

1949

Pete Moleton v. Union Pacific Railroad Company and Pacific Fruit Express Company : Brief of Appellant

Utah Supreme Court

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Case No. 7379

IN THE SUPREME COURT of the STATE OF UTAH

PETE MOLETON,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation, and PA-
CIFIC FRUIT EXPRESS COM-
PANY, a corporation,

Defendants and Respondents.

FILED

27 1949

CLERK, SUPREME COURT, UTAH

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief we shall designate the parties as they appear in the trial court.

All italics appearing in the brief are added.

The figures in parentheses refer to the pages of the record.

The defendant, Union Pacific Railroad Company, will be referred to herein as the railroad company and the defendant, Pacific Fruit Express Company, will be referred to as the express company.

This is an appeal by plaintiff from a judgment (R. 66), entered in favor of the defendants, and each of them, and against the plaintiff "No Cause for Action." This judgment was entered upon the court granting the defendants' motion for nonsuit and for the dismissal of plaintiff's complaint, which motions were made after the plaintiff had rested (R. 267-277). This action was brought by plaintiff to recover the sum of \$100,000.00 for permanent injuries received by plaintiff while working in the yards of the defendant, Union Pacific Railroad Company, at Laramie, Wyoming on the 22nd day of November, 1945.

The complaint in this case was divided into three causes of action. Each cause of action set forth a separate and distinct theory upon which plaintiff claimed that he could recover for the permanent injuries which he had suffered (R. 1-18).

The first cause of action is founded upon the Federal Employers' Liability Act and the plaintiff therein alleges that the two defendants are common carriers by railroad in interstate commerce and that plaintiff was employed by them in such commerce.

The second cause of action is against the express company alone. This cause of action is divided into two counts. Plaintiff alleged in each count that he was em-

ployed by said express company. Under the first count the plaintiff alleges that the defendant is engaged in operating a railroad within the State of Wyoming as a common enterprise with the Union Pacific Railroad Company. Plaintiff under this count relies upon the statutes of the State of Wyoming which applies to railroad companies operated within the State of Wyoming (R. 9-11). This act is very similar to the Federal Employers' Liability Act.

In answer to this first count of the second cause of action the defendants deny that the express company operates a railroad within the State of Wyoming and hence does not come within the said statutes (R. 30-31).

The second count of the second cause of action is based upon the theory that the express company had failed to comply with the statutes of the state of Wyoming requiring the contribution by employers to the Industrial Accident Fund. Under the statutes of Wyoming such failure permits the employees of such employer to maintain their common law actions for injuries (R. 11-12).

In answer to this second count the defendants denied that the express company was subject to the Workman's Compensation Act of Wyoming, relying upon Section 72-105 of the Wyoming Compiled Statutes 1945, wherein it is provided that the Wyoming Compensation laws do not apply to businesses or employment which, according to law, are engaged in interstate commerce (R. 31, 47-49).

The third cause of action is against the railroad company and is based upon the theory that the relationship of employer and employee does not exist between the plaintiff and the railroad company and that plaintiff suffered his injuries by reason of the negligence of the railroad company (R. 13-16).

The negligence set forth in the various causes of action contained in the complaint are almost identical. Under the first cause of action plaintiff alleges that he was employed by the defendants as an iceman and in the performance of his duties in the wintertime was required to descend into bunkers on refrigerator cars to regulate burning heaters which generated carbon monoxide gas. He further alleges that this gas accumulated and was known to accumulate by defendants in these bunkers, making it extremely hazardous to him in the performance of his duties. He alleges that they failed to use reasonable care to furnish him a reasonably safe place to work in that this condition existed in the bunkers, and that the defendants neglected to provide any means of removing and discharging the carbon monoxide gas. Plaintiff further contends that the defendants were negligent in not providing any methods or means whereby plaintiff could be saved or rescued by the peril created by the presence of said gas, and the defendants failed to provide a sufficient crew to assist in the performance of these hazardous duties. Plaintiff further relied upon the doctrine of *res ipsa loquitur*.

These grounds of negligence are realleged in the second cause of action.

In the third cause of action plaintiff alleges that the railroad, knowing that carbon monoxide gas had accumulated in the refrigerator cars and knowing of its dangerous characteristics, negligently instructed plaintiff to adjust the heaters therein without help or assistance and without providing means whereby plaintiff could be saved or rescued from said gas and without warning plaintiff of the presence of said gas.

It was further alleged that the doctrine of *res ipsa loquitur* applied and that the defendant, knowing of the presence of the carbon monoxide gas in the bunkers and that plaintiff would be unable to discover its presence, the railroad company negligently neglected to give plaintiff warning of the existence of the said gas and the hazard thereby created, and the railroad company neglected to ventilate said car or provide means for the removal of said gas (R. 14-16).

The defendants denied all of the acts of negligence and in their answer alleged as affirmative defenses contributory negligence, assumption of risk and the fellow servant doctrine.

We have set out the pleadings to inform the court of the various issues which were involved before the trial court. However, on this appeal we are only interested in the first cause of action. We have set forth the allegations of the second and third causes of action so that the court may be informed of the position taken by the parties with respect to these two causes of action. It is to be noted that the defendants contend that the plain-

tiff is entitled to no form of compensation for the injuries which he has received. By their position in this case they reflect the extent to which they claim they have insulated themselves against liability for injuries to employees working on trains in interstate commerce.

We feel that our position on the first cause of action is well taken and that it is unnecessary to belabor the points raised in the second and third causes of action on this appeal.

STATEMENT OF THE CASE

In setting out the statement of facts, we shall divide it into four classifications, to wit: (a) The Laramie Yards; (b) The conduct of business in those yards; (c) The plaintiff's employment; (d) The event of plaintiff's injuries. The trial court in granting the motions for nonsuit did not specify the grounds upon which they were granted. Although the record does not show it, arguments and discussion on the motions were devoted almost entirely to whether or not the Federal Employers' Liability Act was applicable to this case.

(a) THE LARAMIE YARDS

The Laramie Yards, in which plaintiff was injured on November 22, 1945, are approximately two miles long and two blocks wide. The railroad company owns all of the tracks in this yard and is the only railroad that transports trains or cars either into or out of these yards

(R. 212, 213). These trains contain cars from many different railroads (R. 213).

Laramie is a terminal and all engines are changed in these yards, that is, when a train comes into the yard the engine is disconnected from the train and replaced by a fresh engine (R. 235). When these trains arrive there is generally quite a bit of work to do on them and in some instances they are completely broken up and remade before they proceed on their journey (R. 234).

The yard at Laramie is also a regular inspection point (R. 221) and cars containing perishable produce and commodities are serviced by icing and regulating heaters and ventilators (R. 214). This perishable freight consists of such items as fresh meat, sweet potatoes, spuds, beer, wines and grapefruit (R. 213).

(b) THE CONDUCT OF BUSINESS IN THOSE YARDS

A Yard Office is maintained in these Laramie Yards by the railroad company and into which comes all information concerning trains coming into the yard. This information is made available to all persons who may have work to do on the train so that they may know what work must be done before the train proceeds on its journey. This work consists of switching operations (R. 235) and also the inspection and regulation of heaters on refrigerator cars (R. 214).

The information concerning a train is received at the yard office about an hour before the train arrives in order that preparations may be made for the work

to be done and the train may proceed on its journey without undue delay (R. 230).

The procedure by which this information is forwarded to the yard office was described in the testimony. Trains proceeding toward the Laramie Yards would be in charge of the conductor who would have the waybills on the various cars and freight contained therein. From these waybills he would make up a switch list (R. 230). A copy of the switch list of the train involved in this case was introduced in evidence as defendant's Exhibit "5". A perusal of the switch list will show the type of information accumulated by the conductor in making up this list. The number of each car and the company owning it was listed, the class of freight, the contents of each car and its destination was also placed on this list. The waybill instructions were given and particularly instructions were given concerning the perishable freight. It being wintertime, when the train involved in this case approached Laramie the directions for this perishable freight concerned the temperature at which these cars must be kept to prevent freezing of the freight contained therein.

This switch list, after its preparation, is dropped off by the conductor at some telegraph station along the line. The dispatcher at the station then forwards this information, either by telegraph or telephone, to the yard office at Laramie. In the yard office is made up a consist from the information so obtained from the conductor. Enough copies of this are made for all persons who may have work to do on the train. The con-

sists are then hung on a tab in the office to be picked up by the various persons concerned with getting the train in readiness for its journey. All of the persons who have anything to do with the making up and forwarding of this information are persons in the general employ of the railroad company (R. 230, 231).

In the yard office the railroad company employs a yardmaster. From the information, forwarded to the yard office, he determines how he is going to make up and break up the train. He in turn gives this information to the yardmen and to the switchmen (R. 230, 231).

The express company has a couple of desks in the yard office and persons in the general employ of the express company in the yard office obtain a copy of these consists just as does the railroad company yardmaster (R. 231). The parties stipulated that a copy of Exhibit "5" was furnished by the railroad company to the express company yard clerk in the yards at Laramie on the occasion of the arrival of the train involved in this case. This exhibit was then furnished to the persons working in the yard under the general employ of the express company in order that they could perform their work on the train (R. 233).

The yardmaster would determine from the information he received where the trains coming into Laramie would be stopped and on what tracks and he in turn would inform the express company general employees what tracks were clear and on what tracks he intended

to put the trains (R. 234). The yardmaster would leave a list similar to Exhibit "5" on the caboose for the men on the switch engine working at the rear end of the train so that these men would know what work was to be done on that end of the train (R. 234). It was the yardmaster's responsibility to carry out the necessary things which were required by the information contained on the switch list. It was also the responsibility of the express company to take care of the work to be done on the refrigerator cars as disclosed by the information contained on this list (R. 245).

The foreman of the express company receives his information as to what should be done on the cars over the phone from the yard office. The foreman by those directions is told at what temperature the heaters are to be lighted or the temperature at which the heaters are to be extinguished (R. 215, 220, 221). The foreman has nothing to do with where the trains are placed in the yard and has nothing to do with the time that these trains come into or leave the yards (R. 215).

These refrigerator cars are owned by various companies, including the Pacific Fruit Express, the Swift Company, the Armour Company, the Rath, and the Canadian Pacific (R. 221). The general employees of the express company perform the necessary work on all of these refrigerator cars in the railroad company's trains regardless of what company owns them. It should be noted that the car from which plaintiff fell and was injured was not a car owned by the Pacific Fruit Express (R. 126, 127).

The work of the plaintiff and others in the general employ of the express company was gone into much more in detail than the work performed by the general employees of the railroad company. This was natural because plaintiff was injured while in the performance of his duties in regulating the heaters on the refrigerator cars.

It appeared from the evidence that when the foreman obtained the necessary information he would then direct plaintiff and other employees of the express company what was to be done on the refrigerator cars and gave them the numbers of the cars on which this work was to be done. He also informed them of the track on which the train was to be placed and the time of its arrival.

A rule had been promulgated and was posted in the yards by the express company. The so-called "Safety First Rules" were introduced in evidence as defendant's Exhibit "4". Rule 19 d. provided:

"When inspecting cars or lighting heaters at regular inspection points, not less than two employees must work together for each other's protection."

This rule, requiring two employees to work together in the adjusting of heaters, was usually followed in the yards (R. 218).

It was stipulated by the parties that the express company was a Utah corporation, organized in 1906

and that with the exception of a relatively small number of shares the stock of the express company was owned in equal amounts by the defendants Union Pacific Railroad Company and the Southern Pacific Company. It was further stipulated that no members of the Board of Directors of either the Southern Pacific Company or the Union Pacific Railroad Company were members of the Board of Directors of the express company.

It was also stipulated that the express company performs the same or similar services for at least four railroads, to-wit: The Southern Pacific, The Union Pacific, The Western Pacific and the Mexican railroad (R. 266-267). However, it was also stipulated that this was not true in the yards of the railroad company located in Laramie, Wyoming (R. 267). The evidence conclusively establishes that the only services rendered by the express company nominal employees was to the defendant, Union Pacific Railroad Company.

(c) THE PLAINTIFF'S EMPLOYMENT

At the time of receiving his injuries plaintiff was in the general employment of the express company (R. 141). He had worked for them since 1925 (R. 72). He was not on the payroll of the railroad company and he received his check from the express company. If there had been occasion to fire him it would have been done by the express company (R. 141, 142).

The foreman of the express company told him what work to do (R. 143). In performing the work on

the heater cars the men on the job determined whether or not charcoal was to be placed therein and how much (R. 146). On occasions plaintiff would determine whether the bunker walls should be adjusted (R. 148). Plaintiff also determined how long he would leave a plug out before he climbed into the bunker (R. 149).

It appears that the directions given plaintiff were from information and instructions given to the express company by the railroad company and obtained by that company from the waybills on the various cars and freight in the train. This information was accumulated by the railroad company's conductor and placed on a switch list which eventually came into the hands of all persons who worked on the train, whether nominally employed by the express company or the railroad company.

(d) THE EVENT OF PLAINTIFF'S INJURIES

Plaintiff was injured on the 22nd day of November, 1945, at which time he was 53 years of age. At that time he had worked for the Pacific Fruit Express for more than twenty years; during this time his duties had been to take care of the inspection and handling of refrigerator cars. In the summertime he iced these refrigerator cars and in the wintertime he took care of the heaters (R. 73, 74).

Pictures of one of these refrigerator cars was introduced in evidence as defendants' Exhibits "1" and "3". These cars are about 15 or 16 feet from the top of the rail to the top of the car (R. 75); from the floor

to the ceiling is from 8 to 10 feet; the car is about 10 feet wide (R. 75); the cars have an ice bunker in each end. These bunkers are about 3 feet to 3½ feet wide. The bottom of these bunkers, or the floor, is made of tin or steel. The bunkers are separated from the rest of the cars by either wood or steel partitions (R. 78). To get into the bunkers the men climb a ladder on the side of the car to the top of the car and open the door or plug of the bunker. The men then climb down the ladder on the inside of the bunker to the floor (R. 81).

In the summertime the cars were brought to the icing docks and ice and salt placed in the bunkers (R. 82). In the winter months plaintiff's work consisted of regulating the heaters by either putting charcoal in them or by shutting them off, as the weather required (R. 90). On occasions it was necessary to place ice in cars which contained meat (R. 91). Plaintiff, in the performance of his duties, worked on refrigerator cars owned by various companies including the Fruit Growers' Express and the American Refrigerator Company (R. 92). During the wintertime the plaintiff at all times worked with two men and sometimes with three (R. 92). His foreman would tell him on which track the train was located.

In describing the way the work was usually done the plaintiff testified that at least two men were supposed to perform the duties of regulating the heaters in the bunkers (R. 96). After climbing to the top of the car one of the plugs is opened by the use of a pick handle; after the plug is open one of the men descends into the

bunker and either shuts off the heater or puts more charcoal into it; the other man goes on to the next bunker and performs the same duties. Plaintiff testified that sometimes he noticed that there was gas in the bunkers. He determined the presence of gas by the fact that he would get dizzy, not while he was down in the bunker, but as soon as he got out into the fresh air (R. 93-96).

On the day that the plaintiff was injured he arrived at work at 8:00 o'clock in the morning. At that time there were four men working, plaintiff, the foreman and two other men. On this particular day, Riley was the foreman. In the testimony of the plaintiff, this man is referred to as Rowley (R. 97). During the morning the plaintiff did not work on any of the refrigerator cars, but as he remembered it, he did some cleaning up in the yards. Shortly before noon a westbound train consisting of 50 or 60 cars pulled into the yards at Laramie. It pulled in on Track No. 10 (R. 99, 100). Just before the train arrived plaintiff and the foreman were the only men on duty, the other two men having gone to dinner at about 11:30. The foreman told plaintiff to work on this train and that there were three reefers, which is the name that the men give to these refrigerator cars. He was told that there were three heaters which he was to regulate by shutting them off (R. 101, 102, 150) and he was given the numbers of the cars (R. 104). Because plaintiff would have to walk about a half a mile to the point where he was to perform his duties, he started for Track No. 10 before the train arrived (R. 101, 103). The reefers

on which plaintiff was to work were at the head end of the train, which would be the west end. Plaintiff started walking along the track toward the west (R. 104) and the foreman remained in the shanty (R. 152, 153). Plaintiff went alone to regulate these heaters (R. 105).

When he arrived at the first car upon which he was to work he climbed up on top of that car by means of the south ladder (R. 132) and opened the plug. He then proceeded to the other two cars opening the plug on each. In performing this work he walked along the top of the cars and did not dismount. He opened all of the plugs before he entered the bunkers in order to let the carbon monoxide gas out which had been generated by the burning heaters (R. 193). Plaintiff estimated that it took him about four minutes to open these plugs and return to the first car on which he had opened the plug (R. 199).

After returning to this first car he descended by means of the ladder and shut off the burning heater (R. 204). He climbed out of the bunker and proceeded on to the second car. He descended into the bunker, shut off the heater, climbed out and proceeded on to the third car. He estimated that the plug in the third car had been open between ten and twelve minutes (R. 200). He climbed down the ladder in this car, shut off the heater, and then climbed out by means of the ladder. When he got into the fresh air he lost consciousness and this is the last that he remembers until he came to lying

on the ground near the car from which he had fallen (R. 106-109).

Plaintiff did not know the name of the car or its number: he did know, however, that it was the reefer at the head end of the train. It was stipulated that the car from which plaintiff fell was F.D.E.X. 9084 (R. 126, 127). This car was the second car from the head end (R. 129). It was a car of the Fruit Growers Express and not of the defendant express company (See Exhibit "1"). Plaintiff testified that he remembered coming out of the bunker on this car and that he remembered putting the plug in place but that he did not remember anything after that (R. 110). He fixed the time at which he fell off the car at about five minutes to twelve (R. 112).

Plaintiff testified that he knew that the safe way is to open the plugs on both ends so the gas can get out and there is ventilation through the car, and he stated that he didn't do it on this occasion because the train was in a hurry and the foreman had so told him (R. 193). Plaintiff, in answering the question as to why he did not open all of those plugs, testified as follows (R. 206):

"A. This foreman told me this train been supposed to stay about five or six minutes in the yard, and he call 'hot shot', you know, got to go quick. He told me how much, you can quick open up one plug, that is plenty, this foreman told me.

Q. He did?

A. Yes.

Q. What do they mean, it was a 'hot shot'?

A. Sometimes, you know, this train like sometime coming one train, two train, they have stock, and they have got to get out of town.

Q. He told you that?

A. Yes."

It also appeared that the rear end plugs on at least two of the cars were sealed and plaintiff could not remember as to the third car (R. 205, 206). Plaintiff had not received orders from his foreman permitting him to break the seals (R. 205) and in the absence of such order he could not break the seals (R. 223).

Syler, a foreman for the Pacific Fruit Express Company and who had worked on the refrigerator cars containing these charcoal burners since 1929, testified that the burning heaters created and caused gas fumes within the bunkers (R. 215). It was stipulated by the parties that the gas which was created or formed in the bunkers was carbon monoxide gas (R. 216). Syler testified that he had seen fellows getting headaches from this gas and that they had a "bad feeling" after working too many of these cars (R. 216).

A person is affected by these gas fumes more after he has been in the car and has come out into the fresh air. This gas does not have an odor and it cannot be seen (R. 219).

For protection of the men from these fumes Safety Rule 19 d. requiring two men to work together had

been promulgated and had been in force in the Laramie Yards since 1929 (R. 218, 219).

Plaintiff testified that sometimes he was able to tell whether or not there was gas in the bunker and at other times that he was not able to tell (R. 112). On the occasion of his injury he testified that he figured that the gas was out of the bunkers because he had opened up the three plugs as above indicated. He was not dizzy while he was working on either of the first two cars. As he came out of the bunker on the third car he felt the same as he did at any other time. He testified that he had to bend a little bit when he shut the plug and that when he raised up that is the last he remembered (R. 113, 114) and at that time he fell from the car. When he regained consciousness he was suffering from "plenty pain". He testified that the pain was in his right hip, that three ribs were broken and that he was skinned on one side. He laid on the ground for two hours before he was taken to the hospital at Laramie (R. 114, 140).

Plaintiff then testified to the treatment which he received at the hospital, the fact that he was placed in a cast, and the misery and pain which this treatment caused him to suffer. He also testified that he was required to return to hospitals several times and that various doctors treated him. These matters are of no importance on this appeal other than to indicate that the plaintiff did suffer severe and permanent injuries and suffered severe pain.

ASSIGNMENT OF ERRORS

Comes now the plaintiff and appellant in the above-entitled action and assigns the following errors committed by the trial court and upon which he relies for a reversal of the judgment entered against him:

1. The trial court erred in granting a motion for a nonsuit as to plaintiff's first cause of action made by the defendant and respondent, Union Pacific Railroad Company, and entering a judgment pursuant thereto dismissing plaintiff's cause of action. (See Points I, II and IV of this brief).

2. The trial court erred in granting a motion for a nonsuit as to plaintiff's first cause of action made by the defendant and respondent, Pacific Fruit Express Company, and entering a judgment pursuant thereto dismissing plaintiff's cause of action. (See Points III and IV of this brief).

3. The trial court erred in granting the motion for a nonsuit upon the first count of the plaintiff's second cause of action, said motion being made by the defendant, Pacific Fruit Express Company, and in entering the judgment dismissing plaintiff's action.

4. The trial court erred in granting the motion for a nonsuit on the second count of the plaintiff's second cause of action, said motion being made by the defendant, Pacific Fruit Express Company, and in entering judgment dismissing plaintiff's action.

5. The trial court erred in granting the motion for a nonsuit on plaintiff's third cause of action made by the defendant, Union Pacific Railroad Company, and entering judgment dismissing plaintiff's action.

SUMMARY OF ARGUMENT

POINT I.

THE PLAINTIFF, WITHIN THE MEANING OF THE F.E.L.A., WAS EMPLOYED BY THE DEFENDANT, UNION PACIFIC RAILROAD COMPANY, WHICH ADMITTEDLY WAS ENGAGED AS A COMMON CARRIER BY RAILROAD IN INTERSTATE COMMERCE.

POINT II.

THE ARRANGEMENT WHEREBY DEFENDANT RAILROAD COMPANY SEEKS TO HAVE EMPLOYEES OF THE EXPRESS COMPANY AND NOT ITS OWN EMPLOYEES PERFORM NECESSARY SERVICES ON ITS INTERSTATE TRAINS AND CARS IS A CONTRACT OR DEVICE IN VIOLATION OF 45 U.S.C.A., SECTION 55.

POINT III.

THE DEFENDANT EXPRESS COMPANY AT THE TIME OF PLAINTIFF'S INJURIES WAS A COMMON CARRIER BY RAILROAD IN INTERSTATE COMMERCE.

POINT IV.

THERE WAS SUFFICIENT EVIDENCE INTRODUCED IN THIS CASE TO SUPPORT A FINDING THAT THE DEFENDANTS WERE NEGLIGENT AND THAT SUCH NEGLIGENCE CONTRIBUTED IN WHOLE OR IN PART TO THE INJURIES SUFFERED BY PLAINTIFF.

ARGUMENT

POINT I.

THE PLAINTIFF, WITHIN THE MEANING OF THE F.E.L.A., WAS EMPLOYED BY THE DEFENDANT, UNION PACIFIC RAILROAD COMPANY, WHICH ADMITTEDLY WAS ENGAGED AS A COMMON CARRIER BY RAILROAD IN INTERSTATE COMMERCE.

Whose work was plaintiff performing at the time he was injured and during the time he was discharging the duties of his employment in the Laramie Yards?

If plaintiff was performing the work of the railroad company then he was in the employ of that company and this action is properly founded upon the Federal Employers' Liability Act.

The railroad company owned the yard and tracks at Laramie. It was the only company which transported trains in and out of that yard. The only trains which were worked on in those yards were the trains of that company. It was the one that determined what time the trains should come into the yard and what time they should leave. It determined on what tracks the trains should be placed and where the work was to be performed.

What cars and what freight should be brought into the yard and what should be done with them was determined by that company. It was the one that determined the destination of the cars and it was the one that gave directions as to the inspection and work which

should be performed upon those cars. It was the company that dealt with the shippers and waybills were made out by it. From these waybills and the commodities carried it determined the temperature at which the refrigerator cars were to be transported.

An examination of Exhibit "5", the switch list, discloses the directions it gave for the handling of the cars and freight in the Laramie Yard. Based upon the information and direction set forth in this exhibit every person working in the yard on this train knew exactly what to do in readying this train for its continued interstate journey. Everyone working on this train was given the very same information regardless of whether he was nominally employed by the express company or the railroad company.

The work to be done on these trains consisted principally of switching, changing engines and servicing cars containing perishable freight. The name of the document by which the information concerning the train is distributed is significant. It is designated:

"SWITCH LIST AND
SERVICE INSTRUCTIONS
PERISHABLE FREIGHT"

In the upper right-hand corner is the following:

"TO AGENT OR INSPECTOR

Carload Perishable Freight must be serviced in
accordance with waybill instructions shown be-

low. Position of ventilators is to be recorded under 'Arrival' and 'Departure' columns, show 'O' for Open, 'C' for Closed."

Here is a direct instruction to the nominal employees of the express company what they must do to the cars in this train of the railroad company. Turning to the second page of this exhibit we find the instructions concerning the three cars on which plaintiff worked. They are the 2nd, 6th and 7th cars on the train. We are not able to decipher exactly what the abbreviations mean, but the waybill instructions on these cars in the order worked by plaintiff are as follows:

47 CPS Htr 35° above

47 --- -- 35° --

60 SPS Lt Htrs 15 Ext 20°

These instructions were interpreted to mean that under the conditions at Laramie the heaters in these cars were to be extinguished. The employees working on the refrigerator cars followed these instructions given by the railroad company and the heaters on the cars in that company's train were shut off by plaintiff.

We submit that under these circumstances the work being performed by plaintiff was the work of the railroad company and was conducted in its yards and on cars in its train being transported by it for its shippers and the work was done pursuant to specific directions and instructions given by it. Plaintiff was therefore

its employee in performing its work. This assertion is supported by the authorities.

The case of *Linstead v. Chesapeake & O. Ry. Co.*, 276 U. S. 28, 48 S. Ct. 241, 72 L. Ed. 453 (1928), sustains plaintiff's position here. The problem there was the same as in the case at bar, that is, whether the workman involved was an employee of the defendant within the meaning of F.E.L.A. The action was brought under that statute.

The plaintiff's deceased was employed as a freight conductor by the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., known as the "Big Four." He and the other members of his crew were paid by that company and they were not subject to discharge by the defendant.

The Big Four and the defendant were connecting carriers. The tracks of the Big Four were west of Cincinnati and the defendant's tracks were east. The east end of the defendant's terminal yard was at Stevens, Kentucky, some 13 miles east of Cincinnati. The interchange of traffic between these two companies was accomplished by an arrangement whereby the Big Four sent an engine, caboose and train crew over the rails of the defendant to Stevens and then picked up and brought to Cincinnati cars destined to be transported by the Big Four west of Cincinnati. Defendant did not pay the Big Four for this service, but it sent its engines etc., west of Cincinnati on Big Four rails and returned cars destined to be transported by it east of Cincinnati.

While operating the Big Four train on defendant's tracks the crew was under the supervision of defendant's trainmaster and the crew obeyed the signals of the defendant's switch tenders and complied with the defendant's operating rules.

On the morning of the accident, the deceased was acting as conductor of the Big Four locomotive and caboose. The locomotive and caboose were driven to Stevens and there picked up a train of cars containing 22 loads and 18 empties, and the train was proceeding on its way back to Cincinnati. A passenger train of the defendant company collided with the rear end of the freight train killing the conductor. The trial court instructed the jury that as a matter of law the conductor was in the employ of the defendant company within the meaning of the Federal Employers' Liability Act. Judgment was rendered for plaintiff and the Circuit Court of Appeals reversed on the ground that the conductor was not employed by the defendant company, relying on the case of *Hull v. Philadelphia & Reading Railway Co.*, 252 U. S. 475, 40 S. Ct. 358, 64 L. Ed. 670 (1920). The Supreme Court, however, reversed the circuit court and affirmed the district court, holding that the deceased conductor was as matter of law an employee of the defendant company. In reaching this result the Supreme Court relied on *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480, and the case of *Farwell v. Boston & Worcester R. R. Corp.*, 4 Metc. 49, 38 Am.

Dec. 339. The basis for the Supreme Court ruling is found in the following quotation from the latter case:

“* * * To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.”

The Court, in speaking of the case before it, stated as follows:

“Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake & Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.”

The strength of this case as authority in favor of the plaintiff in the case at bar is emphasized by a consideration of the case of *Hull v. Philadelphia & Reading Ry. Co.*, supra. In this latter case the plaintiff's deceased was in the employ of Western Maryland Ry. Co., as a brakeman and was killed. This company was an interstate carrier operating a railway from Hagerstown, Md., to Lurgan, Pa., at which point it connected with a railway owned and operated by defendant between Lurgan and Rutherford, Pa. By arrangement between the two companies through freight trains were operated from Hagerstown to Rutherford by each of the companies operating its trains over its own tracks and over those of the other company, observing the rules of each company on its respective lines. It was held that the deceased was not a servant of the defendant, by which he was killed, but only the servant of the Western Maryland Company.

In distinguishing this case the Court in the *Linstead* case at p. 243 stated:

“* * * That was because the work which Hull was doing was the work of the Western Maryland Company, even though it was carried on for a part of the way over the rails of the Philadelphia & Reading Company. The locomotive belonged to the Western Maryland Company, the cars belonged to the Western Maryland Company and the loads that were carried were being carried for the Western Maryland Company, and presumably the rates which were received for the transportation were the receipts of the West-

ern Maryland Company. In other words, the whole line between Hagerstown and Rutherford was exactly as if it had been jointly owned by the two companies, and jointly used by them for their freight trains. Therefore the work was done by the Western Maryland for itself and the mere transfer of the train owned by the Western Maryland and operated by it on to the rails of the Philadelphia & Reading Railway did not transfer the relation of the deceased from the general employment of the Western Maryland to a special employment by the Philadelphia & Reading as another master.

“In the present case there was such a transfer and the line over which the transportation was effected and on which the work of transportation was done by the deceased was the line of the Chesapeake & Ohio, which was master and remained in charge of the operation, with the immediate supervision of the Big Four crew which was lent for the very purpose of doing the work of the Chesapeake & Ohio.”

It is to be noted that in both the *Hull* and *Linstead* cases the trains were being operated over the rails and subject to the rules of the company claimed to be a special employer of the deceased person. Different results were reached in each case. Therefore, we must conclude that the factor of rules is not of any great weight in a determination of whether the employees of the company operating the train become also the employees of the company over whose tracks the trains are being operated. Hence, the determining factor is not the control over the employee but is whose work is being

done. The case of *Jones v. George F. Getty Oil Co.*, 92 F. (2d) 255, decided by the 10th Circuit Court in 1937, contains an excellent discussion of the federal cases concerning the problem under review in the case at bar. The court relies principally on the Linstead case, *supra*.

The plaintiff in the *Jones* case was employed by one Norwood in Texas to work on certain oil drilling operations in New Mexico. The water for this operation was to be furnished to Norwood by the defendant. This water was to come from certain wells on defendant's property. The wells came out of repair and Norwood was prevented from continuing his drilling operations because there was no other available source for obtaining water. Plaintiff, under the direction of Norwood's foreman, went to the property of the defendant to assist in repairing the wells. This foreman then directed plaintiff to climb a "gin pole", attach a block to the top thereof and feed a pulley through the block. Plaintiff was standing near the top of the pole, pursuant to the aforesaid order, when a guy wire broke allowing the pole to fall, injuring the plaintiff.

In the performance of this work upon the premises of the defendant the plaintiff was acting under the direction, supervision and control of Norwood and Norwood's foreman. The plaintiff was not at any time or in any manner acting under the direction, supervision or control of the defendant or any of its employees. Plaintiff accepted compensation under the Workmen's

Compensation laws from Norwood and this suit was brought against the defendant on the theory that he was a negligent third party.

The court held that plaintiff was a special employee of the defendant and hence his only remedy was under the New Mexico Compensation Act. He could not bring his action upon the theory which he had brought it. The court pointed out that it frequently appears that a workman will be held to have been at the same time the general employee of his regular employer and the special employee of the person whose work is being done. In reaching the result that the plaintiff was an employee of defendant, the court at p. 259, stated:

“The controlling factor is: For whom is the work being performed, and who had the power to control the work and the employee? The authority to determine the work to be done, and the manner in which it is to be carried on, necessarily includes the right to suspend or terminate the work altogether or, possibly, to exclude the particular employee from the job, not including the right to discharge the employee from the service of his general employer (Norwood), nor need it include the actual giving of directions to the employee in connection with the work he is doing.

“Bill Wood, the foreman, and plaintiff, and the other members of Norwood’s crew, had voluntarily entered upon said premises in said work with the consent of said defendant, who was the owner and in control, through his lease superintendent, Allen Stewart.”

The court in making application of this fundamental principle at p. 263 stated as follows:

“The ultimate test is: Whose is the work being done? *Standard Oil Company v. Anderson*, supra. In determining whose work is being done, the question of the power to control the work is of great importance (*Standard Oil Company v. Anderson*, supra), but is not conclusive (*Linstead v. C. & O. R. Co.*; *Hull v. Philadelphia & R. R. Co.* supra). The identity of the person who, in fact, directs the details of the work and gives the immediate instructions to the workmen is of comparatively small importance, the power of control referred to being the power to control the undertaking as a whole. *McLamb v. DuPont Company*, supra; *Singer Mfg. Co. v. Rahn*, supra.”

In applying the *Linstead* authority to this case and in pointing out the similarity, the court at p. 260 stated as follows:

“* * * There, as here, the injured person was under the general employ of another and was merely temporarily doing the work of the defendant. There, as here, the work so being done was primarily for the purpose of benefitting the general employer. There, as here, no payment to the general employer was made or contemplated for the doing of the work in question by its employees, and no payment of wages to the loaned employee was made or contemplated by the company whose work he was doing. There, as here, however, the work in which the employee was engaged at the time of the injury was a part of the defendant's regular business. The general power of control

and supervision of the work was in the defendant, although the injured employee was under the immediate supervision of the general employer and was only subject to being discharged by his general employer.”

The court, after a discussion of the *Linstead* and *Hull* cases, supra, at p. 261 concludes as follows:

“* * * The determining factor, therefore, is not the question of control over the employee, for that was the same in both cases, but as stated in *Standard Oil Company v. Anderson*, supra, it is a question of whose work was being done. In the *Hull* case the plaintiff’s intestate was operating a train of his general employer, pursuant to his general employer’s obligations with its shippers. It was, therefore, his general employer’s work which was being done and he was held to remain that company’s employee. In the *Linstead* case the plaintiff’s intestate, a general employee of the Big Four Railroad, was carrying on an operation which the C. & O. Company had undertaken to perform. The work he was performing was therefore the work of the C. & O. and the court held that in so doing he became that company’s special employee.”

Another case of the Supreme Court of the United States which upholds plaintiff’s position here is that of *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305, 52 S. Ct. 141, 142, wherein a United States railway postal clerk sustained injury due to the alleged negligence of one Hunter, a porter, in the general service of the two rail-

road companies who were parties defendant. Hunter was hired and paid by one of the defendant railroads and at the time of the injury he was engaged in loading United States mail into a mail car under the direction of a United States postal transfer clerk, and was not as to that work under the direction or control of either of the railroad companies. A judgment and verdict was rendered against the two defendant companies and this judgment was reversed by the Supreme Court of Mississippi and of the United States on the ground that Hunter at the time of the alleged negligence was not working for defendants, but for the United States. The United States court stated:

“Whether the railroad companies may be held liable for Hunter’s act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work or that of another; a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited.”

* * * *

“The statutory obligation imposed upon the railroad carriers is simply to transport mail of-

ferred for transportation by the United States. They are not required to handle, load, or receive mail matter, but only to furnish the men necessary for those purposes. The men so furnished handle the mails and load them into, and receive them from, the railway post office cars, as the regulation prescribes, 'under the direction of the transfer clerk, or clerk in charge of the car.' The work they do is that of the government. It is said that 'direction' means nothing more than the right to point out or indicate to the men furnished the disposition to be made of the mail. The scope of the word, as it is here used, is not to be thus limited. The phrase, 'under the direction of the transfer clerk,' would be practically meaningless unless it comprehended the power to supervise and control the movement. Obviously, as the evidence shows, a direction by the transfer clerk carries with it the duty, on the part of the men directed, to obey, and has, and was intended to have, the force of a command."

Hence, in the *Denton* case the court determined that the employee was an employee not of the one hiring and paying his wages, but of the United States Government, for whom he was performing services at the time of his negligence.

See the following cases which support the contention of plaintiff that at the time of his injuries he was an employee of the defendant railroad company: *Lovett v. Calloway*, 69 F. (2d) 532; *Chicago R. I. & P. Ry. Co. v. Norman*, 165 Okla. 133, 25 P. (2d) 298; *Atlantic Coast Line R. Co. v. Tredway's Adm'x.*, 120 Va. 735, 93 S. E. 560, 10 A.L.R. 1411 (writ of cert. den. 245 U. S. 670, 38

S. Ct. 191, 62 L. Ed. 540); *McLamb v. E. I. Du Pont De Nemours*, 79 F. (2d) 966; *Harrell v. Atlas Portland Cement Co.*, 250 F. 83.

The Utah Supreme Court has had occasion to consider some of the foregoing authorities in the case of *Murray v. Wasatch Grading Co.*, 73 Utah 430, 438, 274 P. 940. In that case the court stated:

“* * * The adjudicated cases affecting the principles of the common law that determine when the relation of master and servant exists consider five elements: (1) The selection and employment of the servant; (2) the payment of the servant's wages; (3) the power to discharge the servant; (4) the power to control the servant's actions; and (5) the person whose work is being done by the servant. It is quite generally held that the first three elements above enumerated are not necessary to the existence of the relationship of master and servant. 37 L.R.A. note pages 38 to 43; 1 Labatt, Mast. & Servt. (2d Ed.) pp. 56 to 58. As stated by the Supreme Court of the United States in the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480: ‘In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.’ ”

There are three recently decided Federal Circuit Court cases which support the position of the plaintiff in the case at bar. Each of these cases was brought under

the Federal Employers' Liability Act, and in each case the injured person had been employed by a person other than the railroad company. In each instance, the plaintiff contended that he was in the special employment of the railroad company and hence could bring his action under the F.E.L.A. The defendant railroad company in each case, as is true in the case at bar, contended that the plaintiff was not an employee of the railroad company, but in fact was the employee of the person hiring him. These cases are *Cimorelli v. New York Cent. R. Co.*, 148 F. (2d) 575, *Pennsylvania R. Co. v. Roth*, 163 F. (2d) 161, and *Pennsylvania R. Co. v. Barlion*, 172 F. (2d) 710.

In the *Cimorelli* case the defendant railroad company had entered into a contract with the United States whereby the company agreed to equip, maintain and operate in its yards at Dock Junction, Pennsylvania, a temporary storage place for war material in transit. The material was to be unloaded from cars, placed in open air storage and so kept that the contents of each car could be reloaded and moved to points of destination under the original waybill and bill of lading. The defendant company was to be paid for its services sums in addition to the ordinary transportation charges and was also to be reimbursed for its cost in preparing, equipping and maintaining the storage yards.

The defendant company contracted with the Duffy Construction Company for the unloading and reloading of the cars in a proper and orderly condition and at such

places in the defendant's yard as were selected by its superintendent. The Duffy Company was required to furnish its own equipment and labor and it was to perform the work promptly at such times and to such extent as was reasonably required by the defendant's superintendent.

The defendant agreed to put the cars for unloading and reloading at such places in the yard as would be reasonably convenient for the Duffy Company. The Duffy Company was to be paid for its services all of its cost of the work and in addition seven cents per ton. This additional amount was in no event to exceed ten per cent of the cost of performing the work. The allowable cost items were enumerated in the contract and no part of them was payable unless approved by the superintendent. The contract required the Duffy Company to keep accurate accounts and to submit copies thereof to the defendant company. The purchase of all hand tools, materials and supplies were to be approved in advance by the defendant and the title to such property was to be vested in defendant.

There was a special provision in the contract that the Duffy Company was to perform the work as an independent contractor with exclusive supervision of the manner and method of the performance of the work except that it was to be satisfactory to the defendant.

The plaintiff was employed by the Duffy Company to perform some of the unloading services required by

the contract. Plaintiff contended that due to the negligence of the defendant he was severely injured while unloading freight from a boxcar stationed on defendant's out-door storage track. Plaintiff contended that he was employed by the defendant. This latter contention was denied by the defendant. The question of whether or not the plaintiff was an employee of the defendant was submitted for determination by the trial court at the time of the pretrial hearing. The two contracts above mentioned were submitted to the court and the trial court determined that at the time of the injuries the plaintiff was not employed by the defendant company and his action was dismissed. From this dismissal plaintiff appealed to the circuit court. The circuit court reversed. It quoted from the Federal Employers' Liability Act as follows:

“* * * every common carrier by railroad* * * shall be liable in damages to any person suffering injury while he is employed by such carrier.”

The circuit court held that the words used in this section are to be construed in their natural sense and that they describe the conventional relationship of employer and employee.

The court also stated at p. 577:

“* * * And so the first question here is whether appellee, for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Company and had thus divested itself of the right of

control, to the extent that it had no longer a legal right to terminate the work or to direct it. If appellee had done nothing to limit its rights with regard to the business which was being done for its benefit, but had retained its proprietorship of it, each person working for the Duffy Construction Company was legally subject to appellee's control while so engaged and was the employee of appellee. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440; *The Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480."

The court recognized the difficulty of the problem involved and stated that each case must be decided on its own peculiar facts and ordinarily no one feature of the relationship is determinative. The court then set forth various tests which have been used in determining whether or not the relationship of an employer and employee existed, as follows:

"* * * One of the tests is who has the right of control over the work being done. Other recognized tests are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of the contractor's business, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies and materials, his right to control the progress of the work except as to final results, the time for which the workmen are employed, the method of payment, whether by time or job, and whether the work is part of the regular business of the employer. The important test is the control over the details of the work re-

served by the employer and to what extent the person doing the work is in fact independent in its performance. Restatement of the law of Agency, Vol. 1, p. 483, ch. 7, Sec. 220."

The circuit court held that the plaintiff was employed by the defendant railroad company within the meaning of the F.E.L.A. The court placed emphasis on the fact that the defendant's superintendent selected the place in the yards where, and fixed the time when, the cars were either unloaded or reloaded. The court pointed out that the part of the work to be done by Duffy was in the railroad yards of defendant where there was presumably a frequent movement of cars and the defendant controlled the place where the work was to be performed. No part of these premises were surrendered to Duffy. The court also pointed out that the whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole. From the very nature of the work its performance could not be committed exclusively to the discretion of the Duffy Company.

There were other factors taken into consideration by the court, but the foregoing are certainly things or factors which are present in the case at bar. The railroad company here continued to control the yards and did not turn over the control of the tracks to the express company. The place where the work was to be performed was determined by the defendant company. The time that it was to be performed was fixed by the railroad

company. It was necessary in the instance involved in the case at bar for the plaintiff to work rapidly upon the train because it was a manifest freight and should leave the yard in five or six minutes not for the benefit of the express company, but obviously for the railroad company's Time-Table.

In *Pennsylvania R. Co. v. Roth*, supra, the defendant railroad company had entered into a contract with the United States Government wherein it agreed to provide certain storage yards on the line of its railroad and to furnish necessary labor and material for the loading and unloading of cars. The railroad company in turn entered into a contract with the Fritz-Rumer-Cook Company. Under this contract this latter company was to unload inbound cars, assemble and place the material, remove the material from the inbound cars and recondition it. The company was also to do certain stenciling and marking in the storage yards. Under the terms of this contract the defendant was to pay the contracting company on a cost-plus-fixed-fee basis, based upon monthly statements submitted to and certified by the division engineer of the defendant railroad company.

Inside the storage yards the work of loading and unloading government material was carried on by the contractor's employees under the supervision of its yard foreman. This foreman hired and fired the men who worked there, directed the railroad company's switch engines which entered the yard as to where to place and pick up cars for loading and unloading, and super-

vised the work. The contracting company's foreman supervised the loading of material and directed its movement out of the yard.

The plaintiff was employed by the contracting company and the work he did was in the storage yard covered by the contract between the defendant railroad company and the contracting company.

On the occasion on which he was injured, the contractor was loading on to a flat car a large crane owned by it and which had been used by it in its operations under the contract with the defendant company. A car inspector for the defendant explained to the contractor's foreman the manner in which the car must be loaded in order to comply with the regulations of the Association of American Railroads and to be acceptable for transportation by defendant. This car inspector was present while the loading was taking place, and made suggestions as to how the crane should be fastened. The physical work was being done by two employees of the contractor. The plaintiff was standing on the ground beside the car, and he testified that defendant's car inspector asked him to hold one of the cross-ties down, and after he had complied with the direction, the car inspector told him to leave it there. Plaintiff thereupon let loose of the bar and started to step away from the car. The other employees also let go of the bar and it slipped and in a twirling motion hit plaintiff just underneath the eye causing serious damage.

Plaintiff alleged in his first cause of action that he was an employee of the railroad company and that he was injured by reason of the negligence of the car inspector of the defendant. In his second cause of action he alleged that if he was not employed by the defendant railroad company, then he was entitled to recover on the theory of negligence by the defendant toward an invitee upon the premises. The trial judge permitted the case to go to the jury under the first cause of action, holding as matter of law that the plaintiff was an employee of the railroad company. The jury returned a verdict in favor of plaintiff and defendant appealed. The circuit court affirmed plaintiff's judgment, relying upon the *Cimorelli* case and concluded that the following matters were the controlling factors in that case, at p. 164:

“* * * In its overall estimate of the controlling facts in that case, it was pointed out that the employment of the contractor was general, that the number of cars to be unloaded or reloaded depended upon the demands of the business, that the work was to be done when, where and in the proportions as the needs of the Railroad Company might justify, that the Railroad Company controlled the place where the work was to be performed and in which there was a frequent movement of cars, and that no part of the premises was surrendered to the contractor. The opinion then stated—‘The whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole. From the very nature of the work its performance could

not be committed exclusively to the discretion of the Duffy Company.' It then ruled that taking into consideration the circumstances surrounding the parties, the subject matter of the contract and the object intended to be accomplished by its performance, it was not the purpose of the parties that the work should be performed by the Construction Company as an independent contractor."

These two cases were then followed by the *Barlion* case, *supra*. The same railroad was the defendant as in the *Roth* case. The same contract with the government was involved and the same type of contract had been made with contractor as in the *Roth* case. The plaintiff was an employee of that contractor. Plaintiff brought his action under the Federal Employers' Liability Act contending that he was the employee of the railroad company and that he had been injured by its negligence. The defendant contended that he in fact was an employee of the contractor and that there was no liability on the part of the defendant for the injuries plaintiff received. In referring to the two previous cases the court at p. 712, pointed out the controlling facts and stated as follows, referring in particular to the *Cimorelli* case:

" * * * that the court, in its over-all, estimate of the controlling facts in the latter case, pointed out that the employment of the contractor was general, that the number of cars to be unloaded or reloaded depended upon the demands of the business, that the work was to be done when, where, and in the proportions as the needs

of the railroad company might justify, that the railroad company controlled the place where the work was to be performed and in which there was a frequent movement of cars, and that no part of the premises was surrendered to the contractor. It was further said that the whole project involved many interdependent details, the control or any one of which could not be surrendered without disorganization of the whole, and that, from the nature of the work, its performance could not be committed exclusively by the railroad to the contractor engaged in doing the unloading and reloading work and rendering the other services in question. The railroad had this right of control in the instant case to the same extent as it did in the Roth case; and it is the right of control, rather than its exercise, that determines whether or not a contractor is an independent contractor. The Roth case, therefore, cannot be distinguished on the ground that the control of the railroad company was there exercised, whereas it was not exercised in the present case."

When we consider these three cases in their application to the present case, it at once becomes apparent that these authorities require a holding that the plaintiff was an employee of the defendant railroad company.

In the case at bar the number of cars to be inspected and heaters regulated depended upon the demands of the railroad company's business; the work to be done by plaintiff and other express company employees was to be done when, where and in the proportions as the needs of the railroad company might justify. The rail-

road company here controlled the place where the work was to be performed and in these yards there was a frequent movement of cars and certainly no part of these premises was surrendered to the express company. In the case at bar the whole project was readying trains in the yards of the railroad company for further interstate movements and involved many interdependent details, such as the switching and servicing of the cars and the speed with which the work had to be done in order that the trains could be put in movement as soon as possible.

The railroad company in this case not only had the right to supervise the work being done by plaintiff, but also actually directed the work to be done by plaintiff as evidenced by the switch list, Exhibit "5", which was given to the express company employees to further the business of the railroad company as a common carrier by railroad in interstate commerce.

The defendants, in arguing the motion for a non-suit, relied heavily upon the case of *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651, affirmed without opinion 174 F. (2d) 1022. In that case the plaintiff brought an action under the Federal Employers' Liability Act against the Southern Pacific Company and the Pacific Fruit Express Company. Plaintiff, at the time of his injury, was employed as an iceman in the ice yard and plant owned and operated by the Pacific Fruit Express Company at Bakersfield, California. He and fellow employees were engaged in unloading ice from a refrigeration

car belonging to the express company. While he was aiding in moving an empty car from a loading platform, the wheels of a loaded car, which were being drawn to the platform by a cable and winch, struck and injured him. In that case the contract between the two defendant companies was introduced in evidence. In the case at bar, we have no such contract. In the *Gaulden* case it appeared that the express company owned the ice yard at Bakersfield where plaintiff was injured, and it further appeared that service is provided from that plant to the Southern Pacific Company and two other common carriers as well. The court clearly recognized that it could not be determined from the foregoing facts that the plaintiff was rendering any services for the Southern Pacific Company. That court stated at p. 656:

“* * * Assuming the existence of an agency relationship between Pacific Fruit Express Company and the Southern Pacific Company, nevertheless nothing of record indicates that plaintiff was injured while pursuing activities related to the alleged agency relationship between the two defendants. The Pacific Fruit Express Company performed refrigeration services at Bakersfield in addition to those covered by the contract of July 1, 1942. It also served the Atchison, Topeka and Santa Fe Ry. and the Sunset Railway. The eventual destination of the ice which plaintiff was helping to unload at the time of his injury was neither known or foreseen at the time. Thus nothing in the record indicates that the plaintiff was injured while employed in the service of his master’s master.”

In the case at bar, plaintiff was not performing services in the express company ice yards or ice house; he was performing services in the yards and on the tracks of the defendant railroad company. The defendant railroad company was the only railroad company involved in this case. It appears conclusively that the services rendered by plaintiff were for the exclusive benefit of the defendant railroad company. Hence, the *Gaulden* case is not authority for the defendant railroad company in the case at bar under this point of plaintiff's brief.

We submit that plaintiff was performing the work of the defendant railroad company at the time of his injury and that under the foregoing authorities he was in the employ of the defendant railroad company and hence could properly maintain his action against that company under the Federal Employers' Liability Act.

POINT II

THE ARRANGEMENT WHEREBY DEFENDANT RAILROAD COMPANY SEEKS TO HAVE EMPLOYEES OF THE EXPRESS COMPANY AND NOT ITS OWN EMPLOYEES PERFORM NECESSARY SERVICES ON ITS INTERSTATE TRAINS AND CARS IS A CONTRACT OR DEVICE IN VIOLATION OF 45 U.S.C.A., SECTION 55.

Another reason why defendant cannot escape liability under the F.E.L.A. for plaintiff's injuries is because the arrangement whereby employees of another company perform necessary services on its trains and cars is a contract or device, the purpose and intent of

which is to enable the defendant railroad company as a common carrier to exempt itself from liability created by that act.

45 U.S.C.A., Sec. 55, in so far as material here, provides:

“Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.”

The defendant express company is a corporation organized under the laws of Utah in 1906. The stock of that company, with the exception of a relatively small number of shares, is owned in equal amounts by the defendant railroad company and the Southern Pacific Company, the latter being a railroad company (R. 266).

Under the contentions of the defendant railroad company it has the employees of a company, of which it owns approximately one-half of the stock, perform services on its interstate trains and since those employees are not its employees it thereby avoids any liabilities to them under the F.E.L.A.

Assume that there was a corporation known as The Switching Company, the employees of which performed all of the necessary switching operations on interstate trains of the defendant railroad company at Laramie. The switch list would be forwarded to the Laramie yard office by employees of the defendant railroad company.

This list would then be given to the clerk of The Switching Company in the yard office who would forward the information contained therein to the company's yard foreman. He would direct The Switching Company's employees to cut certain cars out of the train and put other cars in the train. After this operation was completed the defendant railroad company would again start its train on its interstate journey. Under this arrangement with The Switching Company, and in accordance with the contention of the defendant railroad company in this case, the railroad company would be relieved of all liability for injuries through negligence to employees of The Switching Company.

If the imagination of the officials of the railroad company could devise enough companies to cover the operations necessary to conduct its business, it would soon be freed of all liability under the Federal Employers' Liability Act. If its contention can be sustained in this case, then there is no reason why it cannot continue the formation of such companies to take over the various operations of a common carrier by railroad in interstate commerce.

We submit that if it may eliminate as employees persons who service and regulate refrigerator cars in its interstate trains then by a parity of reasoning it may eliminate switchmen, brakemen, enginemen, car repairmen, etc.

The services performed by plaintiff and other express company employees in servicing and regulating

heaters on refrigerator cars must be considered a necessary service on the railroad company's interstate trains. The railroad company as a common carrier had undertaken to transport perishable commodities. These required, in order to be safely transported, that the cars in which they were contained be maintained at temperatures which would prevent freezing and resulting injury to those commodities. These services were as necessary to plaintiff's operations as the services performed by the switchmen in cutting cars in and out of the railroad company's interstate trains. These services were part and parcel of the railroad company's operations as a common carrier.

In *Gaulden v. Southern Pac. Co.*, supra, the court held that a somewhat similar arrangement did not violate 45 U.S.C.A., Sec. 55. It did so on the basis that the express company was organized to commence business before the enactment of the F.E.L.A.; it acquired none of its operating facilities from the railroad company; that the express company operated under its own management, with its own facilities and employees, and that the express company served other carriers in addition to the defendant railroad company. We submit that none of these reasons should permit the railroad company to avoid liability under the F.E.L.A. The principal reason suggested by the court in holding that there was no violation of this section of the act was that the express company had been created before the act was passed and therefore the contract or device could not have been

created with the intent and purpose of exempting the carrier from liability.

The Supreme Court of the United States in the case of *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 32 S. Ct. 589, at 592, 56 L. Ed. 911, stated as follows:

“* * * that the provisions of Sec. 5 (this section) were intended to apply as well to existing as to future contracts and regulations of the described character cannot be doubted. The words, ‘the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,’ do not refer simply to an actual intent of the parties to circumvent the statute. The ‘purpose or intent’ of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view. Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discern-

ment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.' "

We submit that under the contentions of the defendant railroad company the arrangement between it and the express company circumvents the statute and its necessary operation and effect defeats the liability which that statute was designed to enforce. Such arrangement is declared by the statute to be void and hence cannot protect the railroad company from its liability under the F.E.L.A. for the injuries sustained by plaintiff.

POINT III.

THE DEFENDANT EXPRESS COMPANY AT THE TIME OF PLAINTIFF'S INJURIES WAS A COMMON CARRIER BY RAILROAD IN INTERSTATE COMMERCE.

In operating its business as a common carrier the railroad company accepted for interstate transportation perishable freight. In order to effectively transport such freight it was necessary to have so-called refrigerator cars. These cars are so constructed that the inside of the cars may be maintained at temperatures either higher or lower than the temperature outside by using either

ice or charcoal heaters. Proper and varying ventilation may be maintained by adjusting doors and bunker walls.

The express company by furnishing these cars and the necessary services of inspection, regulation of heaters and the provision of ice, has become a necessary and integral part of the railroad company's business as a common carrier by railroad. Hence, the express company and the railroad company in this case were engaged in a joint enterprise, the purpose of which was to operate the business of a common carrier by railroad.

We submit that this conclusion is inescapable and that the plaintiff was employed in this business by both companies. Under such circumstances the action was properly brought against both of these defendants under the Federal Employers' Liability Act.

POINT IV.

THERE WAS SUFFICIENT EVIDENCE INTRODUCED IN THIS CASE TO SUPPORT A FINDING THAT THE DEFENDANTS WERE NEGLIGENT AND THAT SUCH NEGLIGENCE CONTRIBUTED IN WHOLE OR IN PART TO THE INJURIES SUFFERED BY PLAINTIFF.

In each of the motions for nonsuit the defendants included as grounds that there was insufficient evidence of negligence and of proximate cause. Almost the entire argument on these motions was directed to the propositions heretofore set forth in this brief. Little or nothing was said about the insufficiency of the evidence to establish negligence and proximate cause if this case was

properly based upon the Federal Employers' Liability Act. We will discuss this matter very briefly, and if the defendants make substantial contention in their brief that the evidence of negligence and proximate cause is insufficient, we will file a reply brief in which we will more fully discuss our contentions under this point of our brief.

The evidence discloses that in the wintertime some of the refrigerator cars on defendant's train were equipped with heaters to prevent the perishable freight from freezing. These heaters are in the small compartments at the ends of the cars. These compartments are approximately 3 feet wide and 10 feet long. The heaters when burning create carbon monoxide gas, the deadly characteristics of which are well known. The men working in these bunkers frequently feel the effects of this gas. They suffer headaches and dizziness. They are affected by it, not while they are in the bunkers in its presence, but after they have come out of the bunkers and come in contact with fresh air. This gas is particularly dangerous because it is odorless and invisible and the workmen are given no warning of its presence or the amount of it which is accumulated in these bunkers. The defendant companies certainly are chargeable with knowledge of the fact that such gas is generated by the burning of these heaters and with knowledge of its characteristics and effect upon the men working in it.

The defendants have promulgated a rule to protect the men whose duty it is to regulate these heaters. (See

Rule 19 d., Exhibit "4"). This rule is for their protection and had been in force and effect for many years in the railroad company's Laramie Yards.

Just before the train involved in this case arrived, the plaintiff's foreman told him that it was coming, gave him the numbers of the cars and directed him to shut off the heaters in those cars. The foreman told plaintiff that the train was only to remain in the yards for five or six minutes and that he would have to hurry in performing the duties of his employment. He was instructed by the foreman to open but one plug on each car. Both the plaintiff and the foreman were on duty at this time, yet the foreman directed the plaintiff, in violation of the above rule, to do the necessary work on these three cars while he was alone. Plaintiff proceeded to the place where the cars were located and, after opening a plug on each car, he returned to the first car. He descended into the bunker in that car and shut off the heater. He did the same on the second and third cars. Since plaintiff was alone it was necessary for him to enter all three bunkers and there was no one present to assist him in the performance of any of his duties. He thereby was subjected to the carbon monoxide which had accumulated in the three bunkers in which the heaters had been burning. Upon contacting the fresh air after being in the three bunkers he became unconscious. The evidence discloses that this would be the time when he would be affected by the carbon monoxide gas and is in line with the experience of the men who had been working where this gas was present. When plaintiff fell from the top

of the car he fell a distance of 16 feet, suffering a broken hip and broken ribs.

We submit that under the well-established rules laid down by the Supreme Court of the United States this evidence furnished an evidentiary basis upon which a jury could find negligence on the part of the defendants, or either of them, in directing the plaintiff to perform the duties of shutting off these heaters while he was alone and in telling him to hurry with his work because the train had to leave within five or six minutes and thereby subjecting him to the carbon monoxide gas in these bunkers without providing any means to eliminate this gas from the bunkers.

While there are no Supreme Court cases directly in point on a situation of this type, we submit that under the well known principles laid down by the following cases, the testimony here should have been submitted to a jury for its finding on the matter of negligence and proximate cause. See *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Lavender v. Kurn*, 326 U. S. 713, 66 S. Ct. 740, 90 Adv. Ops. L. Ed. 692; *Wilkerson v. McCarthy*, 187 P. (2d) 188, 69 S. Ct. 29, 69 S. Ct. 413; *Coray v. Southern Pacific Co.*, 69 S. Ct. 275; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29; 64 S. Ct. 409, 88 L. Ed. 520; *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

CONCLUSION

We respectfully submit that the trial court committed error by granting the motions for nonsuit made by each of the defendants in this case. Under the foregoing authorities we submit that the court should have declared as matter of law that the plaintiff was an employee of each of the defendants and that the defendants were common carriers by railroad in interstate commerce. The trial court should have submitted the question of the defendants' negligence and of proximate cause to the jury.

Respectfully submitted,

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