

1951

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rawlings, Wallace, Black, Roberts & Black; Attorneys for Plaintiff and Respondent;

---

## Recommended Citation

Brief of Respondent, *McGowan v. Denver and Rio Grande Western Railroad Co.*, No. 7683 (Utah Supreme Court, 1951).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1492](https://digitalcommons.law.byu.edu/uofu_sc1/1492)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

WILL J. McGOWAN,  
*Plaintiff and Respondent,*

vs.

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COM-  
PANY, a corporation,  
*Defendant and Appellant.*

7683

**BRIEF OF RESPONDENT**

RAWLINGS, WALLACE, BLACK,  
ROBERTS & BLACK,  
*Attorneys for Plaintiff and*  
*Respondent,*  
530 Judge Building,  
Salt Lake City, Utah.

**FILED**

NOV 5 1951

# TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	2
STATEMENT OF POINTS RELIED UPON .....	7
ARGUMENT .....	7
POINT I—THE EVIDENCE WAS SUFFICIENT TO SUP- PORT A FINDING THAT THE COUPLERS DID NOT MEET THE REQUIREMENTS OF THE SAFETY AP- PLIANCE ACT RELATING TO COUPLERS.....	7
POINT II—THE COURT DID NOT COMMIT ERROR, EITHER PREJUDICIAL OR OTHERWISE, IN IN- STRUCTING THE JURY AS SET FORTH IN IN- STRUCTIONS NUMBERED 3 AND 4.....	20
POINT III—THE COURT DID NOT COMMIT ERROR, PREJUDICIAL OR OTHERWISE, IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NUMBERED 5 AND 7.....	24
POINT IV—THE COURT DID NOT COMMIT ERROR, PREJUDICIAL OR OTHERWISE, IN EXCLUDING THE PROFFERED EVIDENCE OF THE DEFENDANT THAT PLAINTIFF VIOLATED SAFETY RULES OF THE DEFENDANT COMPANY EITHER ON THE OC- CASION HERE INVOLVED OR PREVIOUSLY.....	27
CONCLUSION .....	43

## AUTHORITIES CITED

Affolder v. New York C. & St. L. R. Co., 339 U.S. 96, 70 S. Ct. 509, 94 L. Ed. 683.....	22
Alabama Great Southern R. Co. v. Cornett, 214 Ala. 23, 106 So. 242 .....	38
Aly v. Terminal R. Ass'n of St. Louis, 342 Mo. 1116, 119 S.W. 2d 363 .....	34
Atlantic City R. Co. v. Parker, 242 U.S. 56, 37 S. Ct. 69, 61 L. Ed. 150.....	19
Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 70 S. Ct. 226.....	19, 20
Chesapeake & Ohio Ry. Corp. v. Arrington, 126 Va. 194, 101 S.E. 415 .....	26
Chesapeake & Ohio Ry. Co. v. Charlton, 247 Fed. 34.....	23
Chicago Great Western R. Co. v. Schendel, 267 U.S. 287, 45 S. Ct. 303, 69 L. Ed. 614.....	37
Chicago, St. P., M. and O. Ry. Co. v. Muldowney, 130 F. 2d 971, (cert. den. 317 U.S. 700).....	15, 18
Coray v. Southern Pac. Co., 223 P. 2d 819.....	42
Ehalt v. McCarthy, 104 Utah 110, 138 P. 2d 639.....	30

## TABLE OF CONTENTS—(Continued)

	PAGE
Grand Trunk Western Railway Co. v. Lindsay, 233 U.S. 42, 34 S. Ct. 581, 58 L. Ed. 838.....	39
Gulf C. & S. F. Ry. Co. v. Locher, (Tex.) 264 S.W. 595.....	41
Johnson v. Southern Pacific Company, 196 U.S. 1, 25 S. Ct. 158....	11
Jordan v. East St. Louis Connecting Ry. Co., 308 Mo. 31, 271 S.W. 997.....	36
Kansas City M. & O. R. R. Co. v. Wood, 262 S.W. 520.....	19
Kern v. Payne, 65 Mont. 325, 211 P. 767.....	42
Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 196.....	20
Leet v. Union Pacific R. Co., 60 Cal. App. 2d 814, 142 P. 2d 37.....	33
McCarthy v. Pennsylvania R. Co., 156 F. 2d 877 (cert. den. 329 U.S. 812).....	41
O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 70 S. Ct. 200.....	12
Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N.W. 922.....	41
Philadelphia & R. Ry. Co. v. Auchenbach, 16 F. 2d 550.....	30
Potter v. Los Angeles & S. L. R. Co., 42 Nev. 370, 177 P. 933.....	41
San Antonio & Aransas Pass Railway Company v. Wagner, 241 U.S. 476, 36 S. Ct. 626, 627, 60 L. Ed. 1110.....	13, 29
Scrimo v. Central R. R. of New Jersey, 138 F. 2d 761.....	41
Smiley v. St. Louis & S. F. Co., (Mo.) 222 S.W. 2d 481.....	40
Southern Ry. Co. v. Stewart, 119 F. 2d 85.....	23
Spokane & I. E. R. Co. v. Campbell, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.....	42
Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520.....	20
Tiller v. Atlantic Coast Line Railroad Co., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967.....	33, 42
Western & Atlantic R. R. v. Gentle, 58 Ga. App. 282, 198 S.E. 257..	23
Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497....	20
Wilson v. Union Pacific R. Co., 231 P. 2d 715.....	42

### STATUTES CITED

45 U.S.C.A., Section 2.....	1, 22
45 U.S.C.A., Section 53.....	1, 29
Utah Rules of Civil Procedure, Rule 51.....	20, 24

# IN THE SUPREME COURT of the STATE OF UTAH

---

WILL J. McGOWAN,  
*Plaintiff and Respondent,*

vs.

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COM-  
PANY, a corporation,  
*Defendant and Appellant.*

Case No.  
7683

---

## BRIEF OF RESPONDENT

---

### PRELIMINARY STATEMENT

(All figures in parentheses are the page numbers of the record. The parties will be referred to as they appeared in the lower court.)

The plaintiff in this case based his right of recovery entirely upon the Safety Appliance Act relating to couplers, 45 *U.S.C.A.*, Section 2. In so doing he eliminated any defense of contributory negligence on his own part, 45 *U.S.C.A.*, Section 53.

The appeal here is by the defendant from a judgment of \$7,000.00, this being the amount to which the verdict of the jury was remitted by the court with the consent of the plaintiff. The original verdict was for \$13,000.00.

## STATEMENT OF FACTS

The Statement of Facts contained in the appellant's brief is accurate except as to those matters which are of the most importance in this case. Throughout the entire brief the defendant continually seeks to draw unfavorable inferences against plaintiff from the testimony introduced. We believe that a quotation from the record will disclose that the defendant has erroneously construed the evidence given in this case with respect to the following matters: (1) that the drawbar of the moving car was out of line sufficiently far that it was necessary to move it in order to effect a coupling, and (2) that the plaintiff in fact moved the drawbar sufficiently to permit the coupling of the cars.

The coupling movement was made on the defendant's tracks at Cameo, Colorado. The coupling was to be made on the Cameo siding. The engine had hold of a loaded coal car (36, 37) which had a seventy ton capacity (110). The coal car was attached to the rear end of the engine and the movement was to the east along this track for the purpose of effecting a coupling to a boxcar which was stationary on the Cameo siding track. Preparatory to making this coupling plaintiff placed himself eight feet west of the boxcar. He then observed the approaching engine and coal car. He was unable to make a judgment of the position of the drawbar until it was about eight feet from the stationary car (39). The testimony of the plaintiff contained in the record establishes that he did not equivocate about the position of the drawbar. He stated (39):

“Q. Now did you make any observation of the coupling mechanism on that moving car which required you to take some action?

“A. Not until it got close enough to me. I could see it was out of line.”

Plaintiff definitely testified that in his opinion the drawbar was so far out of line that it would not couple. He based this opinion upon his eight years of experience in participating in coupling operations. His testimony on this subject was as follows (40) :

“Q. As that was coming along there did you form an opinion as to whether or not, with the drawbar on that car in the position it was, whether or not there would be a coupling?

“A. Yes, I did.

“Q. Will you tell us your opinion, please?

“A. Well, it got up to where it was about eight feet from me. I could see the drawbar was far enough out of line that it wouldn't couple and that is when I started shoving it.”

Plaintiff put his foot on the drawbar and attempted to kick it over but even then it had not moved far enough to effect the coupling. He testified “I could see it still wasn't going to couple up so I shoved on it again” (40). On cross-examination plaintiff testified in regard to the drawbar as follows (63, 64) :

“Q. Now when you say that drawbar was laterally out of position, in what way was it out of position—to the north or to the south?

“A. It was over too far this way—toward me.

“Q. Which would be toward the north?

“A. Had it not been I wouldn’t have been shoving it over in order that it would couple on impact.”

He further testified on cross-examination (71):

“Q. Now how far would you say, Mr. McGowan, the drawbar was off laterally to the north when you first saw it?

“A. Well, it was far enough out of line it wouldn’t have coupled on impact. If it had’ve I wouldn’t have pushed on it with my foot.

“Q. Can you tell me how far, in inches, or feet it was in direction off to your direction?

“A. In inches I couldn’t tell you. All I know is it was out of line.”

Plaintiff’s testimony, as aforesaid, is unequivocal upon the proposition that the drawbar on the moving coal car was out of line to the north, or toward plaintiff, to such an extent that it would not have coupled without adjustment. Plaintiff was an experienced brakeman and was on the ground for the purpose of effecting the coupling of these two cars. The jury was entitled to give weight to his judgment on the position of the drawbar. Defendant’s continual referring to this testimony as guesswork is neither fair nor does it reflect the fact nor does it give plaintiff the full benefit of this testimony.

Throughout its brief defendant continually states that it could not be ascertained from the evidence whether or not plaintiff moved the drawbar by shoving against it with his foot. Plaintiff unequivocally testified on a number of occasions that there was movement



of the drawbar on each occasion that he shoved against it. He shoved three times with his right foot. On this subject plaintiff testified (41):

“Q. And did the drawbar or did the cars couple together?

“A. They did.

“Q. And did you move the drawbar in order that they could?

“A. I did.”

On cross-examination he was asked in detail concerning the movement of the drawbar accomplished by his pushing. He testified (66):

“Q. \* \* \* Is it your opinion that it moved or didn't move on this first occasion?

“A. Well, I would say it moved a little.”  
He then testified:

“Q. Well, when you found out it had only moved a little, then what did you do?

“A. Well, it continued on, the cars continued on into the impact and I saw it wasn't in line, it wasn't going to make it, so I kept putting my foot in there shoving on it. I think I shoved twice more on it.”

Concerning the second push or shove he testified (70):

“Q. And on the second occasion when you pushed on it with your right foot, which was after you had given the stop signal which you say was ignored on that occasion, did the drawbar move with the pressure of your foot?

“A. It did.

"Q. And how far did it move on that second occasion when you pushed?

"A. Well, I couldn't say approximately how far it moved, but I know it moved. Had it not moved the couplers wouldn't have coupled on the impact and have my foot in there.

"Q. Just answer my question. On the second occasion you say when you pushed the drawbar did move?

"A. Yes."

Regarding the third shove he testified (71):

"Q. Well now did the drawbar move over with the pressure of your foot on the third occasion?

"A. It did, or it wouldn't have coupled up."

He then was asked concerning all three pushes or shoves as follows (71):

"Q. So on each occasion when you pushed on the drawbar with your foot the drawbar yielded and moved to some degree toward the center?

"A. That's right."

We submit that the foregoing testimony regarding the movement of the drawbar establishes that it was moved by the plaintiff sufficiently so that a coupling could be effected.

Counsel in this F.E.L.A. case theorizes that as matter of fact that plaintiff was in some way attempting to adjust the knuckles with his foot and not to align the drawbar (appellant's brief, page 13). This is absolutely contrary to testimony of the plaintiff when he testified (73):

“Q. And in this case there was no need to correct that situation as far as the knuckles were concerned?

“A. As far as the knuckles were concerned, no.”

## STATEMENT OF POINTS RELIED UPON

### POINT I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A FINDING THAT THE COUPLERS DID NOT MEET THE REQUIREMENTS OF THE SAFETY APPLIANCE ACT RELATING TO COUPLERS.

### POINT II.

THE COURT DID NOT COMMIT ERROR, EITHER PREJUDICIAL OR OTHERWISE, IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NUMBERED 3 AND 4.

### POINT III.

THE COURT DID NOT COMMIT ERROR, PREJUDICIAL OR OTHERWISE, IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NUMBERED 5 AND 7.

### POINT IV.

THE COURT DID NOT COMMIT ERROR, PREJUDICIAL OR OTHERWISE, IN EXCLUDING THE PROFFERED EVIDENCE OF THE DEFENDANT THAT PLAINTIFF VIOLATED SAFETY RULES OF THE DEFENDANT COMPANY EITHER ON THE OCCASION HERE INVOLVED OR PREVIOUSLY.

## ARGUMENT

### POINT I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A

FINDING THAT THE COUPLERS DID NOT MEET THE REQUIREMENTS OF THE SAFETY APPLIANCE ACT RELATING TO COUPLERS.

We are unable to understand the contention of defendant under its Point I. The purport of the point as stated in its brief would lead one to believe that its contention is that a directed verdict in favor of the defendant should have been granted. However, in its brief on page 7 the defendant states that it does not contend that the trial court erred in refusing to grant the defendant's motion for a directed verdict because of the absence of a mechanical defect in the couplers or because of a failure of proof of negligence on the part of the defendant in maintaining the couplers in a good state of repair. If no such contention is made, then a directed verdict would not have been in order and the sufficiency of the evidence would become established by admission of the defendant.

Defendant does contend, however, that there is no evidence tending to prove that the cars involved were not equipped with couplers that would couple automatically on impact or that there was any necessity for plaintiff to go between the cars in order to effect the coupling on this occasion. Plaintiff's contention in the trial of this case was that the drawbar of the moving coal car was so far out of line that it was necessary for an adjustment to be made in order to effect the coupling and there was no device or attachment whereby the plaintiff could make the necessary adjustment without going between the ends of the cars. Defendant's

own witness, Thomas McCoy, established that there was no attachment or device which could be used to accomplish a lateral adjustment of the drawbar and that it would be necessary for a brakeman to put some part of his body between the cars in order to accomplish the adjustment (110, 111):

“Q. Now there is nothing, if that coupler and the drawbar get off center, there is no mechanism there that you could stand outside from between the cars and adjust the drawbar, is there?

“A. No sir.

\* \* \* \* \*

“Q. And he would have to step in between the cars, wouldn't he? Isn't that right?

\* \* \* \* \*

“A. He would have to get a part of his body in there.

“Q. In order to make that adjustment to that drawbar?

“A. Yes sir.”

It was also conceded by this witness that these drawbars because of wear and rust and other factors come out of line and remain out of line so that they cannot be coupled without some adjustment (111, 112):

“Q. Now these various coupler mechanisms because of various differences in wear, a different amount of rust, and other things of that kind, they vary, do they not in connection with the movement of the rocker, or the movement of the coupler drawbar itself?

“A. Yes, they could.

"Q. And the ease with which they may be moved differs as among couplers?

"A. Yes sir.

"Q. Some are hard to move and some are easier?

"A. Yes sir.

"Q. And some will stay over farther than an inch, will they not?

"A. Some will, yes.

"Q. And it depends upon the wear and the amount of rust or dirt that is in these working parts?

"A. And the type of carrier arm would have a lot to do with it.

"Q. And the type of carrier arm?

"A. Yes.

"Q. And it isn't your testimony that these drawbars can't get far enough out of line so they won't couple?

"A. Well, I don't know about that. I saw them when they were coupled and we uncoupled them and coupled them back together and they coupled.

"Q. Well, you have seen cars that wouldn't couple when the drawbar was out of line, haven't you?

"A. Yes sir.

"Q. And that happens frequently?

"A. Well, I wouldn't say with what frequency.

"Q. But you have seen it a number of times, isn't that right?

"A. Yes sir."

One of the first cases construing the Safety Appliance Act relating to couplers specifically held that Act placed an absolute duty upon the carrier to furnish cars

with coupling devices which could be coupled together without the necessity of men going between the cars for the purpose of coupling. That case was *Johnson v. Southern Pacific Company*, 196 U.S. 1, 25 S. Ct. 158, 162, the court there stated:

“Tested by these principles, we think the view of the circuit court of appeals, which limits the 2d section to merely providing automatic couplers, does not give due effect to the words ‘coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars,’ and cannot be sustained.

“We dismiss, as without merit, the suggestion which has been made, that the words ‘without the necessity of men going between the ends of the cars,’ which are the test of compliance with section 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling; and if read, as it should be, with a comma after the word ‘uncoupled,’ this becomes entirely clear. *Chicago, M. & St. P. R. Co. v. Voelker*, 129 Fed. 522; *United States v. Lacher*, 134 U.S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.”

The court also expressed the underlying reason for the passage of the Safety Appliance Act as follows, page 161:

“Nevertheless, the circuit court of appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade

was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars."

In recent decisions of the Supreme Court of the United States it has been held that the act is violated where the couplers do not or will not couple on impact without the necessity of men going between the cars. In *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 70 S. Ct. 200, 206, the Supreme Court related the historic development of the law under the Safety Appliance Act and pointed out that courts did not readily accept the simple proposition contained in the Act. The court held the Act places an absolute duty upon the carrier to furnish a coupler which will, under all conditions, automatically couple by impact without the necessity of men going between the cars. Any time the coupler fails to so operate a violation of the Act has occurred and this regardless of any contention that too much was demanded of the coupler mechanism or by showing that the coupler had been properly manufactured, diligently inspected and showed no visible defects. The court stated:



“\* \* \* These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain away its liability if it has violated the Act.”

The court in this case was discussing instructions and the final statement of the court adequately expresses its holding:

“\* \* \* As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability.”

One of the earlier Supreme Court cases is analogous to the present case. In *San Antonio & Aransas Pass Railway Company v. Wagner*, 241 U.S. 476, 36 S. Ct. 626, 627, 60 L. Ed. 1110, a judgment in favor of plaintiff in an F.E.L.A. case was affirmed. The evidence tended to show that plaintiff was engaged in switching in defendant's yard and was riding upon the footboard at the rear of an engine in order to make a coupling between it and a boxcar. The engine was backing. At the first impact the coupling did not make. Plaintiff then signaled the engineer to move forward and then gave him a backup signal. The plaintiff mounted the footboard of the engine. He looked down and saw that the drawhead on the engine had shifted over to the side.

He reached up with his left foot to shift the drawhead over so it would couple. His right foot slipped on the wet footboard and his left foot was caught between the drawheads and crushed. The trial court instructed the jury that if the locomotive and car in question were not equipped with couplers coupling automatically by impact without the necessity of plaintiff going between the ends of the cars and by reason of this and as a proximate result of it plaintiff received his injuries, the verdict should be in his favor. The contentions made by the defendant there are almost identical with those made by the defendant here. The court expressed them as follows:

“\* \* \* They set up that defendant was a common carrier engaged in interstate commerce, and invoked the provisions of the Federal safety appliance act \* \* \*, averring that all couplers attached to railroad engines, tenders, or cars must have sufficient lateral motion to permit trains to round the curves, and must be provided with adjustable knuckles which can be opened and closed, and such couplers must be adjusted at times in order that they may couple automatically by impact, and that there is no kind of automatic coupler constructed or that can be constructed which will couple automatically at all times without previous adjustment, because of the lateral play necessary to enable coupled cars to round curves; that the engine and car upon which plaintiff was employed at the time of his injury were engaged in interstate commerce, and were equipped with automatic couplers which would couple automatically by impact as required by the acts of Congress, but an adjustment was necessary for this purpose, and could have been made by the

plaintiff going between the cars while they were standing, but without going between the ends of the cars while in motion, or between a moving engine and cars, and without kicking the coupling or in any manner endangering his own personal safety; with more to the same effect."

The court in ruling for plaintiff stated in part as follows:

"It is insisted that neither the original act nor the amendment precludes adjustment of the coupler prior to or at the time of impact, or treats a drawbar out of alignment as a defect in the automatic coupler, or as evidence that the cars are not equipped with couplers measuring up to the statutory standard. The evidence of bad repair in the automatic equipment was not confined to the fact that the drawbar on the engine was out of line; the fact that the coupling pin on the box car failed to drop as it should have done at the first impact, and required manipulation in preparation for the second impact, together with the fact that the drawbar on the engine was so far out of line as to require adjustment in preparation for the second impact, and the opinion evidence, being sufficient to sustain a finding that the equipment was defective. *The jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided upon the engine as upon the car, and that there was none upon the engine.*"

In *Chicago, St. P., M. and O. Ry. Co. v. Muldowney*, 130 F. 2d 971, 975 (cert. den. 317 U.S. 700), a situation

was presented in which plaintiff's decedent apparently attempted to adjust a drawbar which was out of line. There were no eyewitnesses to the occurrence of the decedent being caught between the couplers. In the switching operation involved a locomotive tender was to be coupled to a standing car. Decedent was standing on one of the steps on the rear of the tender. When the engine had reached a point about three car lengths from the standing car the engine power was shut off and it drifted gradually toward this car. A yardmaster standing near by, thinking it was about time for the engineer to slack ahead, turned around and observed decedent's lantern laying between the cars in the middle of the track. Decedent was between the coupler of the locomotive and the coupler of the standing car. The engine was moved ahead. Decedent was extricated and taken to the hospital where he died without recovering consciousness. After his removal the crew attempted to proceed with the switching operation. The engine backed up to contact the coupler on the standing car but the coupling did not make. The drawbars on the switch engine and the standing car were out of alignment to such an extent that a coupling could not be made without an adjustment of the drawbars. After the adjustment was made the cars coupled automatically. The court pointed out that it was the duty of decedent to see that the cars were properly coupled and if there was an adjustment to be made in the drawbars it was his duty to make it. An expert testified that the presence of a man's body between the two drawbars could not have forced them out of line.

The court held that by virtue of this testimony the jury could have found that the coupling would not have made because of the drawbars being out of line and that decedent was performing his duties in attempting to make the adjustment at the time of his injury. The court in discussing the testimony stated as follows:

“\* \* \* It must be borne in mind that Muldowney at the time of the accident was engaged in an attempt to make this coupling. He was not, as suggested, proceeding to cross the track between the engine and the Swift car for the purpose of going to the yard house. There is no evidence that that was his purpose and to have done so would have been a desertion of his post in the midst of an important movement in which he was performing an essential part. His activities, we have a right to assume, centered around the successful completion of his undertaking. If the drawbars were out of alignment to the extent that the coupling could not be made automatically on impact, that condition could only be cured by adjusting in some way these drawbars and that involved some movement of them. This could not be effected by the hand lever, and if the condition existed it was the duty of Muldowney not only to detect it but to remedy it. Assuming for the moment that this condition existed, the jury might well have concluded not only that he observed the condition but that he was in the act of attempting to remedy it. In doing so it was necessary for him to pass between the ends of the cars. If the assumed condition existed, the only good faith effort he could have made to couple necessitated an adjustment of the drawbar. Any attempt to

make the coupling without such adjustment would be futile."

In the *Muldowney* case it was necessary for the plaintiff to rely upon testimony that after the attempted coupling was made the drawbars were out of alignment to such an extent that a coupling could not be effected. In the case at bar the plaintiff was in a position where he could see and observe the position of the couplers and testified that the drawbar was sufficiently out of line on the coal car that a coupling could not be effected without adjustment of the drawbar. The position of plaintiff and the decedent in the *Muldowney* case were the same in that both were attempting to make an adjustment of the drawbar in order to effect a coupling. Plaintiff definitely testified in the case at bar that the drawbar was out of line and was moved sufficiently to permit the coupling to take place. We submit that this case is authority for the proposition that where drawbars are out of alignment and it is necessary for the brakemen or switchmen to go between the cars to make the adjustment a violation of the Act has occurred and if it results in injury, the railroad company is liable under the Safety Appliance Act. Neither the Act nor the authorities require that an actual failure to couple is necessary to establish a violation.

Defendant asserts there is no evidence that the rocker device failed to perform its function. Under the evidence this rocker device was supposed to cause the drawbar to come back into line so that the cars would couple on impact. The drawbar in this case was not in

such a position and hence the device had not functioned as it should. Concededly this could happen and adjustment between the cars would then be necessary.

In *Atlantic City R. Co. v. Parker*, 242 U.S. 56, 37 S. Ct. 69, 61 L. Ed. 150, the drawbar was out of line and plaintiff put his arm between the cars to adjust. In holding for plaintiff the court stated:

“If couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law.”

The fact that the coupler functioned properly on other occasions is immaterial. *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 70 S. Ct. 226.

The case of *Kansas City M. & O. R. R. Co. v. Wood*, 262 S.W. 520, cited by defendant, was decided in 1924 and the consideration of evidence is not in accord with the modern day authorities on the interpretation of the F.E.L.A. and Safety Appliance Acts. That case is distinguishable on the facts because the plaintiff there only observed the coupler at the instance of impact and testified that on the impact “it took the drawbar away from my foot.” The court characterized this by saying that it strongly indicated that plaintiff had not pushed the drawbar over prior to the time of impact. In the case at bar the testimony is definite that the drawbar was

moved by plaintiff. The defendant takes the position that the testimony of plaintiff must be entirely disregarded in this case. Under well-known principles in cases arising under the F.E.L.A., courts are not permitted to disregard testimony. The factual questions must be submitted to a jury, which is the tribunal chosen by Congress to decide these questions of fact. See *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 196; *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

From the language of this *Wood* case the court apparently takes the view that it is necessary to show some "defect" but this is not the law. *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 70 S. Ct. 226.

We submit that the evidence in this case supports a verdict in favor of plaintiff under the law set forth in Instruction No. 3 and which correctly states the law of this case.

## POINT II.

THE COURT DID NOT COMMIT ERROR, EITHER PREJUDICIAL OR OTHERWISE, IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NUMBERED 3 AND 4.

Under Point II the defendant contends that the court's Instructions No. 3 and No. 4 are erroneous. No proper exception was taken to these instructions. *Rule 51* of the *Utah Rules of Civil Procedure* provides in part:

"\* \* \* No party may assign as error the giving or the failure to give an instruction unless he



objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds of his objection."

At R. 138 defendant excepted to Instruction No. 3 generally, giving no grounds for its exception, and to the first paragraph thereof on the grounds there was no evidence that there was any necessity for plaintiff to go in front of the moving car to effect a coupling.

This is not the reason it now criticizes this instruction. It contends in its brief, if we understand defendant, that defendant's liability is erroneously made to turn upon a theoretical function and conduct of plaintiff and that this instruction requires defendant to furnish a coupling device that needs no manpower to manipulate.

The grounds set forth in the exception are adequately answered by the testimony of plaintiff that the drawbar was so far out of line that it would not couple without an adjustment, and the testimony that there was no device or mechanism by the use of which a lateral adjustment could be made and it would be necessary for the workmen to go between the cars to make the adjustment.

Defendant's exceptions to Instruction No. 4 are found at R. 138 and 139. No ground of any kind is given as a basis for the exception.

Defendant has not adequately raised the claimed error in these instructions and this Court should not, therefore, consider such assigned error on this appeal.

On the merits of this assignment these instructions

correctly state the law and the language thereof cannot be strained to mean what defendant says it means. Instruction No. 3 sets forth plaintiff's theory of the case, and No. 4 sets forth defendant's theory. By No. 3 the jury was told that to find for plaintiff it must be found by a preponderance of the evidence that the cars would not couple automatically by impact without the necessity of plaintiff going between the cars. In No. 4 the jury was told that if the couplers, even though out of alignment, would nevertheless have coupled automatically upon impact, then plaintiff's assistance was unnecessary and the verdict in such event should be for defendant.

These instructions follow the language of 45 U.S.-C.A., Section 2, and the construction placed thereon by the cases cited under Point 1 of this brief.

These instructions do not say that defendant must furnish couplers which will couple without the necessity of any manpower. They merely require that the couplers couple automatically without the necessity of plaintiff going between the cars. Any manpower or manipulation exerted outside of a position between the cars is not prohibited.

In *Affolder v. New York C. & St. L. R. Co.*, 339 U.S. 96, 70 S. Ct. 509, 94 L. Ed. 683, cited by defendant, one car was kicked against another and they failed to couple together. The court held that before there could be a finding that the cars had not properly coupled, a showing should be made that the couplers were placed in a position to operate on impact. Placing them in position would have to be accomplished without the necessity of

going between the cars under the express language of the coupler act. The *Affolder* case does not involve such adjustment. The case at bar does. Therein lies the distinction between the two cases.

*Western & Atlantic R. R. v. Gentle*, 58 Ga. App. 282, 198 S. E. 257, cited by defendant, is not in harmony with the late United States Supreme Court cases. It holds that it must be shown that failure to couple resulted from a defect. This is not now necessary. In the case at bar it was shown that the drawbar was out of line and no mechanism for adjustment without going between the cars. No such proof was present in the *Gentle* case.

Defendant also cites *Southern Ry. Co. v. Stewart*, 119 F. 2d 85, and *Chesapeake & Ohio Ry. Co. v. Charlton*, 247 Fed. 34. Both of these cases involve a situation where coupling was not effected because the coupler knuckles were closed. However, the cars had a lever with which the knuckles could be opened without going between the cars and there was no showing that this lever had been used. The workmen went between the cars without any necessity. In the case at bar the jury could find the drawbar out of line and no mechanism to adjust without the necessity of going between the cars.

We submit that defendant has not properly raised any error in these instructions by its failure to properly object and in any event the instructions correctly set forth the law and the basis upon which the jury could return a verdict for plaintiff or for defendant.

## POINT III.

THE COURT DID NOT COMMIT ERROR, PREJUDICIAL OR OTHERWISE, IN INSTRUCTING THE JURY AS SET FORTH IN INSTRUCTIONS NUMBERED 5 AND 7.

Defendant has again failed to comply with *Rule 51, Utah Rules of Civil Procedure*, by its failure to state distinctly the matter to which it objects and the grounds of its objection to Instructions No. 5 and No. 7. At Record 139 it merely excepts to these instructions as a whole and particular parts of each without disclosing to the trial court its grounds. We submit that this claimed error is not properly raised and should not be considered on this appeal.

Instruction No. 5 correctly states the law and the entire instruction must be read together. The first paragraph defines "without the necessity of going between the cars." It means necessary for a workman to place some part of his body within the area between the cars. In that connection if it was necessary for plaintiff to adjust the drawbar or coupling mechanism with his hands or feet there would be a violation of the Act. Read as a whole the only reasonable construction is that such use of hands or feet would have to be in the area between the cars to constitute a violation. The second paragraph refers to the first. We submit any other interpretation would be unreasonable. The liability Instruction No. 3 clearly discloses the necessity of this requirement before plaintiff can recover.

We agree that if a mechanism which worked was on the coupler or drawbar which would adjust the lateral

position of the drawbar without the necessity of men going between the cars there would be no violation. But here we have none. The rocker mechanism on the coupler here involved did not prevent the coupler from being out of line and no mechanism was present for plaintiff to use. He had to align the drawbar with his hands and feet between the cars. It was conceded by defendant's expert that these rocker mechanisms sometimes, because of rust, dirt or other reasons, did not swing back into center position and that adjustments became necessary which required use of hands and feet within the forbidden area.

Defendant under this point talks of devices to open knuckles and that the Act is satisfied if such devices can be manipulated outside the ends of the cars. This is true but there is no issue raised concerning knuckles or devices of such kind. Plaintiff contended that the drawbar was out of line and there was no device he could use outside the ends of the cars to make the adjustment. All the evidence related to this and no one involved in the case, jury, court or counsel, could have possibly believed that such evidence or the instructions concerned coupler knuckles or devices to open them.

By Instruction No. 7 the jury was told that defendant was not relieved from compliance with the Safety Appliance Act relating to couplers by reason of the fact that some lateral motion in the coupler mechanism was necessary. The defendant introduced evidence about the necessity of lateral motion in couplers in order that cars could make curves without derailing. The instruction

was required so that the jury would be able to properly evaluate this testimony and understand that merely because lateral motion was necessary still it was incumbent upon defendant to furnish couplers which could be coupled automatically by impact without the necessity of men going between the cars.

Defendant does not claim that this instruction as so construed erroneously states the law. It concedes that the necessity of lateral motion does not relieve it from compliance with the Act. It rightly concedes that nothing relieves it from that duty but claims it was unnecessary to give the instruction. It was proper and applicable in this case because of the testimony introduced by defendant on the subject of lateral motion of the drawbar.

Defendant contends that this instruction informs the jury that lateral play is evidence of a violation. A reading of the instruction establishes the fallacy of this assertion. The instruction just does not say that.

The case, *Chesapeake & Ohio Ry. Corp. v. Arrington*, 126 Va. 194, 101 S.E. 415, does not support defendant here. In that case plaintiff went between an engine and a car to adjust the knuckle and drawbar, the engine moved into him and he was injured. The court held that it was proper for plaintiff to testify, just as plaintiff did in the case at bar, that it was necessary for him to go between the cars to make the adjustment. The case was reversed because the damages were excessive and because the trial court refused to give defendant's request that side play in a drawbar according to standards in general and accepted use on railroads does not con-

stitute a defect in the coupler unless the jury believed there was greater side play or the couplers were farther out of line than necessary for safe operation. Regardless of whether this request was in compliance with the Act the case does not hold that an instruction such as No. 7 is erroneous. Defendant made no such request and assigns no error here based on a refusal of any of its requests.

We submit that defendant cannot prevail on its Point III because (1) the error, if any, was not properly preserved for review and (2) the instructions correctly state the law and are applicable to this case.

#### POINT IV.

THE COURT DID NOT COMMIT ERROR, PREJUDICIAL OR OTHERWISE, IN EXCLUDING THE PROFFERED EVIDENCE OF THE DEFENDANT THAT PLAINTIFF VIOLATED SAFETY RULES OF THE DEFENDANT COMPANY EITHER ON THE OCCASION HERE INVOLVED OR PREVIOUSLY.

The plaintiff in this case contended that the defendant violated the Safety Appliance Act relating to couplers in that it was necessary for him to go in between the ends of the cars in order to effect the coupling. The drawbar was out of line and no device or means was furnished by defendant so that an adjustment could be made without going between the ends of the cars.

Defendant's contention under this point of its brief is one which if sustained would entirely eliminate this particular portion of the Safety Appliance Act. The situation as presented is simply that the Congress of the

United States has said that it shall be a violation of the statute to have couplers which would not couple without the necessity of men going between the cars. The company promulgates a rule which is violated if the workman goes between the ends of the cars. By thus legislating the company can immediately discharge its statutory duty by the creation of a rule. Then, even though the statute is violated, under defendant's contention the rule of the company is also violated, and it would be left to the jury to determine which violation it thought more serious. A moment's reflection on this subject should convince that certainly Congress did not intend any such result as this and the federal courts, including the Supreme Court, under their cases would not tolerate such a contention.

The rules offered in evidence by defendant are rules prohibiting employees from going in between moving engines or cars to couple them, using their hands or feet to adjust drawbars and stepping on a track between or in front of an engine or cars before the stop is made. A violation of these rules could be no more than contributory negligence. The going between the ends of the cars by the plaintiff cannot be eliminated from this case nor can the necessity for his going between the ends of the cars in order to effect a coupling be eliminated. The testimony, as heretofore pointed out, supports a finding that the drawbar was out of line and there is no question but what in order to make an adjustment it was necessary for plaintiff to go in between the cars. We respectfully submit that the violation of these rules in going between



the cars could never raise itself above the dignity of contributory negligence, which is expressly eliminated from consideration in these cases involving a violation of the Safety Appliance Act.

We submit that under the authorities proof of these rules and their violation was not admissible as a defense. The only question here involved was whether there had been a violation of the Safety Appliance Act and whether or not that violation contributed, in whole or in part, to cause damages to plaintiff. The matter of causation, if a violation exists, could not be eliminated by proof that the railroad told its employees not to go between the cars.

A contention very similar to that now made by defendant was made in the case of *San Antonio & Aransas Pass R. Co. v. Wagner*, 241 U.S. 476, 36 S. Ct. 626, 630, 60 L. Ed. 1110. Plaintiff in that case sought to adjust the drawbar with his foot and it was caught between the coupler of the engine and the coupler of a car. The court stated:

“In various forms plaintiff in error raises the contention that it was plaintiff’s improper management of the coupling operation that was the proximate cause of his injury. But any misconduct on his part was no more than contributory negligence, which, as already shown, is, by the employers’ liability act, excluded from consideration in a case such as this.”

Plaintiff in this case sought to bring his case only under the following provision of *Section 53 of Title 45, U.S.C.A.*:

“\* \* \* *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”

By doing so plaintiff eliminated contributory negligence from the case. That this can be done was recognized by this Court in *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639, 641, where it was stated:

“By planting his action on the above act, plaintiff was not embarrassed by any defense of contributory negligence which could have been raised if the action had been founded on secs. 51 to 59 of 45 U.S.C.A., for the reason that the railroad is absolutely liable for injuries which are proximately caused by a failure to comply with the Boiler Inspection Act. *Chicago, Burlington & Quincy R. Co. v. Willard*, 220 U.S. 413, 31 S. Ct. 460, 55 L. Ed. 521, 61 L. Ed. 874; *Baltimore & Ohio Railroad Co. v. Groeger*, 266 U.S. 521, 45 S. Ct. 169, 69 L. Ed. 419.”

There are many cases which have held that by claiming only a violation of the Safety Appliance Act plaintiffs have effectively eliminated proof of contributory negligence from the case.

In *Philadelphia & R. Ry. Co. v. Auchenbach*, 16 F. 2d 550, 551, the plaintiff had withdrawn all charges of negligence against the defendant and relied entirely upon an alleged violation of the Safety Appliance Act. The evidence disclosed that plaintiff opened the knuckle on the

coupler on the rear end of a car so that it would couple with a cut of three cars soon to be brought down from another track. The couplers came together in solid impact but the pin of the drawhead of the approaching cars did not drop and the coupling failed. Plaintiff signaled for the engineer to ease ahead and the cars moved a distance of one and one-half or two car lengths and stopped upon a signal from plaintiff. Plaintiff then went between the cars and attempted to manipulate the couplers by hand. The cut of cars attached to the engine moved back without warning and plaintiff's arm was caught between the two couplers. During the course of the trial the defendant sought to introduce in evidence a rule which required a person going between cars at night to leave his lantern outside on the ground in the view of the other members of the switching crew. Plaintiff failed to comply and defendant contended that this rule of violation constituted the proximate and sole cause of plaintiff's injuries. It was held that the trial court was correct in refusing to admit the rule in evidence. The court pointed out that the plaintiff was engaged in a coupling operation and there could be no question but that he came squarely within the class of employees to whom the law intended to assure protection. In discussing this proposition the court stated:

“\* \* \* The defendant, however, to put the issue of proximate cause into the case, took the position, and still urges, that the Safety Appliance Act stopped and the protection it afforded the plaintiff ended when the couplers (because of a violation of the Act) failed to couple on the first

impact, and that the Safety Appliance Act being thus out of the case, the plaintiff himself was from that moment solely responsible for what happened as a result of his failure to observe the Company's rule to leave his lantern on the ground before going between the cars. Clearly the Safety Appliance Act did not disappear from the case when its violation was first observed by the failure of the couplers to couple automatically by impact. When the couplers failed thus to couple, there arose the very danger against which the Act affords protection, the evil against which its provisions for safety appliances are directed. *St. Louis & San Francisco R. R. Co. v. Conarty*, supra; *Chicago G. W. R. R. Co. v. Schendel*, supra. The Safety Appliance Act 'was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars.' *Lang v. New York Central, R. R. Co.*, 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729. When that necessity arises with its risk of personal injury, the intention of the Act is defeated and the law, if violated, extends to the consequences. The plaintiff in the instant case went between the cars to prepare for another attempt to couple only because the couplers did not at first couple automatically by impact, that is, 'Because the equipment of the car which it was necessary to (couple) did not meet the statutory requirements especially intended to protect him in his position.' *Chicago G. W. R. R. Co. v. Schendel*, supra; *Tennessee A. & G. R. R. Co. v. Drake* (C.C.A.) 276 F. 393. *If his act amounted to negligence it was no more than contributory negligence which was removed from consideration by the Act.* *Chicago G. W. R. R. Co. v. Schendel*, supra; *Auchenbach v. P. & R. R. Co.*, supra. Moreover, it is the law that a violation of the Act need not be the sole

efficient cause in order that an action may lie. *So also the element of proximate cause is eliminated where concurrent acts of the employer and employee contribute to the injury.* *Spokane & Island E. R. Co. v. Campbell*, 241 U.S. 497, 510, 36 S. Ct. 683, 60 L. Ed. 1125; *Pless v. New York Central R. R. Co.*, 189 App. Div. 261, 179 N.Y.S. 578, affirmed, 232 N.Y. 523, 134 N.E. 555. In this situation, where there was nothing to show that the plaintiff's contributory negligence, if any, was other than negligence concurrent with that of the defendant, it follows that an issue of the plaintiff's contributory negligence with its underlying issue of proximate cause was eliminated from the case and, in consequence, evidence to prove it was properly rejected."

In *Leet v. Union Pacific R. Co.*, 60 Cal. App. 2d 814, 142 P. 2d 37, 40, the court recognized that a railroad could not discharge its duties under the Safety Appliance Act by passage of rules. In that case plaintiff brought an action for wrongful death based upon a violation of the Federal Safety Appliance Act requiring all cars used in interstate commerce to be equipped with efficient hand brakes. The defendant sought to introduce a rule which was excluded by the trial court. After referring to *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967, the court stated:

"Since the negligence of the defendant in sending out a car with its brake rigging in a defective condition was concededly established, it follows that defendant may not be relieved from the consequences of its neglect by the claim that plaintiff assumed the risk of such negligence.

“Rule 26, which was excluded from the evidence, reads as follows: ‘When emergency repair work is to be done under or about the cars in a train, and a blue signal is not available, the engineman and fireman must be notified and protection must be given those engaged in making the repairs.’

“In view of the amendment to section 54 and of the Tiller decision rule 26 was immaterial to the issues and was properly rejected. *Chicago, etc., Co. vs. Schendel*, *supra*. If there was no assumed risk or contributory negligence to be attributed to the brakeman, no amount of rules adopted by defendant could alter the law if the company was itself negligent.”

In *Aly v. Terminal R. Ass’n of St. Louis*, 342 Mo. 1116, 119 S.W. 2d 363, plaintiff’s suit was founded upon the Boiler Inspection Act. He sought to mount a moving engine and when he stepped on the footboard it gave way, causing him to fall and lose both legs. The engine was coming toward him at the time he attempted to mount it. Defendant sought to introduce a rule of the company forbidding switchmen to board engines coming toward them. The trial court’s refusal to admit the rule was upheld and the court stated:

“Appellant offered to introduce in evidence a rule of the company which forbade switchmen to board engines coming toward them. The trial court refused to permit this rule to be introduced in evidence. Appellant has cited the case of *Frese v. Chicago, B. & Q. R. Co.*, 263 U.S. 1, 44 S. Ct. 1, 68 L. Ed. 131. In that case a statute of Illinois made it the duty of a locomotive engineer to stop

his train at a crossing of another railroad and to positively ascertain that the way was clear before passing over the crossing. This the engineer failed to do and lost his life in a collision which followed. The court held that a violation of the statutory duty on the part of the engineer was the sole cause of the injury. Without deciding whether a violation of a rule of the company is a parity with a violation of a state statute, there is this distinction: In the Frese Case the plaintiff relied upon the negligence of the fireman in failing to perform a duty which the statute imposed upon the engineer. In the case before us plaintiff was relying upon a defective appliance. So even if plaintiff violated a rule, that would be only a contributing cause and not the sole cause. In *Spokane & I. E. R. Co. v. Campbell*, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125, the plaintiff had violated an order, and was injured through a defective air hose which caused a collision. In 241 U. S. 497, loc. cit. 508, 36 S. Ct. 683, 689, 60 L. Ed. 1125, the Court said in speaking of the violations of the order: 'In its legal effect this was nothing more than negligence on his part.' The court further said in the concluding part of the opinion: 'But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded.' In the case under consideration the jury was explicitly instructed that plaintiff could not recover unless the footboard slipped toward the drawbar and caused plaintiff to fall. A violation of the rule, therefore, could at most have been only contributory negligence and not a defense. We must rule the point against appellant."

In *Jordan v. East St. Louis Connecting Ry. Co.*, 308 Mo. 31, 271 S.W. 997, plaintiff brought suit based upon a violation of the Coupler Section of the Safety Appliance Act. Plaintiff kicked the drawbar in order to align it for coupling and his foot was crushed by the impact of the couplers. Defendant attempted to introduce in evidence a rule of the defendant company prohibiting employees from kicking drawbars. The court stated:

“The next error assigned is the refusal of the court to permit defendant to show that a rule had been promulgated forbidding employees to kick drawbars, and to show that the plaintiff had knowledge of the existence of that rule. Upon that *Schendel vs. C. M. & St. P.R.R. Co. (Minn.)*, 197 N. W. 744, and *Kern v. Payne*, Dir. Gen., 65 Mont. 325, 211 P. 767, are cited. But it was held otherwise in *Moore v. St. Joseph & G. I. Ry.*, 268 Mo. 31, 186 S. W. 1035. In that case, one under the Safety Appliance Act, the question came up upon a rule forbidding employees ‘to go between cars in motion to uncouple them.’ Following reference to the circumstances under which the question arose, the court said, loc. cit. 35 (186 S. W. 1037):

“*‘Further, respondent’s violation, if any, of appellant’s rule was at most but evidence of contributory negligence; and in this case, the action being founded upon violations of the applicable Safety Appliance Act, contributory negligence constitutes neither defense nor mitigation. (Second Employers’ Liability Cases, 223, U.S. 1. c. 49, 50.) There was no error in this ruling.’*

“In the first case cited by defendant, *Schendel v. Chicago, M. & St. P. Ry. Co.*, the question at issue was one of ‘exact obedience from an employee to a foreman’s direct command requiring



instant execution.' It was held that if the employee directly contrary to such command meddled with a defective appliance, his willful disobedience must be regarded as the sole cause of his injury. But the court distinguished between a command of that sort and the issuance of general standing orders or rules; the rule on the latter being that of the Supreme Court of the United States in *Great Northern Ry. v. Otos*, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322. This assignment must be ruled against defendant."

An analogous situation was presented in the case of *Chicago Great Western R. Co. v. Schendel*, 267 U.S. 287, 45 S. Ct. 303, 304, 69 L. Ed. 614. In that case plaintiff's decedent went between two cars to disengage a connecting chain which had been temporarily placed there after a drawbar had been pulled out. He was injured when the car ran slowly down the grade. A rule of the company required that employees should advise the engineer when they were going between or under the cars. Decedent failed to do this although familiar with the rule. Defendant contended that the defective drawbar was not the proximate cause of the death and that the violation of the rule by the deceased constituted negligence subsequent to and independent of the defective safety appliances and was the proximate cause of the injuries. These contentions of the defendant were held incorrect and the court stated:

"The things shown to have been done by the deceased certainly amount to no more than contributory negligence or assumption of the risk, and both of these are removed from consideration

old defense of contributory negligence to be a shield against liability under the name of sole proximate cause. The court therein stated:

“‘If, under the employers’ liability act, plaintiff’s negligence, contributing with defendant’s negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted ‘in whole or in part’ from defendant’s negligence, the statute would be nullified by calling plaintiff’s act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff’s act is the sole cause—when the defendant’s act is no part of the causation—that defendant is free from liability under the act.’”

And also:

“\* \* \* But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars. \* \* \*”

In *Smiley v. St. Louis & S. F. Co.*, (Mo) 222 S.W.

2d 481 the court explained why a violation of a rule not to go between cars could only be contributory negligence. The plaintiff there violated the rule and the court pointed out that his presence there was induced and made necessary by the defective coupler. Except for the violation of the Act plaintiff would not have been there and would not have been injured.

In *Scrimo v. Central R. R. of New Jersey*, 138 F. 2d 761, the defendant introduced in evidence a rule requiring that cars, etc., be stopped before an attempt is made to adjust an inoperative coupling device. Plaintiff based his case on the coupler section of the Safety Appliance Act. The trial court instructed the jury that violation of the safety rules was not an issue in the case and the rules were not to be considered. The defendant excepted and requested an instruction that if the jury found that violation of the rule was the proximate cause of plaintiff's injury the verdict should be for defendant. The trial court was affirmed.

See also *Gulf C. & S. F. Ry. Co. v. Locher*, (Tex) 264 S.W. 595; *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (cert. den. 329 U.S. 812); *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, 150 N.W. 922; *Potter v. Los Angeles & S. L. R. Co.*, 42 Nev. 370, 177 P. 933.

It will be observed that in every case following modern day principles in which a coupling operation is involved the violation of a rule not to go between the cars is considered merely contributory negligence and therefore the rule and its violation is not material in the case. The only coupler case cited by the defendant is that of

*Kern v. Payne*, 65 Mont. 325, 211 P. 767, decided in 1922. In that case there was no evidence that the couplers were closed or open and the court determined that in order for plaintiff to recover there must be indulged in his favor an inference upon an inference, which the court said was not permissible. From the quotation contained in defendant's brief it appears that the court concluded that there was no necessity for the plaintiff to go between the cars. No such finding as matter of law can be made in the case at bar.

The Supreme Court of this State in *Coray v. Southern Pac. Co.*, 223 P. 2d 819, in commenting upon cases involving the Coupler Act and rules prohibiting an employee from going in between the cars discusses some of the cases herein cited by plaintiff and refer to such cases as examples of concurring cause.

The cases cited by the defendant on page 25 of its brief are cases which generally have been considered overruled by *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610. In any event, those cases do not concern a violation of the Safety Appliance Act but in every instance are concerned with collisions of trains and special orders or violations of statute. Where cases involving Safety Appliance Act have arisen together with such orders, the courts have held that the violation of such orders are only contributory negligence. See *Spokane & I. E. R. Co. v. Campbell*, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

The Utah case of *Wilson v. Union Pacific R. Co.*, 231 P. 2d 715, is not comparable to the case at bar. The

violation of the rules here involved could be nothing more than a concurring or contributing cause of plaintiff's injuries. Plaintiff's presence between the cars was made necessary by the drawbar being out of alignment and no mechanism by which he could make the adjustment. His presence there could not be a sole or independent cause of his injuries separate and apart from the necessity which required him to be there.

We submit that the evidence of safety rules and their violation was immaterial in this Safety Appliance Act case and that the trial court properly refused and rejected such testimony.

### CONCLUSION

We respectfully submit that the evidence in this case supports the verdict and no error was committed in the giving of instructions and the rejecting of evidence. The judgment should be affirmed.

Respectfully submitted,

RAWLINGS, WALLACE, BLACK,  
ROBERTS & BLACK,  
*Attorneys for Plaintiff and  
Respondent,*  
530 Judge Building,  
Salt Lake City, Utah.

Received ..... copies of the within Reply

Brief of Respondent this ..... day of November,  
A.D. 1951.

.....

.....

.....

.....

.....

*Attorneys for Appellant.*