1977

Union Pacific Railroad Co. v. Intermountain Farmers Association, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY, a corporation, Plaintiff and Respondent,	:	
vs.	:	Case No. 14635
INTERMOUNTAIN FARMERS ASSOCIATION, INC., a corporation, Defendant and Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment granted in favor of plaintiff and respondent by the Court sitting without a jury in the Third Judicial District Court in and for the County of Salt Lake, State of Utah. The Honorable James S. Sawaya, Judge

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BRIEF OF APPELLANT

STATEMENT OF CASE

This is a civil action brought by plaintiff, Union Pacific Railroad Company, to enforce an indemnity provision in its lease agreement with the defendant.

DISPOSITION IN LOWER COURT

The matter was heard by the court based upon stipulated facts, the Honorable James S. Sawaya, District Judge, presiding. The court found the legal issues in favor of the plaintiff and against the defendant. Judgment was entered accordingly. From said conclusions of law and judgment, this appeal is taken.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment.

STATEMENT OF FACTS

The facts of the case were undisputed and submitted to the court by stipulation of the parties (R 88). The stipulation recites as follows:

1. Union Pacific Railroad Company is now, and has been at all times material hereto, a corporation organized and existing under the laws of the State of Utah, operating a railroad system in the State of Utah and in surrounding states.

2. Intermountain Farmers Association is now, and has been at all times material hereto, a corporation organized and existing under the laws of the State of Utah.

3. On February 6, 1964, plaintiff and its lessor, Los Angeles & Salt Lake Railroad Company, entered into a written agreement with defendant (Hereinafter referred to as "Subject Agreement"), a copy of which is attached hereto, marked Exhibit "A", and by this reference made a part hereof, that provides in general for the leasing of certain property (Hereinafter referred to as the "Leased Premises"), at Draper, Salt Lake County, Utah, for a warehouse, grainery, cold storage, platform, and driveway site.

4. Pursuant to an extension rider dated October 9, 1968, a copy of which is attached hereto, marked Exhibit "B", and by this reference made a part hereof, and an addendum, dated December 31, 1970, a copy of which is attached hereto, marked Exhibit "C", and by this reference made a part hereof, the terms and conditions of the Subject Agreement were in full force and effect to and including November 30, 1973.

5. At approximately 7:00 o'clock p.m., on October 31, 1972, at a time when the Subject Agreement was in full force and effect, and while plaintiff's employees were performing a switching operation on the railroad track immediately adjacent to the Leased Premises, one Richard V. Richins, conductor in charge and an employee of plaintiff, sustained severe and permanent injuries. Richins claims that he sustained such injuries when knocked from the second locomotive unit of a two-unit diesel engine upon which he was riding by a spool of cable owned by Intermountain Farmers, said spool of cable being located on the Leased Premises in a position closer than eight (8) feet six (6) inches to the center line of the nearest track of the plaintiff.

6. At the time Richins sustained said injuries, plaintiff was engaged as a common carrier in interstate commerce; Richins was employed by plaintiff in such commerce;

and Richins' said injuries occurred in the scope and course of his employment for plaintiff.

7. At the time Richins sustained his injuries, it was dark and it had just recently stopped snowing. There was some snow on the ground, as evidenced by the photographs secured on the morning following the accident and attached hereto as Exhibits "D", "E", "F", "G", "H" and "I", and by this reference made a part hereof. In addition, attached hereto as Exhibit "J", and by this reference made a part hereof, is a copy of a Local Climatological Data Report showing weather conditions and precipitation levels recorded at the Salt Lake International Airport during the month of October 1972. The scene of the accident is approximately 18 to 20 miles from said weather reporting station in a southeasterly direction.

8. The train in question, consisting of two locomotive units, twelve loaded cars, twenty empty cars, and a caboose, departed Salt Lake City, Utah, at approximately 6:00 o'clock p.m., on October 31, 1972, enroute to Provo, Utah.

9. The train arrived at Intermountain Farmers Association's facility at Draper, Utah, shortly before 7:00 o'clock p.m., and was stopped on the main line track adjacent to defendant's facility headed generally in an eastbound

compass direction.

10. Immediately to the north of the Leased Premises were three sets of railroad tracks as shown in the print marked Exhibit "K", and by this reference made a part hereof. The trackage immediately north of defendant's facility is identified as the "Poultry Track," the center track is identified as the "Main Line Track," and the track to the north of the Leased Premises is identified as the "Passing Track." The area north of defendant's facility and north of where the tracks are located is fenced by the land owner on the north, said fence running east and west. See three photographs taken September 26, 1975, and marked Exhibit "Q", attached hereto, and by this reference made a part hereof. The area north of the fence referred to as depicted in these photographs is not owned by or leased by Intermountain Farmers.

11. The two locomotive units (3645-A and 137-B) were detached from the balance of the train remaining on the main line trackage, pulled forward beyond the switch into the poultry track, and subsequently backed in a westerly direction along the poultry track adjacent to the Intermountain Farmers Association's facility.

12. At the time of this backward movement along the poultry track, the engineer, an employee of plaintiff, was

operating the two locomotive units from the east locomotive (3645-A) seated at the controls located on the south side of the east locomotive cab.

13. The brakeman, Levi Ki Tua'one, an employee of plaintiff, was riding the west locomotive (137-B), on the southwest corner thereof. He was a student brakeman and this was his third road trip out of the yard.

14. The lead or west locomotive unit identified as 137-B which entered the poultry track first had two headlights operating at the time to illuminate the track and right of way. These headlights, located one above the other on the horizontal center line of the locomotive, approximately 12 feet 5 inches above the rail, were seven inches in diameter and produced a total beam candle power of 600,000 units. The brakeman claims there was plenty of light to see the tracks as they were backing. He said he had no trouble seeing where he was going (Deposition of Tua'one, pages 9 and 34).

15. The purpose of the westerly inbound movement was to pick up two empty but separated box cars located on the poultry track serving the defendant. These two box cars (UP 165227 and LN 12470) at the time of the inbound move were located over the bare spots in the snow depicted in Exhibit "D".

16. During the westerly inbound move on the poultry track, the southwest steps of Unit 137-B upon which the brakeman was riding at the time must have passed by or over the spool of cable; however, the brakeman claims he did not observe the spool of cable. He says he was maintaining a lookout and did not see any obstruction or obstacle to the movement of the train.

17. Plaintiff's employees claim they were performing their duties for the railroad company in the customary and routine manner under the circumstances. The railroad company procedure is such that before backing a train, the track must be free from obstruction to train movement and the track must either be seen during the movement or known to be clear (Richins' Deposition, page 53).

18. During the westbound movement on the poultry track, Conductor Richins, who had been riding the caboose from Salt Lake City to Draper, had dismounted from the caboose and had walked easterly between the main line track and the poultry track to assist in the switching operation being conducted on the poultry track (Second Deposition of Richins, pages 22 and 23).

19. Mr. Richins stated in his deposition,

"Q. Did you know when you left the yard to go south that he was a new man --

"A. Yes.

"Q. -- a new brakeman?

"A. Yes. That is why I was going to help.

"Q. Had he been an experienced brakeman, would you have left the caboose that night?

"A. I'd have left the caboose but chances are I wouldn't have concentracted so much on the work that was at hand. I would have -- there are other duties that I have that I could have been doing.

"Q. You would have allowed him -- if he had been an experienced brakeman you would have allowed him to do the connecting himself?

"A. That's right.

"Q. You wouldn't have assisted him in doing that necessarily unless he asked?

"A. Unless I happened to be there. If I had arrived there at a time when I could assist I'd assist, but in inspecting the train, when I walk up, instead of concentrating so much on getting up there helping him, I would have spent more time looking the train over." (Second Deposition of Richins, pages 22 and 23.)

20. After the two locomotives reached the first car on the poultry track, identified as UP 165227, the brakeman made the connection between the two locomotives and said car.

21. Conductor Richins, who by this time had arrived at the west car on the poultry track (LN 12470), transmitted instructions to the engineer by walkie-talkie radio which he was carrying to facilitate the coupling between UP 165227 and LN 12470. The track where the switching was being conducted was curved in such a manner that the engineer could not see to the rear of the train and visually receive signals from the brakeman or conductor, so the conductor was transmitting signals by radio in the customary and authorized manner under such circumstances.

22. After the coupling had been completed and the brake air lines charged, Conductor Richins advised the engineer by walkie-talkie radio to commence the eastbound movement in order to return to the main line trackage and the balance of the train.

23. As the movement commenced, Conductor Richins and the brakeman simultaneously stepped aboard the southwest corner of trailing locomotive 137-B. Richins testified that he would not have mounted the train as it moved out to the main line but would have walked over to the caboose if it hadn't been for the rubbish, slimy dust, brain dust or grain on the ground in the area (See Richins' deposition, page 28, lines 1-5;

page 34, lines 6-11; page 35, lines 5-13, 22-25; and page 36, lines 1-2).

24. The brakeman claims he had both of his feet located on the bottom step of trailing locomotive 137-B, as depicted in the photograph marked Exhibit "L", and Conductor Richins claims he had his right foot on the bottom step and left foot on the foot board, as depicted in said Exhibit "L". Richins said both men were crowding onto the same area but that such a situation was not abnormal or unusual with a student brakeman (Second Deposition of Richins, page 18).

25. After the movement had obtained the speed of approximately three to five miles per hour and had moved approximately two box car lengths, Conductor Richins claims he was knocked off the moving train by the spool of cable owned by the defendant and depicted in Exhibits "E", "F", "G", "H", and "I", precipitating the injuries sustained.

26. At the time of the accident, Conductor Richins was riding the train movement on the south side of the poultry track next to the Intermountain Farmers Association's facility, under lease to the defendant. The spool of one-half inch steel cable, as depicted in the photographs marked Exhibits "E", "F", "G", "H", and "I", at the time of the accident was located

within eight (8) feet six (6) inches from the center line of the poultry track immediately adjacent to the Leased Premises.

27. Neither plaintiff nor any of its employees, agents, servants, etc. claims to have been aware of or to have observed the subject spool of cable at any time prior to the accident.

28. After the accident, the spool of cable owned by defendant was observed to be located approximately one foot south of the south rail of the poultry track in the location shown in the photographs marked Exhibits "E", "F", "G", "H", and "I". The distance between the rails of the poultry track was four (4) feet eight and one-half (8½) inches.

29. Defendant claims to have last seen the spool of cable located right next to its building immediately south of the poultry track where the accident occurred. At about 11:00 o'clock a.m. on the day prior to the accident, an employee of defendant, Robert W. Turley, its plant manager, made an inspection of the building, by walking along the same. Such inspections were made approximately once a week (Turley deposition, pages 14, 15 and 37).

30. Defendant's employees disclaim having any knowledge as to how the spool of cable got to its location at

or near the track on the night of the accident. The night of the accident in question was Halloween night.

31. The dimensions of the spool were approximately one (1) foot in height by two (2) feet four (4) inches in length. Attached to the spool was some one-half inch (1/2) steel cable. The defendant claims it never used the spool and cable.

32. By letter, dated December 15, 1972, plaintiff advised defendant in writing of the subject accident, expressed the opinion that legal action was apparent, and provided defendant full opportunity to defend or participate in the disposition thereof. (A copy of said letter, marked Exhibit "M", is attached hereto.)

33. On or about January 29, 1973, said Richard V. Richins filed an action, alleging negligent conduct against the Railroad, in the Third Judicial District Court of Salt Lake County, State of Utah, entitled "Richard V. Richins vs. Union Pacific Railroad Company," identified as Civil Number 210084, demanding judgment for injuries sustained in the above-described accident in the sum of $750,000.00; such action was brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

34. On February 21, 1973, the Railroad notified Intermountain Farmers in writing of the pendency of such action and again provided Intermountain Farmers full opportunity to defend the Railroad or participate in the defense against Richins' law suit. A copy of said notification is attached hereto, marked Exhibit "N", and by this reference made a part hereof. By letter, dated March 22, 1973, Intermountain Farmers declined to accept tender of the case.

35. By a hand-delivered letter, dated and delivered October 24, 1973, the Railroad advised Intermountain Farmers that, following extensive settlement negotiations with Richard V. Richins' legal counsel, the Railroad had agreed to compromise Mr. Richins' case for $162,500.00. In said letter, the Railroad requested that Intermountain Farmers be prepared to tender the compromise payment of $162,500.00 to Mr. Richins at the settlement conference scheduled for October 31, 1973. A copy of said letter is attached hereto as Exhibit "O", and by this reference made a part hereof.

36. On October 31, 1973, the Railroad, by way of compromise and in order to settle Mr. Richins' action and secure a release, paid to said Richard V. Richins the sum of

$162,500.00. Intermountain Farmers' name was included in the Release, but not by its request. A copy of said Release is attached hereto as Exhibit "P", and by this reference made a part hereof.

37. At all times mentioned herein, Intermountain Farmers rejected the tender of defense of the claim and suit brought by Mr. Richins and rejected any and all offers of the Railroad to enter into negotiations and/or settlement of Richins' suit.

38. On or about November 15, 1973, the Railroad instituted this action to recover from the Intermountain Farmers said $162,500.00, together with defense costs and expenses in the sum of $1,195.00, reasonable attorneys' fees in the sum of $1,840.00, and deposition expenses of $97.50, for a total sum of $165,632.50.

39. Under the provisions of the Federal Employers' Liability Act herein referred to, a jury issue was presented as to whether or not the Railroad was negligent and would have been held legally liable to Richard V. Richins for the injuries he sustained as described above, and the Railroad could have been held legally liable by a jury or court for such injuries sustained.

40. It is agreed by the parties that the settlement made by the Railroad with Conductor Richins in his law suit under the provisions of said Federal Employers' Liability Act is deemed reasonable in all respects, including all costs and attorneys' fees.

41. The respective parties further stipulate that all depositions taken in this action may be published and used by the Court for the purpose of making its decision herein.

From the facts set forth above, the plaintiff contended that it was entitled to indemnification by the terms of its lease agreement with the defendant. The lease provisions applicable are as follows:

> "Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures, or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage, or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof." (Emphasis ours.)

> "Section 11. The Lessee shall be liable for any and all injuries to or damage to persons or property, of whatsoever nature or kind, arising out of or contributed to by any breach in whole or in part of any covenant of this agreement." (R 99, 100)

From said stipulated facts and based upon the lease provisions, the court entered its Conclusions of Law. In doing so, the court concluded as a matter of law that the lease agreement between the parties required the defendant to indemnify the plaintiff Railroad for any injuries sustained by Richard V. Richins, the employee of the Railroad, as a result of his accident on October 31, 1972, while performing duties for the Railroad on the leased premises. The court further found as a matter of law as follows:

> "The Court further concludes that the negligence of either party is not an issue or a necessary element to the conclusion of this action." (R 155)

The trial court concluded as a matter of law that regardless of the negligence of the Railroad, Intermountain Farmers, or both, the lease agreement provided absolute indemnification and in effect, required that defendant be an insurer of the safety of the employees of the Railroad while switching operations took place on defendant's leased premises.

POINT URGED FOR REVERSAL

POINT I

THE TRIAL COURT ERRONEOUSLY DETERMINED THAT PLAINTIFF WAS ENTITLED TO UNRESTRICTED INDEMNIFICATION FROM DEFENDANT BY VIRTUE OF THE TERMS OF THE LEASE.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY DETERMINED THAT PLAINTIFF WAS ENTITLED TO UNRESTRICTED INDEMNIFICATION FROM DEFENDANT BY VIRTUE OF THE TERMS OF THE LEASE.

Plaintiff's employee, Richins, the conductor of the train in question, was injured on the leased premises of Intermountain Farmers Association while an engine was being used to remove two empty box cars from the premises. The plaintiff's brakeman, working with Richins, signaled to the engineer of the train to back into the premises of the defendant when the area adjacent to the track was apparently obstructed with a partially wound spool of cable (Exhibit "A"). By stipulation of facts, the parties admitted that although the train carried dual headlights emitting 600,000 candle power lighting the tracks, the trainee brakeman nevertheless claimed that he failed to see the spool near the track. He admitted there was plenty of light to see the tracks as they were slowly backing and he had no trouble seeing where he was going. (R 91) It was also admitted by the Railroad's employees and the plaintiff herein that railroad

regulations forbid the backing of a train unless the track is free of obstruction to the movement of the train and the regulations further require that the railroad employees must either be able to see the track during the train's movement or know for a fact that the track and surrounding area are clear. (R 92) In any event, the engine and one car passed by the spool and came to a stop with the spool very near the edge of the tracks as is evidenced by Exhibit "B". At this point, the conductor, Richins, connected the second car and then got onto the platform of the engine with the trainee brakeman. Both employees attempted to occupy the same step or platform of the locomotive as the engine started its forward movement out of the siding. As the train commenced moving out of the yard, a portion of the engine apparently again passed near the spool where the leg of the conductor, Richins, evidently, in some manner, came in contact with the spool, causing him to fall to the ground resulting in severe injuries to his right leg.

As is indicated in the recitation of facts, an employee of Intermountain Farmers claimed to have walked along the tracks where the accident occurred on the day prior to the accident and that such was done in making inspection

of the building. While making the inspection tour, the employee stated he saw no spool of cable in the track area nor had he ever seen a spool of cable prior to that time. It should further be noted that on the night in question, it was Halloween and the area involved, including the plaintiff's train tracks, are unfenced.

The plaintiff claims that regardless of any negligence of its own employees or any negligence of the defendant's employees, or a combination of both, the lease agreement requires absolute indemnification. Based upon this assumption, the Railroad, after having been sued by Conductor Richins for its alleged negligence, made payment to Richins in settlement. It thereafter sought indemnification from the defendant herein under the terms of its lease.

It is respectfully pointed out that nowhere in the lease agreement does it require or exact from the defendant a duty of indemnification for the negligence of the Railroad. (R 99, 100) It is admitted that the Railroad settled its obligation to Mr. Richins based upon his allegations of negligent conduct of the Railroad only. The defendant herein was not a party to that litigation, nor did Richins ever sue this defendant.

After reviewing the stipulated facts and the exhibits herein, including the depositions of the parties, the trial court concluded, as a matter of law, that it made no difference whether or not plaintiff or defendant were negligent, or either in combination, the lease agreement required absolute indemnification as a matter of law.

This Court has repeatedly held that indemnification does not apply unless it is specifically spelled out in no uncertain terms. This Court has further held that the intention of the parties to indemnify must be ascertained from the contract as a whole; doubt or uncertainty should be strictly construed against the parties who prepared the agreement. Union Pacific Railroad vs. El Paso Natural Gas Company, 17 Utah 2d 255, 508 P.2d 910. The contract of lease in the instant case was drawn by the Railroad. It was in effect for many years and was, from time to time, renewed by agreement. (R 103) In spite of each renewal, no change was ever made in the alleged indemnity provisions. This Court has repeatedly held that where one party wishes to be indemnified for its own negligence or its negligence in conjunction with the negligence of others, it must specifically so state in the agreement. The Court will not imply indemnity and will construe the

indemnity provisions strictly against the party drawing the agreement. Had the Railroad wished to conform to the more recent decisions from this Honorable Court, it could have revised its indemnification provisions at the renewal of the lease by simple amendment if such were the intentions of the parties. This, however, was not done. Appellant concedes that a properly worded contract of indemnity between the Railroad and third persons, such as the appellant herein, could impose liability for negligent conduct even of the Railroad; however, such a contract cannot be ambiguous and must state with particularity the clear intent of the parties to be so bound. Unless the agreement is clearly stated to show the intent of the parties, it would not be so construed.

It is well settled that a contract purporting to indemnify one for his own negligence will be strictly construed in favor of the indemnitor. See 41 AmJur 2d, Indemnity, Section 15, Pages 699 and 700, wherein the author states:

> "A contract of indemnity purporting or claimed to relieve one from the consequences of his failure to exercise ordinary care must be strictly construed. Accordingly, it is frequently stated as the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts, unless no other meaning can be ascribed to it.

> "Mere, general, broad, and seemingly all-inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee's own negligence...."

The facts of the instant case clearly show that the trainee brakeman who had a duty to make sure the tracks were clear for travel apparently failed to watch where he was going as the train slowly moved into the yard or he saw but failed to heed the spool near the tracks. His negligent conduct obviously would have been imputed to the railroad, making it liable to its conductor, Richins, who was injured as a result of the employee's improper lookout.

In reviewing the facts, one must further conclude that the negligence of the brakeman, in not watching where the train was moving or failing to heed what was there to be seen, was active negligence. This Court has, on numerous occasions, adhered to the rule that a person is chargeable with seeing what, in the exercise of reasonable care, he should have seen. The spool allegedly causing the injury was certainly there to be seen when the track backed into the siding.

The Utah decisions are entirely harmonious with the rule heretofore referred to in the American Jurisprudence citation.

In Jankele vs. Texas Company, 54 P.2d 425, the Utah Supreme Court expressed doubt that a contract to indemnify one for his own negligence would be enforcible since it probably would be against public policy. This Honorable Court stated:

> "The contract does not pretend to relieve the defendant from damages occasioned by reason of improper and negligent installation. No such construction can be given to the contract. It is very doubtful that defendant could relieve itself by contract from its own negligence. Ordinarily such contracts are contrary to public policy."

The same thought was expressed in Walker Bank & Trust Company vs. First Security Corporation, 341 P.2d 944; there the Court stated:

> "Assuming that in the absence of some consideration of public policy militating against it, one may contract to protect himself against liability for loss caused by his negligence, it is nevertheless well settled that contracts in which a party attempts to do so are subject to strict construction against himself; and further, that he will be afforded no protection unless preclusion against negligence is clearly and unequivocally stated."

A case analogous to the one at bar is Barrus vs. Wilkinson vs. St. Paul Fire and Marine Insurance Co., 16 Utah 2d 204, 398 P.2d 207. In that case, a tenant's employee

slipped and fell in a common hallway and sued the landlord who in turn filed a third party complaint against the tenant for indemnity by virtue of the terms in a lease agreement. The indemnity agreement provided that:

> "...the Lessee will save and hold the Lessor harmless from all loss, damage, liability, or expense resulting from any injury to any person....caused by or resulting from any act of the Lessee or any officer, agent or employee of the Lessee, or about the leased premises or said building."

This Honorable Court affirmed on appeal the dismissal granted by the trial court and said:

> "...where an indemnity agreement is involved, it is generally held that the agreement will not be construed to cover losses to the indemnitee caused by his own negligent acts unless such intention is expressed clearly and unequivocally. Especially is this true where an affirmative act of negligence is involved."

This Honorable Court then went on to state:

> "The intention to indemnify the defendants from their negligent acts is not clearly and unequivocally expressed in the lease agreement .... The district court correctly dismissed the third party complaint."

In the case of Union Pacific Railroad Company vs. El Paso Natural Gas Company, supra, this Court said:

"In support of its claim for indemnification from the defendant, Union Pacific urges that it was its desire, and that the defendant agreed: that as a condition to granting the right of way it was to be protected just as though the pipeline did not exist. The specific language upon which this contention is based is that the defendant would indemnify and hold the Union Pacific harmless:

> '...from and against any and all liability damage, claims, ... of whatsoever nature, ... growing out of injury or harm to or death of persons whomsoever, or loss or destruction of or damage to property whatsoever, including the pipe line, when such injury, harm, death, loss, destruction or damage, howsoever caused, grows out of or arises from the bursting of or leaks in the pipe line, or in any other way whatsoever is due to or arises because of the existence of the pipe line or the construction, operation, maintenance, repair, renewal, reconstruction or use of the pipe line or any part thereof, or to the contents therein or therefrom.' (Emphasis added.)"

In holding the lease language insufficient to establish a contract of indemnity, this Honorable Court said:

> "A closely related proposition pertinent hereto is that the law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone; that of using due care for the safety of himself and others. This would tend to encourage carelessness and would not be salutary either for the person seeking to

> protect himself or for those whose safety may be hazarded by his conduct. For these reasons such covenants are sometimes declared invalid as being against public policy. However, this may depend upon the circumstances. The majority rule appears to be that in most situations, where such is the desire of the parties, and it is clearly understood and expressed, such a covenant will be upheld. But the presumption is against any such intention, and it is not achieved by inference or implication from general language such as was employed here. It will be regarded as a binding contractual obligation only when that intention is clearly and unequivocally expressed .... If it had been the intent of the parties that the defendant should indemnify the plaintiff even against the latter's negligent acts, it would have been easy enough to use that very language and to thus make that intent clear and unmistakable, which was not done here." (Emphasis ours.)

The lease between the parties in the instant case has been in existence for a number of years without amendment of any of its provisions. In spite of the plaintiff Railroad's knowledge and participation in the El Paso case, it nevertheless made no effort to alter or amend in any way its lease provisions with the defendant herein. This, in and of itself, appears to be an obvious indication that the parties had no intention of resorting to an indemnification agreement as is now alleged by the plaintiff or such a rewording of the agreement would have been made.

This Honorable Court again reached the same conclusion concerning indemnification agreements concerning Howe Rents Corp. vs. Worthen, 18 Utah 2d 263, 420 P.2d 848.

The language of indemnity in the plaintiff's lease herein clearly does not attempt to exact an indemnity from the defendant where the plaintiff's negligent conduct is also involved.

Paragraph 5 of the lease specifically refers to the paragraph as a paragraph to prohibit the unlawful use of the premises and refers to the indemnification in the event the premises were unlawfully used. Paragraph 11 sets forth a reference to the defendant's liability but nowhere in that paragraph is the word indemnity or contribution ever mentioned. (R 99-100)

Where the lessor or its employees are actively negligent in some way in causing an injury, the courts simply do not require indemnification from the lessee. See 19 ALR 3rd, Page 1936, wherein the author states:

> "Where acts of the railroad and the indemnitor concurred to produce the injury for which indemnity is sought, both parties being negligent to some extent, the courts have generally held that the railroad is not entitled to indemnity."

See also Chicago & Illinois Midland R. Co. vs. Evans Constr. Co. (1965), 208 NE2d 573, 19 ALR 3rd 921. The Illinois

Court held that even under common law rules of indemnity, the railroad could not obtain indemnity from the owner of the spur track where the railroad and the owner of the spur track were at most equally guilty of the same negligence. In that case, the owner of the premises had contracted for construction work in the area. After the construction work had been completed, some of the old railroad ties were left on the premises but apparently not in an area immediately adjacent to the track. A tie was found near the track as an employee of the railroad was getting off the train to perform his duties. He fell over the tie and was injured. The railroad paid the employee when it was alleged that the railroad failed to provide him with a safe place to work and in so doing, was negligent. The railroad thereafter sought indemnity from the owner of the premises. The Illinois Supreme Court stated:

> "In the case before us, the plaintiff bases its right to indemnity upon the ground that the negligence of the defendant was active, while its own negligence was passive. It states that 'this case is predicated upon the impropriety of defendant in placing or failing to remove the tie which caused the employee's injury.' The plaintiff and its employees were business invitees. The plaintiff railroad was responsible for failing to afford the employees a safe place of employment. This it did not do, but this is passive negligence. Defendant, Pillsbury, the landowner, expecting plaintiff railroad's

use of the premises, had the duty to make the premises safe for plaintiff and its employees. The breach of this duty is active negligence."

The Court further stated:

"The difficulty with this position is that there is no proof as to how the tie came to be where it was when the accident occurred or how long it had been there. The evidence supports the inference drawn by the trial court that the tie which caused the injury was one of the discarded ties belonging to the defendant, but it goes no further. .... There is no evidence which suggests that the defendant or any of its employees placed the tie on the tracks, and there is no evidence which suggests that the defendant knew it was there. In the language of the restatement, the evidence does not show that the dangerous condition was created by the defendant. The breach of duty relied upon to shift the entire cost of the injury from the plaintiff to the defendant must therefore be the defendant's failure to discover and remove the tie .... a failure to see that the premises were safe for the work that was to be done. That exact same duty rests upon the plaintiff." (Emphasis ours.)

The Illinois Court then went on to state:

"It is true that an inspection immediately prior to the accident was a preventative. But the duty to make such an inspection rested equally upon the plaintiff and the defendant."

The Illinois Court then quoted from the case of Union Stockyards Company of Omaha vs. Chicago, Burlington, Quincy Railroad Company, 196 U.S. 217, 25 Supreme Court, 226,

wherein the United States Supreme Court held that where both parties, the railroad and the defendant, failed to discover a hazard which both might have discovered by inspection, both are equally guilty of the same negligent conduct and no indemnity or contribution can be had. The Illinois Court then concluded its decision by stating:

> "In the present case, the plaintiff was not the usual business invitee, but was one which, in the conduct of its business operations, was subject to a nondelegable statutory duty to provide a safe place for its employees to work. That duty was no less stringent than the duty of the defendant as the owner of the premises. Since we hold that the plaintiff was not entitled to indemnity from the defendant, it is not necessary to consider whether the injured employee was guilty of contributory negligence."

In the instant case, the contract between the Railroad and Intermountain Farmers contains but one reference to indemnity in the entire lease agreement. That reference is in Section 5 of the lease agreement under the heading "Use for unlawful purposes prohibited. Indemnity." The portion referring to indemnity then says

> "...the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or <u>from any cause whatsoever growing out of said Lessee's use thereof</u>." (R 99)

The accident in the instant case arose out of the use of the premises by the Lessor's use of the premises, not that of the Lessee.

In the Howe Rents case, supra, the wording of the indemnification agreement was almost exactly the same as the wording of the agreement in the instant case insofar as it stated:

> "Lessee assumes all liability for damages from accident ... and agrees to indemnify and hold harmless the lessor, its officers, agents, and employees from any and all damages and/or liability to any person whomsoever arising out of or resulting from the use, storage or transportation of said equipment by the lessee or anyone else..." (Emphasis ours)

This Honorable Court again stated the rule as follows:

> "The general language, 'the lessee shall be liable for all damage to or loss of the equipment regardless of cause,' does not constitute a clear and unequivocal expression creating an obligation for the bailee to indemnify the bailor for the bailor's negligent acts."

The very limited reference to indemnity in the instant lease clearly indicates that the parties did not contemplate such a broad indemnification as to require the Intermountain Farmers to pay for any and all negligence,

whether it be that of the Railroad's employees, its negligence, or a combination of both. The Railroad undoubtedly will claim that because its liability arises under FELA, the lease agreement might require a different interpretation. It is respectfully pointed out that both parties at all times were aware of the obligations of the Railroad under the Federal Employer's Liability Act. Such being the case, this Court has previously stated:

> "It must be concluded that the parties when they entered into the contract had in mind the provisions of the FELA and the law applicable thereto." Oregon Short Line Company vs. Idaho Stockyard Company, 12 Utah 2d 205, 364 P.2d 826.

The fact that the Railroad is an FELA employer should not give it special privileges in the courts in the interpretation of its lease agreements. The lease agreement contained in the instant case and its reference to indemnification is far less explicit and definitive than the provisions contained within the lease in the El Paso case, supra. In spite of this Court's admonition to plaintiff Railroad in the El Paso case that it should spell out unmistakably and clearly what acts would be required for indemnification, it nevertheless failed to do so in this

instant case. In spite of renewals of the lease, there has been no amendment to the terms in respect to indemnity or any interpretation thereof. One must then conclude that such was not an oversight by the Railroad. It obviously did not intend to exact such a stringent indemnification at the time the lease was renewed.

CONCLUSION

The trial court was in error when concluding that the lease agreement provided absolute indemnification regardless of fault. The railroad employee, Richins, sued the Railroad, alleging that it was negligent in failing to provide him with a safe place to work. One can only conclude that the negligence was the failure of the trainee brakeman to either observe the obstruction near the track or his failure to heed its existence. In any event, the Railroad was obviously actively negligent in bringing about Richins' injury. The Railroad firmly and freely admits that its employees are specifically forbidden to move a train onto the tracks of a siding or any other area until the tracks are observed to be clear and free of obstruction. Obviously, neither was done by the employees of the Railroad in the instant case which caused the injuries.

It is respectfully submitted by Intermountain Farmers that its lease with the Railroad is not an absolute guaranty or a contract of insurance. The trial court was in error in concluding that it was. The most that could be said from the facts is that perhaps both the Railroad's employees and those of Intermountain Farmers were concurrently negligent in causing the injury. Such being the case, the lease agreement did not exact indemnification by virtue of its terms. The judgment of the trial court should be reversed.

Respectfully submitted

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