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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed March 15, 1926.

**Hudson County Court of Common Pleas**

ALFONSO ILLONARDO,

*Plaintiff,*

*vs.*

ERIE RAILROAD COMPANY, a corporation,

*Defendant.*

10

*Action at  
Law.*

*Notice of  
Appeal.*

To Alexander Simpson, Esq., Attorney for plaintiff.

20

SIR:

TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

COLLINS & CORBIN,  
Attorneys of Defendant.

Dated, March 11, 1926.

Service of this acknowledged March 13, 1926. 30

ALEX. SIMPSON,  
Attorney of Plaintiff.

*Complaint.*

**COMPLAINT.**

Filed July 9, 1925.

The plaintiff, who resides at No. 238 Fifth street, in the City of Jersey City, in the County of Hudson, State of New Jersey, says that:

10 1. Defendant is now and was at all times hereinafter mentioned, a common carrier by railroad, engaged in interstate commerce.

2. Plaintiff, was at all times mentioned in the within complaint, the servant of the said defendant and engaged by it in the work of interstate commerce, in which he was working at the time he was injured, as herein set forth.

20 3. On the 28th day of February, 1925, the defendant, by its agents and servants, negligently propelled against the plaintiff a locomotive, while he was working as aforesaid, for the defendant in interstate commerce, at the roundhouse of the defendant, at Secaucus, Hudson County, N. J., which locomotive aforesaid struck at the same time, the door of said roundhouse of the defendant, propelling same against the body of the plaintiff, by reason of the negligence hereinafter set forth.

30 4. The negligence of the defendant consisted in this:

That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to the

*Complaint.*

plaintiff; did not use reasonable care to equip said locomotive with suitable headlight or any headlight; and did not use reasonable care to propel same at safe rate of speed.

5. By reason of the said striking of the plaintiff by said locomotive, through the negligence of the defendant, its servants and agents as aforesaid, he was so injured that his right arm was amputated; his back, spine and both legs were injured; he suffered internal injuries and severe nervous shock. 10

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

7. By reason of said injuries the plaintiff has been compelled to expend money for medical attendance and has lost and will hereafter lose earnings he otherwise would have made and has been permanently incapacitated. 20

Plaintiff demands \$50,000.

ALEX. SIMPSON,  
Attorney for Plaintiff.

*Answer.*

**ANSWER.**

Filed July 22, 1925.

The defendant, Erie Railroad Company, a corporation of the State of New York, duly authorized to transact business in the State of New Jersey, with its principal office in the latter State at the foot of Pavonia avenue, Jersey City, says that:

**FIRST DEFENSE.**

1. It denies paragraph one except that it admits that it is a common carrier by railroad and at times engages in both interstate and intrastate commerce.

- 20      2. It denies paragraph 2.  
          3. It denies paragraph 3.  
          4. It denies paragraph 4.  
          5. It denies paragraph 5.  
          6. It denies paragraph 6.  
          7. It denies paragraph 7.

**SECOND DEFENSE.**

30      The alleged accident set forth in the complaint was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment with the defendant.

**THIRD DEFENSE.**

The alleged accident set forth in the complaint was due to contributory negligence on

*Answer.*

the part of the plaintiff and the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff.

#### FOURTH DEFENSE.

The alleged accident set forth in the complaint was due solely to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety. 10

#### FIFTH DEFENSE.

At the time of the alleged accident set forth in the complaint, the plaintiff was not engaged in interstate commerce.

#### SIXTH DEFENSE.

20

At the time of the alleged accident set forth in the complaint, the defendant was not engaged in interstate commerce.

COLLINS & CORBIN,  
Attorneys of Defendant.

30

*Rule for Judgment.*

**RULE FOR JUDGMENT.**

Filed February 2, 1926.

10 This cause having duly come on for trial before Hon. Charles M. Egan, Judge, and a jury, on the 1st day of February, 1926, and the jury having heard the evidence adduced by the respective parties, the jury returned its verdict in favor of the plaintiff, and against the defendant and assessed damages in the sum of twenty thousand dollars (\$20,000.00):

It is, on this 2nd day of February, 1926, ORDERED, that the plaintiff have and recover from the defendant, the sum of twenty thousand dollars (\$20,000.00), with costs to be taxed, and that judgment be entered accordingly.

20

CHARLES M. EGAN,  
Judge.

On motion of

ALEX. SIMPSON,  
Attorney for Plaintiff.

Rule actually entered, February 2, 1926.

30 Minutes of Common Pleas Court, liber 23,  
page 513.

JOHN J. McGOVERN,  
Clerk.

*Final Judgment.*

**FINAL JUDGMENT.**

Filed February 2, 1926.

HUDSON COUNTY COURT OF COMMON  
PLEAS.

ALFONSO ILLONARDO,

*Plaintiff,*

*vs.*

ERIE RAILROAD COMPANY, a cor-  
poration,

*Defendant.*

10

Judgment entered February 2, 1926.

Damages .....\$20,000.00

Costs

Total

20

ALEX. SIMPSON,

Attorney.

Judgment on verdict in the above-entitled cause was entered in this Court on the 2nd day of February in the year of our Lord one thousand nine hundred and twenty-six in favor of the plaintiff, Alfonso Illonardo, and against the defendant, Erie Railroad Co., a corporation, in a plea of action at law for the sum of twenty thousand dollars damages and costs.

30

Judgment entered and signed this 2nd of February, 1926.

DANIEL T. O'REGAN,

Judge.

*Defendant's Rule to Show Cause.***DEFENDANT'S RULE TO SHOW CAUSE.**

Filed February 9, 1926.

On due application ORDERED that the plaintiff show cause before the above entitled Court on the 19th day of February, 1926, why the verdict  
10 rendered in his behalf against the defendant on February 1, 1926, should not be set aside and a new trial ordered, and

It is FURTHER ORDERED that all objections or exceptions taken by the defendant to the rulings of this Court during the trial of said case be and the same hereby are reserved to the defendant for appeal, and

It is FURTHER ORDERED that until the further order of this Court, execution herein be and the  
20 same hereby is stayed.

CHAS. M. EGAN,  
Common Pleas Judge.

Rule actually entered this 5th day of February, 1926, on motion of

COLLINS & CORBIN,  
Attorneys for Defendant.

*Reasons.*

**REASONS.**

Filed February 9, 1926.

The defendant writes down the following reasons in support of the rule to show cause herein:

The verdict is excessive and against the weight of the evidence.

10

COLLINS & CORBIN,  
Attorneys of Defendant.

Service acknowledged February 8, 1926.

ALEX. SIMPSON,  
Attorney of Plaintiff.

20

30

*Opinion on Rule to Show Cause.***OPINION ON RULE TO SHOW CAUSE.**

Filed March 5, 1926.

A jury rendered a verdict in the above-entitled cause for twenty thousand (\$20,000) dollars.

10 A Rule to Show Cause why the verdict should not be set aside and a new trial granted was allowed. The Rule was argued before me and the sole point raised and argued by the defendant was that the verdict was excessive.

Having considered the testimony, the man's age, his former earning capacity, his impairment and present disability and his pain and suffering, I am of the opinion that the verdict is not excessive and the Rule heretofore granted will be discharged.

20

CHARLES M. EGAN,  
Judge.

Dated: March 5, 1926.

30

*Order Discharging Rule.*

**ORDER DISCHARGING RULE AND  
ENTERING JUDGMENT FINAL**

Filed March 8, 1926.

The above-entitled cause having been tried at the Hudson County Court of Common Pleas and the jury having rendered a verdict in favor of the plaintiff for \$20,000.00; and thereafter a Rule to Show Cause having been allowed why the verdict should not be set aside and a new trial granted, and the same having been duly argued on the 26th day of February, 1926, by Alex. Simpson, for the plaintiff, and Robert J. Bain, Esq., appearing for Collins & Corbin, for the defendant on the sole question of the excessiveness of the damages; and the Court being of the opinion that the damages are not so excessive as to warrant a disturbance of the verdict and that the Rule should be dismissed,

It is thereupon, on this 6th day of March, 1926, ORDERED, that the Rule to Show Cause heretofore granted be dismissed and judgment be entered for the sum of twenty thousand (\$20,000) dollars in favor of the plaintiff.

CHARLES M. EGAN,  
Judge.

Entered on the minutes this 6th day of March, 1926.

*Grounds of Appeal.*

**GROUND OF APPEAL.**

Filed March 30, 1926.

NEW JERSEY SUPREME COURT.

10	ALFONSO ILLONARDO, <i>Plaintiff-Respondent,</i> vs. ERIE RAILROAD COMPANY, a cor- poration, <i>Defendant-Appellant.</i>	}	Action at Law.  Grounds of Appeal.
----	--	---	--

The appellant states the following grounds of appeal:

20 1. The following questions to the witness, Charles W. Broadhurst, were overruled:

(a) "Q Did you receive a claim petition filed by the plaintiff in the Compensation Court of New Jersey?"

(b) "Q And did you file an answer to this petition?"

(c) "Q Who was the attorney for the plaintiff in the compensation petition?"

30 (d) "Q Did you admit in the answer filed in the compensation suit which he brought that he was entitled to compensation in the compensation court?"

2. The trial judge refused to direct a verdict in favor of the defendant when thereunto moved, whereas, said motion should have been granted on one or more of the following grounds urged in support of said motion.

*Grounds of Appeal.*

(a) There is no evidence showing that the plaintiff was employed in interstate commerce at the time of the accident.

(b) There is no evidence that the defendant at the time of the accident with respect to the work plaintiff was doing, was engaged in interstate commerce.

(c) There is no evidence that the plaintiff and defendant were engaged in interstate commerce at the time of this occurrence for which this suit was brought. 10

(d) That any rights which the plaintiff may have had to become compensated for his injuries must be in the Compensation Court of the State of New Jersey, under the Workmen's Compensation Act of the State of New Jersey, the undisputed facts show that to be so in this case and his compensation must be there and exclusively there and not under the Federal Act. 20

(e) There is no proof that the accident was caused proximately by negligence alleged against the defendant in the complaint.

(f) There is no evidence that any negligence of the defendant was the proximate cause of the accident.

(g) The undisputed facts show that the plaintiff assumed the risk of the injury which he received.

3. The trial court charged the jury:

“The plaintiff, Alfonso Illonardo, has instituted an action against the Erie Railroad Company to recover damages for injuries sustained by him on the 28th day of February, 1925. 30

The plaintiff alleges that the defendant at that time was engaged in interstate commerce. He further alleges that he was a servant of the defendant engaged by it in

*Grounds of Appeal.*

the work of interstate commerce and that he was so engaged at the time he was injured on the 28th day of February, 1925; that the defendant, by its agents and servants negligently propelled against him, the plaintiff, a locomotive while he was working as aforesaid as a workman at the round house, Secaucus, Hudson County, New Jersey.

10

The negligence of the defendant, the plaintiff says was as follows:

That the defendant failed to use reasonable care to keep said locomotive under control, to give warning of the movement thereof, to keep same in proper and suitable condition as to brakes, appliances, etc., so that it could be stopped by the use of reasonable care, so as to avoid injury to the plaintiff, and that it did not use reasonable care to provide suitable headlights or any headlights, and did not use reasonable care to propel same at a safe rate of speed, and that by reason of the negligence of the defendant, its servants and agents as aforesaid, the plaintiff was so injured that his right arm, knee, back, spine, both legs, were severely injured, and he suffered nervous shock, and that the plaintiff was at all times in the exercise of due care for his safety.

20

That is the substance of the allegation to the plaintiff."

30

4. The trial court charged the jury:

"The Erie Railroad, the defendant company, sets up as a defense, a denial of paragraph one, except that it admits it is a common carrier by railroad; it admits that it is engaged in both interstate and intrastate commerce, meaning that it runs not only within the State of New Jersey but outside of the state as well.

*Grounds of Appeal.*

It sets up as a defense further that the accident was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment with the defendant.

It further sets up that the alleged accident was due to contributory negligence on the part of the plaintiff and that the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff. 10

It further sets up as a defense that the alleged accident was due solely to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety, and it sets forth under a separate defense that the plaintiff was not engaged in interstate commerce and that the defendant was not engaged in interstate commerce at the time.

As to those two latter defenses, of course the court has said that both parties were engaged in interstate commerce at the time, therefore you will take it as the law laid down by the court that at the time of the happening of this injury both parties were engaged in interstate commerce." 20

5. The trial judge charged the jury:

"The plaintiff, of course, under the well-settled rules of law, is obliged to make out his case of the greater weight of the evidence if he is to have a verdict in this case, that while they were both engaged in interstate commerce, the plaintiff received the injuries of which he complains, and for which, in this suit, he seeks to recover damages by reason of the negligence of the defendant company. In other words, that the injury must have resulted in whole or in part from the negligence of any of the of- 30

*Grounds of Appeal.*

10            ficers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment in the manner charged by him in his complaint. If he has made that out, that the accident to himself resulted in whole or in part proximately from the negligence charged by him, and covered by the Act which I have read, then he would be entitled to your verdict and to have you assess the damages; unless the defendant shall have made out by the greater weight of the evidence that he assumed the risk of the injury. If they make that out, it is a complete defense to the action, no matter how negligently the defendant may be proved by the plaintiff to have been, in proving how this accident did occur.

20            The defendant in this case says, first of all, that it was not negligent, and of course, unless the plaintiff has made out by the greater weight of the evidence that it was negligent, as he has charged, there can be no recovery against the defendant.”

## 6. The trial court charged the jury:

30            “As I said a moment ago, if the plaintiff’s negligence was the sole contributing cause of the accident, manifestly he could not recover anything, for the very obvious reason that he, being the sole cause of the accident, means he was solely responsible. If, however, the plaintiff contributed any part by his negligence to the production of the accident, then this Act is applicable, by which I mean, if the parties were at the time of the injury both engaged in interstate commerce, and the court has already

*Grounds of Appeal.*

instructed you that they were engaged in interstate commerce at the time, you would have to recall the section of the statute to which I directed your attention a moment ago, that:

In all actions hereafter brought against any such common carrier by railroad, under or by virtue of the provisions of this Act, to recover damages for personal injuries to an employee, 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 the negligence attributable to such employee. 10

In other words, gentlemen, you have to call to your aid your knowledge of arithmetic. You have got to say how much, what proportion, of the negligence is attributable to the defendant, if any, and secondly, what proportion of negligence is attributable, if any, to the plaintiff." 20

7. The trial court charged the jury:

"Secondly, he would be entitled to recover compensation for all the expenditures, if any, to which he has been put, in an endeavor to alleviate his suffering or effect a cure, from the injuries which were inflicted upon him, if any, that flowed proximately from this accident. I do not recall whether there was any sum mentioned to have been paid out for medical expenses or doctors' expenses, or any particular expense, but you will recall, and you will be guided by your own recollection. Of course, if there were none proved, you could allow none. If any were proved, you would be entitled to allow him the expenses which he has been put to, if that proof rises to the dignity of establishing the fact by the greater weight of the evidence." 30

*Grounds of Appeal.*

8. The trial judge charged the jury:

“1. The mere fact that an accident happened to the plaintiff does not entitle him to recover any damages against the defendant.

I so charge you. The mere fact that an accident happened does not entitle him to recover damages unless he can show negligence on the part of the defendant and that that negligence was the proximate cause of his injury.”

9. The trial judge refused to charge defendant's request to charge No. 1.

“1. The mere fact that an accident happened to the plaintiff does not entitle him to recover any damages against the defendant.”

10. The trial judge refused to charge defendant's request to charge No. 3.

“3. In deciding whether or not the defendant is liable in this case, you are limited to the allegations contained in the complaint. In the complaint it is alleged that at the time of the accident the plaintiff was employed in and the defendant was engaged in interstate commerce. If the plaintiff has failed to prove that allegation then he cannot recover and your verdict must be for the defendant.”

11. The trial judge refused to charge defendant's request to charge No. 4.

“4. In determining whether at the time of the accident the plaintiff was employed in and the defendant was engaging in interstate commerce, the test is whether the particular work upon which the employee was engaged at the time of the accident was a part of the interstate commerce in which the carrier was engaged.”

*Grounds of Appeal.*

12. The trial judge refused to charge defendant's request to charge No. 5.

"5. An engine as such is not permanently devoted to any kind of commerce. It may at one time be engaged in interstate commerce between two or more states and at another time it may be engaged in intrastate commerce wholly within the territorial limits of one particular state; and still on another occasion it may be out of commerce altogether, as for instance, where it is in the round house undergoing repairs without any assignment for the hauling of any train." 10

13. The trial judge refused to charge defendant's request to charge No. 6.

"6. In this case, it appears without dispute that the only work which the plaintiff was doing at the time the accident happened was to assist in opening the doors of stall No. 13 of the round house at Secaucus so that engine No. 1592 might enter. It appears without dispute that the fires of this engine had been removed on the ash pit and that it had been turned on the turntable preliminarily to going into the round house where it was to undergo repairs which have been testified to. That was on the evening of February 28, 1925, about eight o'clock. It remained at the round house until March 2, 1925, when it was first given an assignment to pull a certain train. In the doing of the work which he was doing at the time of the accident, was the plaintiff engaged in interstate commerce? If he was not, then the plaintiff cannot recover and your verdict must be for the defendant." 20 30

*Grounds of Appeal.*

14. The trial judge refused to charge defendant's request to charge No. 7.

10 "7. The fundamental question to be now decided on the interstate phase of the case is whether the engine for which the plaintiff was opening the doors of the round house stall was engaged in interstate commerce at the time of the accident. If it was not, then he was not engaged in interstate commerce and he does not come under the Act of Congress under which the suit is brought but under another statute of the State of New Jersey which is enforced in another court and with which we have nothing to do here. And in the event that you find that that engine was not engaged in interstate commerce, you will bring in a verdict for the defendant."

20 15. The trial judge refused to charge defendant's request to charge No. 8.

30 "8. In short, the test which you are to apply in determining whether the plaintiff in this case comes under the Federal statute under which this suit is brought is, was the plaintiff, at the time of the happening of the accident to him, engaged in interstate commerce; not whether he was engaged in work of an interstate nature some time prior to the accident. If he was not engaged in interstate commerce at the time of the accident then he cannot recover in this action and your verdict must be for the defendant."

16. The trial judge refused to charge defendant's request to charge No. 9.

"9. If you find that the plaintiff was not engaged in interstate commerce at the time of the accident that will end your consideration of this case because then your verdict

*Grounds of Appeal.*

will be for the defendant and you do not have to consider the other questions which would be involved if he was engaged in interstate commerce."

17. The trial judge refused to charge defendant's request to charge No. 13.

"13. The defendant cannot be charged with negligence in this case because it failed to ring the engine bell or blow the engine whistle at the time of the accident. There is no evidence that it was customary to either ring the engine bell or blow the engine whistle when a locomotive was about to enter the round house, and in the absence of any custom or practice to do so, the defendant cannot be chargeable with negligence for failing to do so." 10

COLLINS & CORBIN,  
Attorneys of Defendant-Appellant. 20

Dated, March 25, 1926.

Service acknowledged March 27th, 1926.

ALEX. SIMPSON,  
Attorney of Plaintiff-Respondent.

*Opening.*

HUDSON COUNTY COURT OF COMMON  
PLEAS.

10	ALFONSO ILLONARDO, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> ERIE RAILROAD COMPANY, a cor- poration, <div style="text-align: right;"><i>Defendant.</i></div>
----	---

Before: Hon. Charles M. Egan, *J.*, and a jury.

Jersey City, N. J., February 1, 1926.

Appearances:

20 Alexander Simpson, Esq., for the plaintiff.  
 Collins & Corbin, Esqs., for the defendant.  
 (By Edward A. Markley, Esq.)

A jury was duly empanelled; being found satisfactory, was sworn.

Counsel opened to the jury.

30 Mr. Simpson: Shall we now stipulate that this was in a round house of the Erie Railroad Company containing thirty-six tracks, that on eighteen of these tracks the plaintiff worked, and that these tracks were used in both interstate and intrastate commerce; that the defendant is a common carrier by railroad engaged partly in interstate commerce.

Mr. Markley: We admit those things but we do not admit that the plaintiff was working on

*Thomas Tantullo, (for Plaintiff) direct.*

any of the engines engaged in interstate commerce at the time of the accident.

THOMAS TANTULLO, sworn.

*Direct examination by Mr. Simpson.*

Q Where do you live? A 788 Jersey avenue. 10

Q How old are you? A Eighteen.

Q And did you work for the Erie Railroad at the round house at Secaucus on the twenty-eighth of February, 1925? A Yes, sir.

Q And what was your work there? A Turntable operator.

Q How did you operate the turntable? A With a switch.

Q By electricity? A By electricity, yes.

Q You would signal the man to drive his engine on, he would drive it on and you would signal him to stop? A Yes. 20

Q Then, you would turn the turntable by electricity until you reached the track at which you wanted to stop it? A Yes.

Q Then, you would signal him to come on? A Yes.

Q On the twenty-eighth of February did you have an engine on the turntable you wanted to put in the round house? A Yes. 30

Q What track did you want to put it on? A Thirteen.

Q What did you do; just describe to these men what you did to the engine and how you operated it. A I put it on the turntable and brought the turntable around to track 13, then I went to open up the doors.

*Thomas Tantullo, (for Plaintiff) direct.*

Q When you went to open up the doors was the engine still on the turntable? A Yes, it was starting to come off and I ran over—

Q I didn't ask you that. When you stopped the turntable was the engine still on the turntable? A Yes.

10 Q Then, you started to go to the round house, is that right? A Yes, sir.

Q You had not given him any signal to come off it, had you? A No, sir.

Q When you got to the round house did you see the engine you had left on the turntable doing anything? A Yes, sir.

Q What was he doing? A He was coming ahead.

20 Q What did you do then? A I ran over and told him to stop, I didn't have the doors open yet.

Q And did he stop? A Yes, sir.

Q And how much was he off the turntable when you ran over and stopped him? A I don't know; he was off the turntable—he was about fifteen feet away from the door.

Q When you told him you had not gotten the doors open did he stop? A Yes, sir.

30 Q And what did you do? A I ran over to open up the doors.

Q Did you have a lantern with you? A Yes, sir.

Q What kind of a lantern was it? A A white lantern.

Q And was this lantern an oil lantern or electric? A An oil lantern.

Q Did you use it for signaling? A Yes, sir.

*Thomas Tantullo, (for Plaintiff) direct.*

Q When you went to the round house to open the doors what did you do with the lantern? A I sat it on the ground.

Q Where? A Inside the round house.

Q Then, what did you do about opening the doors? A I found I could not open the doors, so I called—

Q Did you open one door first? A Yes, sir. 10

Q First you opened one door then you went to the second door? A Yes, sir.

Q What door did you go to last, the door on your right or on your left? A It was on my right hand.

Q That is the door you could not open? A Yes, sir.

Q Then, what did you do, did you call to this man to help you? A Yes, sir.

Q Where did he come from, where did you get him? A He was coming along the track there. 20

Q Well, what did you say to him? A I said, "Please come and help me open the door, I cannot open it."

Q What did he do to open the door? A He started to help me open the door.

Q How did he help you open the door, did he stand outside or inside of the round house? A I was on the inside and he was on the outside. 30

Q You were inside pushing and he was outside pulling, is that right? A Yes.

Q When you were pushing this door, with your lantern on the ground, inside the round house, what happened, if anything? A The engine came ahead and hit us.

Q Hit what? A Hit him and hit me, too.

*Thomas Tantullo, (for Plaintiff) direct.*

Q It hurt both of you, didn't it? A Yes, sir.

Q Had you given the engineer that you had previously stopped any signal to come on when he came on? A No, sir.

Q Did you know he was coming on? A No, sir.

10 Q Did you hear any whistle or bell that he was coming on? A No, sir.

Q These doors, how did they open, do they open on the outside and lay against the side of the building? A No, sir, they come just straight out.

Q You have to open them outside? A Yes. There are two doors that come like that (illustrating), they don't go all the way back.

Q They go straight? A Yes, sir.

20 Q They don't fold around back? A No, sir.

Q They simply stand straight out? A Yes, sir.

Q But they open outside? A Yes, sir.

Q How far had you gotten the door open when the engine came along and smashed you? A About half way open.

Q What did it do to the door, bump against it? A Yes, sir.

30 Q And what was the next thing that happened? A I ran over to the office and I met Mr. Illonardo at the office with his arm hanging

Q His arm was hanging by a shred of skin? A Yes, sir.

Q And this man that was on the engine, that had brought the engine up and smashed the door, did he say anything as to why he came on? A No, sir, he didn't tell me anything.

*Thomas Tantullo, (for Plaintiff) direct.*

Q Well, did you see him there? A Yes, sir, he came there after a while.

Q What did he say?

Mr. Markley: I object to that.

Mr. Simpson: I withdraw it if it is objected to.

10

Q The man did come in, didn't he? A Yes, sir.

Q Where did he come? A Into the office.

Q What was the matter with the door that you could not open it yourself? A It was closed tight behind it.

Q That is, it was frozen in the dirt on the outside of the round house? A Yes, sir.

Q Were you working on it before you called Illonardo to help you? A Yes, sir. 20

Q About how long before you called him?

A Oh, about a couple of seconds before.

Q Then you found you could not push it? A I could not open it.

Q What position did he try to open it in, did he stand outside pulling while you were pushing? A He stood with his arm around it trying to pull it.

Q Which arm did he have trying to pull it out? A His right arm. 30

Q And with his back to this engine that came on? A Yes, sir.

Q The engineer was looking at him and his back was to the engine? A Not his back, his side, like.

Q And you were inside? A Yes, sir.

*Thomas Tantullo, (for Plaintiff) cross.*

Q You did not know the engine was coming on until it smashed you, did you? A No, sir, I didn't know the engine was coming on.

Q How long had you been working on the turntable? A About a month.

10 Q When you stopped an engine at the door that was going in, how would you signal him to come on? How would he know you were ready? A I would come out and signal with the lantern.

Q Once or twice up and down? A As many times as I liked. I could keep on doing that until he got into the round house.

Q And would you go ahead of him so that he would not go too far? A Yes, sir.

20 Q Then when you stopped signalling he would stop, would he? A I would give him the stop signal.

Q What was the stop signal? A Cross, this way.

Q Now, you did not give any of those signals, that night, did you? A No, sir.

Q And you had been doing that a month, you say? This man that operated this engine this night, had he often brought engines in before, this hostler? A Yes, sir.

30 Q All the time you were there? A Yes, sir.

Mr. Simpson: That is all.

*Cross examination by Mr. Markley.*

Q Where do you live? A 788 Jersey avenue.

Q And where does Illonardo live? A I don't know.

*Thomas Tantullo, (for Plaintiff) cross.*

Q You know that he lives on Fifth street, don't you? A That is all I do know, that he lives on Fifth street.

Q Well, you know Illonardo don't you? A I know him from when he worked with me.

Q He worked there while you worked there, didn't he? A Yes, sir.

Q And you are not working for the company now, are you? A No, sir.

10

Q Have you talked to anybody about this case? A No, sir.

Q On this night you had been operating the turntable? A Yes, sir.

Q And you had been doing that for a month? A Yes, sir.

Q How long before the accident had this man Menicke, the hostler, been operating the engine?

A I had known him for quite a while, while I was working, and he always used to bring engines into the round house.

20

Q And on this night, what time did this accident happen? A About eight o'clock.

Q The hostler brought the engine from the ashpit to your turntable, didn't he? A Yes, sir.

Q How far was the ashpit from the turntable?

A About fifty feet.

30

Q And the fires were drawn from the engine, weren't they? A Yes, sir.

Q And you were going to put that engine on what track? A Track 13.

Q That was an empty track, wasn't it? A Yes, sir.

Q You knew it was an empty track, didn't you? A Yes, sir.

*Thomas Tantullo, (for Plaintiff) cross.*

Q And you were going to put it in there because it was going to be repaired, weren't you?

A Yes, sir.

Q Now, then, when the engine was put on the turntable you then moved the turntable, didn't you? A Yes, sir.

10 Q The engine came to a stop on the turntable before you started to move the turntable?

A Yes, sir.

Q So that the engine was perfectly still on the turntable before you started to turn it around? A Yes, sir.

Q And while the engine was perfectly still you turned it around on the turntable and you then brought the turntable to a stop, didn't you?

A Yes, sir.

20 Q And when you brought the turntable to a stop the engine was pointing into stall 13 wasn't it? A Yes, sir.

Q That is, the head end of the engine was on the turntable facing into stall 13? A Yes, sir.

Q How far away were the doors of stall 13 from the head end of the engine when it was on the turntable? A About twenty-five feet.

30 Q About twenty-five feet from the nose of the engine on the turntable to the doors of the round house. A I don't know exactly.

Q Well, might it have been one hundred? A It might, but it wasn't.

Q Well, is it seventy-five feet? A No, sir.

Q You think it is only twenty-five feet? A About that.

Q From the turntable to the doors of the round house? A Yes.

*Thomas Tantullo, (for Plaintiff) cross.*

Q Now, it was your job to open the doors of the round house, wasn't it? A Yes.

Q And as soon as you got through turning the turntable you went up to open the doors, didn't you? A Yes, sir.

Q Stall 13 had two doors, didn't it? A Yes, sir.

10

Q And didn't it open just like garage doors open outward? A It opened like garage doors outward, but they don't go around to the side of the house.

Q They do not go around to the side of the round house? A No, sir.

Q But they went back far enough to clear the track and the engine, didn't they? A Yes, sir.

Q Now, which door did you open first? A 20  
The one on my left-hand side.

Q That is the one you opened first? A Yes, sir.

Q And as I understand it before you opened that door the hostler Menicke started to move the engine up to the round house, didn't he? A Yes, sir.

Q He moved slowly, of course? A Yes, sir.

Q And you told him to stop? A Yes, sir.

Q The doors were not open all the way, is that right? A No, they were not open. 30

Q And did you tell him to stop, that they were not open? A Yes, sir.

Q And he did stop, didn't he? A Yes, sir.

Q He came to a complete stop? A Yes, sir.

Q How far away from the doors? A About fifteen feet.

*Thomas Tantullo, (for Plaintiff) cross.*

Q Then he had only traveled ten feet from the turntable, didn't he? A Yes, ten feet off the turntable.

Q And then he came to a complete stop? A Yes, sir.

10 Q And he was on the right side of the engine, in the engineer's cab? A Yes, sir.

Q And you opened the door of the round house on his side first? A Yes, sir.

Q Then you went over to open the door on the other side? A Yes, sir.

Q And when you called the plaintiff, which door did he help you to open? A The one on the side I could not open, the side the engineer was not on.

Q The opposite side? A Yes, sir.

20 Q That is, you did not have him help you open the door on the side the engineer was on? A No, sir.

Q But on the opposite side? A Yes, sir.

Q That is the door that the plaintiff helped you with, is that right? A Yes, sir.

Q And you say you were inside that door pushing it and Illonardo was outside the door pulling it, is that right? A Yes, sir.

30 Q He was not inside the door, was he? A No, sir.

Q He was outside the door and he had his arm outside of the door pulling it? A Yes, sir.

Q His whole body was outside the door, is that right? A Yes, sir.

Q Then you say the engine came ahead before you got that door open, without any signal? A Yes, sir.

*Alfonso Illonardo, (for Plaintiff) direct.*

Q You did not give him any signal, did you?

A No, sir.

Q Illonardo was outside the door, was he?

A Yes, sir.

Q He was only using one arm opening the door, was he? A Yes, sir.

Q You could not see his other arm from the inside of the door, could you? A No, sir. 10

Q At any rate you are sure you did not give any signal? A No, sir, I didn't give any signal.

Q Well, the door was almost open, wasn't it?

A Almost open?

Q Yes. A It was half-way open, about.

Q How much more did you have to move it to get it open all the way? A About that much (indicating).

Q About five feet? A About four feet. 20

Mr. Markley: That is all.

*Re-direct examination by Mr. Simpson.*

Q You were on the inside of the door, were you? A Yes, sir.

Q And you were hurt, too, weren't you? A Yes, sir.

30

ALFONSO ILLONARDO, sworn. (Examined through an interpreter.)

*Direct examination by Mr. Simpson.*

Q How old are you? A Thirty-two years old.

*Alfonso Illonardo, (for Plaintiff) direct.*

Q Where do you live? A 238 Fifth street, Jersey City.

Q Have you a family? A A wife and two children.

Q Were you working for the Erie Railroad on the twenty-eighth of February, 1925? A  
10 Yes, sir.

Q How long had you been working for them? A From the twentieth of May up to the twenty-eighth of February the following year.

Q What were you doing for them about the time you were hurt, what kind of work were you doing? A I was to place the coal and water in the boilers and do all kinds of work around.

Q You were a common laborer in the round  
20 house, were you? A Yes, sir.

Q And part of your work was coaling and watering engines, is that right? A Yes, sir.

Q What about keeping up the fires? A I was to watch the gauge right along.

Q What is that? A The thing that shows what heat was there.

Q Did you put coal on the fires to keep the fires up? A Yes, sir.

Q So that, as I understand it, you coaled the  
30 engines, fired the engines, kept the steam up and did general utility work around the round house? A Yes, sir.

Q And where did these engines go that you attended to? A Port Jervis.

Q How much money did you earn the month before you were hurt? A One pay was \$92 and one pay was \$72.

*Alfonso Illonardo, (for Plaintiff) direct.*

Q That is in the month before you were hurt, about \$166? A Yes, sir.

Q But your pay varied from month to month; some months you would earn more and some months less? A It was not always the same.

Q On the twenty-eighth of February were you called by Tantullo, the turntable man? A Yes, 10  
sir.

Q What did he say to you when he called you?

A He said, "Please help me out."

Q What was he doing that you had to help him with? A He said, "Please help me out to open the door."

Q Before he told you that did you see him stop this engine? A Yes.

Q So that when you started to open the door this engine was stopped? A Yes, sir. 20

Q What was the matter with the door that you had to help Tantullo? A In the back of the door there was a lot of ice and the door was frozen.

Q Was this frozen ground outside the round house? A Yes, sir.

Q So that you had to push the door against that and break it to get the door open, didn't you? A Yes, sir.

Q Tantullo have a lantern, did you notice? 30

A Yes, but he had placed that somewhere.

Q I didn't ask you where he placed it, but did you notice whether he had a lantern? A Yes, sir.

Q What did you see him do with it, if anything? A He placed the lantern in the back, in the round house.

*Alfonso Illonardo, (for Plaintiff) direct.*

Q And what position did Tantullo take to open the door? A He started to open the door from the inside.

Q And what position did you take? A Outside.

10 Q He was pushing and you were pulling, is that right? A Yes, sir.

Q Did anything happen while you were pulling? A No.

Q Well, what happened? A Well, we opened, tried to open it for about eight minutes and we could not open the door.

Q Then what happened? A Then the engine came.

Q You mean you were working on the door eight minutes before the engine hit you—is that right? A Yes, sir.

20 Q And what was the first you knew that there was any danger while you were working on the door? A Nothing at all.

Q Well, was the first thing you knew, that you were struck? A That is all, and it took my arm off.

Q What position were you in when you were struck, outside or inside or where? A I was outside the door.

30 Q Which arm were you using to try to pull the door out? A The right one.

Q The one that is cut off, is that it? A Yes, sir.

Q And when the engine hit you you had your arm around the door, is that it? A Yes, sir.

Q What happened to the door; was it broken? A Yes, it was all broke and then I could drag my arm out.

*Alfonso Illonardo, (for Plaintiff) direct.*

Q What condition did you find your arm to be in? A The flesh was between the wood and the engine.

Q You mean it had been crushed between the engine and the wood? A Yes, sir.

Q How did you get it away from the wood? A The door fell down, then the arm came out. 10

Q When the door fell down your arm was free, is that what you mean? A Yes, sir.

Q Now, from the time you say Tantullo stopped this engine and you saw it stationary up to the time it smashed your arm off had you heard any whistle or bell or any other warning that the man was going to start it in motion? A No, sir.

Q You had nothing to do with the movement of this engine, did you? You could not signal it to stop or to come, could you? A No. 20

Q That was no part of your work, was it? A No, sir.

Q You were not a hostler, you could not move engines, could you? A No, sir, only to help.

Q Just help as you have described, around the round house? A Yes, sir.

Q Now, after you found your arm in this condition, what was done with it? A I was hollering for help. 30

Q Well, did you get help? A Nobody came, then I had to go to the office myself.

Q You went to the office alone? A Yes.

Q Who was your boss there? A Frank Maxwell.

Q That is the round house foreman? A Yes, sir.

*Alfonso Illonardo, (for Plaintiff) cross.*

Q Is he the first man you saw after the accident? A Yes, him and a clerk.

Q Where did you see him? A In the office.

Q And were you taken to the hospital? A Yes, sir.

Q What hospital? A St. Francis'.

10 Q How long were you there? A From February twenty-eighth to April fourth, and then for a month or two months after I went to the clinic.

Q Were you operated on? A Right away.

Q Did you have any pain after the operation? A I have it now, I have pain.

Q Where do you have pain? A In my arm.

Q Have you had it continuously since the time of the accident? A Yes, sir, continuously.

20 Q Have you earned any money since the time of your injury? A Not even a penny.

Q Have you a trade or occupation of any kind except that of laborer? A No, sir.

Q Will you show the jury your arm and the condition it is in now?

(Witness shows arm to the jury.)

Mr. Simpson: Cross examine.

30 *Cross examination by Mr. Markley.*

Q How long have you been in this country, Illonardo? A Five years and two months.

Q Do you read English? A Yes, sir.

Q Do you write English? A A little bit.

Q You testified that one pay you made was ninety-two dollars? A Yes, sir.

*Alfonso Illonardo, (for Plaintiff) cross.*

Q That was for how many weeks? A Two weeks.

Q A half-month's pay? A Yes, sir.

Q That was the biggest, I think, you ever made, wasn't it? A Yes.

Q And that included a lot of overtime? A Yes.

10

Q Your regular pay was how much? A Sixty dollars.

Q For a half-month? A Yes, sir.

Q The next biggest pay you ever made was seventy-seven dollars, was it? A Yes, sir.

Q You did not have overtime every night, did you? A No, sir.

Q Now, then, on the night of the accident, what time did you go to work? A Three o'clock.

Q And what time did the accident happen? A Eight o'clock.

20

Q You helped open both doors, didn't you? A Yes, but I hardly done anything on the first door.

Q You helped open the first door, didn't you? A It was already open, I just put my hand on it.

Q You actually helped open the first door yourself? A Yes.

Q You knew that there were two doors? A Yes, sir.

30

Q And you helped open the door on the right side of the engine first, didn't you? A Yes.

Q And you got that door open all right, didn't you? A Yes.

Q Then you and Tantullo went to open the other door? A Yes, sir.

*Alfonso Illonardo, (for Plaintiff) cross.*

Q And when you went to open the other door Tantullo's lantern was right on the ground, wasn't it? A Yes, but it was in the round house.

Q Right alongside of the door you opened, wasn't it? A Yes, but inside the round house.

10 Q Now, did you see the engine down on the turntable? A Yes.

Q Did you see the engine move from the turntable before the accident? A No, sir.

Q So that you did not see the engine at any time except down at the turntable? A No, sir.

Q Did you see the engine move from the turntable about half way up to the doors? A No, sir.

20 Q Didn't you see Tantullo go to the engineer and tell him to stop when he was halfway from the doors? A First he did that.

Q But I am saying didn't you see the engine move from the turntable about ten feet up towards the doors of the round house; did you see that? A Yes, fifteen feet, that was before we started to open the last door.

Q Did you see that? A Yes.

Q And then you did see the engineer come off the turntable, didn't you? A No, sir.

30 Q Well, where was the engine the last time you saw it before the accident? A About fifteen feet away.

Q Fifteen feet from the doors? A Yes, sir.

Q Did you see it move from the turntable to the point fifteen feet away? A Yes.

Q Well, where were you when the engine moved about fifteen feet? A I was there, not doing anything.

*Alfonso Illonardo, (for Plaintiff) cross.*

Q Just standing there? A Yes.

Q Which door were you standing near? A Why, in the middle of the track between the two doors.

Q Now, then, you first opened the door on the engineer's side? A Yes, sir.

Q How did you open that door, what did you do? A He pushed and I pulled. 10

Q You pulled that door too, did you? A Yes, sir.

Q And after you got that door opened you went over to the other door? A Yes, sir.

Q And did he push that door? A Yes, sir.

Q Tantullo pushed that door? A Yes.

Q And you pulled it? A Yes, sir.

Q With one arm? A With the right arm.

Q You were outside of the door, weren't you? A Yes, sir. 20

Q Your whole body was outside the door? A Yes, in back of the door.

Q Behind the door? A Yes.

Q That is, Tantullo was inside the door pushing? A Yes, sir.

Q And you were outside the door on the back of the door pulling? A Yes.

Q With only one arm? A One, because I could not use the other one. 30

Q You had nothing in the other hand, did you? A No, sir.

Q You were not pulling with your other hand, were you? A No, sir.

Q You were not doing anything with the other hand? A I had it at my pants.

Q Just alongside of you? A Yes, sir.

*Alfonso Illonardo, (for Plaintiff) cross.*

Q You were doing nothing with the other hand? A I could not do anything with the other hand.

Q Weren't you waving with the other hand? A No, sir.

10 Q Did you give the engineer a signal to come on? A No, sir.

Q Well, why didn't you use your other hand to pull the door out, why didn't you use both hands? A If I did that with the left hand, I would get that hand scratched.

Q You were not using the left hand at all, were you? A No, sir.

Q And you did not give any signal for the engineer to come on? A No, sir.

20 Q Did you go back in front of the engine before the accident happened? A No, I could not get back because I could not pull my hand out.

Q Is this your signature on the back of this check? A Yes, sir.

Q You signed that, didn't you? A Yes, sir.

Q That is your pay, \$30.96? A Yes, sir.

Q That was in May, 1924? A I can account for that. I go to work for the first time for the railroad and that is for only a few days.

Q That was your first pay, \$30.96? A Yes, sir, only for a few days.

30 Q Now, the next check was June 20th, 1924, wasn't it? A Yes, sir.

Q \$51.96? A Yes, sir.

Q And the next one, July, 1924, \$51.60? A Yes.

Q That is your signature on the back of it? A Yes, sir.

Q And the next one in July, \$51.96? A Yes.

*Alfonso Illonardo, (for Plaintiff) cross.*

Q That is your signature on the back? A  
Yes, sir.

Q Your next one is August 5th, \$55.04? A  
Yes, I signed that on the back.

Q The next one is August 20th, \$57.92? A  
Yes, sir.

Q The one September 5th, \$55.93? A Yes, 10  
sir.

Q The next one September 20th, \$56.40? A  
Yes, sir.

Q The next one October 4th, \$56.40? A Yes,  
sir.

Q The next one October 20th, \$56.17? A  
Yes, sir.

Q The next one November 6th, \$56.40? A  
Yes, sir.

Q The next one November 20th, 1924, \$56.40? 20  
A Yes.

Q The next one December 5, 1924, \$56.40? A  
Yes.

Q The next one December 20th, 1924, \$56.40?  
A Yes, sir.

Q The next one January 5, 1925, \$58.20? A  
Yes, sir.

Q January 20th, 1925, \$61.32? A That is the  
regular pay now.

Q February 5th was when you made \$92.60? 30  
A Yes, sir.

Q That was a lot of overtime? A A couple  
of nights.

Q Well, your regular pay was \$61.32? A  
Yes.

Q The next highest one you ever got was  
\$77.58? A Yes, sir.

*Arthur Maxwell, (for Plaintiff) direct.*

Q Then you got this check up to February 28th, the time of the accident, \$58.96? A Yes, sir, there was only twelve days.

Q The regular pay was sixty-one dollars? A Yes, sir.

Mr. Markley: That is all.

10

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ARTHUR MAXWELL, sworn.

*Direct examination by Mr. Simpson.*

Q You were the round house foreman of this round house on the day of this accident? A On the night of the accident, yes, sir.

Q And you were on duty? A I was.

20 Q You did not see the accident yourself? A I did not.

Q What was the first you knew that the man had been hurt? A When they brought him into the office.

Q What was his condition? A His arm was mangled.

Q What door was it smashed on, what track? A On track 13.

30 Q Which door had been broken, the left or the right as you faced the round house? A It would be the left-hand door as you faced the round house.

Q And where was the door broken, what part of the door was broken? A About level with the bumper beam.

Q Did you see the engine yourself? A After the accident.

*Alfonso Illonardo, (for Plaintiff) direct.*

Q What was the position of the engine after the accident? A It stopped, the bumper beam was about even with the door when it would be closed.

Q When the door was closed? A When the door would be closed.

Q When the engine came against the door that was half open, did it carry the door with it? 10

A The bottom part of it; it broke some boards on the bottom part of the door.

Q This round house was a round house used generally to take care of the engines? A Yes, sir.

Q All kinds of engines, engines going inside and outside of the state? A Yes, sir.

Q All kinds of engines? A Yes, sir.

Q Was it the main round house for this territory, Jersey City? A It was the main round house for the freight department, yes. 20

Mr. Simpson: That is all.

Mr. Markley: No questions.

ALFONSO ILLONARDO, recalled.

*Direct examination* by Mr. Simpson. 30

Q Suppose this is the door, this is the outside of the round house and this is the door you were opening, show the jury the position you were in when you were pulling at it. A This is the door and the engine was here.

Q How did you stand? A This way.

*Arthur Maxwell, (for Defendant) direct.*

Q Stopped over? A Yes.

Q And your left hand was at your side? A  
By my pants.

Q And to signal the engine you would have  
had to put your left hand around in back of  
your neck and on top of your right hand, would  
10 you? A I had to look out so that it would not  
get caught in the other door.

Mr. Simpson: That is all.  
That is our case.

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DEFENSE.

20 ARTHUR MAXWELL, recalled for the de-  
fendant.

*Direct examination by Mr. Markley.*

Q Is this the worksheet for the repairs to be  
made on the engine, February 28th, 1925, 1592?  
A Yes, sir.

Q Is that your signature at the bottom? A  
Yes, sir.

30 Q Were those repairs made? A Yes, sir.

Q Just tell us what they were. A Sand  
pipes opened up, set up the left main wedge, front  
end of tank leaking, engine truck wheel had one  
inch lateral, pilot coupler bolts loose, bottom  
number two boiler brace cross-over, brace frame  
stud loose, engine pilot beam step bent, air pipe  
clamp repaired over main air reservoir left side.

Q Those repairs were all made? A Yes, sir.

*Arthur Maxwell, (for Defendant) cross.*

Q After the engine went into the round house on February the twenty-eighth? A From the night of February the twenty-eighth to March second.

Q The engine did not go out until March second, did it? A No, sir, Monday morning, March second.

10

Mr. Markley: Cross examine.

*Cross examination by Mr. Simpson.*

Q Which of these repairs were made necessitated by the accident? A None of those repairs.

Q You said the left step was bent, was that bent by hitting the door? A It was reported by the inspector when the engine comes on the pit.

20

Q I am asking you whether or not this sheet shows that the left step was bent on the engine? A No.

Q Doesn't that report say something about something being bent? A The step was bent.

Q What step? A The left step, on the left side.

Q I asked you does that report show the left step was bent and you answered no. Now, what is the fact? A Let me see that again; I don't memorize all these little jobs. "Left pilot beam step bent."

30

Q Was that the left step or the right step? A That is the left step.

Q You have no doubt now that it was bent? A No doubt at all.

Mr. Simpson: That is all.

*Arthur Maxwell, (for Defendant) re-direct.*

*Re-direct examination by Mr. Markley.*

Q Where is that on the engine? A On the pilot beam, left side, in front of the cylinders.

Q How far from the front of the engine? A It would be back about two feet or eighteen inches.

10 Q And was that reported for repairs before the engine got into the round house?

Mr. Simpson: I object on the ground that that is not the best evidence; the report speaks for itself.

Q Well, is that the original report of the repairs? A This was made out at 6:45—

20 Mr. Simpson: I object to the testimony unless it appears that the report is not procurable.

Q Is this the original report you have in your hand? A Yes, sir.

Q And that shows the things that were required at the time? A Yes, sir.

Q And was that O. K.'d by you? A Yes, sir.

Q It bears your signature? A Yes, sir.

30 Q Showing when the engine came in? A Yes, sir.

Q What is the date of the report? A February 28th, 1925.

Q And the time? A Six forty-five P. M.

Mr. Simpson: I object unless the report is offered. I don't think this witness should be allowed to read it unless it is offered.

*Arthur Maxwell, (for Defendant) cross.*

Mr. Markley: I offer the report in evidence.

Mr. Simpson: I would like to cross examine first.

*Cross examination by Mr. Simpson.*

Q Did you make the report? A No, sir. 10

Q Who made it? A The engineer and the inspector.

Q What are their names? A McKingdon.

Q Did you produce them today? A I didn't bring them with me, no.

Q Who would have control of those reports? Who brought this report? A I believe Mr. Lee.

Q They are out in the round house? A No, he brought all the records with him.

Q Who has control of this document, who brought it today? A Mr. Lee, I believe brought it here. 20

Q You did not bring it here? A No, sir.

Q But it did come out of your round house? A Yes, sir.

Q And you wrote this in the regular course of business? A Yes, sir.

Q And it shows what repairs were made to this engine? A Yes, sir.

Q And when they were reported necessary; is that right? A Yes, sir. 30

Mr. Simpson: That is all.

Mr. Markley: I offer the report in evidence.

(Marked Exhibit D. 1.)

(Witness excused.)

*John Quinn, (for Defendant) direct—cross.*

JOHN QUINN, sworn.

*Direct examination by Mr. Markley.*

Q Where are you employed? A Erie Railroad Company.

10 Q What is your position over there? A Engine dispatcher.

Q As engine dispatcher it is your duty to assign engines to certain jobs? A Yes, sir.

Q If an engine is required from the round house at Secaucus how is it obtained? A The round house at Secaucus?

20 Q Yes. A Why, I ask the round house foreman for an engine whenever they are required for any run and out of the number of engines that they might give me I assign an engine to the run.

Q Could you tell by looking at your record when you got engine 1592 from the round house?

Mr. Simpson: I object unless I have an opportunity to cross examine as to what this record is.

The Court: You may cross examine.

30 *Cross examination by Mr. Simpson.*

Q You make this record, do you? A I do.

Q This is supposed to be a history of what you do with the engines? A Yes, sir.

Q That is, this is your own record telling what you have done with the engines? A Yes, sir.

*John Quinn, (for Defendant) direct.*

Q And your work is to request engines and then assign them, is that right? A Yes, sir.

Mr. Simpson: I have no objection.

*Direct examination continued by Mr. Markley.*

Q Just look at your record and see when engine number 1592 was assigned to you on request for an engine? A February 28th. 10

Q It went into the round house on February the 28th, I believe. When did it come out? A Why, it was ordered for 8:45 A. M., February 28th, for the run known as the Montclair Drill, Greenwood Lake Division.

Q February 28th? A Yes.

Q Then it came back and went into the round house on February 28th; when did it come out again? A March 2nd. 20

Q What time? A Six thirty-five in the morning.

Q Now, then, until you called for an engine, would this engine while it was in the round house be assigned to any job? A Yes, sir, it might be assigned to any run.

Q It might be assigned to any run, but I mean, while it was in the round house and until it was assigned to you or to the dispatcher who might occupy your post, would it have any assignment? A No, sir, none whatever. 30

Q And until it was assigned on March 2nd did it have any assignment? A No, sir, none whatever.

Q Now, it has been testified here that the engine came into the round house on the evening

*John Quinn, (for Defendant) cross.*

of February 28th for certain repairs; would it have any assignment while those repairs were being made? A No, sir.

Q And when it was assigned, would it be assigned to any particular job or might it be assigned to any number of jobs? A It might  
10 have been assigned to any number of regular freight jobs; it was not a through line engine.

Q Are there any other round houses of the Erie in this vicinity? A Yes, sir.

Q What are they? A One at Jersey City and one at Little Ferry.

Q Little Ferry, that is in Bergen County?  
A Yes, sir.

Q And one at Jersey City? A Yes, sir.

Q And one at Secaucus? A Yes, sir.

20 Q Is there any other? A No, sir.

Q Is there one at Port Jervis? A Yes, sir.

Mr. Markley: Cross examine.

*Cross examination by Mr. Simpson.*

Q This round house that this engine went into contains engines going out of the State, doesn't it, going to Port Jervis? A Yes.

30 Q What percentage of engines were through engines; you say this engine was not a through engine, so what percentage of engines in that round house were through engines at the time of the accident? A Well, I would say probably one-third.

Q One-third had to go out of the State? A Yes, sir.

*John Quinn, (for Defendant) cross.*

Q And the other two-thirds were used for switching? A Switching and local freight.

Q They were also used switching in the yard here with cars containing freight? A Yes, but—

Q You have a freight yard here, haven't you?

A Yes, sir.

Q And when you use engines in the freight yard here, switching all kinds of freight, those you say are not through engines, is that it? A No, sir, they are not.

Q The third, which are through engines, they take trains out of the station? A Yes.

Q The other two-thirds are used for different jobs in the State, included in which is the switching of all kinds of freight? A No, sir; about one-third are switching engines exclusively and the others are local freight engines.

Q Taking freight where? A On the regular side line runs. They might be anywhere on the Greenwood Lake Division.

Q But this freight comes to New Jersey from New York and other points and is then taken and delivered in New Jersey? A That might be possible.

Q Well, it is not only possible, but probable. Can you tell any train of cars that is ever taken from Jersey City by an engine from Jersey City to one other point in New Jersey that does not contain one piece of interstate freight? A I have no knowledge of what the train contains with regard to the cars.

Mr. Simpson: That is all.

(Witness excused.)

*Robert Stewart, (for Defendant) direct.*

ROBERT STEWART, sworn.

*Direct examination by Mr. Markley.*

Q Doctor, what is your profession? A Physician.

Q Physician and surgeon? A Yes, sir.

10 Q How long have you been such? A Over twenty-five years.

Q Did you have occasion to examine the plaintiff in this case shortly after the accident?

A I did.

Q Where? A Secaucus, in the office of the round house.

Q About what time did you examine him, doctor? A Within fifteen minutes of the injury.

20 Q What did you find? A I found he had a compound fracture of his right arm between the elbow and the ribs.

Q What did you do for him? A I gave him first aid surgical dressing, put on a splint, and by that time the ambulance from St. Frances' Hospital had arrived and we sent him right to the hospital for immediate surgical attendance.

Q Did you see him on the morning of January 4th, 1926, at the Court House here? A I did, at the last trial.

30 Q And did you examine his arm at the time? A I did.

Q Did you examine the stump? A I did.

Q What kind of a stump is it? A A very good stump.

Q Has it healed? A It has all healed.

Q Is it one that in your opinion will hold an artificial limb? A It is.

*Robert Stewart, (for Defendant) cross.*

Q Now, the plaintiff complains of pain in the arm at this time; can you say whether there was any pain there or not at this time? A No.

Q You cannot say? A There is no evidence of pain as far as I can determine.

Q Pain is a subjective system anyway? A Subjective, not objective.

Q But so far as you can tell, can you tell whether there is any pain there or not? A Not at the time I examined him.

Q That was January fifth? A January fifth.

10

Mr. Markley: Cross examine.

*Cross examination by Mr. Simpson.*

Q How long did your examination take on January the fifth? A About five minutes.

20

Q And in those five minutes you are quite sure that there was no pain? A Yes.

Q You say pain is a subjective symptom; that means that you must depend upon what the man tells you? A Yes.

Q So that if he told you he had no pain at that time it would indicate he had no pain; whether he has pain at other times or not or whether he has pain now sitting in the court room, you do not know? A I do not.

30

Q What are the advantages of an artificial arm over a natural arm? A There are no advantages.

Mr. Simpson: That is all.

*Harry Laurie, (for Defendant) direct—cross.*

HARRY LAURIE, sworn.

*Direct examination by Mr. Markley.*

Q Did you produce these six checks of the plaintiff's that I have here in my hand? A Yes, sir.

10

Q And do they represent his total pay between May, 1924, and February, 1925? A Yes, sir.

Q Have you prepared a statement showing each one? A Yes, sir.

Q What was his average pay during the entire period? A \$114.83 per month.

Mr. Markley: I offer these checks.

20

Mr. Simpson: I have no objection, but I ask that they be left here; they were not left here the last time.

Mr. Markley: They were not offered the last time.

(Checks marked in evidence Exhibit D. 2.)

Mr. Markley: I also offer the statement.

Mr. Simpson: No objection.

(Marked Exhibit D. 3.)

30

*Cross examination by Mr. Simpson.*

Q Those checks show a gradual increase of pay? A Yes, sir.

Q If this man had not had his arm cut off there is no reason why he could not have continued to earn what he did the last month, if he had as much overtime, is there? A No, sir.

*Herman Menicke, (for Defendant) direct.*

Mr. Simpson: That is all.  
(Witness excused.)

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HERMAN MENICKE, sworn.

*Direct examination by Mr. Markley.*

10

Q How old are you? A Twenty-six.

Q Where do you reside? A 96 Western  
avenue, Jersey City.

Q Where are you employed? A Erie Rail-  
road, as fireman.

Q Fireman at the present time? A Yes, sir.

Q Were you employed on the Erie Railroad  
on February twenty-eighth of last year? A Yes,  
sir.

20

Q And what position did you occupy at that  
time? A On February twenty-eighth I was a  
hostler by the day.

Q And where were you employed as hostler  
February twenty-eighth? A In the Secaucus  
round house.

Q What time did you go to work that day?  
A Four P. M.

Q How long had you been a hostler prior to  
that time? A Three and one-half years, off  
and on.

30

Q On February twenty-eighth was there an  
accident with respect to engine number 1592?  
A Yes, sir.

Q Were you operating that engine at the  
time? A Yes, sir.

*Herman Menicke, (for Defendant) direct.*

Q Where did you get that engine before the accident? A From the ashpit.

Q And how far is the ashpit from the turntable at Secaucus? A About 150 feet.

Q When you got it at the ashpit was it attached to any cars? A No, sir.

10 Q Just the engine and tender? A Yes, sir.

Q Were the fires in the engine at the time, or had they been drawn? A No, sir; the fires had been drawn.

Q And was there enough steam for it to get to the engine house? A Yes, sir, forty pounds of steam.

20 Q Now, just tell the jury what you did when you picked the engine up at the ashpit track fifty feet from the turntable? A I got on the engine at the ashpit and ran it down on to the turntable.

Q How did you go on the turntable? A Backward.

Q After you got on the turntable did you stop? A Yes, sir.

Q Did you come to a complete stop? A Yes, sir, in the center of the table.

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

30 Q Where were you on the engine? A Up on the right side.

Q In the engine shed? A Yes, sir.

Q What happened after you came to a complete stop on the turntable? A After I came to a complete stop on the turntable the turntable was turned around to stall 13 and it stopped again.

Q Who did that, the turntable operator? A Yes, sir.

*Herman Menicke, (for Defendant) direct.*

Q Tantullo? A Yes, sir.

Q The man who was on the stand here this morning? A Yes, sir.

Q Well, now, after the turntable was turned in the manner you have stated, to stall number 13, which way was its nose pointing then? A Its nose was pointing in toward the round house.

10

Q That is, the head of the engine was nearer to the round house? A Yes, sir.

Q Track number 13 is the track which leads into stall 13? A Yes, sir; it was spotted for 13.

Q How far away was the head end of the engine as it stood on the turntable from the doors of stall 13? A I should judge about sixty-five feet.

Q And were the doors closed or open at first?

A No, sir, the doors were closed.

20

Q Then what happened? Just tell the jury what the turntable operator did and what you did. A Tantullo came out and look at the rails, to see that they were lying up straight so that the engine would not go off the track, then he gave the signal to come off. He watches the wheels to see that they would go on the track, then he ran into the round house to open the doors, which have a latch on the inside. I pulled off the turntable; the end of the tender was still on the turntable, and I stopped to wait for him to open the doors.

30

Q Did he give you any signal to stop? A No, sir, he did not.

Q After you saw that the rails of the turntable were in line with the rails of track 13, did you slowly move off? A Yes, sir.

*Herman Menicke, (for Defendant) direct.*

Q Did he give you any signal to move then?

A Yes, sir.

Q He did not give you any signal to stop?

A No, sir.

Q You stopped yourself? A Yes, sir.

Q Did he use a lantern? A Yes, sir.

10 Q He had a lantern in his hand? A Yes, sir.

Q How far did you go to the round house when you came to a stop of your own accord?

A About fifteen feet.

Q You were on the right-hand side of the engine? A Yes, sir.

20 Q Then what did he do? A He went into the round house and he loosened the bar that holds the door, to my left-hand side. The door on my left-hand side was open, as far as I could see.

Q That is, the door on your right side of the engine? A No, sir, on the left side of the engine, the door away from me, on my left side as I was facing the door.

Q He opened that, as far as you could see? A He opened that, as far as I could see, pushed it back to where the engine stopped my view.

30 Q How much of the engine was in front of you as you sat in the cab there? A About twenty-five feet.

Q About how wide is the engine in front?

A About twelve feet.

Q As far as you could see, the door on the left was open? A Yes, open, as far as I could see.

Q Then what did Tantullo do? A Then he tried to open the door on my right-hand side,

*Herman Menicke, (for Defendant) direct.*

and he could not get that door open very well; I know he tried it, but he could not get it, and this man Illonardo came to help him.

Q To open the door on your right side? A Yes, sir.

Q Did he help open the door on your right side? A Yes, sir.

10

Q Did it open all the way? A Yes.

Q Then what did they do, if anything? A Then Illonardo started to walk toward the left-hand side and Tantullo gave me the signal to come ahead and he walked over and I started ahead.

Q How did you realize that there was an accident? A Someone ran right in front of me, very close, and I was afraid I would hit him. I threw my brake on full and the engine rolled about eight feet, I should judge, and came to a stop.

20

Q Did you start the engine without a signal? A No, sir.

Q Did you get any signal? A I did.

Q And you say after you got the signal both men were on the opposite side of the engine? A Yes, sir.

Q And you saw someone run across in front of you? A Yes.

30

Q And you applied your brakes? A Yes, sir.

Q How long had you been doing that work before that? A Well, three and one-half years I had been doing it.

Q For three and one-half years before the accident? A Yes, sir.

Q Every day? A Not every day, no, sir.

*Herman Menicke, (for Defendant) direct.*

Q How often? A Well, sometimes I had the job for a month at a time; sometimes I only had it for two or three days, and sometimes only one day, but in my three and one-half years I put in over a year at hostler work alone.

10 Q At the Secaucus round house? A Yes, sir.

RECESS UNTIL 2 P. M.

—  
AFTER RECESS.

*Examination continued by Mr. Markley.*

20 Q As you were going to run into the round house were there any lights outside the round-house? A Yes, sir, about six or eight arc lights around this round house.

Q How about inside? A On poles shining into the round house and on the round house there were lights that were shining out.

Q And aside from the lights you have just referred to were there any lights on the locomotive, any headlight? A No, sir.

30 Q Did you have the headlight lit as you went into the round house? A No, sir.

Q Was it customary to blow any whistle as you went into the round house? A No, sir.

Q Or to ring a bell? A No, sir.

Mr. Markley: That is all.

*Herman Menicke, (for Defendant) cross.*

*Cross examination by Mr. Simpson.*

Q Where did you get this locomotive? A From the ashpit.

Q How far is that from the turntable? A About 150 feet.

Q Did you get any signal that guided you on the turntable? A Yes. 10

Q Who gave you the signal? A Tantullo.

Q What did he give you the signal with? A With a lamp.

Q Was it a continuous signal or just a single signal to you; did he walk ahead or wave a lantern? A No, sir, just gave me a signal to come on.

Q Where was he standing when he gave you the signal to come on? A At the end of the turntable. 20

Q And you backed on, didn't you? A Yes, sir.

Q When you say the end of the turntable do you mean the side nearest to where you got on or the other side? A The end nearest to me.

Q So that you backed your engine on and passed him? A Yes, sir.

Q He had a lantern in his hand? A Yes, sir.

Q And by electricity he turned the engine around until you faced number 13 stall? A Yes, sir. 30

Q And he then gave you a signal with the lantern to come off? A Yes, sir.

Q Where was he standing when he signaled you with a lantern to come off? A Right at the end of the turntable.

Q Did you pass him? A No, sir.

*Herman Menicke, (for Defendant) cross.*

Q Why not? If you came off the turntable and he was standing at the turntable, why didn't you pass him? A The front end of the engine passed him, but not up as far as I was.

Q How much of the engine passed him? A I should judge about fifteen feet of the engine.

10 Q Then did you stop? A No, sir; he ran into the round house.

Q Did you stop? A No, sir.

Q What did you do? A I moved up a little further.

Q Then he ran past the engine into the round house and you stopped of your own accord without any signal from him? A Yes, sir.

Q Although he had given you a signal to come on? A Yes.

20 Q Why did you stop of your own accord? A Because I was not—I could see that the doors were not open; I could not run through.

Q Then you had a plain view in front of you that the doors were not open, is that right? A Yes.

Q Then you saw him disappear into the round house? A Yes, sir.

Q How far were the doors away from you? A When I stopped, about fifteen feet.

30 Q From where you were sitting in the engine? A From the pilot of the engine.

Q How far back were you from the pilot of the engine? A About twenty-five feet.

Q And you were on the right or left hand side of the engine? A The right-hand side.

Q And as you looked could you see that both doors were closed? A Yes, sir, I could see them when they were closed.

*Herman Menicke, (for Defendant) cross.*

Q And you stood there with your engine stopped, with both doors closed? A Yes, sir.

Q You had no trouble in seeing, because of all the electric lights? A No, sir.

Q Could you see perfectly plain? A Yes, sir.

Q Now, then, did they get the door on your own side open? A Yes. 10

Q And you saw that open, did you? A Yes, sir.

Q You could not see the door on the other side of your engine? A I could see it while it was closed, but after it was opened one-third of the way you cannot see it any more.

Q They opened it partially, according to you, and it passed out of your range of vision? A Yes, the left door. 20

Q So that you could not see if it was open or not, is that right? A Yes, sir.

Q Then you say, not being able to say whether it was open or not, you got a signal from Tantullo, is that right? A Yes, sir.

Q But Tantullo was working on this door that you could not see, wasn't he? A He was on the right side when he gave me the signal, on the right-hand door, the door on my side.

Q Wasn't he working on the door that you say you could not see at the time you got the signal? A No, sir. 30

Q Where was he when you got the signal? A He just finished opening the right door.

Q And before he had the other one opened he gave you a signal to come on? A Yes, sir.

Q Then you saw it was not open, didn't you? A No, sir.

*Herman Menicke, (for Defendant) cross.*

Q Why not, it had not been moved according to you before—you say he started to move the door, having finished with the right-hand door he gave you a signal to come on, is that right?

A He pushed the left door until it was out of my range of vision, I could not see it from where I was.

10 Q You said after he finished with the right-hand door he gave you a signal to come on, is that right? A Yes.

Q Where was he standing? A By the right-hand door.

Q He was not at the left-hand door? A No, sir.

Q And he was not hurt by your knocking the door down on him, was he? A He said he was.

20 Q So that he gave you a signal to come on when he was behind the door and you did come on and hit a door and knocked it down on him? A He was on the right-hand side when he gave me the signal.

Q Did he give you the signal with his lantern? A No, sir, with his hand.

Q You swore at the last trial that you did not know who gave the signal, didn't you? A (No answer.)

30 Q You know you swore at the last trial that you did not know who gave the signal, didn't you? A That is right.

Q What has changed your mind since the last trial when you swore point blank under oath at the last trial that somebody gave you a signal and you did not know who it was; now you swear that it was Tantullo; why do you change your testimony? A (No answer.)

*Herman Menicke, (for Defendant) cross.*

Q Why don't you answer that? Has anybody been talking to you since the last trial? A No, sir.

Q Have you been down to counsel's office of the Erie Railroad? A No, sir.

Q And although you swore in January of this year I think the ninth that you did not know who gave you the signal, now you swear that Tantululo gave you the signal. A (No answer.) 10

Q You did not give any warning that you were coming on, did you? A No, sir.

Q Didn't blow any whistle? A No, sir.

Q Did you get off and find out how badly you had smashed the door? A Yes, sir.

Q How much had you smashed it? A There were a couple of boards broken out of the bottom of the door.

Q What was it called your attention to the fact that there was something wrong? A Why, the man ran right out in front of me. 20

Q That was before you struck anything that a man ran in front of you? A I could feel the jar when it hit.

Q Well, was the jar before the man ran out or after the man ran out? A After.

Q The jar was after the man ran out? A Yes, sir.

Q How quick was it, immediately after? A Immediately, yes, sir. 30

Q Now, there was nothing obstructing your view of that door, was there? A Yes, sir, the engine; I could not see on the left side.

Q And you were the only one on that engine were you? A Yes, sir.

Q Nobody on the other side? A No, sir.

*Herman Menicke, (for Defendant) cross.*

Q And you say the reason you moved until you hit this door that you could not see was that Tantullo gave you a signal to come on? A I was given a signal.

Q You say now you were given a signal; who do you say gave it to you now? A (No answer).

10 Q You say, "I was given a signal." Does that mean that you do not know who gave you the signal? A Yes, sir.

Q Then why did you tell these men a minute ago that Tantullo gave you the signal? A (No answer).

Q You told them in cold blood that Tantullo gave you a signal and now you say under oath just as calmly that you do not know who gave you the signal; what is the fact? A Well, I don't know who gave me the signal.

20 Q Then why did you swear to these men that Tantullo gave you the signal if it was not the fact? A (No answer.)

Q Are you still working for the Erie Railroad Company? A Yes, sir.

Q What kind of a jar did you feel when you hit that door? A Just a slight little bump.

Q Did you see this man whose arm was cut off? A I didn't see him until I got into the office.

30 Q What did you see when you got into the office? A I see him sitting there with his right arm broken and they had something tied around it.

Q Where was Tantullo? A He was sitting in a chair.

Q He was hurt too, wasn't he? A I don't know, I didn't see anything wrong with him.

*Charles W. Broadhurst, (for Defendant) direct.*

Q Was he talking? A He was lying back in a chair like in a faint.

Q You did not say anything to him? A No, sir.

Q Was this the last engine you had to take care of that night? A No, sir.

Q Tantullo says that without any signal from him at all you came off the turntable and that he rushed up to you and told you to stop, that the doors were not open; do you say that happened or did not happen? A It did not happen. 10

Q Nobody stopped you, you stopped yourself? A Yes, sir.

Q And you stopped yourself when you saw the doors were not open? A Yes, sir.

Q And you went ahead and hit the doors because they were not open, didn't you? A No, sir. 20

Q Well, did you hit the doors? A Yes, after that, the engine hit the doors.

Q Then you hit them before they were not fully open, didn't you? A Yes, sir.

Mr. Simpson: That is all.

(Witness excused.)

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30

CHARLES W. BROADHURST, sworn.

*Direct examination by Mr. Markley.*

Q You reside in Jersey City? A Yes, sir.

Q You are an attorney and counsellor-at-law?

A Yes, sir.

*Charles W. Broadhurst, (for Defendant) direct.*

Q Associated with what firm? A Associated with Collins and Corbin, practicing law.

Q Did you receive a claim petition filed by the plaintiff in the compensation court of New Jersey? A I did.

10 Mr. Simpson: I object, incompetent.

The Court: Sustain the objection.

Mr. Markley: Exception. I will ask a few more questions merely to make my point for what they are worth, your Honor.

The Court: Go ahead.

Q You are the attorney for the Erie Railroad Company handling this compensation matter? A Yes, sir.

20 Q And did you file an answer to this petition?

Mr. Simpson: I object to all this line of testimony.

The Court: Objection sustained.

Mr. Markley: Exception.

Q Who was the attorney for the plaintiff in the compensation petition?

30 Mr. Simpson: Same objection.

The Court: Sustain the objection.

Mr. Markley: Exception.

Q Did you admit in the answer filed in the compensation suit which he brought that he was entitled to compensation in the compensation court?

*Lee R. Laizure, (for Defendant) direct.*

Mr. Simpson: Object to the question.

The Court: Sustain the objection.

Mr. Markley: Exception. Cross examine.

Mr. Simpson: No questions.

LEE R. LAIZURE, sworn.

10

*Direct examination by Mr. Markley.*

Q By whom are you employed? A The Erie Railroad Company.

Q In what capacity? A Division master mechanic.

Q And where is your headquarters? A Secaucus.

20

Q Are you the man in charge of the Secaucus round house? A Yes, sir, chief mechanical officer.

Q Do you know how long you have been employed there? A Eight years.

Q Were you there on February 28, 1925? A Yes, sir.

Q Still there? A Yes, sir.

Q Same capacity? A Yes, sir.

30

Q Now, is it customary in having an engine enter the round house from the turntable at Secaucus, to ring the bell of the engine? A No, sir.

Q Is it customary in having an engine enter the round house from the turntable at Secaucus to have the engine blow its whistle? A No, sir.

Q Has it ever been the practice? A No, sir.

*Lee R. Laizure, (for Defendant) direct.*

Q Was it the practice on February the 28th, 1925? A No, sir.

Q Now, then, was it customary in having engines entering the round house at Secaucus from the turntable to have the headlight on the engines lighted? A No, sir.

10 Q Was it the practice to have the headlights out? A Yes.

Q Are there any lights in the round house as engines go in from the turntable? A Yes, sir.

Q Will you just tell the jury what lights were there as of February 28th, 1925? A Yes, sir. We have arc lights on tall poles and on top of the engine house that light up the entering circle and around the turntable we have flood lights on top of the round house give you a flood of light throughout the entire area that is covered  
20 by the turntable and the entering circle of the round house, flood lights and arc lights on the outside.

Q Do they light up the round house very well or not? A Outside of the round house, yes, sir.

Q And on the inside? A On the inside we have different lights; we have flood lights on the inside on every stall, two at the head-end of the engine house and one in the rear.

30 Q And do they light up the stalls very well? A Yes, sir.

Q Now, this engine that was in this accident, engine number 1592, it has been testified to it had its fires drawn as it entered the round house from the ashpit over the turntable on the night of February the 28th, 1925, went into an empty stall number 13 so that it might be repaired Would

*Lee R. Laizure, (for Defendant) direct.*

that engine have any assignment of any work under such circumstances? A Any assigned work?

Q Would it be assigned on a job? A No, sir.

Q Would it be assigned to pulling any cars or trains under those circumstances? A The only thing that engine would be assigned to would be whatever job the engine was called on specifically to do. 10

Q It was going in for repairs; would it have any assignment then? A No, sir.

Q Now, it was at the round house from the evening of February the twenty-eighth until the morning of March the second; would it have any assignment while it was in the round house? A No, sir.

Q Might it be assigned to any job? A Not until it was called for, for service after repairs were made. 20

Q How would it be called for service, how would it be assigned to service after it was repaired? A The engine would be reported to the engine dispatcher.

Q By whom? A By the round house foreman or the general foreman.

Q In other words he would report that it was again ready for service? A Yes. 30

Q And after it was so reported, would it then receive an assignment? A It would receive an assignment according to the work that the engine would be required to do; the terminal dispatcher would make known his requirements through the engine dispatcher.

Q It has been testified by Mr. Quinn, the engine dispatcher, that it was called for on the

*Lee R. Laizure, (for Defendant) direct.*

morning of March the second; would it have any assignment of any kind prior to that time? A No, sir.

Q It would be out of service, would it? A Yes, sir.

10 Q And when it was actually assigned, when the dispatcher called for it, would engine number 1592 be assigned to any particular work or might it be assigned to any work on different jobs? A It would be assigned to a train where this class of engine would be required to work.

Q Would there be any number of trains— A There are different jobs in different locations.

Q Might it be assigned, for instance, to pull a pay car to Newark? A Yes.

20 Q Or might it be assigned to pull some cabooses up to Hackensack? A Yes, sir.

Q In other words, it was open for any service it was fit to do? A Yes, sir, absolutely.

Q And until it received an assignment it had no assignment, is that right? A Yes.

30 Q Is this class of engine, such as 1592, an engine that would go out of the State if it was required to, or was it an engine that was used in the State of New Jersey? A Used in the State and would only go out of the State if it was going from Secaucus terminal to a back shop for general repairs, in which event the engine would go light and would not pull any cars.

Q Where would it go to a back shop for general repairs? A Susquehanna, Pennsylvania and Hornell, New York.

*Lee R. Laizure, (for Defendant) cross.*

Q But if it was not going for general repairs and going light, would it go out of the State of New Jersey, in ordinary work? A No, sir.

Mr. Markley: Cross examine.

*Cross examination by Mr. Simpson.*

10

Q How were those engines guided into the round house if they did not get any signal, how were they guided in? A Guided in by hand signal from the turntable operator.

Q With a lantern? A Either by lantern or by hand.

Q Well, at night would they use a lantern on the turntable, or the hand? A A lantern, as a rule.

Q Is it your testimony that it was not customary to give any signal as they entered? A I didn't say that. 20

Q Well, was it customary to give a signal as they entered? A Always customary for the turntable operator to give a signal for the engine to come ahead.

Q How about the engine when it came ahead, how were men like these two men protected that were working at the door? Would he come right ahead and smash down the door and kill both of them? A No, sir. 30

Q How would he protect them? A He would have to be protected by getting a signal to come ahead.

Q And if there was nobody to give a signal to him and right in front of him was a door with two men working on it, would he go right

*Lee R. Laizure, (for Defendant) cross.*

ahead and kill them or what would he do? A He would wait for a signal from the turntable operator.

Q Suppose he got a signal and still he saw the men in front of him, would he come on and kill them? A I don't think so.

10 Q How would he protect them? A The man running the locomotive is in the cab; the man that is supposed to give him the signal is on the ground and he is the man that is supposed to know that the coast is clear before he gives the man the signal to advance with his engine.

Q But, the coast clear or not, if this man on the engine within fifteen feet of a door saw two men working on the door and he got a signal, would he go on no matter what happened and kill somebody? A I don't think so.

20 Q How would he protect them, by stopping, giving a signal, or what would he do? A He would have to stop if he was going.

Q This type of engine used within the space— what is the number of it? A 1592.

Q That pulls passenger cars or freight cars? A Freight.

Q And it pulls cars that come from New York or Florida or any other State? A I don't know where the cars come from.

30 Q Well, where does it operate, within the switching yard or where? A All over.

Q Was this a switching engine? A No, sir, that is known as a road engine or drill engine.

Q What does it do? A Pulls cars on the side line divison.

Q Freight cars or what kind of cars? A Freight cars.

*Raymond F. Lee, (for Defendant) direct.*

Q Cars that come from all over? A Of course, I cannot tell where the cars come from.

Mr. Simpson: That is all.

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RAYMOND F. LEE, sworn.

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*Direct examination by Mr. Markley.*

Q Mr. Lee, by whom are you employed? A The Erie Railroad Company.

Q In what capacity? A General foreman, Secaucus round house, days.

Q You work what hours? A Seven A. M. to seven P. M.

Q And how long have you been so employed? 20  
A Since February the twenty-first, 1924.

Q Were you employed in that capacity on February the twenty-eighth, 1925? A Yes, sir.

Q Were you ever there at night? A Oh, yes.

Q You have worked there nights, to? A Oh, yes, sir.

Q And you know what the practice is? A Yes, sir.

Q Speaking as of February the twenty-eighth, was it customary when an engine entered the round house from the turntable to have its headlight lighted? A No, sir. 30

Q Was it customary to ring its bell on entering the round house from the turntable? A No, sir.

Q Was it customary for the engine to blow its whistle? A No, sir.

*Raymond F. Lee, (for Defendant) direct.*

Q Was the round house and turntable section of the railroad lighted or not? A Yes, sir, it is well lighted.

10 Q How? A Arc lights on top of poles and arc lights around the entrance on the round house roof and on the inside of the round house by two lights at the head of each stall and one at the back end of each stall.

Q Now, the turntable operator in signaling the engine to come ahead, how would he do it by hand or by lantern? A He would do it either way.

Q At night could he do it either way? A Yes, he could do it either way.

Q This engine was engine number 1592? A Yes, sir.

20 Q And it was going into stall number 13 on that night for repairs? A Yes, sir.

Q Would that engine under such circumstances have any assignment to any train of cars? A No, sir.

Q It would be out of service? A Yes, sir.

30 Q It also has been testified that the engine remained in the round house from the evening of the twenty-eighth until the morning of March the second, and that it received an assignment from the dispatcher's office, the dispatcher being asked for an engine and this engine was assigned. Now, in the meantime, while it was in the round house, would it have any assignment? A No, sir.

Q It would be out of service? A Yes, sir.

Q And would the engine under those circumstances be subject to assignment to any number

*Raymond F. Lee, (for Defendant) direct.*

of jobs? A The engine would be assigned to any job which she could handle.

Q This engine number 1592 would be subject to such work as it might be called upon to do in its class? A Yes, sir.

Q Might it be sent out with a caboose to Newark? A Yes.

Q Or with a couple of pay cars, for instance, to Hackensack or Paterson? A Yes, sir.

Q Was it customary for this class of engine number 1592 to actually go out of the State of New Jersey? A No, sir.

Q It was used, as I understand, almost entirely in the State? A Yes, sir, on side line work.

Q And if it went out of the State it would be because it was going to a back shop for general repairs, for instance, at Susquehanna? A Yes, sir.

Q Otherwise it would remain in the State of New Jersey? A Yes, sir.

Q And when its fires are drawn and it is in the round house for repairs it is out of service? A Yes.

Q Is it subject to assignment while it is under such repairs? A No, sir; it is not subject to assignment until repairs are completed.

Q And when it is brought into the ashpit, the fires drawn on its way to the round house, is it then subject to assignment? A No, sir.

Q Has it any assignment under those circumstances? A No, sir.

Q Is it out of service? A No, sir.

Mr. Markley: Cross examine.

*Raymond F. Lee, (for Defendant) cross.*

*Cross examination by Mr. Simpson.*

Q You were the foreman of the round house where Illonardo worked? A Yes, sir, on day tour.

Q You were foreman there? A Yes, sir.

10 Q What was his job there? A He was an engine pumper; his duties were to look after the fires in the engine and keep the water in the boilers.

Q Did he do general labor work around the round house? A Yes, sir.

Q Whatever he was called upon to do? A Yes, sir.

Q This turntable was very well lighted with arc lights, wasn't it? A Yes, sir.

20 Q A man in the cab of an engine would have no difficulty seeing what was in front of him from the turntable because of the lights? A No, sir.

Q Now, you say the proper way for the man on the engine to proceed, as I understand it, is to look to the turntable operator for his signals?

A Yes, sir.

30 Q He is the man who controls the movement of that engine? A Yes, sir.

Q Nobody else had a right to give a signal; a laborer in the round house would have no right to give a signal to an engine coming from the turntable? A Not unless there was an emergency.

Q The engine was under the control of the turntable man? A Yes.

*Motion for Direction of a Verdict.*

Q If the engineer didn't get a signal from the turntable man and moved the engine, that was an improper move, was it? A Yes, sir.

Mr. Simpson: That is all.  
(Witness excused.)

Mr. Markley: That is my case. 10

Mr. Simpson: No rebuttal.

Mr. Markley: I respectfully move for a direction of a verdict in favor of the defendant on the following grounds:

1. There is no evidence showing that the plaintiff was employed in interstate commerce at the time of the accident.

2. There is no evidence that the defendant at the time of the accident, with respect to the work plaintiff was doing, was engaged in interstate commerce. 20

3. There is no evidence that the plaintiff and defendant were engaged in interstate commerce at the time of this occurrence for which this suit was brought.

4. That any rights which the plaintiff may have had to become compensated for his injury must be in the Compensation Court of the State of New Jersey under the Workmen's Compensation Act of the State of New Jersey. The undisputed facts show that to be so in this case and his compensation must be there and exclusively there and not under the Federal Act. 30

5. There is no proof that the accident was caused proximately by negligence alleged against the defendant in the complaint.

*Charge to Jury.*

6. There is no evidence that any negligence of the defendant was the proximate cause of the accident.

7. The undisputed facts show that the plaintiff assumed the risk of the injury which he received.

10 This is the same motion which I made at the last trial to your Honor, and I suppose the same ruling will prevail, so that I will not attempt to argue it before you.

The Court: I deny the motion.

Mr. Markley: Exception.

**CHARGE.**

20 The Court then charged the jury as follows:

The Court: Gentlemen of the Jury—The plaintiff, Alfonso Illonardo, has instituted an action against the Erie Railroad Company to recover damages for injuries sustained by him on the twenty-eighth day of February, 1925.

30 The plaintiff alleges that the defendant at that time was engaged in interstate commerce. He further alleges that he was a servant of the defendant engaged by it in the work of interstate commerce and that he was so engaged at the time he was injured on the twenty-eighth day of February, 1925; that the defendant, by its agents and servants, negligently propelled against him, the plaintiff, a locomotive while he was working as aforesaid as a workman at the round house, Secaucus, Hudson County, New Jersey.

*Charge to Jury.*

The negligence of the defendant, the plaintiff says, was as follows:

That the defendant failed to use reasonable care to keep said locomotive under control, to give warning of the movement thereof, to keep same in proper and suitable condition as to brakes, appliances, etc., so that it could be stopped by the use of reasonable care, so as to avoid injury to the plaintiff, and that it did not use reasonable care to provide suitable headlights or any headlight, and did not use reasonable care to propel same at a safe rate of speed, and that by reason of the negligence of the defendant, its servants and agents as aforesaid, the plaintiff was so injured that his right arm, knee, back, spine, both legs, were severely injured, and he suffered nervous shock, and that the plaintiff was at all times in the exercise of due care for his safety.

That is the substance of the allegation to the plaintiff.

The Erie Railroad, the defendant company, sets up as a defense, a denial of paragraph one, except that it admits it is a common carrier by railroad; it admits that it is engaged in both interstate and intrastate commerce, meaning that it runs not only within the State of New Jersey but outside of the State as well.

It sets up as a defense further that the accident was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment with the defendant.

It further sets up that the alleged accident was due to contributory negligence on the part of the plaintiff and that the damages, if any,

*Charge to Jury.*

must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff.

10 It further sets up as a defense that the alleged accident was due solely to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety, and it sets forth under a separate defense that the plaintiff was not engaged in interstate commerce and that the defendant was not engaged in interstate commerce at the time.

20 As to those two latter defenses, of course, the Court has said that both parties were engaged in interstate commerce at the time, therefore, you will take it as the law laid down by the Court that at the time of the happening of this injury both parties were engaged in interstate commerce.

This action is brought under what is commonly known as the Federal Employers' Liability Act. That Act was passed on the twenty-second day of April, 1908, by the Congress of the United States. The Act provides that

30 "Every common carrier by railroad while engaging in commerce between any of the several States or territories, or between the District of Columbia and any of the States or territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations, 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; and if none, then of such employee's

*Charge to Jury.*

parents; and if none, then of the next of kin dependent upon 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 defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.” 10

And it further 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, the fact that the employee may have been guilty of contributory negligence shall not bar his recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.” 20

That same Act further provides—

“In any action brought against a common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the accident or death.” 30

Now, this latter section, I will say to you, has no application to the case, there being no violation of any statute enacted for the safety of employees by the common carrier established, which contributed to the injury or death of the

*Charge to Jury.*

employee in this case. Therefore, the assumption of risk, which the defendant has a right to avail itself of in defense of the action exists in all its previous legal vigor.

10 The law relating to interstate commerce, governing carriers by rail, may seem somewhat complicated, therefore, I am going to try to make the situation a little more clear to you. I have already read the complaint, or the substance of the complaint, filed in this case by the plaintiff, to you, and you have also heard the substance of the defense which has been filed in the answer of the defendant in this action.

20 You have heard the testimony in this case. You know what happened to this plaintiff on the evening of the twenty-eighth of February, 1925. You are the sole and exclusive judges of the credibility of the witnesses who have been introduced here today. You are to determine from the evidence which has been submitted here who, under all the evidence as it has been submitted here today, sworn under oath (and you are to consider nothing else except what has been testified to) just what the situation was on the night of February 28th, 1925.

30 In the course of summation, counsel have stated to you their versions of what happened. If in the course of their remarks they stated something as being the fact, or being in evidence in this case, which does not square with your knowledge of the testimony, disregard what counsel has said. Even if the Court, in the course of his remarks, may state something to be a fact in this case which does not harmonize with your recollection of the facts, disregard

*Charge to Jury.*

what I have said on that point and allow your own recollection of the facts to prevail.

Now, gentlemen, how have the different witnesses who have been introduced here impressed you? Do you believe what the plaintiff has said in this case, or do you believe what the defendant has said? The plaintiff, of course, under the well-settled rules of law, is obliged to make out his case by the greater weight of the evidence if he is to have a verdict in this case, that while they were both engaged in interstate commerce the plaintiff received the injuries of which he complains, and for which, in this suit, he seeks to recover damages by reason of the negligence of the defendant company. In other words, that the injury must have resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment in the manner charged by him in his complaint. If he has made that out, that the accident to himself resulted in whole or in part proximately from the negligence charged by him, and covered by the act which I have read, then he would be entitled to your verdict and to have you assess the damages; unless the defendant shall have made out by the greater weight of the evidence that he assumed the risk of the injury. If they make that out, it is a complete defense to the action, no matter how negligently the defendant may be proved by the plaintiff to have been, in proving how this accident did occur.

10

20

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*Charge to Jury.*

The defendant in this case says, first of all, that it was not negligent, and, of course, unless the plaintiff has made out by the greater weight of the evidence that it was negligent, as he has charged, there can be no recovery against the defendant.

10      Secondly, the defendant says that the plaintiff assumed the risk of the injury and that he is thereby incapacitated in this suit from recovering damages. I have already covered that point.

That brings me to talk for a moment with respect to this doctrine of assumption of risk. The law says that an employee assumes the risks, not only of dangers arising from facts known to him, but also of such dangers attendant to his work as he might discover by the exercise of ordinary care for his own safety.

20      Another case has laid down the rule clearly in these words:

That the doctrine of assumption of obvious risks by the servant applies as well to those which arise or become known to the servant during the service as to those in contemplation at the time of his original hiring.

Another case, treating on the subject more fully, states:

30      That in the relation of master and servant, whatever may be the negligence of the master to exercise reasonable care to provide a safe place for the servant to perform his work in, or to provide safe appliances for him to do his work with, still, when the risks of danger arising are incidental to the employment and obvious to the servant, or discoverable by the exercise of reasonable and ordinary care on the part of

*Charge to Jury.*

the servant, the negligence of the master cannot be made the basis of an action for damages for injuries caused by such risks. In law they are assumed by the servant when he enters and continues in the employment.

Now, gentlemen, assumption of risk, as I have already stated, is a defense, and the burden of its establishment, if the defendant is to avail itself of it, rests upon the defendant, and it must make that out by the greater weight of the evidence. If it does make it out, under the rules which I have given, by the greater weight of the evidence, then your verdict would be for the defendant, no matter how guilty of negligence the defendant may be proved by the plaintiff to have been. 10

The next thing to which your attention must be directed is the doctrine of contributory negligence, of which this defendant has sought full advantage in this suit. 20

As I said a moment ago, if the plaintiff's negligence was the sole contributing cause of the accident, manifestly he could not recover anything, for the very obvious reason that he, being the sole cause of the accident, means he was solely responsible. If, however, the plaintiff contributed any part by his negligence to the production of the accident, then this act is applicable, by which I mean, if the parties were at the time of the injury both engaged in interstate commerce, and the Court has already instructed you that they were engaged in interstate commerce at the time, you would have to recall the section of the statute to which I directed your attention a moment ago, that: 30

*Charge to Jury.*

10 In all actions hereafter brought against any such common carrier by railroad, under or by virtue of the provisions of this act, to recover damages for personal injuries to an employee, 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 the negligence attributable to such employee.

In other words, gentlemen, you have to call to your aid your knowledge of arithmetic. You have got to say how much, what proportion, of the negligence is attributable to the defendant, if any; and, secondly, what proportion of negligence is attributable, if any, to the plaintiff.

20 Now, if the whole damage—and I use the sum merely for the purpose of illustration, not to indicate that I think that is the amount of damages at all, for I do not—were \$1,000, and suppose the plaintiff by his negligence contributed one-half and the defendant by its negligence contributed the other half, you can readily see that, under the method described under the statute, you must diminish the recovery in favor of the plaintiff to the extent to which his negligence contributed, and that would require you  
30 to subtract one-half, or \$500, from the sum total of the damages (which were \$1,000), and thus give to the plaintiff only a verdict of \$500, because that would be the proportion which he contributed, or, rather, the diminution of the damages, would bear to the entire damage alleged to have been suffered by him. And so, if he contributed one-third and the defendant two-thirds, then you would have to subtract one-

*Charge to Jury.*

third of the total damages from the sum of the damages and give a verdict for the other two-thirds in favor of the plaintiff if you feel that under the circumstances he would be entitled to it.

That, gentlemen, is based on the supposition that the defendant has shown by the greater weight of the evidence that the plaintiff contributed to this accident. 10

Of course, if you are satisfied from the greater weight of the evidence that the plaintiff did not contribute or was not negligent, that is, that he did not contribute to the negligence that was shown by the evidence to have existed, or if it is shown that he was not negligent, then you would give him the full amount you feel he is entitled to recover, and there would be no problem of arithmetic for you to engage in except to estimate the damages. In other words, if there was negligence as alleged in this case by the plaintiff, and this plaintiff in no way contributed to that negligence which was the proximate cause of the injury which he sustained, then whatever you estimate the damages to be he would be entitled to the full sum and nothing should be deducted. In other words, if you feel that he sustained damages to the extent of twenty or thirty or forty thousand dollars, whatever it may be, you would allow him the full sum if he were not negligent or if he did not contribute by his negligence to this accident. Of course, if he did contribute, why, then you would diminish it according to the amount which you feel he contributed to the 20 30

*Charge to Jury.*

sum total. So much on the doctrine of contributory negligence.

That brings us, last of all, to consider the question of damages generally, if the plaintiff is entitled to recover in this case.

10 I will now speak for a moment with respect to how to arrive at the sum total of damages to the plaintiff, whether due to the railroad company in part and to him in part, or due entirely to the railroad company.

The law says that compensation is the measure of damages, by which is meant, that the plaintiff is entitled to recover payment in money so far as money can be said to pay for all the damages which proximately resulted to him from the accident.

20 Entering into that, the compensation would be, first of all, payment for the pain and suffering, both mental and physical, which he has undergone in the past and which he will probably undergo in the future, for so long a time as you will find that he will probably undergo them.

30 Secondly, he would be entitled to recover compensation for all the expenditures, if any, to which he has been put, in an endeavor to alleviate his suffering or effect a cure from the injuries which were inflicted upon him, if any, that flowed proximately from this accident. I do not recall whether there was any sum mentioned to have been paid out for medical expenses or doctors' expenses, or any particular expense, but you will recall, and you will be guided by your own recollection. Of course, if there were none

*Charge to Jury.*

proved, you could allow none. If any were proved, you would be entitled to allow him the expenses which he has been put to, if that proof rises to the dignity of establishing the fact by the greater weight of the evidence.

Thirdly, he would be entitled to compensation for such time as he lost; in other words, loss of wages which proximately resulted to him from this accident, and for such as he will probably lose in the future, if any, for so long in the future as he has established by the greater weight of the evidence he will probably lose them. 10

And, fourthly, if he has suffered any impairment of his earning capacity, proximately caused by this accident, he would be entitled to be compensated for that, and when you arrive at a sum total, which represents the sums or the total amount of all the times that he has established by the greater weight of the evidence as were proximately caused by this accident, that sum would be the verdict that you would give him in this case, if under the rules which I have given you, he is entitled to a verdict. 20

Of course, if it has been proved by the greater weight of the evidence that he participated in whole or in part by his negligence in the production of the accident, then you must subtract that from the sum total; that is, the proportion which his negligence bears to the entire negligence, making that calculation, if there was any negligence, as I have before laid down. 30

So much for the rules which will guide you.

*Charge to Jury.*

I have been requested by the defendant to make certain charges:

1. The mere fact that an accident happened to the plaintiff does not entitle him to recover any damages against the defendant.

10 I so charge you. The mere fact that an accident happened does not entitle him to recover damages unless he can show negligence on the part of the defendant and that that negligence was the proximate cause of his injury.

20 2. Nothing can be allowed in this case for sympathy. The law by which I am bound, and by which you are bound, does not permit the allowance of any money by you because of any sympathy that you might have for the plaintiff, or prejudice, if any, that you might have against the defendant.

I so charge you.

The third request I will deny to charge as requested.

The fourth request I think I have already covered in my charge, therefore will not charge you further along the lines indicated.

30 The same applies to the fifth request. I don't think it is necessary under the rules that I have laid down.

The same applies to the sixth request, and I will not charge that.

The seventh request I refuse to charge.

The eighth request I refuse to charge.

*Charge to Jury.*

The ninth request I think is already covered, therefore I will not charge it.

10. The burden of proof is on the plaintiff to establish each phase of his case by the greater weight of the evidence. If he has failed to establish any part of his case by the greater weight of the evidence, then he cannot recover and your verdict must be for the defendant. 10

I so charge you.

11. Even if the plaintiff was engaged in interstate commerce at the time of the accident, he cannot recover if he has failed to prove by the greater weight of the evidence that the defendant was negligent, as alleged in the complaint, and that the defendant's negligence was the proximate cause of the accident. If he has failed to prove either of these propositions, then he cannot recover, and your verdict must be for the defendant. 20

I think I have covered that, but I reiterate it.

12. Even if the plaintiff has proved by the greater weight of the evidence that the defendant was negligent, still he cannot recover if he has failed to prove that the defendant's negligence was the proximate or efficient cause of the accident. The burden is on him to establish this proposition, and if he has failed to do so, or if you find that the evidence is evenly balanced, he cannot recover and your verdict must be for the defendant. 30

That is so, gentlemen, but the greater weight of the evidence does not mean the greater number of witnesses on the one side or on the other;

*Charge to Jury.*

10 it can probably be explained in a general way by saying that it means quality rather than quantity of the evidence which is produced. The mere fact that one side will bring in twice the number of witnesses that the other side brings in to offer a defense or to present a case does not indicate that truth is lodged on the side of the greater number of witnesses. Bearing that in mind, gentlemen, you may take this request with the instructions I have given you and draw your inferences accordingly.

The thirteenth request I will deny.

20 14. The defendant cannot be chargeable with negligence in this case because the headlight on the locomotive was not lighted at the time of the accident. It does not appear that it was customary to have the engine headlight lighted when an engine was entering the round house; furthermore, it appears that there were arc lights inside and outside of the round house and the plaintiff testified that he saw the engine on the turntable prior to the time he opened the doors for that engine; so that even if the headlight on the engine was not lighted, that was not the proximate cause of this accident.

30 That, gentlemen, I think is so. There is testimony that there were lights inside and lights outside. The hostler who operated this engine at the time said he could see very clearly, saw the two men in front, and said he received their signal.

*Charge to Jury.*

15. The defendant cannot be charged with negligence in this case because the headlight on the locomotive was not lighted.

The sixteenth request I will charge as requested:

I so charge you.

16. The plaintiff cannot recover under the Act of Congress under which this suit is brought if you find that he assumed the risk of the injury which he received. 10

I have already charged that.

17. The rule is well settled that under the Act of Congress under which this suit is brought, a servant such as the plaintiff assumes the extraordinary risks, as well as the ordinary risks, incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. 20

I so charge you.

18. It is an obvious fact that many occupations, as, for example, a powder mill operator, a structural iron worker, a diver, a blaster and a worker on a railroad, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment he knows and takes upon himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. 30

I so charge you.

19. It is also obvious that even where a railroad operates its tracks in the usual and ordi-

*Charge to Jury.*

10 nary manner, railroad men are necessarily subject to great risks. Their very occupation is one of constant peril. It follows from the nature of such employment that they assume the risks which ordinarily and customarily occur in the doing of the work in the usual and customary manner; and such has been the reasonable holding of the law.

I so charge you.

20. If you find that the risk of the injury which the plaintiff received was assumed by the plaintiff when he entered the defendant's employ, then the plaintiff cannot recover and your verdict must be for the defendant.

I so charge you.

20 21. The plaintiff was bound to exercise reasonable care for his own safety. Reasonable care is such care as a reasonably prudent and cautious man would use under the circumstances. If the plaintiff did not use that degree of care and his negligence was the sole proximate cause of the accident, he cannot recover, and your verdict must be for the defendant.

30 I so charge you. I think I have indicated to you, gentlemen of the jury, that if this accident arose solely from the negligence of the plaintiff he cannot recover, but if it arose from the negligence of the defendant, he can recover. Of course, if he contributed by his negligence to the accident, then under the rules I have laid down to you his recovery would be reduced in proportion to the amount which he contributed.

*Charge to Jury.*

22. The Act of Congress under which this suit is brought provides that "the fact that an employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." This means that where the causal negligence, that is, the negligence that caused the accident, is partly attributable to the employee and partly to the company, the employee shall not recover full damages for the injuries sustained but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the company bears to the entire negligence attributable to both. In short, if you find that the accident was due in part to the negligence of the plaintiff himself and in part to the negligence of the defendant, then the plaintiff can only recover that proportion of the damage which was due to the defendant's negligence.

That has been covered several times in my instructions to you, gentlemen of the jury.

23. In determining the amount of damages, if any, to which the plaintiff may be entitled, the jury are not allowed to consider the amount which they or any of them would be willing to accept for a similar injury; the amount of the damages, if any, must be determined solely by reference to the evidence and must be limited to such sum as will give the plaintiff in his station of life reasonable compensation for the injury he has sustained.

I so charge you.

*Charge to Jury.*

24. The fact that the attorney for the plaintiff has sued for a certain amount in this case is not an indication of what amount, if any, the plaintiff may be entitled to. The plaintiff's attorney could name any amount he pleased in the complaint as the amount sued for. The only  
10 purpose of naming an amount is that it fixes that as a limit beyond which the jury cannot go in assessing damages, if they come to that question. You must be governed entirely by the evidence as to what amount, if any, you will allow the plaintiff in this case.

I so charge you.

25. There has been a motion made by counsel for the defendant to me to direct a verdict in favor of the defendant. That motion and the  
20 ruling on it by me is not to be considered by you in arriving at your verdict. It does not indicate that your verdict should be for the plaintiff or even my view of the facts in the case. My ruling on that motion was merely a ruling of law that there were disputed questions of fact for you to decide. It does not decide the facts, for you are the judges of disputed questions of fact. You have the right to find in favor of the defendant even though I denied that  
30 motion.

I will add to that request, and it is for you to decide who, under the evidence, applying thereto the law as expressed by the Court, is entitled to your verdict. You have the right to find in favor of the defendant if you feel from the evidence that it is entitled to a verdict. Of course, if the evidence shows that the defendant is not entitled

*Defendant's Exceptions to Charge.*

to a verdict, then you will not return a verdict for it.

You may now take the case, gentlemen, and return a verdict as you find the evidence warrants.

## THE JURY RETIRES.

10

Mr. Markley: I respectfully except to the modification which your Honor made of my request number one.

Also except to the refusal of the Court to charge request number three, and individually except to your Honor's refusing each of the following requests: numbers four, five, six, seven, eight, nine, thirteen.

Exception to your Honor leaving to the jury each of the allegations of negligence contained in the complaint, because with respect to one or more of them, it is my contention that there was no evidence to support them. For instance, leaving to the jury to determine whether the engine was operated at a safe rate of speed; whether there were suitable and proper brakes and appliances on the engine; failure to give warning of the movement of the engine; failure to control the engine.

20

30

Exception to that part of your Honor's charge in which you instructed the jury as a matter of law that both the plaintiff and the defendant were engaged in interstate commerce at the time of the accident.

Exception to that part of the charge wherein your Honor said that the defendant would be

*Defendant's Requests to Charge.*

liable to the plaintiff in this case if the accident was due in whole or in part to any negligence on the part of the defendant.

10 Exception to that part of the charge in which your Honor let the jury determine whether or not the plaintiff should have any recovery for any expenditures attributable to the accident.

## DEFENDANT'S REQUESTS TO CHARGE.

1. The mere fact that an accident happened to the plaintiff does not entitle him to recover any damages against the defendant.

20 2. Nothing can be allowed in this case for sympathy. The law by which I am bound, and by which you are bound, does not permit the allowance of any money by you because of any sympathy that you might have for the plaintiff or prejudice, if any, that you might have against the defendant.

30 3. In deciding whether or not the defendant is liable in this case, you are limited to the allegations contained in the complaint. In the complaint it is alleged that at the time of the accident the plaintiff was employed in and the defendant was engaging in interstate commerce. If the plaintiff has failed to prove that allegation then he cannot recover and your verdict must be for the defendant.

4. In determining whether at the time of the accident the plaintiff was employed in and the defendant was engaging in interstate commerce, the test is whether the particular work upon

*Defendant's Requests to Charge.*

which the employee was engaged at the time of the accident was a part of the interstate commerce in which the carrier was engaged.

5. An engine as such is not permanently devoted to any kind of commerce. It may at one time be engaged in interstate commerce between two or more States and at another time it may be engaged in intrastate commerce wholly within the territorial limits of one particular State; and still on another occasion it may be out of commerce altogether, as, for instance, where it is in the round house undergoing repairs without any assignment for the hauling of any train. 10

6. In this case it appears without dispute that the only work which the plaintiff was doing at the time the accident happened was to assist in opening the doors of stall No. 13 of the round house at Secaucus so that engine No. 1592 might enter. It appears without dispute that the fires of this engine had been removed on the ashpit and that it had been turned on the turntable preliminarily to going into the round house, where it was to undergo repairs which have been testified to. That was on the evening of February 28, 1925, about eight o'clock. It remained at the round house until March 2, 1925, when it was first given an assignment to pull a certain train. In the doing of the work which he was doing at the time of the accident, was the plaintiff engaged in interstate commerce? If he was not, then the plaintiff cannot recover and your verdict must be for the defendant. 20 30

7. The fundamental question to be now decided on the interstate phase of the case is

*Defendant's Requests to Charge.*

10 whether the engine for which the plaintiff was opening the doors of the round house stall was engaged in interstate commerce at the time of the accident. If it was not, then he was not engaged in interstate commerce and he does not come under the Act of Congress under which the suit is brought, but under another statute of the State of New Jersey which is enforced in another court and with which we have nothing to do here. And in the event that you find that that engine was not engaged in interstate commerce, you will bring in a verdict for the defendant.

20 8. In short, the test which you are to apply in determining whether the plaintiff in this case comes under the Federal statute under which this suit is brought is, was the plaintiff, at the time of the happening of the accident to him, engaged in interstate commerce; not whether he was engaged in work of an interstate nature some time prior to the accident. If he was not engaged in interstate commerce at the time of the accident then he cannot recover in this action and your verdict must be for the defendant.

30 9. If you find that the plaintiff was not engaged in interstate commerce at the time of the accident that will end your consideration of this case because then your verdict will be for the defendant and you do not have to consider the other questions which would be involved if he was engaged in interstate commerce.

10. The burden of proof is on the plaintiff to establish each phase of his case by the greater weight of the evidence. If he has failed to estab-

*Defendant's Requests to Charge.*

lish any part of his case by the greater weight of the evidence, then he cannot recover and your verdict must be for the defendant.

11. Even if the plaintiff was engaged in interstate commerce at the time of the accident he cannot recover if he has failed to prove by the greater weight of the evidence that the defendant was negligent, as alleged in the complaint, and that the defendant's negligence was the proximate cause of the accident. If he has failed to prove either of these propositions, then he cannot recover and your verdict must be for the defendant. 10

12. Even if the plaintiff has proved by the greater weight of the evidence that the defendant was negligent, still he cannot recover if he has failed to prove that the defendant's negligence was the proximate or efficient cause of the accident. The burden is on him to establish this proposition and if he has failed to do so, or if you find that the evidence is evenly balanced, he cannot recover and your verdict must be for the defendant. 20

13. The defendant cannot be charged with negligence in this case because it failed to ring the engine bell or blow the engine whistle at the time of the accident. There is no evidence that it was customary to either ring the engine bell or blow the engine whistle when a locomotive was about to enter the round house, and in the absence of any custom or practice to do so the defendant cannot be chargeable with negligence for failing to do so. 30

*Defendant's Requests to Charge.*

10 14. The defendant cannot be chargeable with negligence in this case because the headlight on the locomotive was not lighted at the time of the accident. It does not appear that it was customary to have the engine headlight lighted when an engine was entering the round house; furthermore, it appears that there were are lights inside and outside of the round house, and the plaintiff testified that he saw the engine on the turntable prior to the time he opened the doors for that engine; so that even if the headlight on the engine was not lighted, that was not the proximate cause of this accident.

15. The defendant cannot be charged with negligence in this case because the headlight on the locomotive was not lighted.

20 16. The plaintiff cannot recover under the Act of Congress under which this suit is brought if you find that he assumed the risk of the injury which he received.

30 17. The rule is well settled that under the Act of Congress under which this suit is brought a servant such as the plaintiff assumes the extraordinary risks, as well as the ordinary risks, incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him.

18. It is an obvious fact that many occupations, as, for example, a powder mill operator, a structural iron worker, a diver, a blaster and a worker on a railroad, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment he

*Defendant's Requests to Charge.*

knows and takes upon himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment.

19. It is also obvious that even where a railroad operates its tracks in the usual and ordinary manner, railroad men are necessarily subject to great risks. Their very occupation is one of constant peril. It follows from the nature of such employment that they assume the risks which ordinarily and customarily occur in the doing of the work in the usual and customary manner, and such has been the reasonable holding of the law. 10

20. If you find that the risk of the injury which the plaintiff received was assumed by the plaintiff when he entered the defendant's employ, then the plaintiff cannot recover and your verdict must be for the defendant. 20

21. The plaintiff was bound to exercise reasonable care for his own safety. Reasonable care is such care as a reasonably prudent and cautious man would use under the circumstances. If the plaintiff did not use that degree of care and his negligence was the sole proximate cause of the accident, he cannot recover and your verdict must be for the defendant. 30

22. The Act of Congress under which this suit is brought provides that "the fact that an employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in propor-

*Defendant's Requests to Charge.*

10 tion to the amount of negligence attributable to such employee." This means that where the causal negligence, that is, the negligence that causes the accident, is partly attributable to the employee and partly to the company, the employee shall not recover full damages for the injuries sustained, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the company bears to the entire negligence attributable to both. In short, if you find that the accident was due in part to the negligence of the plaintiff himself and in part to the negligence of the defendant, then the plaintiff can only recover that proportion of the damage which was due to the defendant's negligence.

20 23. In determining the amount of damages, if any, to which the plaintiff may be entitled, the jury are not allowed to consider the amount which they or any of them would be willing to accept for a similar injury; the amount of the damages, if any, must be determined solely by reference to the evidence and must be limited to such sum as will give the plaintiff in his status of life reasonable compensation for the injury he has sustained.

30 24. The fact that the attorney for the plaintiff has sued for a certain amount in this case is not an indication of what amount, if any, the plaintiff may be entitled to. The plaintiff's attorney could name any amount he pleased in the complaint as the amount sued for. The only purpose of naming an amount is that it fixes that as a limit beyond which the jury cannot go in

*Defendant's Requests to Charge.*

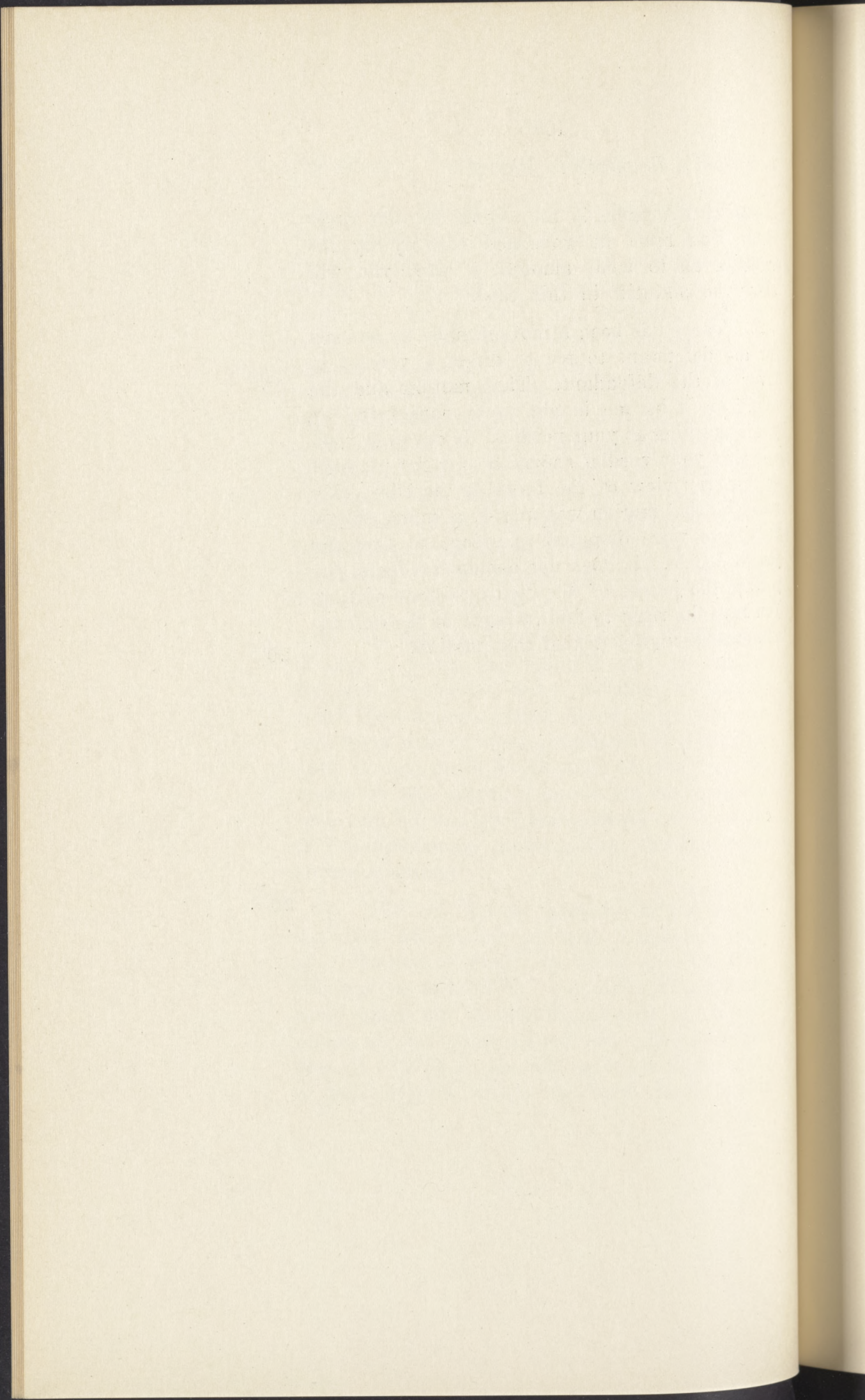
assessing damages, if they come to that question. You must be governed entirely by the evidence as to what amount, if any, you will allow the plaintiff in this case.

25. There has been a motion made by counsel for the defendant to me to direct a verdict in favor of the defendant. That motion and the ruling on it by me is not to be considered by you in arriving at your verdict. It does not indicate that your verdict should be for the plaintiff or even my view of the facts in the case. My ruling on that motion was merely a ruling of law that there were disputed questions of fact for you to decide. It does not decide the facts, for you are the judges of disputed questions of fact. You have the right to find in favor of the defendant, even though I denied that motion.

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*Opinion of Supreme Court.*

**OPINION.**

Filed November 23, 1926.

NEW JERSEY SUPREME COURT.

No. 57, May T., 1926.

ALFONSO ILLONARDO, <i>vs.</i> ERIE RAILROAD CO.	}	<i>Appeal from          Hudson          Circuit          Court.</i>	10
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Argued before Gummere, Chief Justice, and Justices Trenchard and Minturn.

For the appellant, Edward A. Markley and Charles W. Broadhurst.

For the respondent, Alexander Simpson. 20

The opinion of the court was delivered by GUMMERE, C. J.

The plaintiff was employed as a common laborer at the round-house of the defendant company at Secaucus used by the defendant both in interstate and intrastate commerce. While he was engaged in this work a crippled engine was brought to the round-house for the purpose of having repairs made to it; and he was called upon to assist in opening one of the doors of the building in order to admit the engine. While assisting in doing this, and before the door was entirely opened, the engine which had come to a stop some fifteen or twenty feet away, was started up without warning to the plaintiff, crashed into the door and severely injured him. These facts were undisputed. The present suit is brought under the Federal Employers' Liability Act to recover compensation for the in- 30 40

*Opinion of Supreme Court.*

juries that he received. The trial resulted in a verdict in favor of the plaintiff; and from the judgment entered thereon the defendant had appealed.

10 The first ground upon which we are asked to reverse this judgment is that the trial court committed error in charging the jury as a matter of law that the plaintiff was engaged in interstate commerce at the time of the accident. The pith of this contention is that, under the evidence, the question whether the plaintiff was then engaged in interstate or intrastate commerce was one of fact, to be determined by the jury; and that the ruling was not only erroneous, but was harmful, for the reason that if the jury should have found that the plaintiff was engaged in the latter kind of commerce at the time  
20 of the accident, there could be no recovery by him under the Federal statute, his sole remedy in that case being under our Workmen's Compensation Act. We consider that the judicial action which is the subject of this complaint was entirely justified. The theory of counsel for the defendant seems to be that the character of the plaintiff's employment at the time of the accident depended upon whether the engine  
30 which inflicted the injury upon him was at that time engaged in interstate commerce; the testimony showing the contrary to be the fact. But this theory is not sound. The plaintiff had nothing to do with the management of the engine or with its repair. He was a round-house employee, and that building was used indiscriminately both in interstate and intrastate commerce. In this respect the case is similar in its legal aspect to that of *Grybowski v. Erie R. R. Co.*, 88 N. J. L. 1; affirmed 89 N. J. L. 361.  
40 In the cited case the plaintiff's intestate was an

*Opinion of Supreme Court.*

employee of the defendant company at its ash-pit in the terminal yard at Jersey City. This pit was intended to be and was in fact used both by engines engaged in interstate commerce and by those engaged in intrastate commerce. A part of the duty of plaintiff's decedent as such employee was to clean out from time to time the ashes which accumulated in the pit. He had been doing this work, and had just come out of the pit, when he was run over and killed by a locomotive of the defendant company. It was held that a person who is employed by a railroad company in maintaining the effectiveness of a part of the railroad's plant which is used in both interstate and intrastate commerce is entitled to maintain an action under the Federal Employers' Act when injured while engaged in such employment. A round-house is as much a part of a railroad company's plant as its ash-pit; and a person whose employment requires him to assist in opening the doors of a round-house for the admission of locomotives is as much engaged in maintaining the effectiveness of this part of the railroad company's plant as is a man whose duty requires him to clean out the ash-pit of the company in order to maintain its effectiveness.

Next, we are asked to reverse because of the action of the trial court in overruling certain questions which were asked by counsel for the defendant with the object of showing that the plaintiff had filed a petition with the Workmen's Compensation Court of the State, wherein he prayed that he might be compensated under the Workmen's Compensation Act, and that the defendant company had filed an answer to that petition, wherein it admitted that the plaintiff was entitled to compensation under that statute.

*Opinion of Supreme Court.*

10 We find no error in this judicial ruling. If the defendant had desired to prove the contents of such a petition and answer, the proper method of doing so was to have produced those pleadings from the files of the Workmen's Compensation Bureau, or duly certified copies thereof, and to have offered them in evidence. Parol testimony as to their contents was inadmissible unless the pleadings or certified copies thereof could not have been obtained and that fact was made known to the trial court.

20 The next contention is that the court erred in refusing to charge certain requests, each of which was based upon the theory that it was for the jury to say whether or not the plaintiff and the defendant were engaged in interstate commerce at the time of the happening of the accident. We consider that these requests were properly refused, for the reasons upon which our conclusion with relation to the first ground for reversal is based.

30 Lastly, we are asked to reverse this judgment because the trial court, as counsel claims, erred in refusing to instruct the jury that the defendant company could not be charged with negligence for failing to ring a bell or blow a whistle at the time of the accident, as there was no evidence that it was customary to do either the one or the other of these things when a locomotive was about to enter the round-house. In our opinion, this request was properly refused. It was quite immaterial what the usual custom was with regard to the ringing of the bell or the blowing of the engine whistle, under normal conditions, as an engine was about to enter the round-house. The question for the consideration  
40 of the jury in the present case was whether the

*Opinion of Supreme Court.*

engineer knew that the plaintiff was opening the round-house door, and, if so, then whether he ought not to have used care to ascertain whether, by running his engine into the round-house before the door thereof was entirely opened he would thereby jeopardize the safety of the plaintiff. And, if that fact was apparent, then it was for the jury to say whether he was not under a duty to give notice to the plaintiff of his intended movement of the engine either by the blowing of the whistle or the ringing of the bell (although neither of those things was done under normal conditions), or by taking some other precaution for his protection against injury which might otherwise result to him. 10

For the reasons stated, the judgment under review will be affirmed. 20

30

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*Judgmetn of Affirmance.*

**JUDGMENT OF AFFIRMANCE.**

Filed November 26, 1926.

NEW JERSEY SUPREME COURT.

10

ALFONSO ILLONARDO,  
*Plaintiff-Respondent,*

*vs.*

ERIE RAILROAD COMPANY, a cor-  
poration,  
*Defendant-Appellant.*

*Action  
at Law.*

*Order on  
Affirmance of  
Judgment.*

20

This cause having been duly argued at the May Term, 1926, of this Court by Edward A. Markley and Charles T. Broadhurst, Esqs., of counsel for the defendant-appellant, and Alex. Simpson, Esq., of counsel for the plaintiff-respondent, and the Court having considered the same and finding no error in the record or proceedings in the Hudson County Circuit Court;

30

It is thereupon, on this 26th day of November, 1926, ordered and adjudged that the judgment of the Hudson County Circuit Court removed by the appeal in this cause, be affirmed with costs; and that the record to be proceeded with in accordance with this judgment and the practice of said court.

Entered November 26, 1926.

On motion of

ALEX. SIMPSON,  
Attorney for Plaintiff-Respondent.

40

*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed December 6, 1926.

NEW JERSEY SUPREME COURT.

ALFONSO ILLONARDO,	}	<i>Action at Law.</i>	10
<i>Plaintiff-Respondent,</i>			
<i>vs.</i>			
ERIE RAILROAD COMPANY, a corporation,	}	<i>Notice of Appeal.</i>	
<i>Defendant-Appellant.</i>			

To Alexander Simpson, Esq., attorney for plaintiff-respondent.

SIR: 20

TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Respectfully,

COLLINS & CORBIN,  
Attorneys of Defendant-Appellant.

Dated, December 3, 1926. 30

Service acknowledged December 4, 1926.

ALEX. SIMPSON,  
Attorney of Respondent.

*Grounds of Appeal.*

**GROUND OF APPEAL.**

Filed December 15, 1926.

**New Jersey Court of Errors and Appeals**

10	<p>ALFONSO ILLONARDO, <i>Plaintiff-Respondent,</i>  <i>vs.</i>  ERIE RAILROAD COMPANY, a corporation, <i>Defendant-Appellant.</i></p>	}	<p><i>Action at Law.</i>  <i>On Appeal from New Jersey Supreme Court.</i>  <i>Grounds of Appeal.</i></p>
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20 The appellant states the following grounds of appeal:

1. The Supreme Court of New Jersey erred in giving judgment for the plaintiff-respondent instead of for the defendant-appellant for some one or more of the grounds of appeal urged in said Supreme Court.

Respectfully,

30 COLLINS & CORBIN,  
Attorneys of Defendant-Appellant.

Dated, December 4, 1926.

Service acknowledged December 15, 1926.

ALEX. SIMPSON,  
Attorney of Respondent.

40

## New Jersey Court of Errors and Appeals

ALFONSO TALLONARDO, <i>Plaintiff-Respondent,</i>	}	<i>Action at Law.</i>
<i>vs</i>		<i>On</i>
ERIE RAILROAD COMPANY, a cor- poration, <i>Defendant-Appellant.</i>	}	<i>Defendant's Appeal from New Jersey Supreme Court.</i>

### BRIEF IN BEHALF OF THE ERIE RAIL- ROAD COMPANY, DEFENDANT- APPELLANT.

(1)

#### Statement of the Case.

This appeal brings before this Court for review a judgment of the Supreme Court affirming the judgment of the Hudson County Court of Common Pleas for \$20,000 in an action wherein the plaintiff brought suit to recover damages for personal injuries sustained by him on February 28, 1925, while employed by the defendant as a common laborer at its roundhouse at Secaucus, Hudson County, New Jersey (p. 2). Suit was brought under the Federal Employers' Liability Act and the plaintiff alleged that he and the defendant at the time of the accident were engaged in interstate commerce (p. 2). At the close of the case counsel for the defendant moved for a direction of verdict on various grounds (p. 81). This motion was denied and an exception duly noted (p. 82). The case was submitted to the jury and they brought in a verdict as stated (p. 6), and judgment in the Common Pleas Court was entered thereon. Appeal was then taken by

the defendant to the New Jersey Supreme Court which affirmed the judgment in an opinion of the May term, 1926, written by Gummere, *C. J.* It is from the judgment of affirmance of the Supreme Court that the present appeal is taken (pp. 116, 117).

(2)

**Grounds of Appeal.**

There is but one ground of appeal, namely, that the Supreme Court erred in giving judgment for the plaintiff-respondent instead of for the defendant-appellant for some one or more of the grounds of appeal urged in the Supreme Court (p. 118).

The grounds of appeal in the Supreme Court (p. 12) were directed:

- (a) To the refusal of the trial court to direct a verdict in favor of the defendant;
- (b) To the overruling of certain questions; and
- (c) To errors in the charge of the trial judge to the jury.

(3)

**BRIEF OF THE ARGUMENT.**

**Prefatory Statement.**

The brief for the defendant-appellant in the Supreme Court fully covered the questions involved in the grounds of appeal and we shall therefore present it verbatim to this Court, and at the conclusion of the argument we shall discuss the reasons advanced in the opinion of the Supreme Court for affirming the judgment for the purpose of indicating wherein we think the Supreme Court erred.

## I.

The trial court erred in charging the jury as a matter of law that the plaintiff was engaged in interstate commerce at the time of the accident and that therefore the case was governed by the Federal Employers' Liability Act.

This suit is brought under the so-called Federal Employers' Liability Act of April 22, 1908 (8 U. S. Comp. Stat. 1916, p. 9388, Sec. 8657), and the complaint alleges that the plaintiff and the defendant were both engaged in interstate commerce at the time of the accident. The law is settled that the burden of proof to show the application of the Federal statute rests upon the plaintiff.

*New Orleans, &c. R. Co. v. Harris*, 247 U. S. 367;

*Philadelphia & Reading R. R. Co. v. Polk*, 256 U. S. 322;

*Lincks v. Erie R. R. Co.*, 91 N. J. L. 166;

*Carberry v. D., L. & W. R. R. Co.*, 93 N. J. L. 414.

The United States Supreme Court has repeatedly held that the true test to be applied in determining whether the Federal act applies to any given case is the nature of the work being done at the time of the injury and the mere expectation that the plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act.

*Erie R. R. Co. v. Welsh*, 242 U. S. 303, 306;

*Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 478;

*Lincks v. Erie R. R. Co.*, 91 N. J. L. 166.

We contend that, to say the least, the question whether or not the plaintiff was engaged in interstate commerce at the time of the accident was one of fact to be submitted to and decided by the jury. The trial court withdrew that question entirely from their consideration and instructed them as a matter of law that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident and that therefore the case was governed by the Federal act (p. 84, ll. 10-20). The trial court said (p. 84, ll. 15-20):

“You will take it as the law laid down by the court that at the time of the happening of this injury both parties were engaged in interstate commerce.”

Exception was duly noted to this binding instruction of the trial court to the jury that the Federal act was applicable (p. 101, ll. 30-35) and that exception is preserved in the fourth ground of appeal (p. 15, ll. 20-25). In addition, the defendant submitted certain requests to the trial court wherein the question whether the plaintiff was engaged in interstate commerce was submitted to the jury for its consideration and those requests were denied (see requests numbered 4, 5, 6, 7, 8 and 9; p. 103, *et seq.*). The denial of those requests to charge was duly excepted to (p. 101, ll. 10-20), and those exceptions are preserved in the grounds of appeal numbered 11 to 16, inclusive (p. 18, l. 30, *et seq.*). Finally, the defendant moved for a direction of verdict on the ground that the evidence was undisputed that neither the plaintiff nor the defendant was engaged in interstate commerce at the time of the accident and that the plaintiff's right to compensation as against the defendant was under the Workmen's Compensation Act of the State of New Jersey. That motion was

denied and an exception was noted, and it is preserved in the second ground of appeal (p. 12, l. 30, *et seq.*; p. 81, l. 10, to p. 82, l. 15).

However, since a reversal of the judgment will follow if the trial court erred in not leaving the question of interstate commerce to the jury as a question of fact, it is not necessary to establish in this court at this time that the plaintiff was engaged in interstate commerce as a matter of law.

Where fair-minded men might honestly differ as to the conclusions from the facts, whether controverted or uncontroverted, the question at issue is for the jury.

*Bennett v. Busch*, 75 N. J. L. 240;

*McCarthy v. Metropolitan Life Ins. Co.*,  
75 N. J. L. 887;

*More-Jonas Glass Co. v. West Jersey &  
S. R. Co.*, 76 N. J. L. 708.

To render it error to decide a question of fact as a matter of law, it is not necessary that the facts themselves be in dispute, but if the inference from undisputed facts is one as to which there may reasonably be an honest difference of opinion, it is for the jury, not the court, to draw the same.

*Weston v. P. R. R. Co.*, 74 N. J. L. 484;

*Nolan v. Bridgeton Traction Co.*, 74 N. J.  
L. 559;

*Hummer v. L. V. R. R. Co.*, 74 N. J. L.  
196;

*Bower v. Bower*, 78 N. J. L. 387;

*Carroll v. Central R. R. Co. of N. J.*, 80  
N. J. L. 403.

We contend that, to say the least, the question whether or not the plaintiff was engaged in interstate commerce at the time of the accident was

one of fact for a jury to pass upon, because the inferences to be drawn from the facts were such that reasonable men might honestly differ with respect thereto, and therefore the court erred in deciding as a matter of law that the plaintiff and the defendant were engaged in interstate commerce.

(a)

**The Facts.**

The plaintiff testified that he was employed by the defendant as a common laborer. He was supposed "to do all kinds of work" (p. 34, ll. 15-30). On the day of the accident, February 28, 1925, he was at the roundhouse at Secaucus when he was called by Tantullo, the turntable operator, who said, "Please help me out" (p. 35, ll. 1-10). Tantullo was trying to open the doors leading to one of the dead tracks in the roundhouse for the purpose of storing an engine which had its day's work completed and its fires drawn, the purpose of putting the engine on the dead track being so that it might be repaired. Tantullo so testified (p. 29, l. 25, to p. 30, l. 10). The plaintiff testified that he helped to open both doors of the particular stall. The right door entering the roundhouse was opened first and Tantullo and the plaintiff succeeded in getting that door open all the way. Then the two men went to open the other door (p. 39, ll. 20-40). The engine was on the turntable at the time, about fifteen feet away (p. 40, ll. 10-30). As they were pushing and pulling to open the second door on the left as you enter the stall, the engine for some unaccountable reason, according to the plaintiff, struck that door as it was about to enter the roundhouse (p. 41, ll. 1-30; p. 36, ll. 10-20).

Menicke, the engine hostler, who operated the engine, testified that he boarded the engine on the ashpit about 150 feet from the turntable. It was not attached to any train, the fires had been drawn and there was just enough steam to get it into the engine house (p. 58, ll. 1-20). He got on the engine at the ashpit and operated it to and on the turntable, where it came to a complete stop, although he did not get off the engine. The turntable turned the engine so that it was in direct line with stall 13 of the roundhouse (p. 58, ll. 20-40). The turntable was operated by Tantullo. After the engine was turned on the turntable it was in a direct line with stall 13 (p. 59, ll. 1-15). The head end of the engine as it stood on the turntable was about 65 feet from the doors of stall 13 and the doors were closed (p. 59, ll. 10-20).

Tantullo then looked at the rails of the turntable to see that they were in direct line with the track leading to stall 13 and then he gave a signal to Menicke to come off the turntable. As he gave that signal he ran up to the roundhouse to open the doors, which were latched from the inside. Menicke operated the engine from the turntable, the rear end of the tender being still on the turntable, when he stopped the engine to await the signal to proceed into the roundhouse after the doors were open. He stopped the engine fifteen feet from the doors of the stall. He was on the right-hand side of the engine. He testified that the two men opened the left-hand door first, although he could not tell whether the door was all the way back, because the front end of his engine obstructed his view of the left-hand door as you enter. So far as he could see, it was all the way open. Twenty-five feet of the length of the engine was in front

of him as he sat in the cab and the engine was twelve feet wide (p. 60, ll. 1-30). Tantullo and the plaintiff then proceeded to open the door on the right side, and after it was opened all the way the plaintiff started to walk toward the left-hand side of the engine on the front end and Tantullo gave him a signal to go ahead. He started the engine, and as it reached the doors he heard it strike against the left-hand door and immediately stopped the engine. As he was stopping he saw one of the men run across in front of his engine and he immediately applied his brakes (p. 61, ll. 1-30).

Maxwell testified that he was the roundhouse foreman on the day of the accident. He produced the work sheet for the repairs that were made on the engine in question and testified to them in detail. The sand pipes had to be opened up, the left main wedge of the engine had to be set up, the front end of the tank was leaking and had to be repaired, the engine truck wheels had one inch lateral play which had to be taken out, the pilot coupler bolts were loose and had to be tightened, the cross-over of number two boiler had to be braced, also the frame stud was loose and had to be braced, the engine pilot beam step was bent and the air pipe clamp over the main reservoir on the left side had to be repaired. After the accident and while the engine was in stall 13, all of these repairs were made, the engine going into the roundhouse on February 28, 1925, and leaving the roundhouse on March 2, 1925, two days later (p. 46, l. 20, to p. 47, l. 10).

Quinn, engine dispatcher, said that the engine in question, 1592, went into the roundhouse on February 28 and was ordered out for work on February 28, at 8:45 A. M. for the run known

as the Montclair Drill. It came back and went into the roundhouse on February 28 and remained there until March 2. He said, "After these repairs this engine could be assigned to any number of different jobs and until it was actually assigned it was out of commerce altogether." While undergoing repairs it would have no assignment. After it was repaired it might do purely local work in Jersey City or in some other part of the State (p. 51, l. 10, to p. 52, l. 20).

Laizure, chief mechanical officer at the roundhouse, testified that when this particular engine, 1592, had its fires drawn and entered the roundhouse on the night of February 28, 1925, and went into an empty stall known as No. 13 to be repaired, it would have no assignment of any kind. It could not be assigned to any run until after the repairs were made. After the repairs were made it would be reported as ready for work to the engine dispatcher and he could assign it to any job he desired (p. 72, l. 30, to p. 73, l. 30). He further testified that until Quinn, the dispatcher, called for it on the morning of March 2 it was entirely out of service (p. 73, l. 40, to p. 74, l. 10). It might be assigned after repairs to pull a pay car to Newark or to pull intrastate cabooses to Hackensack; in short, any service within the State of New Jersey. It was the type of engine that never left the State of New Jersey except for general repairs (p. 74, l. 30, to p. 75, l. 10).

Lee, general foreman of the roundhouse, testified to the same effect (p. 78, l. 20, to p. 79, l. 30).

It therefore appears without dispute that the plaintiff, a common laborer, whose duty it was to perform any job he might be called upon to

do, at the time of the accident was opening the door of stall 13 of the roundhouse so that engine 1592, which had its fires drawn and no assignment for any work, might go on the empty track 13 to have numerous repairs made thereto, the engine being entirely out of commerce of any kind at the time, and for two days after the accident happened. This is the only work the plaintiff was doing at the time, namely, assisting in opening the doors of the stall for the specific purpose stated, and it is our contention that in the doing of that work he was not engaged in interstate commerce.

This case is not that of repairing appliances permanently devoted to commerce among the States, such as a track, a building or a bridge. An engine or cars as such are not permanently devoted to any kind of traffic.

In *Minneapolis & St. Louis Ry. Co. v. Winters*, 242 U. S. 356, it is pointed out that engines differ from other appliances or things used by carriers indiscriminately in both kinds of commerce.

In the *Winters* case the facts were that the plaintiff was making repairs upon an engine which had been used in hauling freight trains over the defendant's line and the freight trains so hauled were both intrastate and interstate, and the engine was so used after the plaintiff's injury. The accident happened on October 21, 1912, Marshalltown, Iowa. The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on March 21, after the accident, to pull a freight train out from the same place, held:

“In the present case the facts upon which the act of Congress was supposed to apply are stated and were agreed, so that although,

for the reasons that we have stated, an error on that point would not entitle the defendant to a new trial, it necessarily must be determined whether they show a foundation for the attempt to come here upon the questions that were reserved. The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over the defendant's line \* \* \* which freight trains hauled both intrastate and interstate commerce, and \* \* \* it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go out. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

Following the decisions of the United States Supreme Court, this Court has likewise held that the test of whether an action for compensation is properly brought under the Federal Employers' Liability Act is whether or not the particular work upon which the employee was en-

gaged at the very time of the accident was a part of the interstate commerce in which the carrier was engaged. *Lincks v. Erie R. R. Co.*, 91 N. J. L. 166.

In that case this Court, speaking through Gummere, *C. J.*, at p. 168, said:

“Congress has not imposed upon the carrier liability to the employee merely because the general work of the latter involves both interstate and intrastate commerce. The test is whether the particular work upon which the employee was engaged at the very time of the accident was a part of the interstate commerce in which the carrier was engaged. The fundamental question to be now decided, therefore, is whether the engine upon which the decedent had just finished his work, or that upon which he was about to commence his work, was, either of them, intended to be presently used in interstate or in intrastate commerce.”

It will be noted that in the *Winters* case the engine was used on October 18 on an interstate run and then was laid up for repairs. Thereafter, on October 21, it was again put on an interstate run, but at the time of the accident it was out of commerce for repairs. The court held that the injuries to the plaintiff while making repairs upon the engine while it was out of commerce were not compensable under the Federal act, because he was not engaged in interstate commerce.

A case recently decided by this Court is *Bissett v. Lehigh Valley R. R. Co.*, 132 Atl. 302. The plaintiff was foreman at a roundhouse. His work was repairing all engines and cars. In the yard there was an engine used for making up trains. The engine did not leave the yard. It was used only for shifting cars from one place to another in the yard. This engine while being

used developed pump trouble. It required repairs. The engineer and fireman so informed Bissett, who requested them to place the engine on a track used for repairing engines. This track was also used for the usual yard purposes. He climbed up on the engine for the purpose of making repairs to the pump. While thus engaged he fell from it a distance of twelve or fourteen feet and received injuries from which he died. The engine was again placed in service upon the work which was interrupted by the pump trouble after the repairs started by Bissett had been finished by his helper. This Court said that "the question as to whether or not Bissett at the time of the accident was engaged in interstate commerce, and hence not within the provisions of the Workmen's Compensation Act, presented a difficult question for decision." Speaking through Katzenbach, *J.*, at page 303, this Court proceeds to discuss the cases as follows:

"The answer seems to us to depend upon whether or not the engine upon which Bissett was working at the time of the accident was then in use in interstate commerce or had been withdrawn from service. If it had been withdrawn from service, then this case falls within the doctrine of several cases recently decided in the courts of this state. The leading case in this state on this subject is *Herzog v. Hines, Director General, etc.*, 112 A. 315, 95 N. J. Law 98. In this case Herzog was employed in the New Durham yards of the West Shore Railroad Company as a car repairer. The yard was used for the making up of freight trains, both interstate and intrastate, for the storage of cars, and for the repair thereof. Herzog was repairing a freight car. He was called from his work to look at another car which had just been repaired. Upon his return to the car upon which he was working he at-

tempted to crawl under one of several cars which were coupled. At that moment the cars were moved. Herzog was injured. He instituted a suit to recover damages for his injuries under the Federal Employers' Liability Act (U. S. Comp. St., Sec. 8657-8665). It was necessary in that action for Herzog to show that he was engaged at the time of the accident in interstate commerce. The trial court held he had in this respect failed in his proof. A non-suit was entered. This judgment of non-suit was affirmed by the Court of Errors and Appeals. The ground of the decision was that, while the repair work was being done to an instrument of commerce, yet at the time of the accident the car was entirely out of commission. The opinion in the Herzog case cites a case decided in the United States Supreme Court. *Minneapolis, etc., Railroad Co. v. Winters*, 37 S. Ct. 170, 242 U. S. 353, 61 L. Ed. 358, Ann. Cas. 1918B, 54. The facts in that case are quite similar to the facts in the present case. In the *Winters* case the plaintiff received his injury while repairing a locomotive engine. The engine had been used in interstate commerce before the accident happened, and was so used afterwards. There was nothing, however, to show that it was permanently devoted to such commerce. It was held that the facts did not present a case within the federal acts. The court said:

'This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At

the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.'

The Herzog case was followed in the Court of Errors and Appeals by the case of *Price v. Central Railroad of New Jersey*, 123 A. 756, 99 N. J. Law 425. In this case an employee of the Central Railroad Company was killed. He met his death while engaged in repairing a car. The car upon which he was working was not engaged in any specific line of transportation, but was used in both interstate and intrastate commerce, as occasion might require. It was held in this case that the employee at the time of the accident was not engaged in interstate commerce.

This case was followed in the same court by the case of *Jayson v. Pennsylvania Railroad Co.*, 127 A. 169. In this case Jayson had his left hand injured while driving a spike upon a car at the shops of the Pennsylvania Railroad Company at Kearny, N. J. The car had been withdrawn from use in order that the repairs thereto might be made. The injured man presented a petition for compensation to the Workmen's Compensation Bureau. Upon the facts presented, as stated, it was held that he was engaged in intrastate commerce at the time of the accident. This decision was affirmed by the Court of Errors and Appeals. In the federal courts are similar decisions."

We submit that this decision is dispositive of the question presented in the case a bar, for here, likewise, the engine was completely withdrawn from commerce and was going into stall 13 upon an empty or dead track for the purpose of being repaired. The fires of the engine had been drawn and there was just enough steam to move the engine. The only purpose of opening the doors of the roundhouse was so that the en-

gine could be put on track 13. The plaintiff had no other work to perform at the time and was performing no other work. He was a common laborer supposed to do all kinds of jobs and in no way performing any interstate service of any kind at the time of the accident.

In short, the fundamental principle upon which the application of the statute depends is whether the defendant was engaging in interstate commerce and whether the employee was employed in such commerce at the time of the accident.

*Illinois Central R. Co. v. Behrens*, 233 U. S., 473, 58 L. Ed. 1051;

*Delaware, &c., R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397;

*Shanks v. Delaware, &c., R. Co.*, 239 U. S. 556, 60 L. Ed. 436;

*Chicago, &c., R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941;

*Illinois Central R. R. v. Peery*, 242 U. S. 292, 61 L. Ed. 309;

*Erie R. R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319;

*Minneapolis, &c., R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358;

*New York Central R. R. v. White*, 243 U. S. 188, 61 L. Ed. 667;

*Lehigh Valley R. R. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070;

*Kinzell v. Chicago, &c., R. Co.*, 250 U. S. 130, 63 L. Ed. 893;

*Erie R. R. Co. v. Collins*, 253 U. S. 77, 64 L. Ed. 790;

*Erie R. R. Co. v. Szary*, 253 U. S. 86, 64 L. Ed. 794;

*Philadelphia, &c., R. Co. v. DiDonato*, 256 U. S. 327, 65 L. Ed. 955;

*Philadelphia, &c., R. Co. v. Polk*, 256 U. S. 332, 65 L. Ed. 958;

*Industrial Accident Commission v. Davis*,  
259 U. S. 182, 66 L. Ed. 888.

In *Erie R. R. Co. v. Welsh*, 242 U. S. 303, 306, *supra*, a yard conductor, while attempting to alight from a slowly moving locomotive, fell and sustained injuries. His employer was a common carrier by rail engaged in commerce between the states. Plaintiff was employed in miscellaneous services in the yard in the way of shifting cars, breaking up and making up trains under orders from the yardmaster. Just prior to the accident, with his crew, plaintiff took a freight car loaded with merchandise, destined to a point without the State, and a caboose which was not to go beyond the limits of the State, from one part of the freight yard to another, both in Youngstown, where the freight car was placed upon a siding so that it might be made up into a train by another crew. Plaintiff and his crew then took the caboose a short distance farther and placed it upon another siding. Then they took the engine to a water block for water and then returned to the others from which they started. On the return journey the engine was slowed down near the yardmaster's office so as to enable the plaintiff to report for further orders, and the injury was received while the plaintiff was attempting to alight for that purpose. The United States Supreme Court held that notwithstanding that the plaintiff was on his way to the yardmaster's office to receive further orders and had the accident not happened he would have received orders which would have required him immediately to engage in making up an interstate train, nevertheless, he was engaged in work of an intrastate nature because he had not as yet received the orders or started

on the work. The court, at page 306, clearly laid down the rule that is to be applied as follows:

“It was in evidence, also, that the orders plaintiff would have received, had he not been injured on his way to the yardmaster’s office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers’ Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 478.”

We, therefore, respectfully submit that the trial court erred in instructing the jury as a matter of law that the plaintiff was engaged in interstate commerce at the time of the accident and that, therefore, the Federal act applied. We submit that as a matter of law the plaintiff was not engaged in interstate commerce and that his right to compensation is under the Workmen’s Compensation Act of the State of New Jersey. To say the least, reasonable minds could not help but differ as to the inferences to be drawn from the proven facts. An engine with its fires drawn in the hands of a hostler going onto a dead track for a two-day repair job was not engaged in commerce of any kind, and it was so held in *Bissett v. L. V. R. R. Co.*, 132 Atl. 302, *supra*, and in *Minneapolis & St. Louis Ry. Co. v. Winters*, 242 U. S. 356, *supra*, where, quite as a coincidence, it appears that the engine was laid up for a two-day repair job. However, in

the Winters case the repair job was completed on the day the accident happened and the engine put in service on that day shortly after the accident happened, and in interstate service, too, while in the case at bar the accident happened two days before the engine again saw service of any kind and during which two days it was not assigned to any service; so that the case at bar is much stronger than the Winters case.

We respectfully submit that on the grounds herein urged the judgment of the trial court should be reversed and a new trial ordered.

## II.

The trial court erred in overruling certain questions which were asked for the purpose of showing that the plaintiff had filed a petition under the Workmen's Compensation Law of the State of New Jersey and that the defendant had admitted in its sworn answer in said proceeding that the plaintiff was entitled to compensation under said statute.

The defendant offered to prove on the trial of this case that the plaintiff had filed a petition with the Workmen's Compensation Court of the State of New Jersey, wherein he prayed that he might be compensated under the Workmen's Compensation Act and that the defendant had filed an answer to that petition wherein it admitted that the plaintiff was entitled to compensation under the New Jersey act. All of the questions asked for the purpose of proving those facts were overruled by the trial judge (p. 70, ll. 1-30). Exception was duly noted to the overruling of the questions and these exceptions are preserved in the first ground of appeal (p. 70, p. 12, ll. 20-30). The objection to these ques-

tions were on the ground that they were incompetent. The Court of Errors and Appeals, in *Lincks v. Erie Railroad Co.*, 97 N. J. L. 343, held that such testimony was competent to prove whether or not the employment was or was not interstate at the time of the accident. That court affirmed the judgment of this court for the reasons expressed in the opinion of this court. This court, in the *Lincks* case, said:

“The question, therefore, is whether the admissions in the answer by the defendant in the suit for damages in the Circuit Court supplied the requisite proof, under the ruling of the Court of Errors and Appeals. We think the statement of fact in the answer in the Circuit Court is admissible in evidence as an admission of the fact that the decedent was not engaged at the time of the accident in interstate commerce. Mr. Wigmore, in his valuable book on Evidence, at section 1066, says that the pleadings in prior causes, then, can be treated as the parties’ admissions, usable, as evidence in later cases must be conceded. 1 R. C. L. 499, 39, 40. See *Bernard v. Adams*, No. 82, Supreme Court, February term, 1921. We also think this evidence was sufficient to make a *prima facie* case under the state statute and justified the findings of the trial court.”

The answer of the defendant in the *Lincks* case was the only evidence that the defendant was engaged in interstate commerce and that answer was a Circuit Court action and not sworn to. In the present case, both the petition and answer were sworn to; that is, there was a verified petition and a verified answer. In the verified petition the petitioner alleged that he was engaged in intrastate commerce and therefore entitled to compensation under the Workmen’s Compensation Act. The defendant in its sworn answer admitted the allegations of the

petition. Verified pleadings are surely admissible and competent to prove the facts therein alleged as admissions by the parties, if unverified pleadings are.

We respectfully submit the trial court erred in refusing to take the evidence and that for that reason the judgment below should be reversed.

### III.

**The trial court erred in refusing to charge the defendant's requests numbered 3 to 9 inclusive.**

These requests are as follows (p. 102, l. 25, to p. 104, l. 35):

3. In deciding whether or not the defendant is liable in this case, you are limited to the allegations contained in the complaint. In the complaint it is alleged that at the time of the accident the plaintiff was employed in and the defendant was engaging in interstate commerce. If the plaintiff has failed to prove that allegation then he cannot recover and your verdict must be for the defendant.

4. In determining whether at the time of the accident the plaintiff was employed in and the defendant was engaging in interstate commerce, the test is whether the particular work upon which the employee was engaged at the time of the accident was a part of the interstate commerce in which the carrier was engaged.

5. An engine as such is not permanently devoted to any kind of commerce. It may at one time be engaged in interstate commerce between two or more States and at another time it may be engaged in intrastate commerce wholly within the territorial limits of one particular State; and still on another occasion it may be out of com-

merce altogether, as, for instance, where it is in the roundhouse undergoing repairs without any assignment for the hauling of any train.

6. In this case it appears without dispute that the only work which the plaintiff was doing at the time the accident happened was to assist in opening the doors of stall No. 13 of the roundhouse at Secaucus so that engine No. 1592 might enter. It appears without dispute that the fires of this engine had been removed on the ashpit and that it had been turned on the turntable preliminarily to going into the roundhouse, where it was to undergo repairs which have been testified to. That was on the evening of February 28, 1925, about eight o'clock. It remained at the roundhouse until March 2, 1925, when it was first given an assignment to pull a certain train. In the doing of the work which he was doing at the time of the accident, was the plaintiff engaged in interstate commerce? If he was not, then the plaintiff cannot recover and your verdict must be for the defendant.

7. The fundamental question to be now decided on the interstate phase of the case is whether the engine for which the plaintiff was opening the doors of the roundhouse stall was engaged in interstate commerce at the time of the accident. If it was not, then he was not engaged in interstate commerce and he does not come under the Act of Congress under which the suit is brought, but under another statute of the State of New Jersey which is enforced in another court and with which we have nothing to do here. And in the event that you find that that engine was not engaged in interstate commerce, you will bring in a verdict for the defendant.

8. In short, the test which you are to apply in determining whether the plaintiff in this case comes under the Federal statute under which this suit is brought is, was the plaintiff, at the time of the happening of the accident to him, engaged in interstate commerce; not whether he was engaged in work of an interstate nature some time prior to the accident. If he was not engaged in interstate commerce at the time of the accident then he cannot recover in this action and your verdict must be for the defendant.

9. If you find that the plaintiff was not engaged in interstate commerce at the time of the accident that will end your consideration of this case, because then your verdict will be for the defendant and you do not have to consider the other questions which would be involved if he was engaged in interstate commerce.

Individual exceptions were duly noted to the refusal of the trial court to charge these requests (p. 101, ll. 15-20).

These exceptions are duly preserved in grounds of appeal numbered 10 to 16 inclusive (p. 18, l. 20, to p. 21, l. 5).

All of these requests were directed to the question whether or not the plaintiff was engaged in interstate commerce at the time of the accident. Request No. 4 is the identical language of the Court of Errors and Appeals in *Lincks v. Erie Railroad Co.*, 91 N. J. L. 166 at p. 168. Request No. 5 is substantially in the language of the United States Supreme Court in *Minneapolis & St. Louis Ry. Co. v. Winters*, 242 U. S. 353 at p. 356. We respectfully submit that the defendant was entitled to have the question of interstate commerce submitted to the jury in the event that this court should conclude

that the plaintiff was not as a matter of law not engaged in interstate commerce. We further submit that the requests Nos. 3 to 9 were all proper requests by which the question of interstate commerce could be submitted. No one of the requests were given, but, on the contrary, the trial court refused to submit this question to the jury and decided as a matter of law that the plaintiff was engaged in interstate commerce at the time of the accident (p. 84, ll. 15-20).

#### IV.

The trial court erred in refusing to instruct the jury that the defendant could not be charged with negligence because it failed to ring the engine bell or blow the engine whistle at the time of the accident, and, furthermore, the trial court erred in instructing the jury to the contrary.

The defendant's request was as follows (p. 105, ll. 25-35):

"The defendant cannot be charged with negligence in this case because it failed to ring the engine bell or blow the engine whistle at the time of the accident. There is no evidence that it was customary to either ring the engine bell or blow the engine whistle when a locomotive was about to enter the roundhouse, and in the absence of any custom or practice to do so the defendant cannot be chargeable with negligence for failing to do so."

Exception was duly noted to the refusal of the trial court to charge this request (p. 101, ll. 10-20). This exception is preserved in the grounds of appeal (p. 21, ll. 10-20).

The trial court instead of charging this request instructed the jury that it could find the defendant negligent for failing to give warning

(p. 83, ll. 1-10). Exception was duly noted to the charge of the trial court in that respect (p. 101, ll. 20-30) and that exception is preserved in the grounds of appeal (p. 14, ll. 10-30).

It will be remembered from the resume of the facts given in Point I that the engine with its fires drawn was about to enter an empty or dead track in the roundhouse for the purpose of being repaired. The roundhouse was in the railroad yard of the defendant at Secaucus (p. 23, ll. 10-20). No statute required the ringing of the engine bell or the blowing of the engine whistle and it was proven without dispute that it was not customary to have any audible signal by an engine as it entered the roundhouse. Laizure, Division Master Mechanic of the defendant, who was the executive in charge of the roundhouse, so testified (p. 71, ll. 30-40). So did Lee, the General Foreman of the roundhouse (p. 77, ll. 30-40).

Also, the engine hostler who operated the engine at the time of the accident testified that it was not customary to either blow the engine whistle or ring the engine bell as the engine approached and entered the roundhouse from the turntable (p. 62, ll. 20-30). This testimony, as stated, was without dispute and was given for the purpose of meeting the allegation in the complaint that the defendant was negligent because it failed to give warning of the movement of the locomotive and also to meet the proof of the plaintiff and his witness, Tantullo, that the engine was operated without blowing its whistle or ringing its bell. Plaintiff testified that the engine gave no signal by bell or whistle (p. 37, ll. 10-20). Tantullo also testified that he heard no whistle or bell from the engine as it approached the roundhouse (p. 26, ll. 1-10). The

complainant charges the defendant with negligence because it failed to give warning of the engine's approach (p. 2, ll. 30-40).

It appeared without dispute that while the accident happened at night, there was ample light, for there were six or eight arc lights outside the roundhouse at the point of entrance and inside the roundhouse there were arc lights on poles (p. 62, ll. 20-30).

*The plaintiff knew the engine was only fifteen feet away and that it was about to enter the roundhouse. He saw it move to that position from the roundhouse. At that time he was doing nothing but standing there (p. 40, l. 30, to p. 41, l. 10).*

In passing, we desire to point out that so far as the failure of the engine hostler to sound the whistle or ring the bell was concerned, it cannot be said that that was an act of negligence in any event which had anything to do with causing the accident. The sole purpose of ringing the bell or blowing the whistle was to give notice of the approach of the engine and the plaintiff and his companion both had knowledge of that fact as fully as if audible signal had been given for they saw it only fifteen feet away and knew it was waiting to enter the roundhouse.

In *Courtney v. Public Service Railway Co.*, 96 N. J. L. 308, affirmed by the Court of Errors and Appeals on the opinion of this court (97 N. J. L. 564), Gummere, C. J., speaking for this court, at page 310, said:

“So far as the failure of the motorman to ring his gong is concerned, it cannot be said that this was an act of negligence which had anything to do with causing the accident. The sole purpose of ringing the gong is to give notice of the approach of the car,

and both the decedent and his companion had knowledge of that fact as fully as if the gong had been rung and they had heard it.”

We therefore submit that failure to give audible signal by bell or whistle was not the proximate cause of the accident.

The trial court instead of withdrawing this question from the jury permitted the jury to find the defendant negligent because the engine failed to ring its bell or blow its whistle (p. 83, ll. 1-20).

Finally, the law is well settled that in cases of this kind the fundamental question upon which the liability of the defendant depends is whether or not it has been the practice to give warning of the engine movement and whether or not the customary warning was given.

Thus, in *Grybrowski v. Erie R. R.*, 88 N. J. L. 1, 95 Atl. 764 (affirmed 89 N. J. L. 361, 98 Atl. 1085), verdict for plaintiff was affirmed on the ground that there was a disputed question of fact as to whether the customary signal of sounding the bell for the starting of the engine movement had been given.

In *McNally v. Pennsylvania R. R.*, 88 N. J. L. 277, 95 Atl. 975, the plaintiff, who was employed by another company, was passing through a yard and was struck by a car which was moved without warning. Verdict for plaintiff was affirmed on the ground that it was the custom to warn such employees of the intended movement of trains and that the testimony as to whether or not such warning was given was contradictory.

In *Willever v. Delaware, &c., R. R. Co.*, 89 N. J. L. 697, 99 Atl. 321 (reversing 87 N. J. L. 348, 94 Atl. 595), a section foreman was struck in a railroad yard by a train which was backing

down the track on which he was working; no warning was given him of its approach. It was held that under the evidence there was a rule which required warning to be given of such a movement; the employee had a right to rely on such warning and that, therefore, the question of negligence by reason of failure to give same was for the jury. The rule under consideration required an employee to take a position on the front of the head car when a train of cars was being pushed through the yard and to give signals to the engine "in case of need." In the present case there was no such rule and no such custom.

In *Healy v. Erie R. R. Co.*, 91 N. J. L. 325 (the same case decided the same way, 266 Fed. 342), the Court of Errors and Appeals of this State held that it was only necessary to give the warning which ordinarily was given in the ordinary operation of the cars and that the failure to give a warning other than the ordinary or customary warning was not sufficient upon which to base a refusal to non-suit the plaintiff.

In *Berley v. Eastern Coal Dock Co.*, 95 N. J. L. 517, 519, the Court of Errors and Appeals held that where there was no evidence of a custom to warn when a movement of cars was to be made, there could be no negligence in failing to give a warning that the movement was to be made, citing *Precodnick v. L. V. R. R. Co.*, 74 N. J. L. 566.

In *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, where no custom of warning was involved, the court held that a yard track employee assumed the risk of the danger of a shifting movement without warning.

In *Connelley v. P. R. R. Co.*, 228 Fed. 322, 142 C. C. A. 614, where, likewise, no question of

custom as to warning was involved, the United States Circuit Court of Appeals for this circuit made a similar ruling. In the latter case the court, speaking through Buffington, *C. J.*, at page 324, said:

“So, also, in *Aerkfetz v. Humphreys*, 145 U. S. 418 (12 Sup. Ct. 835, 36 L. Ed. 758), where an experienced trackman was injured by a moving train in a switching yard, it was said: ‘Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard. They could not have moved the train at any slower rate of speed. They were not bound to assume that any employe familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forward and backward would have simply tended to confusion. \* \* \* It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant.’

Indeed, in thus making self-protection, the substantial safeguard of trackwalkers and sectionmen, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads. As said in *Keefe v. Railway Co.*, 92 Iowa, 182 (60 N. W. 503, 54 Am. St. Rep. 542), ‘these rules are founded upon the necessities of the business of operating railways,’ and in *Rosney v. Erie R. Co.*, 135 Fed. 311 (68 C. C. A. 155): ‘An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns, and waving flags, designed to cover the erratic

movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.'

This rule has the uniform support of courts in all sections of the country. *Morris v. Boston & M. R. R.*, 184 Mass. 368 (68 N. E. 680); *Bancroft v. Boston & M. R. R.*, 67 N. H. 466 (30 Atl. 409); *Railroad Company v. Hester*, 64 Tex. 401; *Carlson v. Cincinnati, S. & M. R. Co.*, 120 Mich. 481 (79 N. W. 688); *Pennsylvania R. Co. v. Wachter*, 60 Md. 395."

An examination of all the cases which deal with this subject shows that they agree substantially with the rule for which we now contend, namely, that the question of liability depends upon whether it was customary to give any signal of the movement of the crane. If it was not, then negligence cannot be predicated on the failure to give a signal.

The verdict of the jury was a general one. Hence it is impossible to say on which theory of negligence they based their verdict. It may very well be that they found the defendant negligent in this case because it failed to ring the engine bell or blow the engine whistle. Under such circumstances, when there is a general verdict, there must be a reversal, if it appears that some one of the theories of negligence submitted to the jury is either erroneous in point of law or lacks evidential support in point of fact. In this instance, the theory of negligence that the defendant could be held liable because it failed either to ring the bell or blow the engine whistle is erroneous in point of law.

In *New York Central R. Co. v. Lloyd*, 258 Fed. 111, the trial judge submitted four questions of fact, on any one of which he said there might be predicated negligence on the part of the defend-

ant's employees. One of these four was that the accident may have been due to negligence on the part of the defendant in failing to provide a sufficient crew for the train wherein the plaintiff was a passenger at the time of the accident. The Appellate Court reversed a judgment for the plaintiff on the ground that the verdict was a general one, and that there was no evidence to show any negligence in this particular respect. The court said:

“It is not known whether the jury found the plaintiff-in-error negligent in respect of all the claims of negligence submitted to them, or any one or several of them.”

To the same effect are the cases of

*New York Central, etc., R. Co. v. Banker*,  
224 Fed. 351, at p. 355;

*St. Louis, etc., Ry. Co. v. Needham*, 63 Fed.  
107, at p. 114.

And see also the case of *Maryland v. Baldwin*,  
112 U. S. 490, 28 L. Ed. 822, where the court  
said:

“On the trial, evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given.”

In *Fritz v. Sayre & Fisher Co.*, 77 N. J. L. 236,  
the same rule, differently stated, is given as follows:

“A verdict which cannot be supported upon the theory of law (theories of law) on which the case was submitted to the jury must be set aside.”

To the same effect see

*Hays v. P. R. R.*, 42 N. J. L. 446;

*Marts v. Cumberland, etc., Ins. Co.*, 44 N. J. L. 478;

*Halsey v. L. V. R. R. Co.*, 45 N. J. L. 26;

*Cook v. Am. Gunpowder Co.*, 70 N. J. L. 65;

*Oakley v. Emmons*, 73 N. J. L. 206;

*Doran v. Thomsen*, 76 N. J. L. 654;

*Barnes v. Wellington & Co.*, 78 N. J. L. 490.

We respectfully submit that the trial court erred in permitting the jury to find the defendant negligent because the engine failed to ring its bell or blow its whistle, and that the trial court further erred in refusing to charge the defendant's request set forth at the beginning of this point.

## V.

### Comments on the Opinion of the Supreme Court.

#### (a)

The Supreme Court in disposing of the point whether or not the plaintiff was engaged in interstate commerce at the time of the accident, seemed to think that the case of *Grybowski v. Erie R. R. Co.*, 88 N. J. L. 1, affirmed 89 N. J. L. 361, was dispositive. Also, the Supreme Court seemed to think that because the plaintiff worked at the roundhouse, he was therefore engaged in interstate commerce simply because the roundhouse was used for both interstate and intrastate engines. Also, the Supreme Court says, "The plaintiff had nothing to do with the management of the engine or with its repair." Finally, that Court sums up the reason for its decision that the plaintiff *as a matter of law*

was an interstate employee by saying, "A roundhouse is as much a part of a railroad company's plant as its ashpit; and a person whose employment requires him to assist in opening the doors of a roundhouse for the admission of locomotives is as much engaged in maintaining the effectiveness of this part of the company's plant as is a man whose duty requires him to clean out the ashpit of the company in order to maintain its effectiveness."

The testimony of the plaintiff as hereinbefore shown does not indicate that *as a matter of fact* he did anything on the day of the accident prior thereto which was of an interstate nature. It is true that he said it was part of his work to put water in engines, etc., but whether on that day he worked on a single interstate engine prior to the accident does not appear. He was a common laborer, called upon to do any task to which he might be assigned. To say that the plaintiff had nothing to do with the engine in question which caused the accident is to decide a fact, the decision of which is for the jury. Reasonable men might decide that fact one way or the other. There is no question that he assisted, according to his own testimony, in opening both doors of stall 13 so that this engine might enter. There is no doubt that stall 13 was a dead stall and that track 13 was a dead track and that there was no other engine thereon. The plaintiff had nothing to do with selecting the track or the stall into which the engine was to go. That was predetermined by the turntable operator from a blackboard which indicated what tracks were available for repair work. To say that the plaintiff had nothing to do with the engine is to conclude that notwithstanding that he was attempting to open the doors of stall 13 so that that par-

particular engine might enter, still, he had nothing to do with it. The only purpose in opening the doors was so that that particular interstate engine which had no job of any kind to perform and which was going in for repairs, could be repaired. The work that he was doing at the time and place of the accident, which is the test to be applied under all of the Federal cases, had no relation to anything except the engine in question. Therefore, to conclude *as a matter of law* that the plaintiff was engaged in interstate commerce is unwarranted. The decision of the facts was for the jury and not for the Court.

Further, to say that any employee who should happen to work in a roundhouse where both kinds of engines are repaired is necessarily an interstate employee, is a fiction which cannot stand the test of analysis. The telephone operator on the second floor of the roundhouse would necessarily be engaged in interstate commerce simply because the telephone happened to be located in the roundhouse. The office boy who took care of the mail for Mr. Laizure, the division master mechanic, who as chief mechanical officer had his office on the first floor of the roundhouse, would of necessity be engaged in interstate commerce simply because he worked in the roundhouse. That is not so.

The Grybowski case is not analogous at all, for in that case the plaintiff was carrying ashes from both interstate and intrastate engines at the very time he was hurt. These ashes were taken by him from the pit where they were dumped by both kinds of engines, and of course at the time of the accident if he was carrying ashes from an interstate engine, he was engaged in interstate commerce.

In the case at bar the plaintiff was doing nothing at the time of the accident which could be said to be in the slightest degree connected with any engine engaged in interstate commerce. The mere fact that he was opening the doors of the roundhouse for an intrastate engine had nothing to do with commerce of an interstate nature and in no way maintained the effectiveness of the roundhouse. To say the least, whether or not he was at the time and place of the accident engaged in interstate commerce *was for the jury* (see authorities cited in Point I). The Grybowski case *was not decided as a matter of law*. The question raised was whether the defendant was entitled to a directed verdict on the ground that *as a matter of law it was intrastate commerce*. The Supreme Court and this Court held that the denial of the motion was proper. Neither Court held that the decision of the facts involved in the question should be removed from the jury. All we are contending for is that the facts involved should have been decided by the jury (not by the judge), but under proper instructions from the judge as to the law. The rights and obligations under the Federal Act depend upon it and applicable principles of common law as interpreted and applied in Federal Courts. *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030. If that is so, then under the cases cited in Point I, particularly *Minneapolis, etc. Ry. Co. v. Winters*, 242 U. S. 356, and the cases following that case in the United States Supreme Court, the question whether or not the plaintiff was engaged in interstate commerce was at least for the jury.

## (b)

The Supreme Court in deciding Point IV, *supra*, concluded that because the engine happened to strike the roundhouse door, that therefore it was necessary to give audible warning by bell or whistle, notwithstanding that ordinarily it was not customary to do so. We submit that this conclusion of the Supreme Court is based on erroneous conception of the situation presented by this accident. Of course, if the engine hostler who operated the engine knew that the doors were not all the way open and proceeded to operate the engine into the roundhouse, some extraordinary warning would have to be given. There is no evidence in this case that he knew an accident was going to happen, but, on the contrary, he says one of the two men at the roundhouse doors, one of whom was the plaintiff, gave him the usual signal to go on, and he not being able to see the door on the left of the engine proceeded to obey the signal in the customary manner. The turntable operator says he did not give the signal to go on. The plaintiff likewise says he did not give the signal. Yet, according to the engine hostler, somebody did give the signal to go ahead. One of the three must be mistaken as to whether the signal was or was not given, and if the signal was supposed to be given by the turntable operator and he negligently gave it, there would be liability. If it was not given at all and the engine hostler was negligent, there would be liability. But, to charge the defendant with negligence for failing to do something which under no circumstances would be done, is to violate the fundamental rule set forth in Point IV of our brief that unless in a railroad yard it is customary to give audible warning by bell or whistle, it is not negligence to fail to do so.

In short, the same thing would apply to a man who was struck on a track in a railroad yard. If he had not been struck, there would be no duty to warn him. But, because he happened to be struck, then immediately the duty arises to give warning, though it was not customary ordinarily to do so. To enforce this rule is to judge the defendant's conduct not by what was customarily done, but what the effect is when the customary practice is followed, if the effect is to injure somebody; thus to impose a greater duty with respect to warning when a person is hurt. The fallacy of the reasoning is self-evident.

It is true, as stated in the case at bar, that if the engine hostler was negligent in operating his engine without the customary signal from the turntable operator or the plaintiff, or if the turntable operator prematurely gave the customary signal to go on, namely, the waving of the arm or the lantern, then clearly the defendant is negligent. But to say that the defendant is negligent if it failed to do something in a railroad yard that nobody anticipated or expected would be done and which is not in any sense customary, namely, the blowing of the engine whistle or the ringing of the engine bell, is to set up a new standard or rule of negligence which has not heretofore existed. See cases cited in Point IV.

VI.

**Conclusion.**

It is therefore respectfully submitted that the judgment below should be reversed and a *venire de novo* awarded.

February Term, 1927.

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New Jersey Court of Errors and Appeals 10

ALFONSO ILLONARDO, <i>Plaintiff-Respondent,</i>	}	Action at Law.	
vs.		Appeal from New Jersey Supreme Court.	
ERIE RAILROAD COMPANY, a corporation, <i>Defendant-Appellant.</i>			20

**BRIEF FOR PLAINTIFF-RESPONDENT.**

**Facts.**

The plaintiff was employed at the Secaucus roundhouse of the defendant, which roundhouse was used to house interstate engines (P. C., pages 22, 34, 88). His employment consisted in putting coal in, and keeping water and fires up in its engines (P. C., pages 22, 34), and who, it was testified by the foreman in charge of the roundhouse, was a general laborer around this interstate roundhouse (P. C., page 80, lines 10 to 20). He opened the door of the roundhouse on request of the outside turn-table man, for the purpose of allowing a hostler to drive another engine in (P. C.,

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page 25, lines 23-32) and was struck by this locomotive in charge of the hostler while opening the door (P. C., page 25, line 36) and crushed against the door and injured so that he lost his arm. He had nothing to do with the movement of this locomotive (P. C., page 28, line 10; page 37, lines 19-20), which hit the door with such violence as to  
 10 smash it (P. C., page 45). The plaintiff had nothing to do with the movement of the engine (P. C., page 59). The engine was moved without signal, so testified the turn-table man who had complete charge of the engine (P. C., page 25, line 36; page 28, line 10). Plaintiff had nothing to do with the movement of the engine (P. C., page 37, line 19; page 80, testimony of the foreman in charge of the roundhouse, page 80, lines 10-20). The hostler  
 20 says he did receive signal from Tantullo (page 61, lines 20-30), the turn-table man in charge of the engine. Plaintiff had nothing to do with the movement of the engine (P. C., page 59). The engine hostler testified he moved the engine on signal (P. C., page 59). The work of the engine, No. 1592, which was entering the roundhouse (P. C., page 51).

From these foregoing references it is plain that there was no dispute as to the employment of the  
 30 plaintiff. He did not make any claim, controverted by the defendant, as to what he actually was doing. It will be seen he was working in an interstate roundhouse. He was a general laborer in that roundhouse. He was opening the door of that roundhouse at the time he was injured. He had nothing to do with the movement of the engine which struck the door. He was opening the door at the request of the person in charge of the  
 40 engine, the turn-table operator.

Seemingly, the only dispute was between Tanttullo, the turn-table man, and Menicke, the hostler, as to whether the engine was moved with or without signal.

### POINT I.

#### Interstate Commerce.

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The plaintiff was engaged in interstate commerce at the time he was injured. It is argued by the defendant that because the engine which struck the plaintiff was not engaged in interstate commerce, therefore the plaintiff was not engaged in interstate commerce. It will be observed that the plaintiff had nothing to do with the engine which struck him. He was to render it no service. He had no control of its movement. He was not on it and was not concerned with it. He was simply opening the door of the roundhouse at the request of the person in charge of the engine, to permit the entry of the engine. The entry of this engine was not a matter of indifference to interstate commerce, even if the narrow view is taken, that the engine which struck him must be engaged in interstate commerce to make him engaged in interstate commerce, as the contrary has been held where a crossing man was guarding a crossing and he was hit by an engine. The plaintiff's employment was as a general laborer around this roundhouse which was in control of interstate commerce instrumentalities. There were engines already at rest on the rails. If the proper door was not opened for the proper track the incoming engine would damage the engines already in the roundhouse engaged in interstate commerce, and

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might, as was done in this case, smash the instrumentality itself, as it smashed the door.

If, therefore, there was no dispute but that the plaintiff was engaged in handling interstate commerce instrumentalities, he was engaged in interstate commerce.

- 10 See case of GRYBOWSKI vs. ERIE, 88 N. J. L., page 1, where man coming out of ash pit used in both interstate and intrastate commerce was killed by an intrastate engine (88 N. J. L., page 1; affirmed 89 N. J. L., 361). There is no distinction between man coming out of ash pit when he has finished his work, killed by an intrastate engine, and a man still engaged in interstate commerce. The plaintiff's work being as it described, it was interstate commerce.

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See:

*Mathison vs. Director General*, 98 L., page 93, bottom of page.

In the GRYBOWSKI CASE, referring to the Pederson case, the leading case in the United State Supreme Court, the Court said that in the Pedersen case the man was killed by an intrastate engine, although it is improperly stated as interstate commerce in the opinion.

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The Supreme Court of the United States said in the case of INDUSTRIAL ACCIDENT COMMISSION vs. DAVIS, 259 U. S., page 187; 66 Law. Ed., 892, in reference to interstate commerce:

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“And there is a difference in the instrumentalities. In some, the tracks, bridges and roadbeds, and equipment in actual use may be said to have definite character and give it

to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that trade.”

Here it was a roundhouse, permanently devoted to interstate commerce, which, in turn, as in the other cases referred to, gave to the man employed in it the definite character of being employed in interstate commerce. If it is undisputed, as it was in this case, that the plaintiff was employed in a permanent instrumentality of interstate commerce in doing the same work as described in *MATHISON vs. PAYNE*, 98 L., page 93, and *GRYBOWSKI vs. ERIE*, 88 L., page 1, and if the characterization in the United States Supreme Court in *COMMISSION vs. DAVIS*, 259 U. S., 187, that the permanency of the instrumentality devoted to interstate commerce fixes a permanency of a relationship of the plaintiff is correct, how could there be any dispute about whether he was injured in interstate commerce? 10 20

See

Vol. 12;

*Corpus Juris*, where cases are collected, page 38, note 42;

*Baltimore & Ohio R. R. vs. Groeger*, 266 U. S., page 520, Pt. 3 of Syllabus; 69 Law. Ed., 419. 30

The instrumentality upon which he was engaged being a permanent instrumentality devoted to interstate commerce, it makes no difference that he was hit by an intrastate engine, not engaged in interstate commerce, over which he had no control. 40

*Grybowski vs. Erie*, 88 N. J. L., page 1  
and cases cited;  
*Erie Railroad vs. Szary*, 253 U. S., 85.

Crossing flagman employed at a crossing in  
both intra and interstate commerce, under the  
Federal Act.

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*Flanagan vs. Erie*, 3 N. J. Misc., 881.

The United States Sup. Ct. in the Szary case  
says:

“such a distinction is too artificial for ac-  
ceptance.”

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*Erie Railroad vs. Collins*, 253 U. S., 78;  
*Phil. & Reading R. R. vs. Donato*, 65 U.  
S., 955;

*Southern Pac. Co. vs. Industrial Accident  
Commission*, 10 American Law Re-  
ports, 1184;

*Hines vs. Industrial Accident Commis-  
sion*, 14 American Law Reports, 732;

*Stavros vs. Chicago R. R.*, 24 American  
Law Reports, 634;

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*Vincelli vs. C. R. R.*, 98 L., 726; aff. 125  
Atl., page 12;

*Swank vs. P. R. R.*, 94 L., 546.

The Court of Appeals for the Sixth Circuit,  
said of a brakeman riding in an intrastate car.  
“The moment of the injury, plaintiff passed him  
controlling the car, but for the purpose of pre-  
venting damages not only to it, but to the inter-  
state cars in track 14 with which it might other-  
wise collide. This work done for this purpose

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was in operation so bound up with interstate commerce as to constitute a part thereof." *Grigsby vs. Southern R. R.*, 3rd Fed., 2nd Series, 988; citing

*Railway Co. vs. Carr*, 238 U. S., 260;  
*Pederson vs. Railroad*, 229 U. S., 146;  
*Railroad vs. Tuckett*, 244 U. S., 571. 10

It is, therefore, respectfully submitted that there can be no dispute but that the plaintiff was engaged in interstate commerce both because of the roundhouse being an interstate instrumentality and the fact that the opening of the door in reference to the alleged intrastate engine must be properly done to avoid injury to an instrumentality of the interstate commerce. 20

In *BISSETT vs. LEHIGH VALLEY*, 132 Atl., 302, there the intrastate engine was one upon which the plaintiff was working, making repairs to an intrastate engine. In the instant case, the plaintiff had nothing to do with the engine. This is the language of the Court: 30

"The answer seems to us to depend upon whether or not the engine upon which Bissett was working at the time of the accident was an intrastate one." 30

In the instant case Iallonardo was not working on the alleged intrastate engine and had nothing to do with it but was working in an interstate roundhouse. Therefore, the Bissett case is clearly not applicable.

In answer to all that the appellant says about intrastate commerce, and the cases cited, it will be noticed that every case cited by it is one in 40

which the plaintiff was working upon an instrumentality and that instrumentality determined his kind of labor, and in all cases excluding the Federal Act, the instrumentality was an intrastate one. In this case the plaintiff had nothing to do with the engine which hurt him. It was not under his control. It was not moved by him. He was  
 10 engaged in an interstate roundhouse exclusively and while working in it was not only working with reference to the entering engine but to protect the roundhouse from damage and the instrumentalities engaged in interstate commerce within it from the entering engine.

The Court in *Coil vs. Lehigh Valley*, 3 N. J. Misc., 869, held that it was correct to instruct as  
 20 a court question that the defendant was engaged in interstate commerce.

#### POINT Ia.

##### Instruction as to interstate commerce proper.

Where as here there was no disputed question of fact as to plaintiff's employment there was nothing for the jury to pass upon and an instruction as a matter of law from the Court was the  
 30 only proper course. If the contention of the defendant is correct then the Judge should have directed a verdict for the defendant because there being no undisputed facts then the defendant was entitled if correct in its law to have a verdict directed on the ground that the plaintiff was engaged in intrastate commerce.

The course followed by the trial Judge was  
 40 correct.

*Coil vs. Lehigh Valley*, 3 Hd. R., 869;  
*Grybowski vs. Erie*, 88 L., page 1;  
*Roberts on Federal Liability*, Vol. 1,  
 page 798, page 461.

If on undisputed facts the Court had submitted the question of employment to the jury, what disputed fact could they determine?

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## POINT II.

### Negligence.

It is undisputed that the accident was caused by the act either of the turn-table man, Tantullo, who was in complete charge of the engine and who gave a signal at an improper time as was alleged by the man driving the engine, or, it was the fault of the man driving the engine. In either case the defendant was responsible. The plaintiff had nothing to do with the movement of the engine as has been set forth in the statement of facts. Both Tantullo, who was the turn-table man operating the turn-table from which the engine was being taken, and Maxwell, the hostler, who was driving the engine, testified that the engine would only move on signal of Tantullo. If the engine was moved by signal of Tantullo, at an improper time when the plaintiff was in a position of danger, or without signal and solely because of the fault of Maxwell, the engineer. In either case the defendant was liable, under the Act.

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Cases collected in *LAMPHERE vs. OREGON*, annotations 47 L. R. A. (N. S.), page 51.

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## POINT III.

## Assumption of Risk.

10 The assumption of risk of the movement of the engine in the way it did, was left to the jury by the Judge in the broadest possible way. See P. C., page 88, line 20 to page 89, line 20. The plaintiff did not assume the risk of the accident. He assumed the obvious risks which he might see. There was no proof that he knew the engine was going to move, therefore, the risk of the movement of the engine without signal, or by improper signal, was not obvious to him. The risk of the engine moving without signal or by improper signal was not an incident of his employment, because he knew theoretically that the master was bound to use reasonable care to provide him with safe place on which to work. The judge left it entirely to the jury to say whether he did assume the risk under all the circumstances, which was more than the defendant was entitled to.

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30 *Gila Valley vs. Hall*, 231 U. S., 94;  
*Seaboard vs. Horton*, 233 U. S., 492;  
*Palo vs. Palisade Construction Co.*, 75  
 N. J. L., 875;  
*Swank vs. P. R. R.*, 94 L., 546;  
*Vincelli vs. C. R. R.*, 98 L., 726; affirmed  
 125 Atl., 12;  
*Reed vs. Director*, 95 L., 531.

## POINT IV.

## Improper Rejection of Evidence.

One ground of appeal relates to the action of the Judge in refusing to admit evidence. The testimony which it is argued it was erroneous to exclude, is as follows:

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“Q. Did you receive a claim petition filed by the plaintiff in the compensation court of New Jersey? A. I did.

Mr. Simpson: I object, incompetent.

The Court: Sustain the objection.

Mr. Markley: Exception. I will ask a few more questions merely to make my point for what they are worth, your Honor.

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The Court: Go ahead.

Q. You are the attorney for the Erie Railroad Company handling this compensation matter? A. Yes, sir.

Q. And did you file an answer to this petition?

Mr. Simpson: I object to all this line of testimony.

The Court: Objection sustained.

Mr. Markley: Exception.

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Q. Who was the attorney for the plaintiff in the compensation petition?

Mr. Simpson: Same objection.

The Court: Sustain the objection.

Mr. Markley: Exception.

Q. Did you admit in the answer filed in the compensation suit which he brought that he was entitled to compensation in the compensation court?

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Mr. Simpson: Objection to the question.  
 The Court: Sustain the objection.  
 Mr. Markley: Exception."

10 It will be observed there was no offer of any written petition nor of any written answer. The evidence was clearly incompetent unless the petition was produced which it was not. The same applies to the answer. Also as to who was attorney for the plaintiff.

The defendant's brief cites the case of LINCKS vs. ERIE as authority for the admissibility of such testimony. This case is found in 97 Law, 343, and does not support the proposition of the defendant. It holds that where a defendant makes an admission and the Court there says:

20 "The question, therefore, is whether the admission in the answer by the defendant in the suit for damages in the Circuit Court supplied the requisite proof. \* \* \* We think the statement of fact in the answer in the Circuit Court is admissible as an admission of the fact that decedent was not engaged at the time of the accident in interstate commerce."

30 This is a very different situation from that presented by the case at bar where no petition was offered and no answer was offered. A witness was simply asked, did he receive a claim petition filed in the Compensation Court of New Jersey. The answer was allowed to stand, although objected to. That petition was not offered, neither was the answer offered so as to get flatfooted the question as to whether either contained admissions of fact. If the petition contained an admis-

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sion of fact by the plaintiff which would contradict his testimony in the instant suit, that would present another question.

All the statements in the brief of the defendant as to the answer and petition are gratuitous and without foundation on evidence as the foregoing testimony shows. No copy of this petition is annexed in the State of Case and no evidence appears as to the contents of the petition which would indicate that the defendant was harmed. Rule 107 a; P. L., 1912, page 382; 1915 C. S., page 1207 and cases cited. The petition clearly was not material, for it proved nothing as to the facts in dispute. The opinion of the plaintiff as to whether he should get compensation could hardly repeal or invalidate the Act of Congress. 10

As to filing claim under Workmen's Compensation Act, see: 20

*Waters vs. Guile*, 234 Fed., 532;  
*Southern Pac. Co. vs. Industrial Accident Commission*, 10 American Law Repts., 1184;

*Hines vs. Industrial Accident Commission*, 14 American Law Repts., 732;

*Stavros vs. Chicago R. R.*, 24 American Law Repts., 634. 30

There was further proof that the witness, Mr. Broadhurst was not connected with the Compensation Commission and brought no original petition from the Compensation Commission, nor could identify or prove it, if the plaintiff had filed a petition. It was the Compensation Commission who was to be subpoenaed to produce the records of his office. 40

Our own Court of Errors and Appeals has said in *ROUNSAVILLE vs. CENTRAL R. R.*, 90 N. J. L., 176, that the Federal Act is an ouster of the State Compensation Act.

*Talmadge vs. New York, Sus. & W. R. R.*,  
93 N. J. L., 505.

10 In

*Re: Wulzen*, 235 Fed., 367,

the Court said:

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“Twice the Circuit Court of Appeals in this Circuit has held that a State Compensation Act for the benefit of persons injured in the course of their employment must yield, if a person working for a railroad elects to prosecute a suit for personal injuries under the Federal Statutes in the Federal Court, and for the simple reason that the Federal law is paramount.”

Citing:

*Grand Trunk vs. Knapp*, 233 Fed., 950;  
*Waters vs. Guile*, 234 Fed., 532.

30 See:

*Stone vs. New York Central R. R.*, 211  
App. Div., 633; 207 N. Y. Supp., 353,

reversing an award in State compensation for a roundhouse employee.

See cases of roundhouse employees collected in 24 negligence compensation cases, Ann., page 62.

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*Van Buskirk vs. Erie R. R.*, 279 Fed., 622.

The Federal Act supersedes and makes void the Workmen's Compensation Act and no agreement between the parties can exclude the Federal Act from operation.

- Erie R. R. vs. Winfield*, 244 U. S., 170;  
*New York Central vs. Winfield*, 244 U. S.,  
 147; 10  
*Smith vs. Industrial Accident Commis-  
 sion of California*, 26 Calif., 560;  
*Daly vs. Illinois Central*, 268 Ill., 356;  
*West Jersey Press Co. vs. Phila.*, 88 N.  
 J. L., 102;  
*Rounsaville vs. Central R. R. of N. J.*,  
 87 N. J. L., 371.

All cases from all States collected in 12 Amer- 20  
 ican Law Reports, page 688, show that the plain-  
 tiff in this case never had an action under the  
 Workmen's Compensation Act, and therefore, the  
 filing of the petition, if he did so, would have no  
 binding value.

Notes to

- Maclain vs. Chicago*, 12 American Law  
 Reports, Annt., 688; 30  
*New York Central vs. Porter*, 249 U. S.,  
 168;

cited in:

- Reading vs. Honcatt*, 253 N. S., 285.

It is, therefore, urged that the evidence was  
 not material, because the petition showed nothing  
 and the answer of the defendant was certainly a  
 declaration of favor and interest, and if eviden- 40

tial, would repeal the Federal Act by the mere statement of the defendant that he admitted the erroneous contention of the plaintiff that he was under the State Act.

### POINT V.

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#### Requests to Charge.

The refusal to charge requests 3 to 9 is argued as ground of reversal. It will be seen that if the facts were as they were, there was no dispute but that the defendant was engaged in interstate commerce and the plaintiff also. If this was so, 3, 4 and 5 became improper to charge. As to 5, the Court was not bound to apply the law to the facts. No. 6 improperly stated the facts, as to what the plaintiff was doing and the inferences to be drawn therefrom and made his engagement in interstate commerce a question of fact when there was no dispute. As to No. 7, the plaintiff was not working on the engine. Nos. 8 and 9 were clearly improper requests as the matter was one of law.

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The cases cited were where there were disputed questions of fact.

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The Court in refusing to adopt the defendant's request on page 105, lines 25 to 35, left the negligence, if any, to the jury, and that was all the defendant was entitled to. This request would charge the jury as a matter of law in no case could the failure to blow a whistle or ring a bell be negligence. The defendant is not entitled to single out specific facts, but if it could, the charge requested was erroneous, because if this engine

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was moved by the hostler without a signal as

testified by one witness, and it was always customary to give a signal to the hostler then whether in the exercise of due care the hostler should have given warning by bell or whistle, was for the jury and not for the Court.

*Cowell vs. Penn. R. R.*, 3 N. J. Adv. Rept., 973;

*Grybowski vs. Erie*, 88 N. J. L., page 1.

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Not necessary to charge requests covering ground already covered. Cases collected in Parkers Digest, Vol. 10, Col. 1372, sec. 103.

The plaintiff saw a stationary engine, which he knew could not be moved without a signal to the hostler. How can it be said that the trial jury would not have a right to find it negligent if the engine was moved without signal from the turntable man and without bell or whistle from the engine?

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The additional argument made in the brief in the Court of Appeals in criticism of the Supreme Court decision, that the Supreme Court erred when it characterized his work on the day in question, is not borne out by the evidence. He was a common laborer employed in an interstate roundhouse doing the same work on the day he was hurt as he was on all days. The testimony in the case, pages 22, 34 and 80, shows that it was his general duty to work around the interstate roundhouse, and that is what he was doing on the day he was hurt. His opening of the door, was the opening of the door of an interstate roundhouse to admit an engine, and if not done properly, would not only injure the instrument of interstate commerce, the roundhouse, but also the interstate engines therein. The argument of

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the plaintiff's brief is characterized by the following quotation from Szary vs. Erie R. R. Co., 253 U. S., 86, where the United States Supreme Court says "the distinction is too artificial for acceptance." What the plaintiff did immediately before or immediately after the accident is of no consequence. What he was doing at the time of the accident was the taking care of the interstate roundhouse, an instrumentality of interstate commerce, and, therefore, he was, as a matter of law, as the Supreme Court properly held, citing the cases, engaged in interstate commerce.

Pedersen vs. Lackawanna R. R., 229 U. S., 146, Pt. 2 of the Syllabus.

20 It is, therefore, respectfully submitted that the judgment below should be affirmed.

ALEX. SIMPSON,  
Attorney for Plaintiff-Respondent.

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