

1952

Russell S. Stickle v. Union Pacific Railroad Co. : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Stickle v. Union Pacific Railroad Co.*, No. 7831 (Utah Supreme Court, 1952).
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In the
Supreme Court of the State of Utah
FILED
SEP 15 1952

RUSSELL S. STICKLE,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No.
7831

BRIEF OF RESPONDENT

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RUSSELL S. STICKLE,
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Case No.
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BRIEF OF RESPONDENT

STATEMENT OF FACTS

(Italics ours)

At the close of all the evidence in this case the court granted defendant's motion for a directed verdict, it having been urged in support thereof that the evidence as a matter of law disclosed the contributory negligence of the plaintiff and failed as a matter of law to make a jury question on the negligence of the defendant (Tr. 98, 99).

Surely it is unnecessary to brief for this court the law governing the trial court's exercise of its power to direct a verdict. We take no issue with appellant thereon. We also believe that the law establishing the duty and limiting the duty of a delivering carrier to a consignee with respect to the condition of a railroad car and its lading is well settled and subject to little if any dispute. The question of whether the trial court erred or not in directing a verdict in this case obviously requires the testing of the facts disclosed by the record against the simple principles of law referred to. As it appears to us that this court must dispose of the appeal in such fashion, a detailed, accurate and complete statement of the facts is essential if the briefs are to be helpful. We consider the statement of facts in appellant's brief wholly inadequate to assist the court and respectfully submit the following exposition thereof, with supporting references to the record. At the outset a statement of the controlling legal principles seems appropriate.

First, in a case of this kind, if the plaintiff was himself guilty of negligence proximately contributing to the accident causing his injuries, it is a complete bar to recovery. If the evidence of plaintiff's own negligence is such that the minds of reasonable men could not differ thereon, the trial court should direct a verdict in favor of the defendant. It should be noted that this is not a case under the Federal Employers' Liability Act, the plaintiff was not an employe of the defendant.

Second, the defendant as a delivering carrier owes a duty to a consignee and to a consignee's employes to make

a reasonable inspection of the car to be delivered, and its lading, and to discover any defects in the car or the lading which are discoverable upon a reasonable inspection and which might cause injury to one in the process of unloading the car *while such person was exercising due care for his own safety*. The duty of a delivering carrier upon discovery of such a defect as might cause injury to one exercising due care for his own safety during the process of unloading, is to repair the defect *or* give notice to the consignee. *Either* to repair *or* give notice. The delivering carrier's duty is discharged by repairing or giving notice after they have discovered the defect. (Authorities hereinafter cited.)

The plaintiff, 33 years of age, was employed by the construction firm of Rademann-Guisto Co. of Oakland, California, which firm had a contract with the Pacific Fruit Express Company for the erection of a plant at Pocatello, Idaho (Tr. 1, 2, 3). The defendant railroad delivered a flatcar to the plaintiff's employer loaded with two large steel tanks, and plaintiff was injured while assisting in the unloading thereof. The accident occurred December 7, 1949, and plaintiff brought suit against the defendant Union Pacific Railroad Company August 28, 1951, some twenty months later.

The plaintiff alleged in his complaint that the defendant was negligent in that (a) defendant failed to inspect the car and lading before delivery; (b) defendant negligently inspected the car and lading and failed to discover the broken tie band on the tank; (c) defendant negligently spotted the car for unloading when it knew, or

should have known, that the car was in an unsafe condition for unloading (Tr. 2, 3). The defendant in answer denied the foregoing and pleaded affirmatively, assumption of risk and negligence of the plaintiff himself proximately contributing to cause his injuries (Tr. 6, 7, 8). Assumption of risk was not argued by the defendant as a basis for its motion for a directed verdict.

The car in question had been loaded on the Southern Pacific Company lines at Oakland, California, and routed Southern Pacific to Ogden, Utah, Union Pacific to Pocatello, Idaho. It was a flatcar loaded with two steel tanks of equal size, approximately 10 feet in diameter, 20 feet in length, occupying practically the entire flatcar when laid lengthwise, end to end. (Defendant's Exhibits 3, 4, and Tr. 4). These tanks fit snugly in wooden cradles and were held in place by steel bands approximately $2\frac{1}{2}$ to $3\frac{1}{2}$ inches in width and $\frac{1}{16}$ to $\frac{3}{32}$ of an inch in thickness. The bands used on the car were $\frac{1}{2}$ to 1 inch wider than the sample in evidence (Tr. 35, 59, and Defendant's Exhibit 5). These tie bands, as they are referred to, passed over the top of the tanks and through the stake pockets in the bed of the flatcar, the ends being then laid back against the strap and fastened with clamps by a machine. Each tank was held by two of such bands which were located 3 or 4 feet from the end of each tank (Tr. 4, 6, 7, 23). All of the witnesses on both sides testified that this was the customary way for loading and securing such tanks for shipment by rail. When the car arrived at Pocatello it was subjected to the regular inspection given all cars at that point whether they are to be delivered to a consignee in the City of Poca-

tello or are to continue on to some other destination. The car, as will be seen from defendant's Exhibits 3 and 4—the same being freight waybills—was Southern 51595. When inspected by the defendant railroad upon arrival the broken tie band was discovered and noted by defendant's witness George S. Cutler, who was the lead car inspector at Pocatello at that time, and a record thereof made (Defendant's Exhibit 1). This record is the American Association of Railroads original record of inspection required by all member railroads to be preserved. The record is made only on those cars on which defects are noted (Tr. 72, 86). At the time of the inspection a placard or bad order card, similar to defendant's Exhibit 2, was stapled with an automatic stapling hammer on the side of the bed of the flatcar and the specific defect "broken tie band" was indicated thereon (Tr. 72, 73). No other placard or notice is placed on or sent along with the car upon delivery (Tr. 79, 80). The witness George S. Cutler testified that it was, and had been for the 27 years he had worked as a car inspector for the defendant company in its yards at Pocatello, the custom and practice to card cars in such manner and if the car and its load was safe for *transportation*, to deliver the same to the local consignee, so carded (Tr. 73, 74). Of course, if the car was not consigned to a local consignee it would go to the rip track for repairs before it went out on the main line again. If it was not safe for *transportation* to a local consignee, it would be made safe before delivery. The defendant's witness Alfred W. Peters, General Car Foreman at Pocatello with 32 years experience in the car department, corroborated the witness Cutler in the foregoing

(Tr. 86, 87, 89, 90). As to the custom and practice of placing a bad order tag on a car safe for transportation but having some other defect and then delivering it to a local consignee, the witness Peters testified that it was the same at Ogden, Utah, and Cheyenne, Wyoming, where he had also worked for defendant as a car inspector. The car inspected was delivered to the construction area where the plaintiff was working shortly after the inspection and spotted on an industry track running north and south.

The plaintiff was working with a gang of five experienced steel workers, including the foreman, Don Evans, who testified on behalf of the plaintiff. All of the gang were experienced steel men (Tr. 38), the foreman having had 12 years experience in steel (Tr. 44), and the plaintiff himself having had approximately 12 years experience as a steel worker (Tr. 2). They started preparing to unload the tanks at approximately 12:30 P. M. December 7, 1949, and these five men, including the plaintiff Stickle, worked about the car preparing cribbing and moving up a crane with which to lift the tanks off the car and performing other preliminary tasks for somewhere *between thirty minutes and one hour* before the plaintiff Stickle was injured (Tr. 34, 35). During the preparation for unloading the tank the plaintiff himself cut the south tie band on the southerly of the two tanks on the car. The car was standing on a track running north and south and this band was cut on the east side (Tr. 7). The crane which was to be used in lifting the tank off the car was to be moved up on the west side of the car and plaintiff testified that someone had to go on top of the tank to hook the crane (plaintiff's

testimony Tr. 7). He then testified, "*So I grabbed ahold of the metal band and proceeded to crawl up. I got just about on top when it broke on the other side*" (Tr. 7). Pressed by his counsel as to whether or not he did any "testing" to see whether or not the strap would hold him before he went up, he testified: "I just put my weight on it to see if it would hold is all." He also testified that while it is a common practice to cut a tie band and use it much as one would a rope to pull himself up on top of the car (Tr. 7), it was *also customary* for the man who was going on top of the tank to go up the boom of the crane and thus reach the place on top of the tank where he would fasten the chains or cables to be used in unloading (Tr. 26). His foreman, Don Evans, testified that the work was not always done by a man pulling himself up by the tie band, as now contended for by appellant, but was also performed by a man riding the crane up.

Questions by Mr. Roberts:

"Q. Now is there a custom and practice with relation to the manner in which these cars are unloaded that have the things on them that this car did?

"A. Oh, generally, yes.

"Q. And what is that custom and practice?

"A. Well, you cut your car loose and get your crane in there to hook on to it and take it off.

"Q. Well, what is it with relation to going up the side of the tank?

"A. Well, the way, *the general practice is either that, climbing up the side, or riding the crane up.*

"Q. One or the other is the way it is done?

"A. Yes" (Tr. 45).

A crane was being moved up to the car at the time plaintiff fell, and the tanks were finally removed by use of the crane (Tr. 4, 39, 40).

The plaintiff testified that in his experience the tanks in question were loaded in the customary manner (Tr. 21); that he had worked all over the United States as a steel worker, and had assisted in unloading approximately 50 to 75 similar loads and had personally gone on top of such loads 20 to 30 times (Tr. 5, 30).

The tie band which broke and permitted the plaintiff to fall was, by the testimony of the plaintiff and his witness the foreman, Don Evans, fractured in such a fashion that before the plaintiff endeavored to pull himself up thereby less than $\frac{1}{4}$ of an inch of metal was holding the strap together on the west side of the car. It broke near the point where it entered the stake pocket on the west side of the car. Both the plaintiff and his foreman testified that it was an old break and that after the plaintiff had fallen they examined the fracture and found the break to be weathered and rusty, with the exception of a break of less than $\frac{1}{4}$ of an inch in length on one edge of the strap which showed bright metal (Tr. 29, 31, 32, 46). Neither the plaintiff nor his foreman made any examination or inspection whatsoever of the car or its lading or the tie band to determine whether the clamps on the west side had loosened, whether the band was broken or had become detached from the west side of the car, or in any other way had become unsuitable for the use to which the plaintiff Stickle knew he was going to put it when he cut

it on the east side of the car with the intention of using it to climb with. The break in the tie band was such that it was readily observable. The plaintiff Stickle told his counsel Mr. Roberts on direct examination that if he had gone over on the west side of the car and examined the tie band he could have seen that it was broken (Tr. 8). On cross-examination he again admitted that the break could have been readily observed had he or anyone on the gang looked (Tr. 35). The foreman Evans also testified on cross-examination as to the nature of the break as follows:

Questions by Mr. Bronson:

"Q. And you didn't inspect it, is that right?

"A. No.

"Q. And none of your men inspected it?

"A. No.

"Q. And Mr. Sickle didn't inspect it?

"A. No, I don't think so.

"Q. And yet the break in that band was such, you have told us, that it was readily observed if somebody had been inspecting those bands?

"A. Yeah, if you had been inspecting them.

"Q. You could have readily observed that, is that right?

"A. I think so" (Tr. 62).

Called on rebuttal by the plaintiff he was asked on cross-examination:

"Q. You didn't make any inspection of the car, did you?

"A. No particular inspection" (Tr. 96).

The plaintiff Stickle was also called on rebuttal and again testified, as he had on direct, as follows:

“Q. And even without a bad order card tacked on the car had you been inspecting the car, observing this band that you were going to use to pull yourself up with, you could have seen that it was broken, is that right?

“A. Yes sir, that’s right” (Tr. 98).

Both the plaintiff Stickle and his witness the Foreman Evans testified that in their work they were familiar with bad order cards being placed upon railroad cars which they had in the past unloaded. They both testified that they would not proceed to unload a car which was placarded as bad ordered for some defect until they had made a check of the car and ascertained whether or not it was safe to do so (Tr. 96, 97). Yet they did not examine the car for a bad order card or anything else. They both testified that they did not notice a bad order card on the car in question, but it was obvious that they did not look, and they both admitted on cross-examination that they made no examination or inspection of the car. The *plaintiff* Stickle himself testified on cross-examination as follows:

Mr. Bronson:

“Q. You have seen those (referring to bad order cards) sticking on cars, haven’t you? You didn’t observe anything like that on this car?

“A. No, I didn’t.

“Q. Of course you didn’t make any inspection of the car?

“A. *None whatsoever*” (Tr. 39).

This, in spite of the fact that by the testimony of the plaintiff himself, he and his foreman and the rest of the gang

had been around and about the car for from 30 minutes to one hour prior to the time he was injured preparing it for unloading.

STATEMENT OF POINTS

POINT I.

PLAINTIFF WAS NOT DENIED HIS RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

POINT II.

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

POINT III.

THERE WAS NO SUBSTANTIAL EVIDENCE INTRODUCED THAT THE DEFENDANT WAS NEGLIGENT IN THAT IT FAILED TO REPAIR OR TO GIVE WARNING OF THE BROKEN TIE BAND TO PERSONS WHO WOULD UNLOAD THE TANKS FROM THE FLATCAR.

ARGUMENT

POINT I.

PLAINTIFF WAS NOT DENIED HIS RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

In connection with this point appellant urges upon this court the proposition that the question of contributory

negligence is for the jury where the evidence and the inferences to be deduced therefrom are such that reasonable men might arrive at different conclusions, citing four or five authorities from this court in support thereof. We are at a loss to understand why such an elementary and fundamental proposition of law should be briefed for this court. This case is not one under the Federal Employers' Liability Act and the conception of negligence as laid down by the Supreme Court of the United States under such act should not be extended to all other cases in the law, particularly where as here it is not a suit by an employe against his employer. Not only in this connection but in connection with appellant's brief as a whole it might be well to refer to the statement of Mr. Justice Wolfe in the case of *Eugene W. Raymond v. Union Pacific Railroad Company*, 113 Utah 26, 191 P. 2d 137, which involved the same defendant and the same counsel. It was another suit by an employe of a consignee, who, in total disregard of every reasonable, sensible measure for his own safety, was injured on a car which this defendant had delivered to his employer. After receiving full compensation under the appropriate act he brought suit against this defendant and was nonsuited because of his contributory negligence, which judgment was affirmed. This court with respect to "Point I" said:

"It has been strenuously argued by plaintiff that this decision has deprived him of his constitutional right to a jury trial. That contention has been urged upon this court in almost every case of non-suit and directed verdict brought before us. This court is charged with the duty of protecting all of the rights of all litigants. This is especially true of those fundamental rights guaranteed by the State

and Federal Constitutions. But the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief."

POINT II.

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

After defendant's motion for a directed verdict was made and the court had listened to arguments thereon, the trial judge took the matter under advisement until the following morning. When the jury returned the following morning the judge, having determined that he should direct a verdict, spent some 10 or 15 minutes speaking somewhat informally to the jury in connection with his dismissing them from further service in the case (Tr. 101-103). In following this highly commendable practice, which is no more than a display of good manners and judicial courtesy on the part of the trial judge toward the jury, it is doubtful that the trial court considered he was delivering a technical oral legal opinion which would be subjected to what we consider the rather captious criticism now made by appellant's counsel. The trial judge did make the unfortunate statement attributed to him by appellant's counsel on page 11 of his brief, which statement of the law is unquestionably erroneous. Appellant's counsel says that

the trial judge, "Took the utterly defenseless position that the burden of proof was upon the plaintiff to free himself from contributory negligence", and "Apparently * * * had the idea that it was incumbent upon plaintiff to establish by a preponderance of the evidence that he was not guilty of contributory negligence." Appellant's counsel on numerous occasions in the past, when we were also present as counsel for the defendant, has heard the Honorable Ray Van Cott, Jr. instruct the jury that the defendant has the burden of proving contributory negligence of the plaintiff, and must prove it to the satisfaction of the jury by a preponderance of the evidence. Charging the trial court in this instance with ignorance of such an elementary and basic principle in the trial of personal injury suits seems particularly unwarranted in view of the fact that Judge Van Cott, prior to the time he made the unfortunate statement referred to and early in his talk to the jury, said: "The doctrine and well-settled law is that if a person is himself guilty of negligence which contributes to his own injury, that fact is fatal to his right to recover against somebody else, *and it is on that basis* that I have determined as a matter of law and without any question of fact that the plaintiff ought not to be permitted to recover against the railroad in this instance" (Tr. 101, 102). "The evidence in this case shows, *by the plaintiff himself*, that had he walked around and looked at this strap that he was about to use as a ladder to climb up this side of this tank that he would have seen that the strap was torn and that it probably was not safe" (Tr. 101). The court did not purport to discuss "burden of proof", "preponderance of the

evidence", or the rules of law governing the direction of a verdict in any technical sense. Only desperation over a cause without merit can account for counsel grasping at this straw.

This court must examine the facts in the record and from the record alone determine whether or not there is any substantial conflict in the evidence on contributory negligence which would warrant submitting the case to the jury and whether or not there is any substantial evidence of the defendant's negligence which would warrant submitting the case to the jury. There may be situations where the court itself is deciding a question of fact and where the record discloses that because of a misconception of the law the court reached such a dubious result as warrants reversal. An example might be where the court found a defendant guilty of a criminal offense by a misapplication of law to an undisputed set of facts. But that is not this case, and even though it be ridiculously assumed that Judge Van Cott did not understand the law, it does not change the facts in this record upon which the case must be affirmed or reversed.

Turning now to the facts in the record bearing upon the contributory negligence of the plaintiff, there is but one suggestion made for submitting the case to the jury, viz: that the plaintiff put his weight on the tie band as he started to climb the same and thus "tested it". The appellant does not mention one single piece of evidence in the entire record which would indicate that the plaintiff exercised any care for his own safety, for the simple reason that there is no evidence in the record that he did so. On

the contrary, both he and his foreman admitted in their testimony that they did nothing whatsoever to ascertain whether or not it was safe to use the tie band in the manner it was used. The entire testimony which counsel says raises an issue of fact that warrants submitting this case to the jury because plaintiff "tested" the strap, appears on page 7 of the transcript and is as follows:

Questions by Mr. Roberts:

"Q. All right. Now after you cut through the band with this torch then what did you do, please?

"A. Then the crane was moving over there from the other side; we was going to spot the crane on the other side, so someone had to go up on top to hook the crane. *So I grabbed ahold of the metal band and proceeded to crawl up.* I got just about on top when it broke on the other side.

"Q. Now is there anything you did in connection with *testing* this strap before you went up?

"A. I just put my weight on it to see if it would hold is all.

"Q. And did it?

"A. It held me, yes" (Tr. 7).

If the plaintiff had done anything other than, as he said, "grabbed ahold of the metal band and proceeded to crawl up", it seems to us he would have said so without prompting by counsel. Even when prompted by his counsel with the leading suggestion that he "tested" the strap, he would only say, "I just put my weight on it to see if it would

hold is all.” Of course the plaintiff could not start climbing the strap without putting his weight thereon before his feet were off the bed of the flatcar. It is all too obvious that he simply took hold of the metal band and proceeded to crawl up. His foreman on direct examination, questioned by his counsel Mr. Roberts, testified as follows:

“Q. And did Mr. Stickle start to go up?

“A. Yes.

“Q. Where were you at the time he did?

“A. I was standing on the ground, right at the side of the car.

“Q. And will you tell us what you saw? Just *describe what he did* and what happened.

“A. *Well, he come on the car and grabbed ahold of the strap and started climbing up. He got nearly to the top and it give way and he fell*” (Tr. 46).

Counsel reiterates again and again in argument that the plaintiff “tested” the strap before climbing and that this made a question for the jury as to whether or not the plaintiff was exercising due care for his own safety. If the plaintiff had had the slightest interest in whether or not the strap was sufficient to support his weight all he would have had to do was to look at it, as the tear in the strap was readily apparent as testified to by both the plaintiff and his foreman Evans (Tr. 8, 35, 62, 96, 98). The only statement in the record suggesting that the plaintiff “tested” the strap came from his counsel. The plaintiff by his own testimony made no examination whatsoever,

nor was any examination made by plaintiff's foreman, of the condition of the car or of the load. On direct examination the plaintiff testified:

"Q. Did you see this band from the other side of the car, where it had broken?

"A. Yes. They went over and got it because they wanted to know what was, why it broke and they went over and examined it afterwards.

"Q. When you say, 'they went over' what do you mean?

"A. They went over and picked it up right where it was laying. I drug it right down to the ground with me.

"Q. You drug it down on your side?

"A. Yes.

"Q. And this particular metal band would be which one; the one that broke?

"A. The one on the south end of the tank.

"Q. Would you describe for us, please, the condition of this band as you observed it there?

"A. Yes. It was, it had evidently had quite a jar some place during the trip and it had broke almost in two. There was a fresh tear of less than a quarter of an inch left and the rest had all rusted over, so it had been broken for some time.

"Q. And as you looked at it there could you observe that condition; as you saw it?

"A. If you had've went over there and examined it you could have, yes" (Tr. 8).

On cross-examination the plaintiff testified:

Questions by Mr. Bronson:

“Q. Of course you didn’t make any inspection of the car?

“A. *None whatsoever*” (Tr. 39).

And further:

“Q. And even without a bad order card tacked on the car had you been inspecting the car, observing this band that you were going to use to pull yourself up with, you could have seen that it was broken, is that right?

“A. Yes sir, that’s right” (Tr. 98).

Plaintiff’s foreman Evans testified on cross-examination, referring to the car:

“Q. And you didn’t inspect it, is that right?

“A. No.

“Q. And none of your men inspected it?

“A. No.

“Q. And Mr. Stickle didn’t inspect it?

“A. No, I don’t think so.

“Q. And yet the break in that band was such, you have told us, that it was readily observed if somebody had been inspecting those bands?

“A. Yeah, if you had been inspecting them.

“Q. You could have readily observed that, is that right?

“A. I think so” (Tr. 62).

The plaintiff and his foreman were both experienced steel men, the plaintiff having worked all over the United States in steel for approximately 12 years. He had assisted in the unloading of 50 to 75 similar tanks from flatcars and had personally gone on top of such tanks 20 to 30 times (Tr. 5, 30). The plaintiff and his foreman and the rest of the gang, all experienced steel men, had spent between thirty minutes and one hour about the car preparing it for unloading prior to the time the plaintiff was injured (Tr. 34, 35). The plaintiff himself used a torch to cut, on the east side of the car, the tie band which he used to climb on top of the tank with.

Appellant's counsel contends that because the plaintiff and his foreman knew that railroads customarily inspect cars before delivering them to a consignee, they had a right to assume that the car was in reasonably safe condition for unloading. Assuming this to be true, it does not relieve plaintiff of all responsibility. The defendant was not an insurer of plaintiff's safety. It cannot be contended that because the railroad company inspects the car before delivery the consignee or his employees are relieved of the duty to exercise reasonable care for their own safety. The undisputed evidence in this case is that the defendant company made an inspection of the car and its lading upon arrival at Pocatello, discovered the broken tie band, and gave notice thereof to the consignee. A record thereof was made at the time, which record is required to be preserved by the American Association of Railroads (Defendant's Exhibit 1; Tr. 72, 86). Upon discovery of such a defect and the making of a permanent record thereof, such as was

done in this case, a bad order card (a sample thereof being defendant's Exhibit 2) was stapled to the side of the bed of the flatcar and written thereon was a reference to the specific defect "broken tie band" (Tr. 72, 73). Defendant's witness George S. Cutler, the inspector who found the defect and made the record thereof (Defendant's Exhibit 1), said that in the light of the records he would say he *did* place such a bad order card on the car (Tr. 72). That he had no independent recollection of placing a bad order card with the notation "broken tie band" upon the particular car in question. Owing to the great lapse of time and the many hundreds of cars he had inspected between the date of the accident and the date of trial, he could not testify otherwise. It is true that both the plaintiff Stickle and his foreman Evans testified that they did not observe any bad order card on the car, but in view of the fact that they made no examination of the car, yet were familiar with bad order cards and recognized the importance of paying heed to them when found on cars (Tr. 96, 97), such testimony does not even have the weight of negative evidence. Assuming the car did not carry a bad order card, it would not relieve plaintiff of exercising due care to avoid injury on account of a clearly obvious defect in the load.

The appellant says at page 11 of his brief that, "Theirs was not a duty to inspect. Precautions might be expected from them as reasonably prudent persons in the performance of their job." The appellant thus admits that the plaintiff was required to exercise reasonable care for his own safety. This is all we have ever contended for or now contend for on this appeal. The appellant apparently seeks

to point out a distinction between the type of inspection required to be made by the railroad company and the type of inspection or examination which the consignee or his employes has a duty to make. That such a distinction exists in some types of cases may be admitted. In cases where a defect is found to exist in the car itself rather than in the load, the consignee, although he observes the defect or is warned about it and is nevertheless injured, can under some decided cases have the question of his contributory negligence submitted to a jury. The question of his contributory negligence under such circumstances does not depend solely upon whether he was warned of the defect or observed it himself, but in particular upon the question of whether or not he *fully appreciated* the danger therefrom on account of his lack of knowledge or experience with the construction and functioning of various parts of railroad cars that may be out of order. Many parts of railroad cars themselves consist of mechanical contrivances, the functioning of which laymen are not entirely familiar with. For instance, a dock laborer might observe a defect of some kind in a power brake or a car door or be warned by the railroad company about such defect and thereafter be injured because he did not fully appreciate the danger inherent in such defect. Under such circumstances, it is quite proper to submit the question of contributory negligence to a jury. In the case at bar it was not a defect in the car that caused the injury, but a defect in the load—a defect in the tie band holding the tanks on the car. This was a condition that the plaintiff and his foreman should have known a great deal more about than the railroad inspectors

should be required to know in view of the plaintiff's experience as a steel worker and the large number of similar loads he had assisted in unloading.

Every case that counsel for the appellant has cited to this court in support of the proposition that the plaintiff had a right to reply upon the inspection made by the railroad company involves situations where there was a defect in the car. In *Maher v. Chicago, M. & St. P. Ry. Co.*, 278 F. 431, 434, cited by appellant, the plaintiff was injured by the operation of a defective door. He observed its general ramshackle condition and certain defects in the door, but the court held that in spite of this the question of his contributory negligence should be submitted to the jury for the reason that there was still the question of whether or not plaintiff as a layman and not a railroad car inspector fully appreciated the dangers that lay in the defects which he observed. The court said:

*"He was a merchant, not a car inspector. * * **
For him to have apprehended the danger it would have been necessary for him mentally to have followed the application of force on the edge of the door, to and through the boards held together only at the top, to and through the hanger in its relation to rail and canopy, and *to have realized* the likelihood or possibility of the hanger's being forced from the rail as it came to the enlarged space between the rail and canopy."

In other words, the danger from such a condition might be readily observable to a railroad car inspector but not to a layman and therefore reasonably raise a jury question on the contributory negligence of the plaintiff. We submit

this case is readily distinguishable from the one at bar where the plaintiff himself was the specialist, the expert skilled steel man, familiar with unloading similar tanks from flatcars loaded in a similar manner. All the other cases cited by counsel are of the same pattern and likewise not applicable to the facts in the case now before this court.

In the cited case of *Folsom v. Lowden*, 157 Kan. 328, 139 P. 2d 822, the plaintiff, a coal heaver, was unloading coal from a gondola which had what is known in railroad parlance as a "drop end". This means that the end of the gondola is hinged and held in place by latches and may be lowered to the bed of the gondola. In this case it was warped and sprung. *The plaintiff was unfamiliar with the construction and operation of a drop end gondola.* He was unloading coal from the car and when he removed a chunk of coal from the end of the car the end fell inward upon him and injured his foot. It was quite properly held that a jury question was presented on his own contributory negligence.

In *Paul v. Georgia Railway & Banking Co.*, 60 Ga. App. 461, 4 S. E. 2d 99, the railroad had delivered some cars for unloading to the plaintiff's employer. As the cars were unloaded they would be moved on the side track with a pinch bar and another loaded car moved up to the place where the plaintiff and his fellow workmen were unloading. After one such car was unloaded and was in the process of being moved on the track the adjacent car, containing a load, rolled down upon the plaintiff injuring him. The railroad company had not set the brake on the car which

rolled free and the court held that a complaint setting up the facts as thus outlined was not defective as showing the contributory negligence of the plaintiff as a matter of law.

In *Louisville & N. R. Co. v. Freppon*, 134 Ky. 650, 121 S. W. 454, the plaintiff was injured when he attempted to open a car door. He knocked out a pin that was holding a defective car door and the court merely held that there was a question as to whether or not he knew, or had reasonable grounds to believe, that the car door would fall on him when he knocked the pin out.

The case of *Oklahoma City-Ada-Atoka Ry. Co. v. Riddle*, 182 Okl. 318, 82 P. 2d 304, is another case cited by appellant where the plaintiff was injured by a car door that fell on him when he knocked off a cleat that was holding it in place. Here, as in all these cases, there is a jury question as to whether or not the individual plaintiff should have, in the light of his experience and knowledge of the functioning of various parts of railroad cars, *appreciated the danger even though he observed the defect*.

The case of *Stoutimore v. Atchison, T. & S. F. Ry. Co.*, 338 Mo. 463, 92 S. W. 2d 658, was one where the plaintiff was injured by a defective brake, being knocked thereby from the top of a cattle car. The court said:

“Neither can we sustain defendant’s contention that plaintiff was guilty of contributory negligence as a matter of law. *Plaintiff was not a railroad man*. He was working in the dark with the instrumentalities furnished to him by the defendant.”

The case of *Lewis v. Southern Pac. Co.*, (Cal. App.), 220 P. 2d 431, also cited by appellant, involved a defect in the door of the car. The plaintiff could clearly have observed the guides on the door, but nevertheless, he was not held guilty of contributory negligence as a matter of law, the court saying:

“Whether they should, acting as persons of ordinary care and prudence, have observed the defective guides and whether if they had *they should with their knowledge* have realized the danger were properly questions for the jury.”

An examination of the few cases cited by plaintiff that we have not specifically referred to will show that they are all cases involving defects to cars and injuries to plaintiffs who were warned, or who observed the defect but were not *sufficiently experienced* to fully appreciate the danger, and therefore, *and only because of this latter qualification*, were they held to involve questions for the jury on contributory negligence. They are readily distinguishable from the case at bar upon two grounds. First, the defect here was not a defect in the car, but in the load; and second, it was the type of load that the plaintiff by his own testimony was entirely familiar with. In view of his experience and the greater knowledge that he should have of the danger inherent in such a defect as a broken tie band than even a railroad car inspector, he is in no position to assert that the cited cases apply to and should govern in the case at bar.

Appellant urges that the defendant should be charged with knowledge that it was the custom in unloading such

tanks for a man to cut a tie band and use it to pull himself to the top of the tank and therefore a "special" duty (although it is not suggested just what) is imposed upon defendant to warn the consignee if a broken tie band is found. Of course plaintiff's own evidence was that such method was not the customary method; that the work was also done by a man "going up the crane" (Tr. 45).

At any rate, to place upon a delivering carrier the duty of knowing all the methods that might be employed in every case by consignees in unloading the myriad types of shipments hauled by rail is ridiculous and fantastic. We know of no authority that has ever suggested a delivering carrier has such a duty and appellant cites none. We do not see how the argument is pertinent to the question of contributory negligence in any event.

This court in the recent case of *Raymond v. Union Pacific Railroad Co.*, 113 Utah 26, 191 P. 2d 137, held, in accordance with all the authorities upon the matter, that an employe of a consignee must exercise ordinary care for his own safety working on and about cars which have been delivered by a railroad. This rule applies even though the railroad company itself was negligent in not inspecting or failing to discover a defect in the car or load that it should have, or, having discovered the same, in failing to notify the consignee by placarding the car with a bad order card.

In the *Raymond* case the plaintiff was an experienced switchman who rode a gondola car loaded with scrap iron into a coupling with a standing car and was injured as a result of placing his hand inside the gondola. When the

car came into impact with the standing car some of the scrap fell on the plaintiff's hand. The plaintiff knew from his experience as a switchman that it was a dangerous thing for a man to put any part of his body inside a loaded gondola while it was in motion. The trial court granted a nonsuit on the grounds that the evidence showed the plaintiff to have been guilty of negligence as a matter of law. This court unanimously affirmed, and said:

“The obvious truth from plaintiff's own testimony is that he gave no thought to his own safety. He placed his hand in a position which he knew to be dangerous when there was a safe method open to him. The court below correctly held that plaintiff was guilty of contributory negligence as a matter of law.”

The court in this decision attached considerable importance to the fact that the plaintiff Raymond was an experienced switchman. We submit that the plaintiff Stickle, an experienced steel man, experienced in unloading this very type of shipment, obviously “gave no thought to his own safety.”

In a very early case decided by this court, *Smith v. Rio Grande Western Railway Co., et al.*, 27 Utah 307, 75 P. 749, it was held that the personal representatives of an employe of a consignee were not entitled to recover for his death occasioned by a defective brake on a car delivered by the defendant where he had failed to exercise ordinary care for his own safety. The defendant had delivered the car with a defective brake, the defect being such that it was readily observable upon the most casual inspection.

Plaintiff's duty was to loosen the brakes on the car left by the railroad company at a distance from the ore house, allowing them to move downgrade, and stopping them by means of the brake. He lost control of the cars, they ran away, and he was killed. He had failed to follow the instructions of his employer as to the method of dropping the cars and had given no attention to the condition of the brake, which the court says was "obviously very defective." In holding the deceased guilty of contributory negligence as a matter of law, the court said:

"It is plainly indicated by the evidence that deceased made no effort to discover an open peril.
 * * * The conclusion, from the evidence, is irresistible that the lamentable misfortune was the result of his own heedlessness. * * * Such being the case the tortious acts or negligence of the railroad company, if it was guilty of any, cannot be made the basis of a recovery for injuries resulting from the wrong or negligence of the deceased."

In the case of *Southern Pacific Co. vs. Edwards*, 44 F. 2d 526, the plaintiff, an employe of a consignee, was preparing to unload some poles from a flatcar. The load was retained in the customary manner by stakes set upright in the stake pockets along the side of the flatcar. Wires were then fastened to the tops of the stakes and run across the top of the load. The load in question was leaning 10 or 12 inches to one side. The plaintiff, following the customary practice, cut the wires on the stakes but did so while standing on the side of the car toward which the load was leaning. As a result the poles fell upon him. The court held that such conduct on his part constituted con-

tributory negligence as a matter of law. In this case *no notice* of the condition of the load had been given to the plaintiff or his employer. The court said that under the circumstances no notice was necessary and in holding plaintiff guilty of contributory negligence as a matter of law said:

“We are aware of no valid reason for holding a carrier is under a duty to give notice or warning of a condition which is so visible that any danger therefrom must be apparent to and appreciated by a person of ordinary intelligence, prudence and experience who undertakes the unloading of a car.”

In the case of *North Dakota v. Great Northern Railway Co.*, 155 F. 2d 1005, the court affirmed a judgment directing a verdict for the defendant upon the grounds that the railroad was non-negligent and that plaintiff was himself guilty as a matter of law of contributory negligence. While fully recognizing the duty of the delivering carrier the court had this to say about the duty of the plaintiff, who was an employe of the consignee:

“The evidence was without dispute that the condition of the door was apparent to one who looked at it. * * * Defendant was not an insurer of the safety of plaintiff and had a right to assume that this man of mature years and wide experience would, while on defendant’s property, exercise ordinary care for his own safety and it cannot be charged with negligence for its failure to anticipate that plaintiff would not exercise such care. One is not under the duty of anticipating negligence on the part of others who have reached the age of maturity and are in possession of all their physical and mental faculties, but is entitled to assume and to act on

the assumption that others will exercise ordinary care for their own safety. Speaking of the duty to exercise ordinary care, we said in *St. Mary's Hospital v. Scanlon*, 71 F. 2d 739: 'This duty is limited by the rule that no one is required to guard against or take measures to avert that which a reasonably prudent person under the circumstances would not anticipate as likely to happen.' "

While the above discussion by the court concerns the duty of the defendant principally, it forcibly asserts the settled principle of law that an employe of a consignee must exercise ordinary care for his own safety in unloading a railroad car, and emphasizes that such duty exists apart from and without any consideration of the negligence or non-negligence of the delivering carrier.

Throughout appellant's brief it seems to us that there has been an attempt to qualify and minimize the duty that plaintiff had to exercise ordinary care for his own safety, by emphasizing and enlarging the duty the defendant as a delivering carrier owed to the consignee and its employes. Counsel for appellant at page 12 of the brief says the plaintiff had "no duty to inspect", and that he "had no required duty to look." While admitting on page 15 of the brief that the defect in the strap could be found by looking at it, counsel for the appellant says that this "does not mean that plaintiff was guilty of negligence because he did not see it." He says that it was the duty of the defendant railroad to see it, but not the duty of the plaintiff to see it. Appellant throughout his brief seems to imply that because he and his foreman knew that railroads inspected cars before delivery to consignees he was relieved of all duty of

making any examination himself, that is, relieved of any duty of exercising ordinary care for his own safety. Appellant's counsel says that plaintiff's task was to "use the strap" and "not to inspect it." Such arguments seem to us to be without any validity and certainly fail to relieve the plaintiff of the duty he had to exercise reasonable care for his own safety. No conduct on the part of the defendant releases plaintiff from this responsibility. It simply comes back to what was said by Mr. Justice Wolfe in the *Raymond* case, *supra* :

"The right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief."

And quoting Mr. Justice Frankfurter in the case of *Johnson v. U. S.*, 68 S. Ct. 391, 394, this court went on to say:

"So long as liability is dependent upon proof of fault on the part of the defendant, and freedom from fault on the part of plaintiff, 'it is not for this court to torture and twist the law of negligence so as to make it in result a law not of liability for fault, but a law of liability for injuries.' "

The trial court was amply warranted in directing a verdict upon the grounds that the evidence in this case disclosed as a matter of law that the plaintiff was himself guilty of negligence proximately contributing to his injuries.

POINT III.

THERE WAS NO SUBSTANTIAL EVIDENCE INTRODUCED THAT THE DEFENDANT WAS NEGLIGENT IN THAT IT FAILED TO REPAIR OR TO GIVE WARNING OF THE BROKEN TIE BAND TO PERSONS WHO WOULD UNLOAD THE TANKS FROM THE FLATCAR.

The duty of the defendant in part was to make a reasonable inspection to discover any defects in the car or load that might cause harm to a person exercising *ordinary care for his own safety*. (Raymond v. Union Pacific; Smith v. Rio Grande Western Ry. Co.; Southern Pac. Co. v. Edwards; North Dakota v. Great Northern Ry. Co., *supra*). The further duty of the delivering carrier we admit is to repair such defect or to notify the consignee thereof. It is important to recognize that the carrier may either repair or notify the consignee of the defect if it chooses, and if it does either it has discharged all the duty imposed by law.

Erie R. Co. v. Murphy, 108 F. 2d 817;

Sykes v. St. Louis & S. F. R. Co., 178 Mo. 693,
77 S. W. 723;

Roy v. Georgia Ry. & Banking Co., (17 Ga. App. 34), 86 S. E. 328.

And see cases in the *Annotation* 126 A. L. R. 1095, where the decisions specifically decide the point or assume it to be the settled law in writing the decisions.

But the duty to notify exists only where the defect or its potentialities for harm would not be evident to a less

experienced person, which necessarily follows from the rule that the delivering carrier has no duty to warn of a defect that is readily apparent to an ordinary person exercising due care for his own safety.

We earnestly say to this court that the defect in the tie band—"readily observable" by plaintiff's own testimony had he looked at it before he used it to pull himself up—was such that had the defendant not discovered it or, discovering it, failed to give notice thereof, it would not as a matter of law constitute negligence. The defendant's duty is limited by the rule that it has a right to assume others will exercise ordinary care for their own safety. No delivering carrier is required to anticipate and guard against and take measures to avert the consequences of a failure on the part of the consignee or his employes to exercise ordinary care for their own safety. The defendant is not an insurer of its own employes, much less those of its consignees. There is no duty to make loads "accident proof." (Cases *supra*).

Be that as it may, what did the defendant do towards discharging its responsibility to the consignee in this case? We think the defendant went beyond the requirements of the law in the discharge of its duty. It made the inspection, it discovered the defect and it gave notice by bad ordering the car. A greater display of care and responsibility would scarcely be possible in view of the nature of the railroad business. And the law requires no more.

Appellant says at page 26 of his brief that, "One of the witnesses for the defendant company testified that bad or-

dered cars should go to the repair track and a car with a broken tie band, such as the car in question, should have been sent to the rip track to be repaired." The witnesses who testified on this point clearly testified to the contrary. The general car foreman, Mr. Peters, testified that the particular car in question if safe for transportation would in conformity with the custom be delivered to the consignee. He was asked,

"Q. And would that kind of a load go to the rip track or the repair track before it was being moved?

"A. No sir" (Tr. 87).

Although he was subjected to a vigorous cross-examination on the point he did not in the least deviate from his testimony that the particular car in question would in view of the type of defect involved be delivered to the consignee. Counsel may be referring to the testimony of the witness Cutler upon cross-examination. But this witness also on direct testified as follows:

"Q. If you find a defect in the load, such as a broken tie band, and it appears to you that the car can be moved without safety to the customer, is that what you do with it?

"A. Yes sir.

THE COURT: You mean with safety, don't you?

"Q. I mean with safety.

"A. Yes sir.

“Q. And in the twenty-seven years that you have worked there in Pocatello has that been the custom?

“A. Yes sir” (Tr. 74).

And on redirect he testified as follows:

“Q. Now, Mr. Roberts in questioning you, when he was questioning you, you said that ordinarily if a car is bad ordered it goes to the rip track for repairs?

“A. Yes sir, that’s right.

“Q. Now suppose that there is a defect in the load which is considered safe to transport to someone right there in the city, as distinguished from going out on the line to the next town. What do you do with that car?

“A. Ordinarily they just let it go to the place that it is going to be unloaded if it is safe to go that far. A tie band, that would be safe to travel to where it is going to be unloaded.

“Q. And would you consider this, a flat car loaded with two tanks with say, two tie bands on each one, one of which was broken, with the tanks sitting in wooden cradles, would be safe to move those within the city, from the inspection point to the customer?

“A. Yes sir. Yes sir, they would be safe.

“Q. Well then, you wouldn’t send that kind of a load to the rip track, would you?

“A. No sir” (Tr. 81, 82).

We are not forgetting that the appellant says there was sufficient evidence of a failure to put a bad order card

on the car as to warrant submitting to the jury the question of defendant's negligence. This presupposes the defect to be one that required notice, a defect that could not be discovered by the exercise of ordinary care, which we are unwilling to admit. As to the evidence of failure to give notice, the defendant produced the Association of American Railroads original inspection records signed by the witness Cutler, car inspector on the job when the car went through. The specific defect "broken tie band" was noted thereon (Tr. 73, 74). The witness Cutler, who for 27 years had been performing his job adequately it can be presumed, said that although he had no recollection of the car independent of the record, he was willing to say that he did staple a bad order card on the car which bore a notation of the specific defect "broken tie band" (Tr. 72). We ask the court to consider the handicap the witness was under when asked if he had an independent recollection of placarding the car. There is no evidence as to when the defendant learned that plaintiff considered it responsible for the accident. Suit was not instituted until the lapse of more than twenty months. Plaintiff was not an employe of defendant. It isn't that we ask the court without any basis to assume the defendant did not learn of the accident until such a lapse of time that our car inspector could not honestly remember placarding the particular car in question. The defendant had no reason to have an investigation file of an accident that it did not know concerned it, or to talk to the car inspector at a time so close to the event that he might have an independent recollection thereof. Such facts are reasonable inferences that can be drawn from all the evi-

dence in the case. Against this, the appellant says the testimony of the plaintiff and his foreman that they "did not see a bad order card" is sufficient to make a jury question on the issues of whether the defendant gave notice by placarding the car. In spite of the fact that plaintiff and his foreman testified they were familiar with the use of bad order cards, would not work on a car carrying such a card until they ascertained they could do so in safety (Tr. 96, 97), they nevertheless by their own admissions made no inspection or examination of the car whatever, to determine whether it carried a bad order card or was safe to unload in the manner they were going to unload it (Tr. 96, 97, 98). As to inspection, the plaintiff Stickle himself said he made "none whatsoever" (Tr. 39). The record we believe is such as warranted direction of a verdict of no cause of action on the non-negligence of the defendant alone. The defect was so apparent as not to require notice to one exercising ordinary reasonable care for his own safety. But if it be thought otherwise, the statement by plaintiff that he *did not see what he did not look for*, is not the kind of evidence that raises an issue of fact upon which the minds of reasonable men might differ.

It may be thought that placing a bad order card on a car and noting the specific defect thereon is insufficient notice. The evidence discloses that the practice and custom of defendant at Pocatello for 27 years had been to serve notice of bad order cars only in such manner (Tr. 73, 74). That such custom and practice prevailed elsewhere on defendant's line of railroad (Tr. 86, 87, 89, 90). That the custom and practice is a reasonable one, a practical and

almost necessary one cannot be questioned. If a car is safe for transportation to a local industry, the exigencies of the business require that it be sent to the consignee with a bad order card placed thereon notifying of the defect. The law permits such handling in connection with the load without imposing liability on the delivering carrier for injuries sustained by the consignee or his employees. Otherwise, the car would have to be diverted to the repair track and wait its turn for repairs. In this case it would have meant putting on a new tie band that would be cut with a torch as soon as consignee got the load. Not only an unnecessary tie-up of railroad equipment would result, but consignees themselves would *strenuously object to such delay to their shipments*. Delays such as this would cause untold unnecessary expense to business and industry. Railroads can be held liable in damages for unnecessary delays. The law should be useful and practical while protecting individual rights, and in this instance wisely approves the custom and practice of notifying consignees of defects in loads by bad order tags. On the very last page of appellant's brief he quotes from *Erie R. Co. v. Murphy*, (supra) as follows:

“* * * Though the evidence was conflicting as to whether an inspector *should have carded a car as unsafe* or defective under the circumstances here presented, there was substantial evidence * * *.”

indicating an assumption that placing a bad order card on a car is sufficient form of notice.

In *North Dakota v. Great Northern Ry. Co.*, 155 F. 2d 1005, the plaintiff, a grain inspector employed by a company other than the defendant railroad, went to the repair

track to inspect the grain in a car that had been bad ordered. He was given a list of all cars that had been sent to the repair track and knew the car in question had been bad ordered. The defendant railroad had put a bad order card on the door and had written thereon "door out at top". The defect was readily observable and the danger inherent in the defect was apparent. A fellow-employee removed the seal and the door fell on the plaintiff. The Eighth Circuit Court of Appeals said:

"* * * the evidence was without dispute that the condition of the door was apparent to one who looked at it. With warning that the car was in bad order, and invitee was put on his guard, *and the bad order card showed that the car was in bad order.*"

The court held there was no substantial proof of negligence on the part of the defendant railroad and affirmed a directed verdict.

Appellant seems to suggest that even though it be assumed the car in question was bad ordered there was a jury question as to whether defendant ought to have done more. He cites no authority for such a proposition, and we have found none, recognizing such an extension of a carrier's responsibility. The cases cited above indicate otherwise. In view of the plaintiff's special knowledge and experience with the type of load in question, there is nothing whatever to suggest the defendant had a duty to do more than follow the customary practice of placing a bad order card on the car. Without specifically deciding the question of what constitutes notice the cases, as do those cited above,

all show an assumption by the courts that the duty to notify is complied with by placing a bad order tag on the car. There were no special circumstances in the case at bar requiring more. The defendant is not charged with the burden of knowing the precise details of the method a consignee may choose to use in unloading. There is no proof that defendant knew or ought to have known a man would use the tie band to pull himself to the top of the car. Plaintiff's own evidence was that just as frequently the man went up the crane. A ladder or other means might just as well, and perhaps with greater safety, be employed. The defect was not such that any person would have observed it and failed to appreciate the danger in putting it to the use plaintiff did. And plaintiff was specially skilled and experienced in unloading such tanks. We submit that a bad order card was sufficient notice, if indeed notice was required at all.

In passing, it might be noticed that the plaintiff never charged in the complaint (Tr. 2, 3), that the defendant failed to give notice or proper notice and has never amended so as to make an issue thereof.

We think the evidence of the defendant's negligence is insufficient to warrant submission of the case to the jury. First, for the reason that the defendant does not have a duty to repair or give notice of a defect in a load where the defect and its potentialities for causing harm are readily apparent to anyone undertaking to unload the car and exercising care for his own safety. The admission of the plaintiff and the undisputed evidence is that the defect was

readily apparent to anyone that looked, and not only to one skilled and experienced with this very type of load. Secondly, the statement by plaintiff that he did not see what he did not look for—the bad order card—is insufficient in view of defendant's inspection, discovery, record of defect, universal practice of bad ordering such cars, great lapse of time precluding an independent recollection of this particular car, to raise an issue upon which the minds of reasonable men might differ.

CONCLUSION

We respectfully submit that the evidence in this case as a matter of law disclosed the negligence of the plaintiff to be a proximate cause, if not the sole cause, of the accident and his injuries, and failed as a matter of law to raise any question substantial enough to warrant submission of the defendant's negligence to a jury. Unless the defendant is an insurer, unless the law is "a law of liability for injuries" and nothing more, we think the judgment of the trial court should be affirmed.

Respectfully submitted,

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