 62 N. J. L. 59, &c., or in *Arkfetz vs. Humphreys,* 145 U. S. 418.

The balance of the rule relating to main track switches shows on its face its inapplicability, in as much as the accident happened in broad daylight.

The third rule relative to the manner in which any engineer should run his train, like the preceding Rule 530, makes no mention whatsoever as to the giving of whistle or other audible signals, for it reads:

> Rule 553. "They must maintain as far as practicable regular and uniform speed, avoiding excessive speed on descending grades and run with due caution where the track is under repair and at all points where there is reason to apprehend danger" (p. 50, l. 31; p. 51, l. 1 *et seq.*).

It is apparent that it had no application to any of the evidence introduced in the instant case.

C.

THERE WAS NO EVIDENCE THAT THE APPELLANT FAILED TO ADOPT A SAFE METHOD OF DOING THE WORK IN WHICH NOON WAS ENGAGED.

The mere happening of the accident to Noon established nothing, as an action under the Federal Employers' Liability Act must be predicated upon negligence. While one may imagine how the accident was brought about, no finger can point to any dereliction of duty on the part of any member of the drill crew, except on the part of Noon himself. The engineer Graves was on his engine taking and receiving signals and operating his train (p. 71, l. 18 *et seq.*); the conductor and the "other trainman" were on the train giving and relaying the signals of the engineer (p. 31, l. 24 *et seq.*), and Simmons, the flagman, was out on the tracks west of the drill protecting it from any train movement from Paterson on the eastbound track (p. 75, l. 30 *et seq.*), and Noon was safely on the first or second car of the drill (p. 71, l. 27 *et seq.*). Not one word of evidence was offered to show that the work Noon was doing could have been done in any other or safer manner. As said by this Court in *Kingsley v. D. L. & W. R. R. Co.,* 81 N. J. L. 540:

> "A person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. A violation of this duty, which we call negligence, cannot

be presumed but must be proved. The liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done. And so it cannot be predicated on any particular act that it is *per se* negligence; it is only so because it is a breach of some duty which must appear as a substantive factor in the case."

D.

THERE WAS NO PROOF OF FAILURE TO INSTRUCT NOON.

The respondent introduced in evidence the instructions which Noon received from the appellant in the following language:

> "Employees must not place themselves in position where the movement of a car, engine or train would injure them. In the performance of their duties in connection therewith, they must know that they are fully protected as prescribed in the rules. Employees must stand outside and clear of all main tracks while trains are passing. They must not rely upon others to notify them of the approach of a train. Employees who are careless of the safety of themselves or others will not be retained in the service" (p. 30, l. 3 *et seq.*).

This taken with his familiarity with the *locus in quo*—his experience in running in this particular territory as a trainman from April, 1917, to

October, 1918, and continuously from January, 1920, to April 27, 1925, when he was killed (p. 24, l. 17, *et seq.*), and in doing the identical work which he was doing on the day he was killed, for six days in 1924 and five days in 1925, the year he was killed (p. 25, l. 18, *et seq.*), with no evidence as to *what he should have been instructed about,* leads to the inevitable conclusion that this charge of alleged negligence was but a figment of the pleader's imagination.

E.

THERE WAS NO PROOF OF VIOLATION OF ANY RULE PROMULGATED TO PROTECT THE DECEDENT.

We have in the preceding portion of our brief referred to and discussed the applicability and non-applicability of Rules 526, 530, 553 and R which are in evidence in the case. It remains to consider the other rules offered in evidence by the respondent over the objection of the appellant in order to ascertain whether any foundation existed for the action of the Court in permitting them to be considered by the jury.

Rule 400 received in evidence, read as follows:

> "Where two or more switch tenders are employed at one post they must relieve one another, and give full information regarding overdue trains" (p. 48, l. 12, *et seq.*).

This rule shows on its face its inapplicability to the instant case. The class of employees it

seeks to regulate was never mentioned or referred to anywhere in the evidence in this case except in the rule itself. Because Noon, a trainman, threw a switch, does not make him a switch tender, and further, if he were, the rule contemplated a switch tending operation wherein more than one switch tender was engaged at the same time.

Respondent further offered and read in evidence Rule 402 under the title "Conductors", as follows:

> "They have general charge of the train to which they are assigned and all persons employed thereon, and are responsible for the movement, safety and proper care of the train in strict accordance with the rules and special instructions; likewise for the good conduct and vigilance and the faithful performance of duty on the part of their trainmen" (p. 48, l. 22, *et seq.*).

We fail to find in the evidence any situation to which this rule was applicable. We fail to find wherein, with the exception of the actions of Noon which resulted in his death, the crew's conduct was other than good, vigilant and faithful in the performance of their duties (see discussion of their activities under Subdivision B, Point I, *supra*).

The respondent further offered in evidence and read from that portion of the Rule Book under the heading of "Freight Conductors", Rule 463, as follows:

> "They must see that their trainmen are so distributed over the train as to control it most effectually and be able to pass signals from any part of it to the engineman. In cold or inclement weather they may allow their men to ride in the caboose or on the engine, when consistent with safety, but in descending long grades and when approaching and passing through points at which the train may be required to stop, the trainmen must all be out on the train in their proper position" (p. 49, l. 2, *et seq.*).

For the third time we feel obliged to refer the Court to our discussion of and reference to the evidence as to the activities of the drill crew under Subdivision B, Point I, *supra,* which makes manifest that no violation of this rule occurred—certainly none that in any way had the remotest bearing on the accident to Noon.

F.

There was no evidence that the appellant failed to promulgate rules for Noon's safety.

It is true that in some manner Noon was struck by some part of a train moving west on the appellant's westbound track, but one searches in vain to find any evidence to justify even an inference that Noon was obliged at the time of his accident to be, as charged in the complaint *"between the east and westbound main tracks"* (p. 7, l. 13, *et seq.*) or at any other place than where he was when last seen by Engineer Graves, viz., on his train in a place of safety. Nothing occurred or was occurring to

disturb him or require him to move from such place of safety. No accident or untoward occurrence was taking place or took place to his train then safely on the siding which branched off the eastbound main track, and what more could be done or what actions could have been regulated by the promulgation of additional rules, and what the character and nature of additional rules would be or should be was left entirely to speculation and conjecture. A set of rules which would eliminate railroad accidents entirely and yet permit a railroad to run is a desideratum devoutly wished but well recognized in view of the human element in such operations as impossible of accomplishment.

G.

THERE WAS NO PROOF THAT THE APPELLANT FAILED TO HAVE THE WESTBOUND TRAIN UNDER CONTROL, OR THAT THE ENGINEMAN COULD HAVE STOPPED IT IN TIME TO HAVE AVOIDED THE ACCIDENT.

While it is true that the westbound train was three minutes late, there was absolutely no evidence to show that its speed was excessive or that it was not under control. The only piece of evidence in the case as to the speed of the westbound train was that it was running at between 20 and 25 miles an hour *when it struck Noon* (p. 27, l. 8 *et seq.*). Surely not a lively rate for a delayed express train.

Therefore, the failure to slow down the speed of the train until too late to prevent the accident does not indicate negligence.

It cannot be said that the engineer should have anticipated that trainmen of this drill crew would be walking on or standing near the westbound track. This is so because there was no need or requirement or occasion for members of that crew to be on or near the westbound track while engaged in drilling cars from the eastbound main track into sidings of industries located on the southerly side of the eastbound tracks—the side farthest away from the westbound main track. This is particularly true in view of appellant's Rule R introduced by the plaintiff, as follows:

> "Employees must not place themselves in position where the movement of a car, engine or train would injure them. In the performance of their duties in connection therewith, they must know that they are fully protected as prescribed in the rules. Employees must stand outside and clear of all main tracks while trains are passing. They must not rely upon others to notify them of the approach of a train. Employees who are careless of the safety of themselves or others will not be retained in the service."

That the engineer was alert and on his job is well borne out by the fact that even after Noon was struck the train only went *an engine and two or three cars' length* past his body before it stopped (p. 67, l. 14, *et seq.*).

The answer to Interrogatory No. 21 (p. 27, l. 14, *et seq.*) did state that the men on the engine of train 367 could have first seen Noon, if they had been looking out for him, for a distance of 500 feet. Still there was absolutely no evidence that *at the rate of speed his train was then proceeding,* it was not stopped in as short a time and within as short a distance as was possible under all the circumstances of the situation; circumstances such as the condition of the rails of the track, the load of the train, the character of its equipment, etc., as to which the case was absolutely silent.

Furthermore, we may pertinently repeat here what was said under the discussion of the charge of the failure to warn Noon. There was absolutely no evidence to show that the engineman of train 367 saw Noon or could have seen him in time to have stopped the train before striking him. There was no evidence whatever as to the relationship between the time when Noon got onto the westbound track or so near to it as to be in a place of danger, and the time and point in the progress of train 367 toward the place of accident when and where the engineer first might have seen Noon had he been looking out for him. For aught that appears in the evidence, Noon might very well have been safely aboard the first or second car of the drill train at the time when and where the engineman first could have seen him.

POINT II.

The Trial Court erred in admitting rules 402, 463, 526, 530 and 553 of the appellant.

These rules which were admitted, over the objection of the appellant, are set forth verbatim on pages 16, 17, 18, 21-22 and 23 of this brief, and are discussed in sub-divisions B, C, D and E of Point I at pages 13 to 23, and there the inapplicability of them is made so manifest that it is not necessary to discuss them again or the error made by the trial court in their admission.

POINT III.

The Court erred in admitting in evidence Exhibits P-4, P-5 and P-9, and in refusing to strike out Exhibit P-5.

In the complaint respondent alleged that, at the place of the accident, the tracks and right of way of the railroad company were crossed and used not only by its employees but by "other persons, including the employees of the numerous industries located in the vicinity thereof", for the purpose of laying a foundation for the charge that appellant failed to adopt rules or regulations requiring enginemen to give warning of the approach of their trains to this alleged permissive crossing, to have their trains under control and to keep a special look-out when so approaching.

To support this charge of negligence, the plaintiff's Exhibits P-4, 5 and 9 were offered and received in evidence over the objection of appellant (p. 37, l. 19).

An examination of the exhibits mentioned (see Exhibit Book) will show that appellant had enclosed its property and right of way, at and in the vicinity of the place of accident, by wire fencing held in place by concrete posts. The photographs also indicate that, at the time they were taken, a section of this fence opposite the Athenia Steel Company's office had been torn down so as to permit entrance upon the railroad company's right of way. The photographer who took the exhibits was not produced, but from the markings thereon it appeared that they were all taken on April 21, 1927, nearly two years after the happening of the accident here in question, and they were all objected to as not showing conditions at the time of the accident (p. 37, l. 19, *et seq.*), but were nevertheless admitted as showing conditions as of April 21, 1927—subject to being stricken out if not connected up with the time of this accident (p. 38, l. 820, *et seq.*).

The only witness produced by respondent to connect up Exhibit P-5 was one Wallgren, who "could not say" what the condition was of the wires on the fence on April 27, 1925 (p. 58, l. 11 *et seq.*) and whether the fence shown was "intact or not" (p. 58, l. 11 *et seq.*), although another witness Johnson, produced by the respondent, said

he thought the condition of the fence on April 27, 1925, was "O. K." (p. 64, l. 19 *et seq.*).

The Court, however, denied appellant's motion to strike out Exhibit P-5, and permitted the jury to consider that exhibit together with Exhibits P-4 and P-9 in reaching their verdict,

> "with the qualification that it generally portrays conditions as they existed at the time of the accident with the exception that some part of it was not then in the same condition as when the photograph was taken" (p. 59, l. 4 *et seq.*).

The very purpose of these exhibits was to aid the respondent in showing an unusual use of the railroad's tracks, and it was grossly misleading to permit the jury to take the same with them to the jury room and to consider them as part of the evidence, because if the actual situation was that the railroad's right of way was securely fenced at the time of the accident, any verdict predicated on the theories of negligence herein adverted to would be palpably erroneous.

Again, were it the fact that the wires had been but recently broken, as may have been the case (see Johnson's testimony, p. 65, l. 10 *et seq.*), no actionable negligence would have arisen from this fact unless it further appeared that the railroad company knew of the condition of the fence and failed to repair it within a reasonable time, or unless the condition had existed for such a length of time that the railroad company would be charge-

able with knowledge of it and with negligence for failure to repair it.

Furthermore, if, for the purpose of argument only, we assume the existence at the time of the accident of the alleged permissive crossing and a duty on the part of the railroad company to make, promulgate and enforce rules and regulations requiring enginemen to give warning of the approach of their trains to the alleged permissive crossing, we are still at a loss to understand how a failure to perform the alleged duty of warning persons using the alleged permissive crossing located some 300 feet easterly of the point of the accident here in question had any causative connection with the injury and death at the latter point of a member of a switching crew engaged in drilling cars. Such a rule, if it existed, would be for the protection of those using the crossing and in nowise for the protection of members of a drill crew switching cars into an industrial siding 300 feet away.

The presumption that permitting the exhibits to continue in the case worked the appellant harm was not overcome by the Court's observation in refusing to strike out Exhibit P-5, that

> "the jury will, of course, understand the qualification",

which observation was not addressed to the jury. Nor did the trial court remedy the wrong in its charge to the jury. It nowhere in its charge adverted to or referred to or explained the qualified admission of the exhibits in question.

CONCLUSION.

In the refusal of the Trial Court to direct a non-suit and in its refusal to direct a verdict in favor of defendant, as well as in the admission in evidence of the several rules of the appellant which were not germane to the issues but were totally irrelevant and misleading, the admission in evidence over objection of defendant of Exhibits P-4, P-5 and P-9, and in the refusal of the Court to strike out Exhibit P-5, the Trial Court committed substantial error to the prejudice of the appellant; because thereof the judgment should be set aside.

Respectfully submitted,

FREDERIC B. SCOTT,
Attorney of Defendant.

X3651

NEW JERSEY COURT OF ERRORS AND APPEALS

JOSEPHINE NOON, ADMINISTRATRIX OF GEORGE NOON, DECEASED, Plaintiff-Respondent, vs. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant-Appellant.	ACTION AT LAW. APPEAL FROM SUPREME COURT.

BRIEF OF PLAINTIFF-RESPONDENT

INTRODUCTION

The plaintiff, as administratrix of the estate of George Noon, deceased, began this action on behalf of herself and two young daughters, under the Federal Employer's Liability Act, to recover damages for the death of her husband. On April 27, 1925, at 5:52 P. M., deceased was in the employ of the defendant as a brakeman, switching cars at the station of Clifton, New Jersey. While working near his train between two main line tracks, he was instantly killed by a passing express train, running behind its schedule, at a speed of forty-five miles per hour, without a timely warning of its approach. The deceased's view of the train was obstructed, he was absorbed with his work and not able to escape his fate.

On the trial, the defendant offered no evidence and the jury was instructed that it was the duty of the defendant "to exercise such due and reasonable care as the circumstances required."

In answer to interrogatories the defendant admitted that it kept no lookout, gave no warning and took no precautions to protect the deceased, and asserted that it owed him no duty to warn. The plaintiff asserted that the defendant's duty to warn was imposed upon it by reason of (1) the unusual facts and circumstances, admitted or in evidence, (2) the rules of the defendant, prescribing the conduct of its employees, under such facts and circumstances and (3) the application of the doctrine of the last clear chance.

On its motions for non-suit and for an instructed verdict, the defendant assigned as its *sole reason* therefor, that the plaintiff had not established the negligence of the defendant. The defendant requested no instructions and took no exceptions to instructions given.

The jury returned a verdict for the plaintiff, which was affirmed by the Supreme Court, thereby eliminating from further consideration, the questions of excessive verdict and contributory negligence.

On this appeal, the defendant does not assign as grounds therefor that the deceased assumed the risks of his employment or that his negligence was the sole proximate cause of his death.

The only grounds assigned and argued are "that the plaintiff has not established any negligence of the defendant and that certain of its rules were improperly admitted in evidence."

I.

DEFENSES WAIVED OR ABANDONED

The defendant asserts in its brief that its answer plead, as defenses, assumption of risk, and the sole negligence of the deceased, as the proximate cause of his death.

These defenses were waived and abandoned by the following acts and omissions of the defendant:

The defendant's motions for non-suit and for an instructed verdict assigned as a *sole* reason therefor, "that the plaintiff has not established any negligence on behalf of the defendant railroad company, under any or all of the charges set forth in the complaint." (P. 81.) Neither defense was then and there presented.

In its assignments of its grounds of appeal, the defendant adopted word for word, the language of these motions and did not refer to or assign error as to either defense.

The evidence did not justify the submission of either defense to the jury and the defendant took no exceptions to the instructions given and requested none to be given.

Under the general rules, long enforced, these acts and omissions worked a waiver or abandonment of both defenses, and they are not involved on this appeal.

Garritson v. Appleton, 28 N. J. L., 386.
Illinois Central R. v. Skaggs, 240 U. S., 66.
Pa. R. v. Clark, 266 Fed., 182 (C. C. A.).
Chicago R. v. Ward, 252 U. S., 18.

II.

STATEMENT OF FACTS

The defendant's statement of facts, scattered here and there in its brief, omits so many material facts that a supplemental statement must be made.

On April 27, 1925, the defendant operated two main line tracks between Passaic and Paterson, New Jersey, passing through the City of Clifton. One track was used for west bound and the other for east bound traffic.

At Clifton, there were numerous side and industry tracks, used in the receipt and delivery of car-load traffic to adjacent industries. East of Clifton station, there existed in both main tracks a sharp right hand curve. (Exhibit 6.) In front of the station building these tracks straightened out. (Exhibits 6 and 7.) About 260 feet west of the station, they curved southerly to the left and at about 1,775 feet west of the station, they curved northerly to the right, the two curves forming an elongated letter "S." (Exhibits 7 and 8.) On the most westerly curve was located an industry switch, connecting the east bound main track with the Aethenia Steel Mills Plant. Three hundred feet west of this switch was located a north and south crossing, over the main tracks, and for many years used daily by hundreds of workmen, women and children. (Pp. 53 and 54.) The extent of this use is indicated by the *white line* across the right of way in Exhibit 9, and the permanent approaches at both ends of this crossing, are shown in Exhibits 3, 4 and 5. The deceased was killed 300 feet east of this crossing, 1,775 feet west of Clifton station and directly north of this switch. (Exhibit 2, P. 30, Ans. 38.)

The deceased had worked as a trainman of the defendant, on and off, for less than seven years. At the time of his death, he was working within station limits on a train which performed service between Passaic and Paterson. He had worked on his train in that territory for only eleven days, five in April, 1925, and six some time in 1924. (P. 25, Ans. 8.) His crew consisted of two enginemen and a conductor, two trainmen and two flagmen. (P. 31, Ans. 46.) When killed, he was working in the presence of and under the direction of his conductor, and four cars were being switched into the Steel Plant. (P. 25.) Just prior thereto, a car had been

switched into the plant and the engine had backed out onto the east bound main track, where it picked up four other cars. The engine was headed west, with the four cars ahead and was standing on the west curve, some distance east of the plant switch. In the presence of his conductor, the deceased threw the switch, leading from the east bound main track into the Steel Plant, crossed north over that track, ahead of his train and stood between the two main line tracks. He was then on the engineer's side and there gave him the "go ahead" signal. As the engine started to push the cars west, he mounted the first or second car from the west end and there repeated the signal. (P. 71, L. 20.) He then dropped off the car at or near the switch, stepped backward, evidently for the purpose of ascertaining the position of the gates across the plant tracks, and was reporting their position to his conductor when he was struck and killed by an express train. (P. 21, Ans. 43.) He was then facing south towards his conductor and moving away from the west bound track (P. 31, Ans. 41 and 37); both trains were moving west, the express train overtaking and passing the other train at or near the switch. Deceased's view of the express train was obstructed by his train, until it was within a few feet of him. He was apparently engrossed with his work and oblivious of his peril, until his last chance to escape was gone. When on his own train, he could not see the position of the gates owing to the curvature of the plant tracks (Exhibit 9) and it was not his duty to open or shut the gates. (P. 32, Ans. 51.)

The deceased was struck by a west bound, past due, express train, running forty-five miles per hour, which approached without giving any warning, except to sound its emergency whistle, too late to avoid the accident (P. 66, L. 15 and 31.)

The accident occurred at 5:52 P. M., daylight saving time, when one hundred and fifty employees of the Steel Plant, quitting work, were about to cross the defendant's tracks at the crossing, three hundred feet west of where deceased was struck. This train, consisting of an engine and nine coaches, was three minutes late (P. 27, Ans. 24), and its engineer had an unobstructed view of the train on the adjacent track, its location on the curve and its movement for at least three thousand feet. (Exhibits 8, 9 and 1.) It did not stop at or whistle for Clifton Station, the other train, or nearby crossing, used by the public. It ran from Passaic Tower to the place of accident, a distance of one and one-half miles, in two minutes, as shown by defendant's official record. (P. 42, L. 10-24.) This was at the rate of forty-five miles per hour or about sixty-six feet per second.

The deceased's conductor was, at the time of the accident, in the second car from the west end of his train (P. 31, Ans. 48); he saw the express train when it was twenty-five feet east of the switch (P. 32, Ans. 53a); he knew it was due to pass at the time it passed (P. 32, Ans. 53b); he kept no lookout, took no precautions and gave no warning of its approach. (P. 32, Ans. 54 and 55.)

In answer to interrogatories, the defendant admitted that it took no precautions to protect the deceased. (P. 32, Ans. 35a.) Evidently not considering the sounding of the emergency whistle an act of precaution.

The rules of the defendant required that engineers must run their engines with due caution, at all points where there is reason to apprehend danger (Rule 553, P. 50); that their trains must proceed with caution through yards and station limits (Rule 530, P. 50); that

in case of doubt the safe course must be taken (Rule 118, P. 41); that the engine bell must be rung when passing a train on an adjacent track (Rule 30, P. 46); that on delayed regular trains, engineers must keep a sharp lookout for trackmen, sounding the whistle at short intervals where the view is obstructed (Rule 526, P. 50); and that when on duty they are prohibited from reading engaging in unnecessary conversation or having their attention diverted from their duties (Rule 10, P. 46); also that the conductor shall have general charge of all persons employed on his train and be held responsible for the good conduct, vigilance and faithful performance of duty by his trainmen (Rule 402, P. 48) and shall so distribute his trainmen over the train, as to control it most effectually and be able to pass signals from any part of it. (Rule 463, P. 49.)

Defendant's statement of facts is inaccurate in several particulars. How deceased met his death was not a matter of conjecture. In its brief defendant admits he was struck by some part of the west bound train (Bf., P. 22), and in response to interrogatory 40, it answered that he was struck while jumping away from the west bound main track (P. 30, L. 27). There were two flagmen in deceased's crew, not one as stated by defendant (P. 31, Ans. 46). No evidence supports the statement that the other trainman was on the train relaying the signals of the engineer. (Br., P. 18.) The latter was taking his signals from the deceased and not the conductor. (P. 71, L. 76; P. 76, L. 23.) No evidence sustains the statement that the express train "only went an engine and two or three car lengths past the body." (Br., P. 25.) Sometime after the accident, one witness so located the train, but the evidence fails to show *where* it first stopped or how far it backed up *after* stopping. No evidence sup-

ports the statement that when deceased was killed, he was "doing the identical work" he did on the six days he worked on this run, in 1924 or the five days he worked in 1925. (Br., P. 30.) He worked those days on the "Passaic Drill," operating between Passaic and Paterson. (P. 25, Ans. 8.) There was no evidence showing what work, if any, the defendant did for the Steel Co., on those days. Deceased may never have worked on the tracks of that company except on the day of his death, or he may never have worked under the conditions as they existed that day.

III.

ARGUMENT

The plaintiff contends that under the facts and circumstances, admitted and in evidence, it was the defendant's duty to give the deceased a timely warning and that the engineer of the express train was negligent in that he failed to observe either the letter or spirit of his rules; that he failed to keep a proper lookout; that he failed to sound the station whistle at Clifton, or a timely whistle for decedent's crew or for the persons using the crossing near the place of accident, and that he failed to have his train under control, at the time of the accident.

The duty to warn was imposed upon the defendant by the unusual fact and circumstances involved, by its rules applying thereto and by reason of the last-clear-chance doctrine.

As the express train approached Clifton from the east, its engineer was on the north side of the engine, with an unobstructed view to the west, for at least 3000 feet. It was daylight and there was nothing to divert his attention. If he were then looking ahead, he could have seen

decedent's train and crew, working on the west curve of the east bound track, 300 feet east of the crossing, used by the public.

He had a clear view of the tracks, train and crew and if he failed to look for men working on or near these tracks, he was negligent; and if he looked and failed to see them, his observation was so careless as to be negligent. Defendant admitted that if he had been keeping a lookout, he could have first seen deceased 500 feet distant (P. 27, Ans. 21) thereby implying that he kept no lookout. He was within station limits, running behind his schedule, at 45 miles an hour and approaching and about to pass another train on the adjacent track. The nearer he approached that train, the better became his vision, until his engine ran on to the east end of the west curve, where his view disappeared and did not reappear until about the time he struck the deceased. This curve was obvious to him and he must have known how it would affect and temporarily obstruct his view ahead. He must have known and should have expected that switching movements require trainmen to be at any time, at either end or side of their trains; that when working on curves, they must stand away from their trains to signal their engineer and that getting on and off adjacent tracks is a necessary incident of their work. A few hundred feet west of the *locus in quo* was a crossing used by hundreds of men, women and children, and 150 men were about to cross it at the time of the accident.

All of these circumstances were unusual, obvious and known to the defendant and its engineer. Each of them involved elements of danger and taken all together, created a very dangerous situation. Under the law, hereinafter cited, they imposed upon them the duty of warning the deceased.

With his experience, his belated train, high speed, and obstructed view, and with his knowledge of the curves and narrow clearance between tracks, of the train at work on the curve ahead of him and of the nearby crossing used by the public, the engineer should have anticipated just what happened and given the deceased a chance for his life.

The duty of lookout and warning was also imposed on the defendant and its engineer by its rules, wherein was anticipated and provided for, the same conditions that existed when deceased was killed. The rules pointed out to the engineer these dangerous conditions and enjoined upon him the exercise of *extra care* and *caution* when running his train through yard or station limits, when passing another train on an adjacent track, when running behind his schedule, when his view was obstructed and at all points where there was reason to anticipate danger. He had every reason "to apprehend danger" and should have taken "the safe course" and proceeded "with caution" as required by the rules. He should have kept a lookout ahead, rang his bell, and sounded his whistle for the station, the train on the adjacent track and the nearby crossing. He should have put his train under such control as to have enabled him to stop it within the limits of his vision.

All railroad experts agree that trains passing one another in station limits, should sound a timely warning, not a last minute emergency whistle, and in addition to that, should be run under control (American Railway Association Rules). The courts have construed "under control" to mean *"that an engineer must run at such speed as would enable him to bring his train to a stop within his vision,"* and that is true, irrespective of weather conditions. *Cent. R. v. Young,* 200 Fed., 359 (C. C. A.). The

killing of deceased is evidence that the train was not under control and by implication, defendant's answer 35a admits that fact.

Defendant's Rule 30 admitted in evidence without objection (P. 46, L. 20) required the engine bell to be rung when an engine is about to move, when approaching public crossings at grade, when running through yards and "when passing a train standing on an adjacent track." By its answers to interrogatories 55 and 35a, it admitted that it took no precautions and gave no warning to the deceased and, therefore, did not ring the bell as required by its rule. The case of *Lehigh R. v. Mangan,* 278 Fed., 85, involved the construction and application of the same rule, under very similar conditions and establishes the liability of the defendant.

Disregarding the letter and spirit of his rules, this engineer did nothing except blow his emergency whistle, too late to avoid the accident. It was his last-minute effort to excuse his failure to give timely warning and to have his train under control.

No one testified where this engine was when its whistle *began* to blow or where it was when it *ceased* to blow or *how long* it blew *after* the accident. Deceased's conductor was on his train and first saw the express train when it was 25 feet east of the switch. (P. 32, Ans.53a.) His engineer first heard it and its emergency whistle when he was at or just west of the switch, (Pp. 75-76-72) indicating that this whistle was sounded very close to the switch. Both trains were moving west, the express overtaking and passing the other, at or near the switch. The deceased then first saw it, so close to him that he failed to escape by jumping (P. 30, Ans. 40).

Up to that time, his view to the east, had been obstructed by his engine and cars on the curve. The ex-

press train must have been almost upon him when its whistle sounded, and the presumption of self-preservation confirms this conclusion. It is quite evident, the whistle was not sounded in time for the deceased to escape and was not sounded where the engineer could have first seen him, if he had been looking out for him. (P. 27, Ans. 21.) There was no testimony that a timely warning by bell or whistle was given, but *two* witnesses testified that the emergency whistle was the only whistle sounded. (P. 66, L. 30; P. 74, L. 17.)

By interrogatory 35a the defendant was asked, *"What precautions had you taken to protect your employees working on or near your tracks, extending 2000 feet east and west of the switch at or near which Noon was killed?";* and its only answer was a copy of Rule R, (P. 30, Ans. 35a) which instructed all employees not to place themselves in a position, where the movements of a car, engine or train would injure them. That was the sum total of all precautions taken by the defendant to protect the deceased. That answer admitted that no lookout was kept, no bell was rung, no warning by whistle was sounded, no effort was made to reduce the speed of the train and no effort to prevent the accident, after discovering the peril of the deceased.

The defendant treated the deceased as a trespasser and exercised no care for his protection. The failure of its engineer to keep a lookout, to sound a timely whistle and ring his bell for the train on the adjacent track, to put his train under control, to take the safe course and to proceed with caution, was negligence and was at least evidence thereof, sufficient to support the verdict.

The plaintiff further asserts that the conductor of the switching crew was negligent in failing to adopt the safest methods of doing the work; in failing to distribute his men so as to secure the protection of all; in failing to require them to keep a lookout and warn one another of approaching trains and that he saw, or by the exercise of ordinary care should have seen the deceased on, near or between the tracks, in a position of peril and oblivious thereof and gave him no warning and took no precaution for his safety.

These assertions find support in well established rules of law to the effect that where a place of work involves unusual danger or is made more dangerous by methods of work, whereby new risks are created or existing risks are increased, the employer must take due care to guard against such risks.

West El. Co. v. Haurelman, 136 Fed., 569 (C. C. A.).
McCollum v. R. Co., 215 Fed., 465 (C. C. A.).
Germanus v. R. Co., 74 N. J. L., 662.
N. Y. R. v. Randel, 47 N. J. L., 144.

This conductor was the representative of the defendant, authorized to give orders, outline methods of work and protect his men. The deceased when struck, was working in his presence and under his directions and rightfully assumed that he would be protected.

Goessel v. Cent. R., 81 N. J. L., 17.
Chi. R. v. McGuffey, 252 Fed., 25 (C. C. A.).
Mullen v. Cent. R., 77 N. J. L., 241.

This conductor, knowing the express train "was due to pass at the time it did pass," required the deceased to work at a time and place that was most dangerous. If he had delayed the work for four seconds, the express train, running 66 feet per second, would have passed without peril to anyone, and if he had not required the work to be done on a curve, no accident would have happened.

He failed to adopt reasonable methods of work by not requiring his men to keep a lookout for approaching trains and to warn one another, when they were in peril or engrossed with their work. His crew consisted of two enginemen, two trainmen, two flagmen and himself. (P. 31, Ans. 46). At the time of the accident, one flagman was four or five car lengths west of the switch, the conductor was in or on the second car of his train and the engineer and the deceased were apparently doing all the work. The other flagman and trainman were not located but there was *no* flagman east of the switch, watching for west bound trains (P. 76, L. 15). The conductor, one brakeman and one flagman were merely onlookers, doing nothing, while the deceased threw the switch, crossed to the north of it, signalled his engineer to come ahead, mounted his moving train, repeated his signal to the engineer, then got off of his train, between the main line tracks and while indicating the position of the gates to the conductor, was struck as he jumped away from the west bound track. It was not his duty to open or shut the gates. All of his work was done in the presence of the conductor and in the line of his duty. The information he gave his conductor as to the position of the gates, justifies the inference that the latter had asked for it and that he got off of his train to ascertain their position or to report that information to the conductor. Under the circumstances, the conductor should have gotten that information himself or required the idle flagman or trainman to have gotten it. He should not have required the deceased to do so, as he was then engaged with riding and directing the movement of his train.

During the afternoon of the accident, thirty-one regular and extra trains passed by the place of the accident

(P. 27, Ans. 25), thereby creating special hazards for the men required to work on or near the tracks. The defendant and its conductor knew this and knew when the express train would pass and how late it was. Ignoring this knowledge and without notice thereof to the deceased, they required him to work on the curve, on the time of the express train, where his view was obstructed and where his work required him to get on or near the adjacent track. As a result, he was caught between two main line tracks, separated by a narrow clearance and penned in between two moving trains. He was killed, trying to escape from the place where he was required to work and when exposed to the hazards created by the defendant.

By interrogatory 55 the defendant was asked, *"What precautions, warnings or instructions did Noon's foreman take or give to insure Noon's safety?"* and the answer was *"None."* The defendant thereby admitted that it kept no lookout and gave no warning; that it concealed from deceased the time the express train was to pass and its lateness; that it did not adopt safe methods of work and did not have a flagman watching for west bound trains and that its conductor gave no warning and took no precautions for the protection of the deceased, although he saw or should have seen, that he was in a place of danger, absorbed with his work and oblivious of his peril. Defendant did nothing to lessen or eliminate the perils of his position and failed to exercise the slightest degree of care for his protection.

Deceased's place of work was created by the defendant and its conductor and its perils were obvious to them.

They made it more dangerous by requiring him to do all the work at the most dangerous time and place.

Chi. R. v. McGuffey, 252 Fed., 25 (C. C. A.).
Williver v. D. L. & W. R., 81 N. J., 352.

The conductor must have seen where and what the deceased was doing and have realized or anticipated his peril. He knew that his view to the east was obstructed; that he was engrossed with his work and oblivious of his peril. If he had been half human and attentive to his duty, he would have warned him or momentarily suspended the work for the passage of the express train. The doctrine of "discovered peril," imposed on the defendant, the duty of exercising due care as to a trespasser under such circumstances, and the deceased was entitled to no less consideration.

Cratty v. R. Co., 169 Fed., 593 (C. C. A.).
R. Co. v. Selden, 249 Fed., 122 (C. C. A.).
I. & S. Co. v. Tolson, 139 U. S., 558.

This conductor was negligent or at least, the evidence of his negligence, was sufficient to justify the verdict.

If the record herein is lacking in fulness, the plaintiff disclaims all responsibility. She made every effort within her means and opportunities, to give the court and jury all the facts. Seven of the employes of the defendant, were probably eye-witnesses of the accident and she could produce but one. The engineer and the conductor, charged directly with responsibility, did not appear and their names and addresses are not in the record. So far as it discloses, they may be sojourning at Paris or on the Riviera.

In considering a like matter, this Court has approved, as fairly satisfactory, the following statement: "Where

it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, it is within the knowledge of the defendant and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances and thus raising a presumption that if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.

Newark Co. v. Ruddy, 62 N. J. L., 505.

The general rule is that the failure of a party to call an available witness possessing peculiar knowledge concerning facts essential to his case, especially if the witness naturally be friendly to such party gives rise to an inference that the testimony of such witness would sustain such parties' contention and creates a presumption against him.

Kirby v. Tallmadge, 160 U. S. 379.

The record herein shows that the defendant denied in its answer, that the deceased was in its service on April 27, 1925, or that he was killed on that day; that it refused under advice of counsel, to give the plaintiff the names of her husband's co-employees, at the time of the accident, or their knowledge of the facts, and that it failed to produce them as witnesses at the trial. Under these circumstances, the plaintiff is justified in asserting, that if these eye-witnesses had testified, their testimony would have emphasized the guilt of the defendant and that every reasonable presumption, arising from the evidence, should be drawn in support of her case.

IV.

LAW OF THE CASE

For the convenient reference of the court, the following pertinent rules of law and decisions are cited:

Rights and obligations under the Federal Act depend upon that Act and applicable principles of common law, as interpreted and applied in the Federal Courts.

Southern R. v. Gray, 241 U. S. 333.
St. L. R. v. McWhirter, 229 U. S. 265.

Ordinary Care. The defendant's duty to exercise ordinary care in providing for the deceased a safe place and safe methods of work, was implied by law; ordinary care meaning such care as a reasonable man would exercise in view of all the circumstances presented to him. Want of such care is negligence, which is the failure to observe for the protection of another that degree of care, protection and vigilance which circumstances demand, whereby another suffers injury (Cooley, Hale and Jaggard on Torts).

In *R. C. v. McDaniels,* 107 U. S. 454, that court said, "Ordinary care, then * * * implies the exercise of reasonable diligence, and reasonable diligence implies, as between employer and employee, such watchfulness, caution and foresight as, under all the circumstances of the particular service, a corporation, controlled by careful, prudent officers, ought to exercise."

Ordinary risks are those naturally incident to the work, which the master has used due care to prevent and which cannot be avoided by the exercise of due care by him. Risks which ought not to exist and would not exist except for the negligence of the master, are not ordinary

risks and under the Federal Act the negligence of a co-employee is not an ordinary risk.

Reed v. Director General, 258 U. S. 92.
Davis v. Crane, 12 Fed. (2nd) 355 (C. C. A.).

Care Due Trainmen and Trackmen

The risks of running railroad trains, cars and engines under normal conditions, are ordinary risks involved in the work of trackmen, and the company owes them no duty to keep a lookout or to warn them thereof, unless special circumstances exist, or unless the train causing the injury is behind its schedule, or unless their presence in a particular place should be anticipated, or unless such duty has been assumed by rule, custom or practice, or unless the last-clear-chance doctrine applies.

If, however, any of these exceptions are present and change normal conditions to abnormal, thereby increasing the perils of the work, the company is then obligated to exercise ordinary care to protect such employees from such increased risks. Ordinary care has come to mean in this connection, the keeping of a lookout and the giving of a warning of moving trains, cars and engines, and a failure to do so, is evidence of negligence. The duty of lookout and warning, is measured and determined by the circumstances and conditions of each particular case.

39 *Corpus Juris,* 459, Sec. 576.

As a general rule, a lookout duty *is* due to a person in peril, whenever the circumstances are such as to enable

the person in control of a dangerous agency to anticipate the peril.

Special circumstances create the duty to warn, suggesting to the master that a warning is necessary.

Cetofonte v. Camden Co., 78 N. J. L. 662.
Cervona v. D. L. & W. R., 95 N. J. L. 246.
Labatt's Master & Servant, Sec. 209.

It is the duty of railroad companies "to take reasonable care for the safety of employees, who in the prosecution of their work, might properly be on or near the tracks."

D. L. & W. R. v. Hardy, 59 N. J. L. 35.

A lookout by enginemen must be kept at places where, and times when, persons or employees may reasonably be expected to be, on or near the track, especially when women or children are to be anticipated.

Garner v. Trumbull, 94 Fed 321 (C. C. A.).
Townly v. Chi. R., 53 wis. 626.

It is the duty of railroad companies in moving their cars and engines in yard limits, to anticipate the presence of employees on or near the tracks and to keep a lookout, observe a reasonable rate of speed and be able to control their movements.

Ry. Co. v. Johnson, 161 Ky. 821.
Crecelinus v. Ry Co., 284 Mo. 26.

The following cases hold that in the absence of rule or custom, special circumstances impose on railroad companies, the duty of warning their employees of approaching trains, cars and engines.

D. L. & W. R. v. Hughes, 240 Fed. 941 (C. C. A.).
Seaboard R. v. Koennecke, 239 U. S. 352.
Lehigh R. v. Scanlon, 259 Fed. 141 (C. C. A.).
Cent. R. v. Sharkey, 259 Fed. 144 (C. C. A.).
Voorhees v. Cent. R., 14 Fed. (2d) 901 (C.C.A.).
N. Y. R. v. Devine, 23 Fed. (2d) 589 (C. C. A.).
Colasurdo v. Cent. R., 180 Fed. 832.

In *Hughes v. D. L. & W. R.,* 233 Fed. 118 (Affirmed in 240 Fed. 941), a switchman was killed at night, while walking on or near a yard track, on each side of which was an adjacent track, eight feet distant. On one of them, cars were standing and on the other a train was moving. Another train backing up on the center track overtook him. His duties required him, as a matter of course, to move up and down and occasionally on or across the tracks. The negligence involved was the insufficiency of the light and lookout and the court defined the duty of the defendant as follows: *"It was, of course, the duty of the defendant and of those moving the cars, to keep such a lookout as was reasonably necessary to avoid doing injury to an employee, who under the circumstances, had neglected to fully protect and care for himself."* On appeal, the court affirmed the judgment and stated more definitely the duty of the defendant in the following language:

"While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving trains, there is a concurrent or secondary duty independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who may neglect to protect himself, and the extent of

that duty is measured by the peculiar circumstances of the case."

And the Court further said:

"It is the duty of a railroad company to give adequate warning to a switchman on its tracks in its yards, on the approach of a car," and that by reason of the decedent's long experience, a presumption arose "that some abnormal condition prevailed which was not to be expected, which he could not have foreseen and which he was not required to guard against by taking extraordinary precautions. That such a man would have remained on the track if an adequate warning had been given is contrary to all the impulses which govern the conduct of men of ordinary intelligence."

In *Seaboard R. v. Koennecke,* 239 U. S. 352, a switchman was run down in railroad yards and the court held that if he was struck by a road engine, running through station limits, on the main track, without a timely signal of its approach, he could recover, and the verdict in his favor was sustained.

In *McGovern v. Pa. R.,* 235 U. S. 389, a section man while cleaning snow from tracks in a railroad yard, was struck by a fast express train, which gave no warning of its approach. Snow and smoke obstructed his view, and the court held that defendant's negligence was an issue of fact.

In *Lehigh R. v. Scanlon,* 259 Fed. 137, a switch tender, alighting from standing cars, was struck by a train passing on an adjacent track, giving no warning of its approach. Held that defendant's negligence was an issue of fact.

In *McMarshall v. Chi. R.,* 80 Iowa 757, a conductor, working in the yards, after coupling cars in his train,

stepped onto an adjacent track to signal his engineer, and was struck by a passing engine. Held that defendant's failure to keep a lookout on the engine was evidence of negligence.

The following cases hold that where a warning is usually given or is required by rule, a failure to give it is evidence of negligence.

McGovern v. R. Co., 235 U. S. 389.
Director Gen'l v. Templin, 268 Fed. 483 (C. C. A.).
Lehigh R. v. Mangan, 278 Fed. 85 (C. C. A.).
Toledo R. v. Bartley, 172 Fed. 82 (C. C. A.).
St. Louis R. v. Jeffries, 276 Fed. 73 (C. C. A.).

In *Director General v. Templin,* 268 Fed. 482 (C. C. A.), a brakeman jumped from between cars, when his train was slowing down at a station, and was killed by an express train, following on an adjoining track, which failed to give timely warning of its approach, although customary to do so. Held, that the negligence of defendant was for the jury to determine.

In *Lehigh R. v. Mangan,* 278 Fed. 85, a conductor, watching repair work on his engine, stepped on an adjacent track to the one his train occupied and was struck by a west bound train, running thirty miles an hour and giving no warning of its approach. Both tracks were much used main line tracks and only four feet apart. The accident occurred on a curve, which caused his view to be obstructed to the east. *The rules required the approaching train to ring a bell when passing a train on an adjoining track,* and the court sustained a verdict for the plaintiff.

In *Lassiter v. R. Co.,* 133 N. C., 244, a conductor, in charge of a freight train in a railroad yard, while giv-

ing orders to his men on the train, stepped back, without looking, onto a side track and was killed by a passing train. When he stepped on the side track, the train was about twenty feet from him, moving about 4 miles per hour. There was no lookout on the train and no evidence that the bell was not ringing nor that the whistle was not sounded. The court held the negligence of the defendant was for the jury, saying that "there was no watchman or flagman on the boxcars or * * * anywhere else to give notice to the engineer of the peril of the intestate and there was evidence that the engineer himself could not see the intestate on the track."

In *R. Co. v. Smith,* 172 Ky., 117, a track repairer stepped off his track onto an adjacent track, to let a train go by and was struck by a car moving on the latter track, held that defendant was negligent in not having a lookout on the car and in not warning of its approach.

In *Davis v. R. Co.,* 175 N. C., 648, a messenger boy was standing between two parallel tracks, on one of which stood a train, and while delivering a message to its conductor, was killed by an engine passing on an adjacent track, held that the defendant was negligent in not giving him a warning of the passing train.

The following cases illustrate when and under what conditions trackmen and others, required to work continuously on tracks, do not assume the risks of moving engines or cars. They have special application to the case at bar, if consideration be given to the distinctions between trackmen and trainmen.

These distinctions arise out of the differences in the duties performed by each. The trackman works continuously on the track, with no other duties to perform, no emergencies to meet and nothing to distract him. On the other hand, the trainman works in many places,

with many varied duties, requiring haste and concentration of mind. The circumstances of his work demand a higher degree of care than that due a trackman and what is ordinary care with the one may be negligence with the other.

In *So. R. v. Cook,* 226 Fed., 1 (C. C. A.), a sectionman was killed and the Court in stating the law applicable thereto, said that "ordinarily the engineer may assume that sectionmen will be on the lookout and protect themselves against trains run in the usual way, but this does not exempt him from the duty of keeping a lookout for trackmen, who may be caught unawares * * *, or giving signals or stopping the train according to circumstances and the duty is more pressing if he is running at a high and unusual rate of speed. While, therefore, under ordinary conditions, neither high speed nor the failure to give signals standing alone, would constitute negligence toward workmen on the track, both would aggravate the negligence of running without a lookout. Conversely, running at a high rate of speed without a lookout would be negligence."

In *So. R. v. M'Guin,* 240 Fed., 649 (C. C. A.), a sectionman, walking between two tracks not usually used by south bound trains, the Court held that he assumed the risk thereof, but that the risk so assumed, is subject to the limitation that the trains be run with the care to be reasonably expected under such conditions. The engineer saw deceased on or near the track and only sounded his emergency whistle, too late to avoid striking him, thereby raising an issue of fact for the determination of the jury.

In *Norf. R. v. Holbrook,* 215 Fed., 687 (C. C. A.), a bridge worker was run down on a bridge, where double

tracks, with curves, located therein, east and west of the bridge and many trains were passing, held, the company was negligent in failing to keep a proper lookout and to warn of approaching trains as required by its rules.

In *D. L. & W. R. Co. v. Caboni,* 223 Fed., 631 (C. C. A.), a sectionman, at work on track, near station with five others, was struck by train and killed. He could have seen the approaching train if he had looked but was engrossed with his work. No one was stationed to keep a lookout and give a warning; held that the negligence of the company was for the jury.

In *R. Co. v. Bennett,* 186 Ind., 672, a sectionman, ballasting track, was run down and the court announced the law applicable thereto, viz.: "It has been expressly held, that where a person is rightfully on a railroad track, in the discharge of his duties, which absorb his attention, it is negligent for those having the management of trains, and who are or should be aware of the presence of the person so situate, to permit engines or cars to run upon him while so employed, without giving sufficient warning to enable the person thus engaged to escape the danger," following *R. Co. v. Hennessey,* 177 Ind., 64; *R. Co. v. Long,* 112 Ind., 166.

Test of Ordinary Care

If there be a right to expect a warning, it makes no difference in principle whether the right springs from *custom* or *usual conditions* or from *exceptional conditions,* and on proof of either, the issue is for the jury.

Albanese v. Cent. R., 70 N. J. L., 241.

D'Augustino v. Penn. R., 72 N. J. L., 358.

In *Chicago R. v. Moore,* 166 Fed., 663 (C. C. A.), the Court, in its syllabus, said:

> "The ultimate and controlling test of the exercise of reasonable care is, not what has been the practice of others in like situations, but what a reasonably prudent person would ordinarily have done in such a situation and the practice of others is evidence, but not the sole evidence of that test. In respect of questions upon which men of ordinary observation and experience have some knowledge and are not incapable of forming opinions of their own, jurors are not dependent upon the opinions of experts, even though they would be assisted by them."

In *R. Co. v. Behymer,* 189 U. S., 468, a brakeman was knocked off his train by a jolt, and on appeal, the court said, "The fundamental error alleged in the exceptions to the charge is that the court declined to rule * * * that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual or ordinary way. Instead of that the court left it to the jury to say, whether the train was handled with ordinary care, that is, the care that a person of ordinary prudence would use under like circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not," citing *Wab. R. v. McDaniels,* 107 U. S., 454.

Where there is no proof of the degree of care which other ordinarily prudent persons, engaged in the same kind of business, commonly use or when the degree of care exercised is so clearly insufficient, that the customary use of the same degree by others, in like circumstances becomes immaterial, juries may measure the care

required of a defendant, by applying their common knowledge, acquired by experience and observation, to the facts and circumstances in evidence.

Canadian Co. v. Senske, 201 Fed., 637 (C. C. A.).

Care Due Licensees

Where for a considerable period, numerous persons have been accustomed to walk across a railroad track, between given points, those in charge of passing trains are required to take notice of that fact and to use reasonable precautions to prevent injury to persons whose probable presence on the track, should be anticipated.

Garner v. Trumbull, 94 Fed., 321 (C. C. A.).
Cahill v. R. Co., 74 Fed. 287 (C. C. A.).
Felton v. Aubrey, 74 Fed., 359 (C. C. A.).

Employees May Invoke Such Rule

When a rule intended primarily for one class of persons is generally and properly conformed to by other classes of persons, it becomes their protection also. Where the rule thus directly and constantly affects the safety of others, its disobedience is evidence of negligence.

So. R. v. Cook, 226 Fed., 1 (C. C. A.).
Stevens v. Boston R., 184 Mass., 476.

V.

ANSWER TO DEFENDANT'S BRIEF

In its brief, defendant stresses at length alleged errors in the admission of certain of its rules. It admits that all the rules tendered were its rules, in effect when deceased was killed. (P. 45, L. 39.) Under the issues,

all the rules received in evidence were admissible *when* they were offered, as the objections thereto were made long before the plaintiff rested her case. In the exercise of its discretion, the court received them subject to the right of the defendant to strike out. One of defendant's objections was that there were other rules, not tendered, which rendered inapplicable the rules tendered. (P. 48, L. 4, and P. 49, L. 38.) Defendant offered none of such rules, made no motion to strike out the rules received in evidence and asked no instruction to that effect. To have made a proper record, it should have done one or the other and by not doing so, has waived its right to review the court's action.

Defendant objected to *all* parts of each rule offered in evidence, so that if any part was germane or relevant, the objection was properly overruled. Plaintiff asserts that parts of each rule received in evidence, were material and relevant and such parts are summarized in her statements of facts.

Defendant made *no objection* to the admission of Rules 10 and 30 (Pp. 45 and 46), requiring employees to give attention to their duties and the engine bell to be sounded, when an engine is about to move, when approaching public crossings, when running through yards and when passing a train standing on an adjacent track. The defendant was not prejudiced by the admission of other rules, covering like subjects.

Defendant took *no exception* to the admission of Rule 526 in evidence and has *not assigned* as a ground of appeal, the admission of Rule 400 in evidence.

Sixth Ground of Appeal

Defendant asserts that Rule 530, requiring trains to proceed with caution through yards and station limits,

is not applicable to the evidence, because the *locus in quo* was not within station or yard limits. Yard and station limits are determined by track and traffic conditions and requirements. Defendant's brief describes these conditions at Clifton, as consisting of the main tracks, with several sidings, serving industrial plants, including storage, commercial and coal tracks of the Steel Company, each requiring a switch for its operation. (Brief, P. 8.) No references were made, however, to the storage track, side tracks and switches, serving the Glass Co. and Coal Co., located north of the main tracks, opposite the *locus in quo,* nor to the other side tracks, switches and industries located easterly thereof. (All Exhibits.)

Courts have held that "station limits" are *"so much of the main line and grounds outside the switches as are in use for reaching side tracks, within the switches."*

Grondin v. D. L. & W. R., 100 Mich., 598.

The question of what constitutes "station limits" or "yards" is one of fact, for the jury.

Grosse v. Chi. R., 91 Wis., 482.

In law, "station limits" include railroad yards.

Hall v. R. Co., 46 Minn., 438.

Hudley v. L. M. R., 57 Fed., 144.

The *locus in quo* involved herein, was clearly within the station limits of Clifton. If not, the evidence thereof, was sufficient to sustain the finding of the jury. The *Voss case* cited by defendant, does not define yards or station limits and is not in point.

The defendant was not prejudiced by the admission of this rule, because it consented to the admission of Rule 30, dealing with the same subject matter. (P. 46.)

Chesebough v. Tirrill, 61 N. J. L., 629.

Fifth Ground of Appeal

Defendant asserts that Rule 526, requiring the engineer on delayed regular trains to keep a sharp lookout for trackmen and to blow the whistle when the view is obstructed, applies only to trackmen, but cites no authority therefor or rule to the contrary. *Defendant took no exception to the ruling admitting this rule in evidence.* (P. 50, L. 1.)

A trackman must generally rely on himself for protection against moving trains. In the rules, he is given the minimum of protection, less than any other employe and little more than a mere licensee. The rule therefore which applied to him is inclusive of other employees, such as trainmen not so continuously working on tracks. Defendant also asserts that this rule only applies where the view is obstructed. It admitted in its Answer 21 that the engineer of the express train could not have seen the deceased for a distance of more than five hundred feet and the evidence shows that the curve at the place of the accident, prevented the engineer from having a continuous view of the deceased. (Exhibits 8 and 6.)

Seventh Ground of Appeal

Defendant asserts that Rule 553, requiring engineers to "run with due caution at all points where there is reason to apprehend danger" has no application, but out of necessity it advances no argument in support thereof. Having consented to the admission of Rule 30 defendant was not prejudiced by the admission of Rule 553.

Third and Fourth Grounds of Appeal

Defendant asserts that Rules 402 and 463, conferring on the conductor authority to direct the actions of his crew and to prescribe methods of work, has no application. This rule made the conductor the representative of the defendant and placed the deceased, and other trainmen, under his control. It was, therefore, material and relevant on all issues. If the idle members of this crew had been distributed with the view of protecting one another, some one of them, might have seen the approaching train and warned the deceased thereof, or if one of them had relieved the deceased from looking after the gates the accident would not have happened.

Not Assigned as Ground of Appeal

Defendant also asserts that Rule 400, requiring switch tenders to give one another "full information regarding over-due trains," has no application. *This ruling was not assigned as a ground of appeal.*

Any employe who is required to tend switches, is a switch tender while so engaged. The character of the work and not the words used determines the fact. Deceased was a switchman when throwing switches and so was the other brakemen of the crew whom defendant asserts was likewise engaged. The defendant admitted that the other trainman knew the train was overdue (P. 32, Ans. 53) and it was therefore, his duty to notify the deceased of that fact.

These rules pointed out special conditions requiring extra care and caution, such as trains running through yards or station limits, passing of another train on an

adjacent track, running behind the schedule or where the view is obstructed and at all places where there is reason to apprehend danger. In one way or another, they applied to all employees and should be read together. They express the concentrated wisdom and experience of defendant's ablest officers; and the general intent thereof was to require employees to exercise the care required under the circumstances. Courts have accepted them as defendant's best conception of what due care requires, and if they were not applicable to the evidence, as defendant asserts, it is not probable the jury was prejudiced by hearing them read. None of these rules was prejudicial, if as the trial court said, they simply enjoined upon the employees the duty of exercising due care (P. 50, L 30). Defendant laid no foundation for review, by motion to strike or an instruction to disregard, and objected to all parts of each rule. The court did not err in admitting the rules.

Limitations of Rule R

The plaintiff sought, in her interrogatories, to ascertain what rules defendant had in effect on April 27, 1925, for the protection of her husband and the only answer was a copy of Rule R (P. 30), which in general applies to all employees. This answer implied that there were no other rules for his protection, and defendant asserts in its brief, that none of the rules received in evidence, was applicable to the deceased, although Rule R carried the assurance that he was protected by its rules. A like rule was construed and applied in *Schlereth v. Mo. R,* 115 Mo. 102, where a trackman was run down by an engine, approaching from the rear and the rules required trackmen at all times, to look out for engines while working or walking on tracks, and the court said:

> *"The rules required no more than the instinct of self-preservation and did not relieve those in charge of the engines from the duty of looking out for them."*

Rule R is copied and recopied in the defendant's brief, although it relates only to the issues of contributory negligence and assumption of risk, neither of which is assigned as a ground for appeal. The unreasonableness and invalidity of this rule were presented and argued at length, in the Supreme Court, on the issue of contributory negligence and it is not, therefore, a proper matter of argument on this appeal.

Ninth Ground of Appeal

Defendant argues at length that the Court erred in refusing to strike Exhibit 5, one of the pictures of the *locus in quo*. The motion to strike was made before plaintiff had closed her case and before the section foreman had testified to the condition of the fence, at the time of and after the accident. The defendant did not renew its motion to strike and asked no instruction to disregard the exhibit. When Exhibit 4, a picture showing the same condition of the fence, was offered, it made no objection thereto and took no exception. If there was any error in the admission of Exhibit 5, it was waived by the admission of Exhibit 4, covering the same condition.

Defendant argues that the plaintiff failed to show that the wires of the fence were down in 1925, and for that reason the exhibit should have been excluded. The section foreman testified that with the exception of the extra track and readjustment of the switch, he saw no differences between the conditions shown in the picture

and the conditions existing in 1925 (P. 61, L. 39), that it was a regular thing for the fence to be broken down; that as fast as they fixed it up, the public broke it down, and that they could not stop them (P. 64, Ll.14-22; P. 65, Ll. 15-23).

In answers to interrogatories, defendant described the changes it had made in the *locus in quo* since April 27, 1925, and made no reference to any change in the fence (P. 28). Other witness testified as to what changes had taken place, between the time of the accident and the taking of the picture, all of which the jury heard and should have understood. In admitting this exhibit, the court said:

> "It generally portrays conditions as they existed at the time of the accident, with the exception that some part of it was not *then* in the same condition as when the photograph was then. The jury will, of course, understand the qualification." (P. 59, L. 10.)

The court thereby told the jury, the fence was *not* down at the time of the accident, a statement certainly not prejudicial to the defendant. The condition of the fence, however, was a secondary or incidental matter, remotely related to the issue. The plaintiff was seeking to show the daily presence of many people at or near the place of the accident as one of the circumstances, imposing upon the defendant the duty of lookout. Fence or no fence, that fact was shown beyond a reasonable doubt and the admission of this exhibit could not have been prejudicial, as the court said in sustaining an objection of the defendant:

> "The engineer was supposed to use his eyes, looking ahead to see if there was anything on the track or not." (P. 77, L. 21.)

Implications and Conjectures

Defendant expresses curiosity to know why deceased got off his train after its engineer's statement placed him there. (P. 71, L. 17.) None of its answers located him on the train. If it had fairly answered the interrogatories propounded, instead of evading and sliding away from them, there would be no reason to be curious. The defendant was asked what the deceased was in the act of doing or about to do when killed and answered that:

> "Just prior to the accident Noon opened a switch and shortly prior to meeting his death, called his conductor's attention to the position of the gates of the Steel Co." (P. 31, Ans. 43.)

No one knows better than the defendant why he got off his train. Its conductor, no doubt, has some interesting information on the subject. Defendant asserts that it can only imagine how he was killed. With several eye-witnesses in its service, it should not be a matter of imagination, and a disclosure of the facts would further the ends of justice When deceased was on his train, he could not see the gates of the Steel Company, because of the curvature in that company's tracks. (Note Exhibits 9 and 8.) This is more obviously true, if he was on the second car. To ascertain the position of the gates, he had to alight from his train. His last message was to his conductor, who doubtless had asked him for that information. To comply, deceased had to get off his train, in order to see the position of the gates or to report to his conductor. Presumably, he got off in the discharge of his duty and not to be struck by a train.

In defendant's argument, questions of deceased's acts, knowledge, appreciation of peril, etc., are insidiously injected, notwithstanding all such defenses were abandoned and deceased's reasons for getting off the train, his other acts and knowledge of conditions, cannot relieve the defendant of its negligence.

CONCLUSION

In this record, all the facts are admitted or established by uncontradicted evidence. The defendant's contention that it owed the deceased no duty to warn, ignores all the special circumstances involved and its established rules, applicable to such circumstances. As an employer, it was obligated by law, to exercise ordinary care for the safety of every employee which, under the special facts of this case, required a lookout and warning when unusual circumstances existed, when a train was behind its schedule, when an engineer's view was obstructed, when passing a train on an adjacent track and when the presence of employees on or near the track should be anticipated. All these facts were present when deceased was killed. Obviously, none of them was an ordinary risk of his employment and none of them naturally and incidentally arose therefrom. On the contrary, each of them was exceptional, unusual and pregnant with peril for him. The defendant failed to exercise due care to prevent any of them and all of them, could have been avoided, if it had exercised such care. Each of these facts imposed on the defendant, the duty of lookout and warning. In recognition of such duty, it promulgated rules, specially applicable to these facts and established a standard of due care for itself and its employees. It thereby obligated itself to enforce these rules and its failure to do so was negligence.

The plaintiff's case must rest upon its own facts and circumstances and is distinguishable from all other cases, wherein the defense of assumption of risk defeated a recovery. In confirmation thereof, this record shows that assumption of risk and contributory negligence, as defenses, were abandoned by the defendant and it fails to show that the deceased ever threw the switch involved, or worked on the tracks of the Steel Co., except at the time of his death. It also shows that the accident involved a road movement, not an ordinary yard movement; was caused by a through express train and not a switch engine; and occurred on a main line track and not on a switch track; and that deceased was a trainman and not a trackman. These distinctions are recognized by the decisions hereinbefore cited and are persuasive, if not conclusive, on the issue of the defendant's negligence.

The Court instructed the jury that it was the defendant's duty "to exercise such due and reasonable care as the circumstances required." The defendant's admission that it took no precautions, implies that it did not exercise the slightest care for the protection of the deceased. If the circumstances imposed the slightest degree of care, it was sufficient to sustain the verdict. The defendant made no objection to the submission of the case and took no exception to the charge of the court. Such action, on its part, was a judicial admission that the case was fully and properly submitted and the charge correct in every particular.

Confident that there is sufficient evidence to support the verdict and that the record is without prejudicial error, this brief is respectfully submitted.

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