

1951

# Will J. McGowan v. The Denver and Rio Grande Western Railroad Company : Brief of Appellant

Utah Supreme Court

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FILED

JUL 28 1951

In the

Clerk, Supreme Court, Utah

# Supreme Court of the State of Utah

WILL J. McGOWAN,

*Appellant,*

vs.

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COMPANY,  
a Corporation,*Respondent.*Case No.  
7683

## APPELLANT'S BRIEF

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In the  
Supreme Court of the State of Utah

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WILL J. McGOWAN,

vs.

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COMPANY,  
a Corporation,

*Appellant,*

*Respondent.*

Case No.  
7683

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APPELLANT'S BRIEF

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STATEMENT OF THE CASE

Basing his complaint upon the Safety Appliance Act (45 U. S. C. A., Section 2 et seq.) respondent brought this action to recover damages for personal injuries alleged to have been sustained as a result of the use by the appellant in interstate commerce of a car "not equipped with coupler mechanism which would couple automatically on impact"

(R. 1-4). The jury returned a verdict in favor of the plaintiff in the amount of \$13,000.00 (R. 25-A). The court granted a new trial conditioned upon the plaintiff's refusal to remit \$6000.00 from the judgment. He accepted the reduced amount and a new trial was denied (R. 28).

## STATEMENT OF FACTS

Plaintiff, a brakeman, was injured while the crew of which he was a member was switching cars in the defendant's railroad yard at Cameo, Colorado (R. 35). The movement in the course of which the plaintiff was injured involved the coupling of a Grand Trunk Western Railroad car and a Rio Grande car, No. 70523 (R. 36). The Grand Trunk Western car was a boxcar and was stationary. The Rio Grande car was a coal car and was attached directly to the engine (R. 36). Plaintiff was directing the coupling movement from a position on the ground about eight feet away from the end of the boxcar (R. 38-9). As the coal car reached a point opposite him he inserted his foot between the cars and against the drawbar of the coal car (R. 40). When the coupling devices of the two cars came in contact plaintiff's foot was between them, and he suffered the loss of part of the big toe of his right foot (R. 41-5). The cars coupled upon impact notwithstanding the presence of portions of plaintiff's foot was inside the knuckles (R. 41).

Plaintiff testified that the coal car was moving at a speed of about four miles an hour when it reached a point about eight feet from the boxcar and that he then noticed that the drawbar appeared to be "out of line" (R. 40). He

says he pushed on the drawbar three times but he was unable to determine the extent of movement of the drawbar, if any, accomplished by his pushing on it with his foot (R. 65-6). He was, however, still pushing on the drawbar when the cars came together (R. 68).

The cars were about eight feet apart when the plaintiff made the first push on the drawbar with his foot (R. 64).

He testified that while the coal car was moving this distance at a rate of speed of about four miles an hour, he not only pushed on the drawbar three times with his foot but found time to step out from between the cars in the interval between the first and second push and signal the engineer to stop (R. 67). He says that this signal was given when the cars were about four feet apart and that the engineer ignored the signal (R. 67).

The engineer testified for the defendant that he observed the plaintiff standing near the point where the coupling was later made and that when the two cars were about one foot apart the plaintiff went between the cars (R. 95-7). He recognized the plaintiff's danger and immediately attempted to stop the train but was unable to do so (R. 95-7). He observed the plaintiff during the entire course of the movement and testified positively that at no time did the plaintiff give any stop signal (R. 97).

The coal car was barely moving at the time of impact and the coupling was made with only a minimum of jarring.

Mr. Kuykendall, the conductor, remained at the scene of the accident until the arrival of three safety inspectors, employees of the defendant (R. 101). These inspectors care-



fully examined the coupling devices of both cars and made several tests in which the cars on every occasion coupled automatically upon impact. McCoy, one of the inspectors, testified that there was no defect of any kind in any of the coupling mechanism of either car and that they functioned perfectly.

Mr. McCoy also testified that the coal car drawbar against which plaintiff had pushed was of modern type, built on a rocker mechanism so that it would automatically rock or gravitate to a centered position (R. 107). This rocker is called a swinging type carrier arm, and its purpose is to keep the drawbar centered within a minimum lateral play of not more than one inch each way (R. 107). The lateral movement could be increased to two inches each way by exerting extra pressure, so that the carrier arm would "ride up." This extra pressure was demonstrated by two men pushing against the drawbar. One man could not push the drawbar beyond the one inch free play allowed by the rocker. As soon as the extra pressure was released the drawbar would rock back within the centered area (R. 108).

The witness also testified that the rocker mechanism was in good mechanical condition, and that there were no defects which would prevent it from rocking back within the one inch play permitted by the special type rocker arm (R. 108, 109, 112, 113 and 115).

The defendant had prepared for the jury a portable mechanism upon which were mounted two drawbars and couplers of the exact type, measurement, and make of the couplers involved in the accident. These couplers were so constructed that they could be operated and pushed together in the presence of the jury (Ex. 5).

The witness Martin, who is the General Car Foreman of the Grand Junction Division, testified that he supervised the construction of the exhibit and that it was in all respects identical to the equipment involved (R. 115-120). After qualifying as an expert witness he explained to the jury why the drawbars must be engineered so that they can move laterally. This movement is necessary so that the cars can negotiate curves and accommodate the swaying motion incident to ordinary travel along the tracks (R. 121). If at least a two-inch movement each way is not allowed, a car as long as the coal car (fifty feet and two inches) will derail on curves. For this reason the coal car was equipped with a drawbar which would, under extra pressure, move two inches each way, and when the pressure was released, gravitate back to a centered position (R. 121-122).

Mr. Martin further testified that he had never seen any railroad car on the D. & R. G. system, or on the system of any other railroad, that had a mechanism on the side of the car from which an operator could center a drawbar, and that on occasions men go between the cars for the purpose of making a preliminary alignment of a drawbar. He stated, however, that this preliminary action takes place *when the cars are stopped* (R. 124-125-126).

The only injury sustained by the plaintiff was the crushing of the big toe, necessitating amputation at the first joint (R. 45). He was off work from April 16th to the latter part of September. He resumed his regular employment as a brakeman in September and was so employed at the time of the trial (R. 47).

## STATEMENT OF POINTS RELIED ON

## I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT THE COUPLERS DID NOT MEET THE REQUIREMENTS OF THE STATUTE.

## II.

THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NOS. 3 AND 4.

## III.

THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NOS. 5 AND 7.

## IV.

THE COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING THE PROFFERED EVIDENCE OF THE DEFENDANT THAT THE PLAINTIFF VIOLATED THE SAFETY AND OPERATION RULES OF THE COMPANY AND THAT ON THE DAY BEFORE PLAINTIFF'S INJURY, PLAINTIFF HAD VIOLATED SAID RULES AND HAD BEEN SPECIFICALLY WARNED TO DESIST FROM SUCH PRACTICE.

## ARGUMENT

## I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT THE COUPLERS DID NOT MEET THE REQUIREMENTS OF THE STATUTE.

The controlling provision of the Safety Appliance Act reads as follows :

“It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically on impact and which can be uncoupled without the necessity of men going between the ends of the cars.”

We do not contend that the trial court erred in refusing to grant the defendant's motion for a directed verdict because of the absence of any evidence of a mechanical defect in the coupling devices or because of a failure of proof of negligence on the part of the defendant in maintaining the couplers in a state of good repair. What we do contend is that there is no evidence which tends to prove that the cars in question were not equipped with couplers that would couple automatically on impact or that there was any insufficiency in the coupling equipment that made it necessary for the plaintiff to go between the cars to effect the coupling on the occasion in which he was injured.

To effect a coupling of two railroad cars by any devices so far invented, it is necessary that the drawbars

of the couplers be in alignment sufficient to allow the jaws or knuckles of the couplers to mesh. The coupled cars cannot be operated in any ordinary railroad movement if the drawbars are rigidly fastened to the cars. There must be some lateral play in the drawbars or the cars will derail upon reaching a curve in the railroad tracks. The amount of lateral play required to prevent derailment of the car depends upon the size and length of the car. No court, so far as we know, has ever intimated that a drawbar having only a reasonably required lateral play does not meet the full requirements of the statute.

There is no evidence whatsoever to the effect that the drawbar on either of the cars involved in the coupling movement had any more lateral play than was necessary to successfully operate the cars.

As to the amount of lateral play in the drawbar of the standing box car the only testimony was that this type of car had a maximum lateral play of  $2\frac{1}{2}$  inches. However, the plaintiff testified that he observed the drawbar on this car and that it was in a centered position. This testimony was not disputed. The plaintiff in his complaint makes no claim that the drawbar on this car was out of alignment. In any event the coupling was made without anything being done to this drawbar in the way of aligning.

With respect to the lateral play in the drawbar of the moving coal car, the undisputed testimony was that in order to operate the car on the defendant's tracks, the drawbar had to have a lateral play of two inches on each side. The evidence is further undisputed that this drawbar

had a lateral play of only two inches on each side. Mr. Martin measured the lateral play and testified without contradiction that it was not in excess of the amount required to keep the car from derailing.

The evidence being uncontradicted that neither drawbar had any more lateral play than required to operate the cars successfully and that the drawbar on the standing car was in a centered position, there remains for consideration the position of the drawbar on the moving coal car.

Assuming solely for purpose of argument that a drawbar having a maximum lateral play of two inches on each side may, on some occasion, require alignment in order to effect a coupling and that the statute requires that such a car be equipped with a mechanism that will align the drawbar without the necessity of a man going between the cars to operate the mechanism, there is in this case no evidence of any failure on the part of the defendant to comply with the statute as so interpreted.

The only claim made by the plaintiff of any defect or insufficiency in the coupling mechanism of the two cars was that the Rio Grande car's drawbar was out of alignment and had no device whereby it could be aligned except by pushing on the drawbar with the hands or feet. Therefore the precise question to be determined is whether there is any evidence to sustain any such claimed defect or insufficiency.

It is undisputed that the drawbar on this car was equipped with a rocker or swinging carrier arm device. This rocker device was designed to automatically rock or

gravitate the drawbar to a centered position. It was made to perform that function without the necessity of any manual operation or manipulation. By the exertion of a great deal of pressure it was possible to push the drawbar off center a maximum of two inches each way. The moment this lateral pressure was released, the drawbar would be swung back by the rocker to a centered position. It is possible that the drawbar could have a lateral play of as much as one inch after the pressure was released but there is nothing to indicate that a drawbar having only that much lateral play would move off center sufficient to prevent the knuckles from meshing upon impact.

There is no evidence that the rocker device failed to perform the function for which it was designed.

We are aware that plaintiff testified that he observed that the drawbar on the moving car was "out of line". However, he made this observation while the car was moving about four miles per hour and when the front of the drawbar had reached a point eight feet from the point of coupling. He says that he pushed on the drawbar with his foot three times. He was unable to state how much, if any, he succeeded in moving the drawbar. It is extremely significant that he was still pushing on the drawbar at the very moment the coupling occurred.

We submit that this testimony is wholly insufficient to prove any defect or insufficiency in the rocker device or that it failed in any respect in its function of automatically aligning the drawbar to a position where the cars would couple upon impact. The plaintiff's testimony that the drawbar was out of line to the extent that the two cars would

not couple upon impact was a mere opinion, which the subsequent event demonstrated was in error. He could not say to what extent, if any, his pushing on the drawbar caused it to move one way or another. His testimony is entirely speculation. He speculated that the drawbar was out of alignment at the very instant that the coupling occurred because he was then still pushing it with his foot. He was most certainly wrong at that instant. He was also wrong the first time he pushed.

In the case of *Kansas City M. & O. R. R. Co. v. Wood*, 262 S. W. 520, the very same kind of evidence was offered to show that a drawbar was out of alignment and was rejected as mere speculation in view of the fact that the cars actually coupled just as they did in the case at bar. The appellate court of Texas said:

“There is no proof other than this of any defects whatever in the couplers in question, mechanically or otherwise, and nothing to support plaintiff’s contention save his own observations and opinion as to what would have happened had he not gone between the cars. This, we think, is leaving the domain of fact and invading the realm of fancy, and is too meager to sustain a recovery against appellant. The burden was upon the plaintiff to show some defect that would constitute a failure to comply with the Federal Safety Appliance Act. The fact that Wood went between the cars and was hurt imposes no burden upon appellant unless it was negligent or failed to comply with law. And, as said in *Ry. Co. v. Bonds* (Tex. Civ. App.), 244 S. W. 1102:

“‘It would be manifestly unfair to hold that the carrier had violated the statute until



the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective.'

"See also, *Morris v. Ry. Co.* (Tex. Civ. App.), 158 S. W. 1055."

The decision of the Texas appellate court is unanswerable. The statute which we are considering requires the railroad to provide a certain type of equipment. The equipment specified is that which will accomplish a designated function and which can be manipulated without a man going between the cars. It would be manifestly unwarranted, to hold that a finding of insufficiency in the coupling equipment could be based upon a mere guess of an injured employee.

It is submitted that a failure to comply with Section 2 of the Safety Appliance Act can be established only by proof of some mechanical defect or by failure of the coupling mechanism to function upon a fair test. Such proof is certainly required in an action based upon the provisions of the Safety Appliance Act requiring the carrier to equip its cars with an efficient hand brake. To this effect see *King v. Denver & Rio Grande Western R. Co.*, ... Utah ..., 211 P. (2d) 833, from which we quote as follows:

"In the recent case of *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615, the U. S. Supreme Court announced the rule as to the methods of showing that a hand brake is 'inefficient' within the meaning of the Safety Appliance Act. The court quoted with approval from *Didinger v. Pennsylvania R. Co.*, 6 Cir., 39 F. 2d 798, 799, as follows:

“There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.’”

No logical reason can be assigned for refusing to adopt the same method for determining whether the carrier has complied with the section specifying the type of couplers which must be furnished.

There was, as has been pointed out, no evidence whatever of any mechanical defect in the coupling device on either car. There was likewise no evidence whatever of any failure of the couplers to function when subjected to a fair test. On the contrary they functioned perfectly on the occasion in question and thereafter when repeatedly tested. The plaintiff's testimony that he thought the drawbar was out of line has no probative value whatever. The controlling inquiry is whether the equipment was sufficient or insufficient—not what the plaintiff thought about it. Nothing short of a fair test could establish its insufficiency. Such a test was given and conclusively demonstrated the sufficiency of the entire coupling mechanism.

It is extremely difficult to read the plaintiff's version of how the accident occurred and escape the conviction that the plaintiff was between the cars attempting to adjust the knuckles and not to align the drawbar. Of course he testified that the knuckles were open but that is contrary to the admitted fact that his foot was inside the knuckle

and that he was pushing against the knuckle at the instant of impact. His description of hopping along on one foot to align the drawbar is fantastic. His statement that he signalled the engineer to stop was flatly contradicted. His story that he was aligning the drawbar is demonstrated by the facts and circumstances of the accident to be a fiction. In any event, there was no evidence that the rocker mechanism had failed to align the drawbar sufficiently to effect a coupling upon impact, and the court erred in denying the defendant's motion for a directed verdict.

## II.

### THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NOS. 3 AND 4.

Instruction No. 3 reads in part as follows:

“If you find from a preponderance of the evidence that on the occasion when plaintiff was injured the couplers on the two cars would not have coupled automatically upon impact without the necessity of plaintiff going between the cars, then the defendant is guilty of a violation of the Safety Appliance Act, and if such violation proximately caused, in whole or in part, injuries to plaintiff, then you should return a verdict in favor of the plaintiff and against the defendant and award to plaintiff damages as in these instructions set forth.”

The fundamental vice in this instruction is that it makes the liability of the defendant turn upon a theoretical function and the conduct of the plaintiff.

The statute, however, deals solely with mechanical equipment. The reference in the statute to function and to human conduct is merely descriptive of the type of equipment required and the place where the equipment is to be attached to the cars. It is error to assert that this statute requires coupling devices that will operate without manipulation by human hands. The limit of the requirement of the statute is that those parts of the coupling equipment that require manpower to operate shall be so attached to the cars so as to permit operation from a position outside the cars. It is true, of course, that the statute requires the mechanism to perform a certain function but it does not require that the equipment shall perform this function without the intervention of any human manipulation. No coupling device has been invented which will function automatically unless the knuckles are properly set. Yet it is universally held that the carrier meets the requirement of the statute when the cars are equipped with levers attached to the outside of the car by means of which the employee can open the knuckles. The most recent announcement of this proposition was made by the Supreme Court of the United States in *Affolder v. New York, Chicago and St. Louis R. R. Co.*, 339 U. S. 96, 94 L. Ed. 683, 70 S. Ct. 509.

We quote: "Of course this assumes that the coupler was placed in a position to operate on impact. Thus if the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened the railroad had a good defense" and from the dissenting opinion of Mr. Justice Jackson, "The court of appeals thought the charge as a whole very probably gave the

jury the impression that it need only find that two cars failed to couple on impact to establish a violation of the Safety Appliance Act. This as the court recognizes is not the law. Before a failure to couple establishes a defective coupler it must be found that it was properly set so it could couple. If it was not adjusted, as such automatic couplers must be, of course the failure is not that of the device."

Also see:

*Western & Atlantic R. R. v. Gentle*, 198 S. E. 257, 58 Ga. App. 282. Certiorari denied 59 S. Ct. 252, 305 U. S. 654, 83 L. Ed. 424.

*Southern Ry. Co. v. Stewart*, 119 Fed. (2d) 85. Reversed on other grounds 62 S. Ct. 616, 315 U. S. 283.

*Chesapeake & Ohio Ry. v. Charlton*, 247 Fed. 34, 159 C. C. A. 252.

The error pointed out in Instruction No. 3 was emphasized in that portion of Instruction No. 4 which reads: "You are further instructed that it was the duty of the defendant company to require on the two cars in question couplers that would couple automatically upon impact without the necessity of plaintiff going between the cars." Although this instruction does faintly recognize that the statute deals with machinery and not conduct (a virtue which Instruction 3 does not possess) still it requires the carrier to furnish a type of equipment which has not yet and never will be invented.

It requires the carrier to equip its cars with a mechanism that will function without any manual effort being

applied to it. Such a device is unknown. Surely the statute was not intended to require a carrier to perform an impossibility. The requirement of the statute that the equipment shall perform a certain function does not mean that it must function without any intervention of manpower. Such however is the type of equipment that Instruction No. 4 required the defendant to furnish. The instruction therefore repeated and emphasized the vice contained in Instruction No. 3.

These two instructions deal directly with the statute upon which liability is solely predicated. Since they embody a radical misconception and erroneous interpretation of the statute, the errors were seriously prejudicial and prevented the defendant from having a fair trial.

### III.

#### THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NOS. 5 AND 7.

Instruction No. 5 reads:

“You are instructed that the phrase ‘without the necessity of going between the cars’ means that in order to effect an automatic coupling it was necessary for a workman to place some part of his body within the area between the cars.

“In this connection you are instructed that if, in order to effect an automatic coupling by impact, it was necessary for plaintiff to adjust the draw-bar or coupling mechanism with his hands or feet, then there would be a violation of the Safety Ap-

pliance Act by the defendant in not having the type of coupler required by the Act.

“You are further instructed that it would make no difference whether the car was moving or standing still.”

The definition in the first paragraph above of the phrase “without the necessity of going between the cars” is confusing, misleading to the jury and entirely erroneous. To begin with, there is no such phrase in the Safety Appliance Act. The similar phrase of the statute is “without the necessity of men going between the ends of the cars.” It is obvious from a mere cursory reading of the statute that the phrase “without the necessity of men going between the ends of the cars” is no more than a description of the design of the coupling equipment to be placed on the cars. It is a specification for the location of certain parts of the coupling mechanism. It is a direction that the parts of the coupling mechanism that are to be manipulated by manpower are to be located on the outside of the car. If any authority were needed to demonstrate that such is the intent and meaning of this phrase, it can be found in the *Affolder* case cited above.

The second paragraph of Instruction No. 5 applies this misconception of the statute and repeats and emphasizes the error in Instructions Nos. 3 and 5. It makes the liability of the defendant turn upon the lack of necessity of the plaintiff to do certain things. The statute, however, makes the liability of the defendant depend upon the type and condition of the coupling mechanism on its cars.

The instruction was actually a peremptory direction to return a verdict for the plaintiff because admittedly it was

necessary for the plaintiff to adjust the knuckles with his hands if they were closed. The knuckles are, of course, a part of the coupling mechanism. To tell the jury that it would be a violation of the Safety Appliance Act if it was necessary in order to effect an automatic coupling by impact for the plaintiff to adjust the coupling mechanism with his hands left the jury no alternative except to return a verdict for the plaintiff. It is impossible for a carrier to equip its cars with a self-operating mechanism that will open knuckles, and the statute does not require such a mechanism. It is satisfied by a mechanism attached to the outside of the car, notwithstanding the mechanism can be operated only by manpower. Since the instruction involved a completely erroneous interpretation of the statute and directed a verdict in favor of the plaintiff, there is no occasion to consider further the prejudicial character of the error.

The last paragraph of the instruction is *sui generis*. We are utterly unable to see wherein the paragraph has any bearing upon the Safety Appliance Act or any of the issues in this case. The only possible function it could serve would be to perplex and confuse the jury. An equally enlightening and helpful instruction would be to tell the jury that it makes no difference whether the car was black or white.

We need not determine whether the last paragraph of the instruction is so meaningless as to render the error in it harmless because the error in the remaining part of the instruction is so patent and fundamental that no reasonable mind could, in our opinion, regard it as harmless.



In Instruction No. 7 the court instructed the jury that:

“The Safety Appliance Act applicable to this case requires that a common carrier shall equip cars used by it in interstate commerce with couplers which will couple automatically by impact without the necessity of men going between the cars and the fact that some lateral motion in the coupler mechanism is necessary in the operation of defendant’s trains does not relieve the defendant from the requirements of said Act.”

We submit that this instruction is a further repetition of errors in other instructions considered above and is peculiarly misleading and confusing. It misconstrues the intent and meaning of the statute and then proceeds to direct the jury to give consideration to a wholly irrelevant and immaterial matter. It tells them that the fact that there must be some lateral motion in the coupling mechanism does not relieve the defendant from the requirements of the Act. The inevitable effect of so instructing the jury is to create in their minds a conviction that a mechanism having some lateral play does not meet the requirements of the statute.

Of course the necessity of lateral play in the drawbar does not relieve the carrier from its duty of complying with the Act. Neither does the necessity of having knuckles that open and close relieve the carrier of such duty. Nothing relieves the carrier of its duty because the duty is absolute. It would therefore have been entirely proper for the court to have instructed the jury as requested by the defendant that the existence of the normal amount of lateral play was not evidence of a violation of the Act. But to tell the jury that the necessity of lateral motion in the coupler does not

relieve the defendant from the requirements of the Act is equivalent to telling them that lateral play is evidence of a violation. The instruction is utterly indefensible and highly prejudicial to the defendant's case.

See:

*Chesapeake & Ohio Ry. Corp. v. Arrington*, 101  
S. E. 415 (Va.).

#### IV.

THE COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING THE PROFFERED EVIDENCE OF THE DEFENDANT THAT THE PLAINTIFF VIOLATED THE SAFETY AND OPERATION RULES OF THE COMPANY AND THAT ON THE DAY BEFORE PLAINTIFF'S INJURY, PLAINTIFF HAD VIOLATED SAID RULES AND HAD BEEN SPECIFICALLY WARNED TO DESIST FROM SUCH PRACTICE.

The court, during the trial and in the presence of the jury, refused to let defendant cross-examine the plaintiff on his alleged violations of the safety and operating rules of the defendant company. During the noon recess on the day of the trial, this matter was argued informally to the court and the court sustained the plaintiff's objections to such proffered testimony. Thereafter, the defendant was permitted to make its proffer of the evidence excluded, which proffer was made on the cross-examination of the

plaintiff and in the absence of the jury. During this cross-examination the plaintiff admitted that the safety rules of the operative department of The Denver and Rio Grande Western Railroad Company, and particularly Rule 101, Rule 102 and Rule 107, were violated by him at the time of his injury and that he knew that said rules were in effect at the time of the violation. These rules are set out in defendant's proposed Exhibit 2. The rule specifically prohibits an employee from going between moving cars or from using hands or feet to adjust drawbars, knuckles or lockpins while the cars are in motion (R. 76, 77 and 78).

The plaintiff also admitted that he was familiar with the operating rules and regulations of the railroad, particularly Rule 811 of defendant's proposed Exhibit 3. This rule likewise prohibits employees from going between cars in motion or in attempting to couple cars while they are in motion (R. 79). Also, during the course of the cross-examination which was conducted in the absence of the jury, the defendant denied that on April 14, 1950, the day before the accident in which he was injured, he had violated the foregoing rules by pushing on a drawbar with his foot while the cars were in motion and that on that occasion the conductor of the crew had warned him against this practice.

The conductor of the crew was called to testify relative to this incident. His testimony likewise was taken in the absence of a jury. He said that on the 14th day of April, the day before plaintiff's injuries, while he and the plaintiff were engaged in switching operations in the yard at Funston, Colorado, that the plaintiff kicked on a drawbar with his foot while the car was in motion and that he was warned

of the bad practice and advised against it. In response to the warning, Mr. McGowan merely "looked at him and grinned" (R. 84, 85). All of the foregoing evidence was excluded and was never presented to the jury. Certainly, if such evidence was competent and material, the court's ruling excluding it was prejudicial.

The defendant contends that the rejected evidence was material to show that the plaintiff was guilty of negligence which was the sole proximate cause of the injury complained of.

We may assume, for the moment, that the plaintiff proved as matter of law a violation of Section 2 of the Safety Appliance Act. There would still remain for determination by the jury the question whether such violation contributed to the injury or whether the injury was caused solely by the negligence of the plaintiff. That the assumed violation of Act did not as a matter of law contribute to the injury is established by two recent decisions of this Court and the authorities therein cited.

See:

*Coray v. Southern Pac. Co.*, . . . Utah . . ., 223  
P. (2d) 819;

*Wilson v. Union Pac. R. Co.*, . . . Utah . . ., 231  
P. (2d) 715.

In the *Coray* case, the violation of the Safety Appliance Act was conclusively established, and in the *Wilson* case it was assumed in considering whether the violation contributed to the injury as a matter of law. Here the most that the plaintiff can claim is that it was for the jury to

determine whether the defendant violated the Act. It follows that since it was for the jury to determine whether there was a violation of the Act and whether such violation if it existed contributed to the injury, there was open to the defendant the defense that negligence of the plaintiff was the sole cause of the injury. In this posture of the case any evidence tending to show that plaintiff was guilty of negligence which was the sole cause of the injury was admissible.

It is true that the defendant was permitted to show that plaintiff went between the cars while one of them was in motion. We concede that the jury could properly have determined from the evidence admitted by the court that plaintiff was negligent and that his negligence was the sole cause of the injury. But the rejected evidence would have demonstrated the plaintiff's negligence as a matter of law. It would have established that the defendant had expressly directed the plaintiff not to go between moving cars for any purpose, that the plaintiff had notice of this instruction and of the danger attending its violation; that, notwithstanding this express direction and warning, the plaintiff deliberately disobeyed the instructions and exposed himself to danger which he fully understood and appreciated.

The rejected rules contain a specific direction to all employees, including the plaintiff, not to go between moving cars for any purpose. The rejected testimony would have shown that the plaintiff knew and understood the contents and the meaning of this rule. The rejected testi-

mony of the conductor would have established a direct warning to the plaintiff of the danger of going between moving cars. In other words, it would have established the plaintiff's negligence as a matter of law.

The Supreme Court of the United States has consistently held that the violation by a railroad employee of a specific order or rule of conduct of which he has knowledge and understands constitutes negligence on his part which precludes recovery for an injury proximately caused by such violation.

See:

*Southern Ry. Co. v. Youngblood*, 286 U. S. 313,  
52 S. Ct. 518;

*Southern Ry. Co. v. Dantzler*, 286 U. S. 318, 52  
S. Ct. 520;

*Great Northern R. R. Co. v. Wilds*, 240 U. S.  
444, 36 S. Ct. 406;

*Frese v. Chicago B. & Q. R. Co.*, 263 U. S. 1, 44  
S. Ct. 1;

*Unadilla Valley R. R. Co. v. Caldine*, 278 U. S.  
139, 49 S. Ct. 91.

See also:

*Vandever v. Delaware L. & W. R. Co.*, 84 F.  
(2d) 979.

This question before us was considered in *Boghich v. Louisville & N. R. Company*, 26 Fed. (2d) 361. In that case the engineer on defendant's train had been killed when his engine ran into a passenger train at a crossing. The

operating rules of the Company provided that trains should come to a full stop before going on to a crossing such as the one involved in the accident. The deceased's widow brought the case under the Boiler Inspection Act, alleging failure of the defendant railroad to have a proper headlight on the train which her husband was operating. The evidence conclusively showed that this headlight was defective. Under the Boiler Inspection Act contributory negligence is not a defense. The trial court permitted the railroad to introduce evidence, over the plaintiff's objection, of the failure of the deceased to stop his train before going on to the crossing, which failure was a violation of the operating rules of the Company. The plaintiff's objection was based upon the reasoning that contributory negligence is not a defense in such cases. This Circuit Court, however, sustained the trial court's ruling, admitting this evidence and said:

"It is not sufficient to merely show a violation of the Safety Appliance Acts to support a recovery. That violation must be the proximate cause of the injury; and the contributing negligence of the injured employee may be so great as to bar recovery."

In *Kern v. Payne, Dir. Gen.*, 65 Mont. 325, 211 P. 767, suit was brought by the administrator for the death of a railroad employee who was killed when he went between two cars to open knuckles of a defective coupler. In doing so he violated the safety rules of the company. The Supreme Court of Montana, in reversing a judgment for the administrator, said:

"If it were assumed, in this case, that the decedent knew of the defective knuckle, and knew that

the knuckle on the moving car was closed, we then have a situation where the deceased, knowing all of the circumstances, and with no necessity requiring him so to do, and with ample time and space in which to act, willfully and deliberately violates a rule of the company governing his conduct, and by his own carelessness and negligence brings about his own injury.

“We recommend that the judgment and order be reversed, and the cause remanded to the district court of Custer county, with directions to dismiss the complaint.”

The Montana court quoted as authority for its position Thornton’s Federal Employees’ Liability Act and Safety Appliance Acts (3rd Ed.), page 469, wherein the author states:

“In order to enable an employee to recover when he has been injured by a car not properly equipped with automatic couplers, such improper equipment or the absence of an automatic coupler must have been the proximate cause of his injury, and he has the burden to show that such was the fact.”

In *Wilson v. Union Pac. R. R. Co.*, cited above, this Court held that “sole causation may include contributory negligence as the greater includes the lesser”. In determining the sole cause of the plaintiff’s injuries, his conduct and the surrounding circumstances of that conduct are proper subjects of inquiry. His understanding and appreciation of the dangers involved in going between the cars are important in determining whether he acted negligently. His intentional and deliberate violation of the rules of the defendant designed to prevent accidents and the specific



instructions of the defendant preclude his recovery if they were the sole cause of the injury. The rejection by the court of this competent and material evidence deprived the defendant of a vital element of its defense.

### SUMMARY

In conclusion, the defendant respectfully submits that no evidence was offered or received which tended to prove that the coupling mechanism on the cars involved failed in any particular to meet the full requirements of the statute; that, on the contrary, the coupling equipment demonstrated by functioning perfectly on the occasion in which plaintiff was injured that it complied fully with the requirements of the statute; that the trial court in its instructions committed prejudicial error consisting of an entirely unwarranted interpretation of the statute and in effect directing a verdict in favor of the plaintiff and in rejecting competent and material evidence which prevented the defendant from having a fair trial; and that the judgment should be reversed with directions to the trial court to dismiss the action.

Respectfully submitted,

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