

1949

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

Utah Supreme Court

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Bryan P. Leverich; M. J. Bronson; A. U. Miner; Howard F. Coray;

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# In the Supreme Court of the State of Utah

PETE MOLETON,  
*Plaintiff and Appellant,*

vs.

UNION PACIFIC RAILROAD COM-  
PANY, a corporation, and PA-  
CIFIC FRUIT EXPRESS COM-  
PANY, a corporation,  
*Defendants and Respondents.*

Case No.  
7379

## BRIEF OF RESPONDENTS

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PETE MOLETON,  
*Plaintiff and Appellant,*

vs.

UNION PACIFIC RAILROAD COM-  
PANY, a corporation, and PA-  
CIFIC FRUIT EXPRESS COM-  
PANY, a corporation,  
*Defendants and Respondents.*

Case No.  
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## BRIEF OF RESPONDENTS

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### PRELIMINARY STATEMENT

This is a suit for personal injuries brought by Pete Moleton, an employe of the Pacific Fruit Express Company, against the Union Pacific Railroad Company and the Pacific Fruit Express Company. The first cause of action of plaintiff's complaint proceeds upon the theory that Moleton's right of recovery is predicated upon the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 et seq. This is the only cause of action of plaintiff's complaint material to this appeal for reasons which will be hereinafter noted. For convenience the appellant Pete Moleton will be hereafter re-

ferred to as the plaintiff; the respondent Union Pacific Railroad Company will sometimes be referred to as the railroad company; and the respondent Pacific Fruit Express Company will sometimes be referred to as the express company.

We accept the statement of facts contained in plaintiff's brief with the following exceptions:

At page 6 of his brief the plaintiff asserts in his statement of facts that the argument on the motions to dismiss plaintiff's complaint made by the defendants at the conclusion of the plaintiff's case were almost entirely devoted to the applicability of the Federal Employers' Liability Act. This statement is true, but it is only fair to go further and point out that this took place because plaintiff's attorneys conceded at the outset of the argument that they were of the opinion that the strongest theory in support of plaintiff's cause of action was dependent upon the applicability of the Federal Employers' Liability Act. We wish to make it clear that the defendants have always contended and now reiterate that there is no liability in this case even in the event that the Federal Employers' Liability Act has application. This contention was thoroughly presented to the trial court by the motions for nonsuit and by the argument thereon and will be discussed in this brief.

At page 10 of his brief the plaintiff asserts that it was the responsibility of the express company to take care of the work to be done on the refrigerator cars in the yards at Laramie as disclosed by the information contained on the switch list mentioned in plaintiff's brief and in the evidence. If plaintiff intends to leave the inference that only such

work as was mentioned in the switch list was done by employes of the express company, then he is in error. The evidence shows that the express company is a separate organization engaged in an independent business; that other work is performed by the employes of this company than is mentioned in the switch list described in the evidence, and that the express company engaged in similar work for other railroads than the Union Pacific Railroad Company.

At page 15 of plaintiff's brief he asserts that Moleton determined the presence of gas in bunkers of refrigerator cars by the fact that he became dizzy when he got into fresh air. It is significant to note that he did not become dizzy on the occasion of the accident (R. 113). It appears that when the plaintiff climbed out of car FDEX9084 from which he fell, he felt "good", that he was not dizzy after working in the first two cars which he reached in the train, and that he felt the same upon reaching the fresh air after working the third car, FDEX9084; and that he thought all gas had left the bunkers of these cars because of the fact that he had left the plugs open (R. 126, 112, 113, 114, 139). It further appears that the next thing the plaintiff can remember after closing the plug on the third car is that he was lying on the ground in an injured condition. There is no factual evidence to the effect that plaintiff suffered carbon monoxide poisoning.

Plaintiff further asserts at page 16 of his brief that he lost consciousness "*when he got into the fresh air.*" No such testimony appears in the record. The fact that Moleton does

not remember falling is no evidence that the plaintiff was unconscious during the fall. Certainly one may search the record in vain for testimony to the effect that Moleton became unconscious before the fall.

It will be necessary for the defendants to add to plaintiff's statement of facts during the course of the argument contained in this brief. Such additions are not inconsistent with the statement of facts given in plaintiff's brief, except as noted above. In such instances references to the record will be given.

Only the first cause of action of plaintiff's complaint is of any interest on this appeal. The plaintiff asserts at pages 5 and 6 of his brief that he relies only upon his first cause of action. Apparently this was his real intention since his argument is addressed exclusively to the theory that plaintiff made a jury question of liability under the Federal Employers' Liability Act, which said act has no application to either the second or third causes of action contained in plaintiff's complaint. We assume, therefore, that assignments of error Nos. 3, 4 and 5, contained at page 20 of plaintiff's brief are abandoned by plaintiff.

In the case of *Palfreyman v. Bates & Rogers Const. Co.*, 108 Utah 142, 158 P. (2) 132, this court said:

"We are favored with no citation of authority in the appellant's brief. This court does not look with favor upon the cause of a litigant who raises points and casts them in the lap of the court for research and determination, and if this is done, it is within the discretion of the court to refuse to consider them."



In the case of *Aiken v. Less Taylor Motor Company*, 110 Utah 265, 171 P. (2) 676, Mr. Justice Wolfe, speaking for the court, said :

"The assignment of error should not be a mere repetitious itemization of practically all the acts and rulings of the trial court which are set out by counsel with the hope that one or more will be found to be reversible error. Rather the assignment of error should clearly and concisely inform the court and the adverse party of the errors relied on for reversal so that the court and the adverse party may know what questions are to be raised in the appeal. Some counsel make mass assignments of error (more than 180 in some cases) when only ten or fifteen would be sufficient to raise all the real issues involved. Such mass assignments are not helpful as they bury rather than indicate and define the issues of the appeal. Errors must be assigned but care and effort should be taken to make those assignments so that they will effectively serve the purpose for which they are required.

"We have searched appellants' brief in vain for their assignment of errors set out and labelled as such. Only a most liberal application of the rule and our desire to give the appellants the benefit of a review prevents this appeal from being dismissed for the reason that their brief does not contain a statement of the errors upon which they rely for reversal."

In the case of *United States Building & Loan Ass'n. v. Midvale Home Finance Corp.*, 86 Utah 506, 44 P. (2) 1090, this court said :

"It is not pointed out in the unit holders' brief or elsewhere wherein the evidence does not support the questioned findings, nor wherein the evidence

touching such findings may be found in the transcript. Under such circumstances the appeal of the unit holders must be regarded as being prosecuted solely upon the judgment roll."

We believe that this court should hold that assignments of error Nos. 3, 4, and 5 are waived by the failure of the plaintiff to submit any argument in support thereof; but in any event we shall confine our answer to plaintiff's brief to those issues which it properly presents, i. e. assignments of error No. 1 and No. 2. To go further and defend the ruling of the trial court attacked by assignments of error Nos. 3, 4 and 5 is impractical since neither the defendants nor this court have any information as to the basis upon which the plaintiff rests said assignments.

In support of his first two assignments of error the plaintiff has divided his argument into four points, as set forth on page 21 of his brief. We accept those four points as the legal issues presented on this appeal; and our brief will be addressed to the four propositions urged by plaintiff in the same order as these arguments appear in plaintiff's brief.

## ARGUMENT

### POINT NO. I

By Point No. I of his argument plaintiff contends that the plaintiff was an employe of the defendant railroad company, in the following language: "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." As stated by the plaintiff, we admit that the defendant railroad company was engaged in interstate commerce as a common carrier by railroad. We deny that plaintiff was employed by the railroad company within the meaning of the F. E. L. A. Title 45, Section 51, United States Code Annotated, provides, in so far as is material, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury *while he is employed by such carrier* in such commerce \* \* \* for such injury \* \* \* resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier \* \* \*.

"*Any employee of a carrier*, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The words chosen by Congress to define the industrial relationship which invokes the application of the Federal Employers' Liability Act are, "while he is employed by such carrier", and the further words, "any employee of a carrier." Since the enactment of this statute the courts have uniformly refused to give any artificial meaning to the language above referred to and have insisted that the words "employee" and "employed" are used in their common and usual sense.

*Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849. In this case suit was brought by a pullman porter against the Railroad Company operating the train in which the pullman car where the plaintiff worked was being transported. The Supreme Court of the United States stated this principle in the following language:

“We are of the opinion that Congress used the words ‘employee’ and ‘employed’ in the statute in their natural sense and intended to describe the conventional relation of employer and employee.”

See also

*Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670;

*Stevenson v. Lake Terminal Railroad Co.*, 42 Fed. (2) 357;

*Reynolds v. Addison Miller Company, et al.*, 255 P. 110.

Plaintiff is therefore foreclosed from any support for his argument upon the theory that the words “employee” or “employed” have any special significance as used in the Federal Employers’ Liability Act. His relationship to the Union Pacific Railroad Company must be determined on familiar principles. This factor alone should be conclusive as to the question of the relationship between the plaintiff and the Union Pacific Railroad Company in view of the evidence.

The facts as shown by the evidence and as admitted by plaintiff’s brief may be summarized as follows:

- (1) Moleton was originally hired by the Pacific Fruit Express Company; (R. 72)

- (2) He worked for that same company approximately twenty years; (R. 72)
- (3) His wages were exclusively paid by that company; (R. 142)
- (4) He worked under the direct supervision of employes of that company with no supervision by any employe of the Union Pacific Railroad Company; (R. 141, 142, 144, 226, 227)
- (5) His rate of pay was determined by that company; (R. 142)
- (6) His methods of performing the work were governed by rules of that company, as for example, the safety rules mentioned in the evidence; (Ex. 4)
- (7) He acquired seniority rights on his job with Pacific Fruit Express Company; (R. 124)
- (8) Pacific Fruit Express Company is an independent business engaged in performing services for various railroad carriers, which has been in existence since the year 1906; (R. 254, 255, 256)
- (9) The only instructions which are given Pacific Fruit Express Company by the Union Pacific Railroad Company in the performance of the Heater Protective Service (the type of work in which Moleton was engaged when injured) are switch lists whereby the orders of the shipper relating to the character of the service desired are transmitted. (R. 226, 227.)

Under these circumstances, to contend that Moleton was an employe of the Union Pacific Railroad Company is so

obviously a strained interpretation of the words "employee" and "employed" as to plainly conflict with the principle laid down in the *Robinson* case, *supra*.

In the recent case of *Gaulden v. Southern Pacific Co.* the identical proposition now urged by plaintiff was presented to the federal courts. In that case Gaulden was employed by the same Pacific Fruit Express Company with the same kind of job as Moleton. He was injured at Bakersfield, California while engaged as an iceman unloading ice from a refrigerator car belonging to the Express Company. The ice was stored later to be used in interstate trains. Suit was brought against the Express Company and against the Southern Pacific Railroad on the theories now espoused by the plaintiff herein. The District Court resolved this question against the plaintiff in a written opinion, 78 Fed. Supp. 651. The United States Circuit Court of Appeals of the Ninth Circuit affirmed this result in the following language:

"The judgment is affirmed on the grounds and for the reasons stated in the opinion of the trial court, 78 Fed. Supp. 651."

The Circuit Court opinion is to be found in 174 Fed. (2) 1022. Counsel for the plaintiff in their brief state that the Circuit Court decision is without opinion (Plaintiff's Brief p. 47). The fact appears to be that the Ninth Circuit Court of Appeals adopted the opinion of the federal trial court so that the trial court opinion is now the opinion of the Circuit Court of Appeals. This case stands squarely for the proposition that an employe of the express company, such as Moleton, is not an employe of a railroad carrier. This holding is

unmistakable in view of the following language used by the trial court and adopted by the Circuit Court of Appeals:

“The terms of the Protective Service contract as well as the manner of its performance indubitably constitute the parties independent contractors. The Pacific Fruit Express Company performed with its own employees at its own expense. No right of control over the manner and means of performance was reserved to the railroads. To be sure certain conditions of performance and means of cooperation and assistance are specified in the contract but these provisions, directed to the successful accomplishment of the contract’s broad objective, do not invest the railroads with control of the method of performance. Cases such as *Pennsylvania Railroad Co. v. Roth*, 163 Fed. (2) 161, in which the railroad company employed a contractor to operate one of its railroad yards are not apropos for there is absent here that substantial degree of control over the manner and means of performance as was present in *Pennsylvania Railroad Co. v. Roth* and like cases.

“The remedial and humanitarian purposes of the Employers Liability Act in no way impel an interpretation of the contract in favor of an employment or agency relationship.”

The essential proposition now urged by plaintiff to the effect that the express company is nothing more than an agent of the railroad company at Laramie, Wyoming, so that its employes are in fact employes of the railroad company, was thus clearly rejected by the most recent opinion dealing with the matter in the federal courts.

It is true that the court in the Gaulden case had another basis upon which it could have decided that action in that

at the time of the accident it was impossible to determine the final destination of the ice being unloaded. In view of the fact that carriers other than the Southern Pacific operated in the Bakersfield yards it became impossible to state that Gaulden was injured while employed in the service of any particular master's master. This is the distinction which the plaintiff attempts to rely upon in the case at bar; but the federal courts took occasion in the Gaulden case to consider the contention now urged by plaintiff as well and the decision is so plainly a determination of the issue now raised on this appeal that the effect of that opinion should be controlling in this case.

The case of *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 P. 110, is another ruling squarely in point and squarely overruling the contentions now urged by the plaintiff. In that case the Addison Miller Company and a railroad company had made a contract whereby the railroad leased to the Miller Company an icehouse and icing equipment. The Miller Company agreed to manufacture, sell and deliver in the bunkers of refrigerator cars which the railroad might set out at the icing platform, all ice that was required for use by the railroad. The railroad company had the right to inspect the work performed by the Miller Company. The plaintiff was injured while engaged in icing a car for the railroad company. Reynolds sued the Miller Company and the Railroad Company for his injuries, basing his complaint on the theory that his cause of action was governed by the Federal Employers' Liability Act. It is to be noted that in this case there could be no contention that the opinion



is based upon any uncertainty as to which carrier would receive the benefit of the services of the employe of the icing company. In the course of its opinion the Supreme Court of Washington said:

“The question then first for consideration under this act is whether at the time of the respondent’s injury he was an employee of a common carrier by railroad. To answer this question it is necessary to determine the effect of the contract between the Addison Miller Company and the Northern Pacific Railway Company. Under the authorities that contract was valid and constituted the Addison Miller Company an independent contractor, and its employees would not be employees of the Railway Company engaged in interstate commerce.”

The court went on to cite the opinions of the Supreme Court of the United States, commencing with the *Robinson* case, *supra*, and determined that the plaintiff was not an employe of the railroad company. It then took occasion to refer to a previous opinion which it had written holding that a railway company which had employed a construction company to do particular work made all the employes of the construction company employes of the railway company within the meaning of the Federal Employers’ Liability Act. The Washington Supreme Court specifically held that this opinion had been written without proper consideration and that there was no proper legal basis for any such holding.

The two cases cited above dealing with the Pacific Fruit Express Company and another company whose business was substantially identical thereto stem from opinions of the Supreme Court of the United States construing similar sit-

uations in other industries closely connected with railroad operations. The first such decision by the Supreme Court of the United States was handed down in the case of *Robinson v. Baltimore & Ohio Railroad Company*, supra. In that case the plaintiff was a pullman porter on a car which was being hauled by the defendant railroad company. He sued for injuries sustained as a result of a collision which, it was alleged, was occasioned by the negligence of the Railroad Company. The defendant introduced in evidence a contract between the plaintiff and the Pullman Company by which the plaintiff released all railroad corporations over whose line the cars of the Pullman Company might be operated from all claims whatsoever arising out of personal injury or death. The plaintiff contended that this contract was invalid and therefore inadmissible as in violation of the section of the Federal Employers' Liability Act which prohibited contracts or devices to exempt carriers from liability created by the Act. It therefore became necessary for the Supreme Court of the United States to determine whether or not a pullman porter, nominally employed by the Pullman Company, was within the coverage of the Act. After reviewing the facts of the relationship between the railroad company and the Pullman Company, Mr. Justice Hughes, speaking for the court, indicated that the words "employee" and "employed" contained in the statute were used in their natural sense, as heretofore stated. He further pointed out that it was well known that there were on interstate trains many persons engaged in various services for masters other than the railroad company operating the train. He stated that Congress, though familiar with this situation, did not

use any expression which could appropriately be taken to indicate a purpose to include such persons within the coverage of the Act. The Supreme Court unanimously concluded that the plaintiff was not an employe of the Railroad Company within the meaning of the Federal Employers' Liability Act.

Counsel for the plaintiff have asserted that the decision of the District Court in the case at bar makes it possible for railroad companies to discharge all the various jobs necessary to the operation of trains through other corporations, thus eliminating all employes from the coverage of the federal statute. The fact is that certain work occasioned by the operation of railroad trains has historically been performed by the railroad companies and other jobs incidental to the operation of these trains have been performed by other industries and companies. The Pullman Company is one example of an industry affiliated with the operation of railroad trains which historically has been handled by a separate company whose employes are held to be outside the coverage of the Federal Employers' Liability Act. We are all familiar with the functions which pullman porters perform in the operation of a passenger train. Plaintiff suggests that Moleton was performing work which was the work of the railroad company so that he was, in fact, the employe of the railroad company. Can it fairly be said that the work performed by a pullman porter is less the work of the railroad company hauling the train on which he is in service than was the work performed by Moleton for the Pacific Fruit Express Company in the Laramie yards? It is equally true as to each of these fact situations that the

work performed by a pullman porter or the work performed by Moleton is essential to the operation of interstate trains. But the fact remains that in each instance this work is performed by a separate business organization distinct from the railroad company and that the work is, in fact, done for such separate business organization. The reason for this historical separation of strict railroading from supplemental services, however necessary the work in connection with such supplemental services may be, is unimportant. The distinction exists, has been recognized by the Supreme Court of the United States, and, as will be pointed out, has been approved by Congress.

Following the Robinson case the Supreme Court of the United States was called upon to consider the matter more fully in the case of *Chicago, Rock Island & Pacific Ry. Co. v. Bond, Administrator of Turner*, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. Ed. 735. In that case the deceased, William L. Turner, was killed while unloading coal to be used by the defendant railroad company at Enid, Oklahoma. His administrator brought suit against the railroad company alleging that his death was caused by the negligence of the railroad company and attempting to invoke the benefits of the Federal Employers' Liability Act. It appeared that Turner had performed work for the railroad company under a contract requiring him to place all coal required by the company in coal chutes so that the same could be discharged into the engines of the railroad. He had other work consisting of breaking the coal, unloading wood from cars to storage piles, loading cinders from the right of way of the railroad company to cars at points designated by the railroad company,

and unloading sand from cars furnished by the railroad company at points designated by it. The contract required considerable direction and instruction to Turner by agents of the railroad company. The court in that case held Turner to be an independent contractor as distinguished from an employe of the railroad company, thus eliminating the Federal Employers' Liability Act from the case. Mr. Justice McKenna, speaking for the court, used the following language in making such determination:

"There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect.

\* \* \* \* \*

"The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words did not retain control not only of what should be done but how it should be done."

In the case of *Hull, Administratrix of Hull, v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670, the Supreme Court of the United States considered this problem again. In that case the deceased, Hull, had for many years been in the general employ of the Western Maryland Railway Company. This Railway Company operated a railroad from Hagerstown, Maryland to Lurgon, Pennsylvania, at which point it connected with the railroad owned by the Pennsylvania & Reading Ry. Co., the defendant. Through freight trains were operated from Hagerstown through Lurgon to Rutherford, Pennsylvania. Hull was employed as a brakeman on such a train at the time he received his fatal injuries. His administratrix brought suit against the Pennsylvania & Reading Ry. Co. claiming liability under the Federal Employers' Liability Act. The through freight service along this line was conducted under a written agreement between the two railway companies which provided that each company was to supply motive power in certain proportions, each company was to compensate the other for the use of the other's engines and crews, but the division of earnings of the traffic was not to be disturbed by the arrangement. Each company had the right to enforce its objection to any unsatisfactory employe of the other company running upon its tracks and the employes of each company, while upon the tracks of the other, were subject to the rules, regulations, orders and discipline of the owning company. The Supreme Court held that under such circumstances Hull had not been transferred from the employ of the Western Maryland Railway Company to that of the defendant at the time when he was killed. The court

reiterated the ruling in the *Robinson* case, supra, that the words "employee" and "employed" were used in their natural sense and went on to state that since each company retained control of its own train crews, what was done on the line of the other railroad company was done as part of the employees' duty to their general employer. This was true even though the accident resulting in Hull's death occurred while the train on which he was working was picking up seven cars at Harrisburg, Pennsylvania, on specific orders and instructions of the yardmaster of the defendant company.

In the case of *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. Ed. 205, the Supreme Court of the United States reiterated its decisions respecting this matter in a slightly different aspect. In that case Taylor, the plaintiff, sued Wells Fargo & Company for personal injuries received through the derailment of an express car in which he was working as the car was being hauled over the railroad of the St. Louis & San Francisco R. R. Company in interstate commerce. It appeared that Wells Fargo & Company was a common carrier by express and that it had a contract with the railroad company giving the express company the exclusive privilege of conducting an express business on and over the railroad company's line. In this case several other problems were treated by the court, but Mr. Justice Van Devanter, speaking for the court, took occasion to say:

"As respects the express company, it appears not merely that Taylor was in its employ, but also that the injuries were received while it was engaged and

he was employed in interstate commerce; and so the question is presented whether the act embraces a common carrier by express which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown. The District Court answered the question in the negative and the Circuit Court of Appeals in the affirmative.

“In our opinion the words ‘common carrier by railroad,’ as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad \* \* \*.”

This case represents another example of the decisions of the Supreme Court of the United States to the effect that employment by a company closely allied with the railroad industry does not make such employe an employe of a common carrier by rail so as to invoke the coverage of the Federal Employers’ Liability Act.

The next determination by the Supreme Court of the United States on this matter was in the case of *Linstead, Executrix, v. Chesapeake & Ohio Railway Co.*, 276 U. S. 28, 48 Sup. Ct. 248, 72 L. Ed. 467. This is the case so heavily relied upon by the plaintiff in the case at bar. In that case the deceased, Linstead, was a conductor in the employ of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known as the Big Four. He was working upon a freight train running upon the defendant Chesapeake & Ohio Railway Company’s tracks in interstate commerce. The facts were that the Chesapeake & Ohio Railway Company had a



track from the east to Cincinnati, Ohio, where it delivered cars to the Big Four Company for delivery to the northwest. It was convenient for both railroads to make an arrangement by which the Big Four Company loaned to the Chesapeake & Ohio Railway Company equipment and a train crew to take freight trains from Stevens, Kentucky to the Big Four Company at Riverside, Ohio, over the rails of the Chesapeake & Ohio. The defendant Chesapeake & Ohio did not pay the Big Four Company any rental for the loan of the locomotive, caboose or crew, but paid for this service by rendering a reciprocal service of similar nature. Suit was brought by the executrix of Linstead to recover damages for his death under the Federal Employers' Liability Act against the Chesapeake & Ohio. In this case the Supreme Court of the United States held that the deceased was in the special employment of the defendant, though nominally employed by the Big Four, and sustained recovery under the federal act. It is to be noted that the court relied upon the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, which had been cited by the Supreme Court of the United States in the opinions heretofore discussed and that the Hull case was distinguished. We have no quarrel with the ruling in the Linstead case but certainly this case is not in point in the case at bar for the following reasons :

1. The work in which Linstead was engaged at the time of his death was not work which historically has been performed by companies other than railroad companies, but was the actual operation of a train in interstate commerce.

2. The work which was being done by Linstead at the time of his death was work being done under the rules of the Chesapeake & Ohio Railway Company and it was done under the immediate supervision and direction of a trainmaster of the Chesapeake & Ohio Railway Company.

The court took occasion to make the following comments in passing upon this matter :

“ ‘The master’s responsibility cannot be extended beyond the limits of the master’s work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.

“ ‘It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the

ultimate benefit of the other, it is still in its doing his own work. 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.' " Quoting from the *Anderson* case.

We submit that this case is also authority for the defendants' position in the case at bar because the most that can be said to be shown by the evidence at the trial is that the Union Pacific Railroad Company transmitted to the Pacific Fruit Express Company directions (originally given by the shipper) as to the heater services to be performed. Certainly in the case at bar there is an absence of proof that the Union Pacific had the power to control and direct Moleton and other employes of the Pacific Fruit Express Company in the performance of their work. This remains true though the ultimate benefit of the work performed by Moleton and his fellow employes was conferred upon the railroad company, or perhaps, more properly speaking, the shipper of the merchandise in the cars upon which Moleton worked.

It appears from the evidence that the only connection which the Union Pacific Railroad Company had with Moleton was as follows: Before a train would arrive at Laramie the Union Pacific conductor on that train would compile a switch list showing every car in the train. This list would be com-

piled from waybills in his possession, which waybills showed among other things the instructions originally given by the shipper as to the heating service to be furnished. The conductor would telegraph this switch list to the railroad company employes at Laramie. Those employes would make sufficient copies of this switch list that one or more could be furnished to Pacific Fruit Express employes, thus passing on the information as to the requirements of service for particular cars. From then on the Union Pacific had no more concern with the manner or method in which the work was done and no more control over the same than does any member of this court. We respectfully submit that the fact that the railroad company desired to have the work performed by the Pacific Fruit Express Company ultimately accomplished does not make the work done by the Pacific Fruit Express Company the work of the railroad company as contended for in plaintiff's brief. The *Linstead* case specifically sustains our contention in the following language:

“In the second case (relationship of independent contractor) he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work.”

If the conveying of the information contained in the switch list in the case at bar to the Pacific Fruit Express Company is enough to make any employe of the Pacific Fruit Express Company doing work on cars covered by the switch list an employe of the railroad company, then no service rendered

by any third person to the railroad company falls without the Federal Employers' Liability Act. In the course of its business the railroad company may choose to purchase railroad cars which are to be constructed by "X" company according to rigid specifications. The "X" company will be directed by the railroad company to manufacture such cars according to plans and specifications furnished. Would it be a normal and usual interpretation of this relationship to state that employes of the "X" company engaged in manufacturing the cars were employes of the railroad company? The railroad company may call upon "Y" company to furnish towel service so that mechanics of the railroad company may wash their hands at their place of work. By reason of the fact that the railroad company may direct the "Y" company to place its roller towel in a certain position on the railroad company's premises, to replace the towels at designated intervals, and to furnish satisfactory service in the way of repairs to the mechanism for operating the towel service, can it reasonably be maintained that the employe of the "Y" towel company engaged in this work is, in fact, an employe of the railroad company? Yet what the evidence shows was the extent of the Union Pacific's contribution to the supervision of Moleton in the case at bar is less than the contribution to the supervision of the employes mentioned in either of the foregoing situations.

Counsel for the plaintiff state, at page 29 of their brief, that the question as to the relationship of employer and employe "is not the control over the employe but is whose work is being done." In the *Linstead* case, *supra*, upon which

counsel for plaintiff so heavily rely, Mr. Justice Taft, speaking for the court, said :

“To determine whether a given case falls within one class (employment) or the other (independent contractor) 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.”

The cases heretofore mentioned conclusively establish that under the facts of the case at bar Moleton was an employe of the Pacific Fruit Express Company and not an employe of the railroad company. The decisions of the Supreme Court of the United States require such a holding and, in addition, the following cases decided by other courts adhere to the same proposition :

*Stevenson v. Lake Terminal Railroad Company*,  
42 Fed. (2) 357,

*Docheney v. Pennsylvania Railroad Company*,  
60 Fed. (2) 808, certiorari denied 77 L. Ed.  
573,

*Pollock v. Minneapolis & St. Louis R. R. Co.*, 166  
N. W. 641, certiorari denied 63 L. Ed. 421,

*Taylor v. New York Central Railroad Company*,  
62 N. E. (2) 777, certiorari denied 326 U. S.  
786. This case was decided in 1945.

Plaintiff relies upon the case of *Jones v. George F. Getty Oil Company*, 92 Fed. (2) 255. We call to the court's attention the fact that this case presented no question involving the Federal Employers' Liability Act in any manner whatso-

ever. The only question involved was as to the applicability of the New Mexico Compensation Act. This case is not remotely similar to the Moleton case on its facts. It appears that the work which Jones was doing at the time of his injury was repairing wells owned by the defendant and operated by the defendant, the main portion of the work being done by the defendant with the plaintiff assisting therein under the general supervision of the defendant.

Plaintiff also relies upon the Cimorelli, Roth and Barlion cases, all decided by the same court and all cited at page 37 of his brief. In the Cimorelli case it appeared that the defendant railroad company had hired a contractor to operate certain yards at Dock Junction, Pennsylvania. The plaintiff was an employe of the contractor and sued the railroad under the Federal Employers' Liability Act. In that case the court determined that the action fell within the federal statute, relying upon the following factors:

1. The defendant selected the place in the yards and the time when the work was to be performed.
2. The defendant determined the amount of equipment and the number of employes to be furnished by the contractor.
3. The defendant under its arrangement with the contractor had the right to approve in advance every item of cost and the necessity for the purchase of every item of equipment, and also the amount of the salary or wages of every employe of the contractor, and in addition, the contractor was to be paid on a cost-plus basis.

The distinction between that case and the case at bar is so obvious as to require no further elaboration.

In the Roth case the Sixth Circuit Court of Appeals followed its previous opinion in the Cimorelli case upon substantially the same facts, pointing out that each case must be decided on its own facts and circumstances and that ordinarily no one feature of the relationship between the plaintiff and the defendant is determinative of the employment question. It appeared in that case that the contract between the railroad company and the contractor who nominally, at least, employed the plaintiff, was general and indefinite as to the nature of the work to be done and required that the contractor perform such other work incident to the operations as might be requested by the company. It further appeared that the contractor made changes in the work pursuant to the orders of employes of the railroad company, and upon this basis the Sixth Circuit Court apparently felt that the railroad company had retained such control of the work being done as to require a holding that the relationship between the railroad company and the contractor was that of agency, making the contractor's employes also employes of the railroad company. This case is not similar to the case at bar on its facts and is no authority for the plaintiff's present contention.

The Barlion case arose when Barlion suffered personal injuries in the same yards as those in which Roth had been injured. Barlion was injured while working for a company doing the same work as the contractor in the Roth case and the contract was substantially the same in the two cases.



The court again pointed out that each controversy must be determined on its own peculiar facts and held that the railroad had sufficient right of control to require a holding that the contractor was an agent of the railroad company, so that its employees became employees of the railroad company. Again, the facts are not similar to those in the Moleton case and the case is not in point on the question involved in the present appeal.

Before concluding this phase of our brief we would like to point out to this court a further factor which seems to us conclusive of the plaintiff's contentions on this particular point. As was stated by the trial court in the *Gaulden* case, cited *supra*, during the forty year life of the Federal Employers' Liability Act Congress, while liberalizing its benefits, has not seen fit to extend the scope of the statute beyond railroading in its true sense. Although Congress took occasion to amend the Federal Employers' Liability Act in 1939 to broaden the coverage of the Act to those employees whose work for railroad carriers substantially affected interstate commerce, it did not see fit to enlarge the scope of the statute to cover those industries allied with the railroad industry but historically separate therefrom. It must be assumed upon familiar principles of statutory construction that Congress was aware of the interpretation placed upon the original act by the Supreme Court in the *Robinson*, *Bond*, *Hull* and *Wells Fargo* cases, *supra*, and was satisfied with that interpretation.

*State v. Roberts*, 56 Utah 136; 190 P. 351;  
*Annotation*—146 A. L. R. 923.

because the application of this provision depended upon the plaintiff's employment. In other words, if the plaintiff is correct in the proposition that he is an employe of the Union Pacific Railroad Company as urged in his Point No. I, he has no necessity to rely upon the provisions of Section 55 of the act. If he is not an employe of a common carrier by railroad, such as the Union Pacific, then he is not entitled to the protection of Section 55. The courts, moreover, have specifically overruled the contention now urged by the plaintiff. In the *Bond* case, *supra*, the exact argument now urged by the plaintiff was presented to the Supreme Court of the United States and that court again laid at rest plaintiff's contention in the following language:

"We do not think that the contract can be regarded as an evasion of Section 5 of the Employers' Liability Act, which provides 'that any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void \* \* \*'

"Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of this own power to direct and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences."

In the *Gaulden* case, *supra*, the federal courts overruled plaintiff's contention in the following language :

"Section 5 of the Federal Employers' Liability Act, 45 USC 55, provides as follows :

'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 creation of the Pacific Fruit Express Company, although intended to further the transportation business of its two railroad stockholders, occurred before the Act was passed. There is therefore no basis for a charge that creation of Pacific Fruit Express Company violated Section 5. *Chicago, R. I. etc. v. Bond*, 240 U. S. 449, *Robinson v. B. & O.*, 237 U. S. 84; *Wells Fargo v. Taylor*, *supra*.

"It is suggested that the so-called indemnity clause of the Protective Service Contract amounts to a violation of Section 5. But inasmuch as this clause is one merely of indemnity, it does not have the effect of exempting the railroads from their liability as common carriers under the Act. Hence in no sense may it be considered a violation of Section 5."

For a well considered State court opinion to the same effect see the case of *Drago v. Central R. Co.*, 106 A. 803, a New Jersey case. In that case the plaintiff was injured while transferring steel tires from a railroad car to a lighter at the water front terminal of the Central Railroad Company of New Jersey. He sued under the Federal Employers' Liability Act but was denied recovery. Plaintiff contended that he was entitled to the benefits of Section 5 of the Act (45

U. S. C. A. 55). The New Jersey Court made the following observations :

“We think that no evasion of the provision that ‘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 act shall to that extent be void,’ results from the making of a contract (as here) by an interstate railway carrier with an independent stevedoring corporation under which the work of handling the railroad company’s freight from cars to boats and from boats to cars at its water front terminal is to be performed by such independent contract, even though the latter expressly assumes all liability for injury to its employes while employed upon the premises of the railroad company.”

The court then cited the *Bond* case, *supra*, and went on to conclude as follows :

“In the present case the Stevedoring Corporation occupied precisely the same position with respect to the defendant that Turner in the *Bond* Case occupied to the railroad. Since the independent contractor himself could not recover because not an employe of the railroad, it follows that the plaintiff here cannot recover because not an employe of the railroad. Since, under the *Bond* Case, a contract very similar in terms to that in the present case was not a contract in violation of section 5, it cannot be said that the contract under consideration is in violation of that section.

“As was said in effect in the *Bond* Case, we cannot say that the contract was one which the parties were incompetent to make. By it the defendant railroad did not undertake to relieve itself from responsibility as a common carrier to its patrons or the public,

and hence we are not now concerned with such a case. The defendant railroad evidently considered, for one reason or another, that it would be more satisfactory to have its cars unloaded by stevedores employed and directed by an independent contractor. In entering into the contract for that purpose it intended of course to relieve itself of the burden of dealing with and being responsible for this class of employees. But that, as we have seen, it had the legal right to do."

In view of the foregoing cases we do not believe plaintiff's counsel are justified in their sweeping statement to the effect that the arrangement in the case at bar is a contract or device in violation of the Federal Employers' Liability Act. Before a legitimate business arrangement between a railroad and any other responsible company, by terms of which the second company becomes an independent contractor in its dealings with the railroad, is declared to be null and void as a violation of Section 5 of the Federal Employers' Liability Act it seems to us that we should have some better authority than the unsupported statements of the plaintiff's counsel.

### POINT NO. III

By Point No. III of the plaintiff's brief he asserts that the defendant Pacific Fruit Express Company was a common carrier by railroad in interstate commerce. The importance of this contention lies in the fact that the defendant Pacific Fruit Express Company has admitted Moleton to have been its employe at the time of his injuries; consequently, if the Pacific Fruit Express Company was a com-

mon carrier by railroad in interstate commerce at that time, Moleton's cause of action against the Pacific Fruit Express Company would be governed by the Federal Employers' Liability Act. Again plaintiff states, without any semblance of authority for his position, that the conclusion is inescapable that the defendant express company was a common carrier by railroad in interstate commerce because it was engaged in a joint enterprise with the Union Pacific, which was admittedly a common carrier by railroad. Despite this assertion by plaintiff's counsel, we call to the court's attention that the Supreme Court of the United States has been able to escape this conclusion and, in fact, to rule to the contrary on every occasion when the matter has been presented to it. In the case of *Wells Fargo & Co. v. Taylor*, cited supra, the Supreme Court had occasion to determine whether or not Wells Fargo & Company was a common carrier by railroad within the meaning of the act. It appeared in that case that Wells Fargo & Company transacted express business on and over the railroad company's road under a contract giving it the exclusive right to conduct such business over the railroad and obligating the railroad company to refrain from competing. The railroad company agreed to transport by suitable cars to be provided by it and attached to its passenger trains all express matter of the express company and the express company agreed to make payments determined by a percentage of its gross earnings and to assume certain risks of loss. There was an integration of two businesses much more complete than is presented in the case at bar. It further appears that the plaintiff urged that the contract between the railroad company and Wells Fargo &

Company showed a co-proprietorship or sort of partnership between them which made him an employe of both. In overruling his contentions the Supreme Court of the United States said:

"In his declaration in the state court Taylor did not claim that he was in the employ of the railroad company, and his judgment was not obtained on that theory. Here it is shown with certainty that he was not in that company's employ. True he urges that the contract between the two companies shows a co-proprietorship or sort of partnership between them which made him an employee of both; but the contract discloses no basis for the claim or for distinguishing his case from that of the Pullman porter recently before us. • *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U. S. 84. Here the businesses of the companies concerned were quite as distinct in point of control and otherwise as they were there. That here the railroad company provided the express car is not material, for it is measurably equalized by other differences. In both cases the railroad company provided the motive power and the train operatives. The messenger here, like the porter there, was on the train as an employee, not of the railroad company, but of another by whom he was employed, directed and paid, and at whose will he was to continue in service or be discharged.

\* \* \* \* \*

"As Taylor was not an employee of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement."

In the case of *Reynolds v. Addison Miller Company et al.*, cited *supra*, the Supreme Court of Washington was like-

wise able to escape the conclusion demanded by the plaintiff. It is to be noted that the Addison Miller Company was doing work identical with the general work performed by the Pacific Fruit Express Company. In passing upon the contention now raised by plaintiff, the court said:

“Under the authorities that contract was valid and constituted the Addison Miller Company an independent contractor, and its employes would not be employes of the railway company engaged in interstate commerce; nor would the Addison Miller Company itself be within the terms of the Federal Employers’ Liability Act.”

In the *Robinson* case, cited *supra*, the Supreme Court of the United States held, in substance, that the Pullman Company was not a common carrier by railroad within the meaning of the act. This decision was the basis of the court’s opinion in the case of *Taylor v. New York Central R. R. Co.*, cited *supra*, where the Court of Appeals of New York said:

“Nor does plaintiff as an employee of the Pullman Company come within the federal act and escape the controls of the workmen’s compensation law. We find no express holding in the cases as to whether or not an operator of parlor and sleeping cars is liable to its porters under the federal act, but the answer seems plain enough. In *Wells Fargo & Co. v. Taylor*, the Supreme Court, denying the applicability of the federal act to workers on the cars of a railway express company said: ‘In our opinion the words common carrier by railroad as used in the act mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier.’ ”



In the *Gaulden* case, cited *supra*, plaintiff's contention was again overruled. The trial court said:

"Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers' Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 USC 51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a common carrier by railroad. *Ellis v. Interstate Commerce Commisioner*, 237 U. S. 434; *U. S. v. Fruit Growers Express Co.*, 279 U. S. 363; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175; *U. S. ex rel. Chicago Refrigerator Company v. Interstate Commerce Comm.*, 265 U. S. 292; *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 Pac. 110.

"The Federal Employers' Liability Act was amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i. e. acquiescence in the judicial rulings. Federal legislation concerning the social security of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier, thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period

of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act."

The evidence in the case at bar does not even suggest that the Pacific Fruit Express Company was (1) a common carrier, or (2) that it was such common carrier by railroad. There is no evidence that the Pacific Fruit Express Company accepts shipments from anyone and as a matter of fact it does not accept shipments. The cases mentioned above clearly indicate that there is no legal support of any nature whatsoever for the proposition that the Pacific Fruit Express Company is a common carrier by railroad within the meaning of the Federal Employers' Liability Act.

#### POINT NO. IV

The fourth point argued in plaintiff's brief asserts that sufficient evidence was introduced in the 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 the plaintiff. In support thereof plaintiff has cited six of the recent decisions of the Supreme Court of the United States construing the Federal Employers' Liability Act. He concedes that these cases are not in point on the facts of this particular case.

In the event that this court determines the Federal Employers' Liability Act to be inapplicable to plaintiff's claim, it will be unnecessary to consider Point No. IV at all; and we therefore believe that no discussion of Point No. IV of

plaintiff's brief should be required. But to complete our answer to the four points urged by Moleton we desire to make the following observations on Point No. IV of plaintiff's brief.

We concede that the plaintiff introduced sufficient evidence to make a jury question of negligence against the Pacific Fruit Express Company if Moleton's fall was due to carbon monoxide poisoning. The issue which we raised by our motion for nonsuit and by our argument thereon was based upon the insufficiency of the evidence presented to show that the plaintiff's fall and the consequent injuries suffered therefrom were contributed to or caused by such carbon monoxide poisoning. Unless the evidence is sufficient to make a jury question upon the fact of Moleton's fall having in some manner been contributed to by carbon monoxide poisoning, there could be no causal relationship between the negligence alleged and the injuries complained of since all of the plaintiff's theories of liability revolve around the basic premise that carbon monoxide poisoning rendered Moleton unconscious and thus produced the fall.

No question is here presented involving any peculiar legalistic meaning of the term "proximate cause." The point which we now wish to make to this court is that the evidence fails to show that carbon monoxide poisoning was in fact a cause of plaintiff's injuries. There is no direct testimony in the record to the effect that plaintiff suffered such poisoning at the time of the accident; and if his case is sufficient to go to a jury on this matter it can only be held sufficient

on the theory that a jury could properly draw some sort of inference that Moleton's fall was so caused.

We are not unmindful of the decisions of the Supreme Court of the United States in the Lavender and Tenant cases cited in plaintiff's brief. These cases do hold in substance that jurors must be permitted a certain amount of speculation and conjecture in choosing what seems to them the more reasonable as between two or more conflicting inferences; but we do not understand that the Supreme Court of the United States has ever receded from the proposition which found expression in the case of *Atchison, Topeka & Santa Fe Railway Co. v. Toops*, 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896, where Mr. Justice Stone, speaking for that court, stated that the type of inference which a jury would be permitted to draw must be a reasonable one. We believe that the Lavender and Tenant cases go no further than to state that a jury must be permitted to choose between conflicting reasonable inferences; and to further state that it is of no consequence to a court whether the jury chooses the more reasonable or less reasonable as between such inferences. But it still remains for every trial court or appellate court to decide whether or not as between conflicting inferences one is so unlikely as to be unreasonable, so that it could not properly be the basis for a jury verdict. In any case where the inference sought to be drawn to support liability is so unsubstantial as to fail to commend itself to any reasonable person no jury should be permitted to draw the same. So in the case at bar if the inference of carbon monoxide poisoning as a contributing factor to the accident is so weak and unsubstantial as to be unreasonable, the jury should

not have been permitted to draw the inference in support of a verdict for the plaintiff. Each case must, of course, be viewed on its own facts and the reasonableness of the inference sought to be sustained must always be considered in the light thereof.

In the instant case no one can rule out with rigid certainty the possibility that Moleton's fall may have been caused by carbon monoxide poisoning, but consideration of the evidence leads us to the conclusion that any inference to the effect that such poisoning was a cause of the accident is so weak, unsubstantial and unreliable that it could not properly be accepted by reasonable men and should not therefore be submitted to a jury for determination. The following facts, either shown by the evidence or within the judicial knowledge of this court, seem to us important and to lead to that conclusion:

- (1) Carbon monoxide is lighter than air;
- (2) The hatch in the top of the bunker of the car from which Moleton fell had been open for several minutes before Moleton entered the bunker;
- (3) Moleton himself had been in the open air for enough time after working in the bunkers of the first two cars which he reached on the day of the accident that any possible effects of gas in the bunkers of those cars should have been dissipated. This is demonstrated by the fact that FDEX9084, which was the second car from the west end of the train, was three car lengths removed from the nearest other heater cars in which the plaintiff worked on the day of the accident;  
(See Exhibit 4.)

- (4) Moleton was in the bunkers of the three cars a total of less than six minutes and in the bunker of FDEX9084 only a minute or two;
- (5) There is no evidence that carbon monoxide gas ever caused anyone difficulty under circumstances such as outlined above and made apparent by the evidence in this case;
- (6) The symptom of carbon monoxide poisoning observed by the lay witnesses is dizziness felt upon reaching fresh air, but Moleton experienced no such symptom after leaving any of the bunkers on the day of the accident and, in fact, displayed no symptom of carbon monoxide poisoning whatsoever;
- (7) There are numerous other possible explanations as to the cause of the accident; two which readily occur are as follows: (a) Moleton might have fainted from causes wholly dependent upon his own physical condition; (b) Moleton might have slipped and fallen without losing consciousness at all; and his recollections thereof may be lost due to the shock he sustained as a result of the fall. Such other possible explanations do not, of course, eliminate the possibility that carbon monoxide poisoning contributed to the fall and the consequent injuries; but these other possibilities must be taken into account in determining whether the inference of gas poisoning is, in fact, a reasonable inference;
- (8) No medical evidence was offered by the plaintiff to demonstrate that he had ever displayed any symptoms of carbon monoxide poisoning. In fact, no medical evidence of any kind was offered by the plaintiff to sup-

port his theory as to how the accident happened or even to prove that the accident could have happened as the plaintiff now claims by his brief that it did.

In view of the extent to which the Supreme Court of the United States has broadened the field within which a jury may be permitted to conjecture and speculate as to matters of negligence and causation, it seems to us that it would be a useless thing to attempt to refer this court to cases of by-gone days dealing with situations similar to this case. The cases of fifteen years ago are, for the most part, unreliable guideposts in deciding matters of negligence and causation under the Federal Employers' Liability Act in view of the decisions of the Supreme Court of the United States. But nevertheless, we are of the opinion that careful examination of the evidence in this case shows the inference that carbon monoxide poisoning contributed to plaintiff's fall to be so unlikely, unsubstantial and unreasonable as to fall far short of any acceptable standards of proof recognized by the law. To attribute Moleton's fall to gas poisoning is not to draw a reasonable inference. It is just plain guessing and it is an unreasonable guess at that. This seems to us to require a holding that the plaintiff has failed in his proof even in view of the decisions of the Supreme Court of the United States cited by the plaintiff.

## CONCLUSION

We respectfully submit that Moleton's claim does not fall within the provisions of the Federal Employers' Liability Act for the following reasons: (1) He was not an employe of the Union Pacific Railroad Company; and (2) he was employed by the Pacific Fruit Express Company which is not a common carrier for hire and which is not, therefore, subject to the act. But even in the event that this court should rule that the act was applicable, we do not believe that the plaintiff offered sufficient evidence that a jury could be permitted to find that his injuries were caused in whole or in part by the negligence of the defendants. Therefore, the judgment should be affirmed.

Respectfully submitted,

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