

1994

# Jose Ruiz v. Southern Pacific Transportation Company: Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOSE RUIZ,	)	
	)	
Plaintiff/Appellant,	)	Appellate Court No.
	)	940661-CA
vs.	)	
	)	District Court No.
SOUTHERN PACIFIC	)	910900648
TRANSPORTATION COMPANY,	)	
	)	(Priority No. 15)
Defendant/Appellee.	)	
	)	

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**BRIEF OF APPELLEE**

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An Appeal from the Second District Court  
Weber County

Judge Michael D. Lyon

---

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**UTAH COURT OF APPEALS  
BRIEF**

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**COURT OF APPEALS**

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**BRIEF OF APPELLEE**

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Pursuant to Rules 24 and 26 of the Utah Rules of Appellate Procedure, Defendant/Appellee, Southern Pacific Transportation Company (hereafter "Defendant" or "Southern Pacific"), hereby files its brief in opposition to the brief filed by Plaintiff/Appellant, Jose Ruiz (hereafter "Plaintiff" or "Ruiz").

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k)(1992) and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUE AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is whether the district court was correct in ruling that Plaintiff was not acting within the course of his employment and, therefore, could not bring an action against his employer, Southern Pacific, under 45 U.S.C. §



51 ("FELA"). The court below concluded "that defendant was not in the course of his employment as a matter of law," and granted summary judgment for Defendant. It is from this order only that Plaintiff appeals. It merely is the correctness of this ruling that is reviewed on appeal, and this Court may affirm the grant of summary judgment on any basis, even if not relied on below. Hill v. Seattle First National Bank, 827 P.2d 241, 246 (Utah 1992); State Farm Fire & Casualty Co. v. Geary, 869 P.2d 952, 954 (Utah App. 1994).

The ruling of the lower court does not grant complete relief to the Defendant. The ruling only precludes the Plaintiff from maintaining an action under the FELA. Plaintiff also has sued the Defendant for common law negligence in a separate action. Jose Ruiz v. Southern Pacific Transportation Company, Civil No. 940900197 (pending in the Second Judicial District Court of Weber County, State of Utah). The resolution of this appeal will not affect that separate suit.

#### FEDERAL STATUTE AT ISSUE

The determination of the issue appealed by Plaintiff will require this Court to interpret 45 U.S.C. § 51 which reads, in pertinent part, as follows:

Every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of . . . such carrier . . . (Emphasis added.)

Plaintiff cites also to the second paragraph of this statute. However, it is not relevant to the issue before this Court. The second paragraph only clarifies that an employee's duties for his employer furthers interstate commerce, for purposes of this statute, when the duties in "any way directly or closely and substantially, affect such commerce." As stated above, the issue here is not whether Ruiz was performing duties that furthered interstate commerce, but more fundamentally whether Ruiz was performing any employment duties for Defendant at the time he was injured. Since the court below found as a matter of law from the record before it that Plaintiff was not acting within the course of his employment, the issue of whether or not his conduct also furthered interstate commerce was rendered moot and was not decided. Likewise, this Court need not consider the second paragraph of 45 U.S.C. § 51 that was cited by Plaintiff.

#### STATEMENT OF THE FACTS

The relevant facts of record relied upon by the district court are not disputed. Plaintiff simply argues for legal conclusions that the district court rejected.

##### A. Relevant Facts

1. Plaintiff seeks herein to recover from his employer, Southern Pacific, for personal injuries he sustained on May 18, 1990. Plaintiff's claim in this action is based solely upon the FELA. (R. at 1.)

2. In May 1990, Plaintiff was an employee of Defendant assigned to work on Defendant's tracks and right-of-way

at Lakeside, Utah which required him, and the other members of his work gang, to live at Defendant's work camp at Montello, Nevada. Montello is approximately 75 miles from Lakeside. (R. 174-75. 254.)

3. The entire work gang customarily gathered together at Montello at 5:00 a.m. and traveled together to the work site at Lakeside by company truck, which would take approximately two hours, during which time they were under the Defendant's control and direction and were paid for their time. (R. 175-76, 259-60, 304.)

4. However, prior to the date of the accident, Plaintiff voluntarily requested permission not to travel to Lakeside with the other gang members in the company truck because, for his own convenience, he wanted to have his own vehicle at Lakeside with him so he could leave directly from Lakeside for his home in Ogden, Utah rather than returning that evening to Montello with his gang. (R. 175, 305-14, 498-99.)

5. Plaintiff's request was granted by his supervisor with the understanding that since Plaintiff would not be under Southern Pacific's supervision Plaintiff would not be paid for his time nor reimbursed for his use of his own vehicle. (Id.)

6. On the day of the accident, Plaintiff did not gather with the rest of the work gang in the company truck, or submit himself to the supervision or control of the Defendant, but left after the gang left, in his own car, in order to travel at and for his own convenience to the work site at Lakeside. (R. 175, 311-15.)

7. On that day, Plaintiff's on duty point, for the purpose of receiving compensation, was agreed to be Lakeside. (R. 314, 414.)

8. Plaintiff was not paid for the time he spent commuting in his car that day, nor was he reimbursed for his own use of his vehicle. (R. 176.)

9. Plaintiff was injured in a rollover accident 14 miles away from Lakeside, before he had reported for duty at Lakeside. (R. 166-68, 287, 395.)

B. Irrelevant and Incorrect Statements of Plaintiff

10. Defendant agrees that the agreement between Defendant and its maintenance of way employees ("Union Agreement") provides that normally "Employees' time shall start and end at regular designated assembly points." (R. 350, Rule 22(a).) However, this fact, which was stated by Plaintiff, is irrelevant because Plaintiff did not assemble with his gang, nor submit himself to the supervision or control of the Defendant, at the designated assembly point at Montello on the day of the accident. At Plaintiff's request, he agreed with Defendant that on that day he would not assemble with the rest of the gang until he arrived at Lakeside. (See paragraphs 4-7 above.)

11. Defendant also agrees that it provided living facilities at Montello for Plaintiff, but this fact also is irrelevant because Plaintiff was not injured at Montello, nor did Plaintiff assemble with this gang and submit to the supervision or control of Defendant at Montello. Under these facts, it is irrelevant that Montello be designated as the "headquarter" or "designated assembly point" for purposes of computing

compensation generally under the Union Agreement. Plaintiff was injured when he crashed while driving his own car, for his own purposes, 14 miles from the work site at Lakeside and 64 miles from Montello. (See paragraphs 4-7 above; see also paragraph 24 of Plaintiff's Statement of the Facts.)

12. Plaintiff is wrong in stating in paragraphs 14 and 22 of his Statement of Facts that the Union Agreement entitled Plaintiff to be compensated for his personal commute on the day of the accident, and that his starting time, for purposes of compensation, could not be altered. The Union Agreement speaks for itself and does not state that employees are entitled to be paid for time spent using their own vehicles for their own purposes rather than time spent after assembling and submitting to the supervision and control of the Defendant for which it provides they are paid. To the contrary, the Union Agreement specifically provides that "[e]mployees shall not be allowed time while traveling . . . between their homes and designated assembling points, or for other personal reasons." (R. 369.)

13. Rather than citing to the specific language of the Union Agreement, Plaintiff relies on the Declaration of Robert Douglas in Support of Plaintiff's Motion for Summary Judgment (R. 417) as the basis for his statements in paragraphs 14 and 22 of his Statement of Facts. However, plaintiff fails to inform the Court that Defendant moved to strike this declaration on the grounds that it lacks proper foundation and makes hearsay statements and improper conclusions of law in interpreting the Union Agreement. (R. 420-27.)

14. Moreover, these incorrect statements are immaterial because, as Plaintiff admits at paragraph 28 of his Statement of Facts, a claim for violation of the Union Agreement must be brought within 60 days from the date of occurrence and no claim ever has been brought. There is no admissible evidence of record that Plaintiff was entitled to be compensated for his personal commute.

#### SUMMARY OF THE ARGUMENT

Plaintiff is not entitled to pursue the instant action against Defendant to recover for his personal injuries because his injuries occurred while he was acting outside the course of his employment. Under the FELA, which is the legal basis for Plaintiff's action, Plaintiff only is entitled to recover from Defendant if he can prove he was injured because of Defendant's negligence while he was working in the course of his employment for Defendant.

The facts of record are undisputed that rather than performing any duties for Defendant, Plaintiff was furthering his own objectives when he was injured while he was driving his own vehicle to Lakeside where he was to report to work. The law also is undisputed that the relevant factors to be considered in deciding this issue include the employee's ability to chose his own conduct and the employer's lack of control and supervision over the employee. All the cases cited by Plaintiff support this conclusion, even though many of those cases reach differing conclusions because of the different facts of each case. Choice and control are the critical factors this Court must consider in

analyzing whether Ruiz's conduct was within or without the course of his employment when the accident occurred.

Under this analytical framework provided by FELA case law, the only reasonable conclusion is that Plaintiff clearly had total control and freedom to choose what he would do on his way to the work site and when he would do it, as does every commuter on the way to work. Defendant, on the other hand, had no control over Plaintiff and received no benefit from what Plaintiff had chosen to do, and it would receive no benefit until Plaintiff arrived at the work site to perform his duties. Plaintiff simply was commuting, as the district court held, and all case law is in accord that commuters are not within the course of their employment under the FELA.

Upon the undisputed facts and uncontroverted, relevant legal authority, summary judgment is necessary in this case because, as a matter of law, Plaintiff cannot prove he was injured while acting within the course of his employment. The judgment of the district court should be affirmed, and Defendant should be awarded its costs.

#### ARGUMENT

##### POINT I

THE FELA ONLY APPLIES IF THE PLAINTIFF  
WAS ACTING WITHIN THE COURSE OF HIS EMPLOYMENT.

Railroads are not insurers of the safety of their employees. In order to recover for on-the-job injuries under the FELA, an employee must prove the negligence of his employer.

Atchison, Topeka & Santa Fe Railway Co. v. Saxon, 284 U.S. 458, 459 (1932); O'Hara v. Long Island Railroad Co., 665 F.2d 8, 9

(2nd Cir. 1981); Lessee v. Union Pacific Railroad Co., 690 P.2d 596, 599 (Wash. App. 1984). Even more fundamental, however, is the requirement that an injured employee must prove he was injured while acting within the course of his employment. Moore v. Chesapeake & Ohio Railway Co., 649 F.2d 1004, 1008 (4th Cir. 1981); Atchison, Topeka & Santa Fe Railway Co. v. Wottle, 193 F.2d 628, 629 (10th Cir. 1952), cert. granted, 343 U.S. 963 (1952), and cert. dismissed, 344 U.S. 850 (1952); Williams v. Norfolk Southern Railway Co., 767 F. Supp. 756, 758 (E.D. Va. 1991). It is this narrow, legal question of what constitutes course of employment that is now before this Court. If the undisputed facts indeed establish, as the district court found, that Ruiz was not acting within the course of his employment with Southern Pacific at the time he was injured, summary judgment was properly granted as a matter of law.

Prior to 1939, the FELA had been interpreted to provide a cause of action for on-the-job injuries only for employees who were "at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." Southern Pacific Co. v. Gileo, 351 U.S. 493, 496-97 (1956), citing, Shanks v. Delaware, Lackawanna & Western Railroad Co., 239 U.S. 556, 558 (1916). A railroad employee, thus, was not covered by the FELA even if he was injured while acting within the scope of his employment unless the specific activity he was doing at the time was in furtherance of interstate commerce.

The 1939 amendment to the FELA, discussed by Plaintiff in his brief, merely abolished this "moment of injury" rule.



Southern Pacific Co. v. Gileo, 351 U.S. at 497-98. See also Reed v. Pennsylvania Railroad Co., 351 U.S. 502, 504 (1956). Hence, the FELA now covers a work-related injury when any part of the employee's duties furthers interstate commerce, directly, closely or substantially, even if the injury occurred while the employee was at the time performing duties not directly related to interstate transportation. 351 U.S. at 499. This point never has been disputed by Defendant.

The 1939 amendment is discussed here by Defendant only because Plaintiff argued that it was relevant to the issue before this Court. It is not relevant. This amendment did not expand, or even address, the fact that a railroad employee must be injured within the course of his employment to be covered under the FELA. Off duty injuries never have been covered and the 1939 amendment did nothing to change this fact. Nothing in this 1939 amendment changes the conclusion "that Congress used the words 'employ' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." Robinson v. Baltimore and Ohio Railroad Co., 237 U.S. 84, 94 (1915). Hence, the single issue remains: "Was Plaintiff acting within the course of his employment with Defendant at the time he drove his car off the road?" If not, he cannot assert a negligence claim against Defendant under the FELA and this cause of action was properly dismissed as a matter of

law.<sup>1</sup> The law and facts support the conclusion of the district court in this regard.

## POINT II

PLAINTIFF WAS NOT ACTING WITHIN THE COURSE OF HIS  
EMPLOYMENT WHEN HE ROLLED HIS AUTOMOBILE  
ON THE WAY TO REPORT FOR DUTY.

"Course of employment" is defined generally to mean that "the worker is doing the duty he is employed to perform." Black's Law Dictionary 352 (6th ed. 1990). This definition is no different under the FELA. See Rogers v. Chicago & North Western Transportation Co., 947 F.2d 837, 839 n.4 (7th Cir. 1991); Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 841 F.2d 1347, 1352 (7th Cir. 1988), cert. dismissed, 487 U.S. 1244 (1988). See also Restatement (Second) of Agency § 229 cmt. c (1958). As shown in the cases discussed below, which were cited by Plaintiff, the basic factors of the employer's control and supervision over the employee and the employee's lack of choice over his own actions at the time of injury remain the same. In the case at bar, an analysis of the facts as applied to these factors conclusively support the district court's holding that Ruiz was acting outside the course of his employment when he was injured.

On the day of the accident, Plaintiff voluntarily chose to drive his own automobile rather than travel to the work site in Defendant's truck, as was the custom and practice. On that

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<sup>1</sup>As noted above, if Plaintiff was not acting within the course of his employment he still can pursue his action against Defendant for common law negligence in the separate action he already has filed. See Jose Ruiz v. Southern Pacific Transportation Company, Civil No. 940900197 (pending in the Second Judicial District Court of Weber County, State of Utah).

day only, Plaintiff decided when he would leave for the work site, and in fact left after the rest of the gang departed in Defendant's truck. Only Plaintiff had control over when he left to go to the work site, the condition of his automobile and the manner in which he drove it. Defendant had no ability to control or supervise Plaintiff, as it did the other workers who submitted to Defendant's control and travelled together in Defendant's truck under the supervision of the gang's foreman. Defendant received no benefit from Plaintiff's voluntary choice to reject Defendant's mode of transportation in order to further his private objective of taking his car to work with him so he could get home earlier that night. With these facts, relevant case law supports finding that Plaintiff was acting outside the course of his employment and that the FELA does not provide Plaintiff a cause of action against the Southern Pacific.

The issue of when an employee acts outside the course of his employment has arisen under varying factual circumstances. Most analogous to the facts of the instant action are cases commonly referred to as "commuter cases." Commuter cases generally involve the factual situation of an employee travelling under his own volition, and without his employer's supervision, to or from his work site in a manner chosen by the employee without compulsion by the employer. In these cases, it is established that employees are outside the course of their employment even if they are on their employer's property or riding on their employer's train or vehicle.

For example, Young v. New York, New Haven & Hartford Railroad Co., 74 F.2d 251 (2nd Cir. 1934), involved a fireman who

had finished his run and had left his job. However, while on his way home, the fireman was riding on one of his employer's locomotives when he was injured. Judge Learned Hand found the fireman was not acting within the course of his employment at the time he was injured. As Plaintiff points out in his brief, a critical fact influencing Judge Hand in Young was that the plaintiff exercised his choice to get home on his employer's locomotive and that this choice "had nothing to do with his employment, and could scarcely concern his relations with the defendant." Id. at 253. On a second appeal, the court again held as a matter of law that the plaintiff was outside the course of his employment when he was injured. In this decision, the court considered to be significant the facts that the plaintiff had ceased the specific duties of his job, his pay had ended, and he chose the means by which he rode home. Young v. New York, New Haven & Hartford Railroad Co., 79 F.2d 844, 845 (2nd Cir. 1935). The jury verdict for the plaintiff, consequently, was reversed as a matter of law. Id. at 846.

In another commuter case, Sassaman v. Pennsylvania Railroad Co., 144 F.2d 950 (3rd Cir. 1944), a train dispatcher was held to be outside the course of his employment when he was injured while getting off of one of his employer's trains that he took from the station where he worked to the station where he lived after his day's work. Again, Plaintiff in the case at bar points out that the court in Sassaman, after discussing the cases Plaintiff relies upon in this appeal, held that Mr. Sassaman was outside the course of his employment, under the FELA, because he chose to ride his employer's train to get home instead of taking

other available transportation. Id. at 953. The court found that it was significant that the plaintiff's employer did not compel the plaintiff in the mode of travel he used to get to and from the place he was to perform his duties. Id.

The employee's ability to choose also was considered to be a significant factor in Quirk v. New York, Chicago & St. Louis Railroad Co., 189 F.2d 97 (7th Cir. 1951), cert. denied, 342 U.S. 871 (1951). In Quirk, the court affirmed an order of the district court that the plaintiff's decedent, who was a track foreman, was outside the course of his employment as a matter of law when he was killed while driving one of his employer's motorcars on his employer's track, since the plaintiff's decedent was doing so pursuant to his own choice. Id. at 100. He had the freedom of remaining where his work had ceased, being provided meals and lodging by his employer, or going home for the night. Id. Moreover, the court held that the plaintiff's decedent's mere use of the defendant's motorcar for part of his voluntary trip home would not "reestablish the relationship which the decedent by his voluntary act had previously severed." Id. at 101. The court reasoned:

Certainly it cannot be thought that this action of the decedent was for the purpose of discharging any duty incident to or in connection with his employment. When he left Muncie, he was engaged solely in a personal activity unrelated to his duties as an employee of the defendant. (Id. at 100.)

Related to the employee's exercise of his own choice is the factor that the employer has no control over the employee or the risks the employee may take in order to get to or from the work site. This interrelationship between the employee's choice

and the employer's lack of control was discussed in Williams v. Norfolk Southern Railway Co., 767 F. Supp. 756 (E.D. Va. 1991). In the Williams case, the plaintiff was a maintenance of way employee who travelled to his designated assembly point and back in different ways including on an Amtrak train with a pass provided to him by his employer. The plaintiff could get to the assembly point any way he chose, but he then completed the trip to the work site on his employer's rail sidecar. He was paid only after submitting himself for the ride on the defendant's sidecar. The plaintiff was injured on his way home while riding the Amtrak train. In holding that the plaintiff was outside the course of his employment, the court stated:

The justification for the [commuter] rule's limitation of FELA coverage is the employer's lack of control over the risks associated with commuter travel. By limiting FELA to injuries suffered by plaintiff "while he is employed," Congress chose to limit FELA's additional burdens on employers to those risks over which the employer had substantial control. Amtrak travel, like private auto travel, had plaintiff chosen it, was not part of plaintiff's job, nor did Norfolk Southern have substantial control over the risks associated with either mode of travel . . . . In short, FELA was enacted to protect railway workers against the dangers of actual railway work, not against the risks of commuting. (Id. at 759.) (Emphasis added.)

Although the foregoing cases involved commuting home from work, the same rule is applied with respect to employees commuting to work. In Metropolitan Coal Co. v. Johnson, 265 F.2d 173 (1st Cir. 1959), a flagman was held to be outside the course of his employment when he was injured while travelling on his employer's train to join his crew at the point where he was to start his work. After reviewing the case authority, the court

found the plaintiff to have been outside the course of his employment because he was not required to be on his employer's train in order to get to work. Id. at 178.

Choice and lack of control also was pivotal in Spoonamore v. Louisville and Nashville Railroad Co., 179 F. Supp. 290 (E.D. Ky. 1959). Mr. Spoonamore was an engineer who was injured in an automobile accident while on his way to where he was to meet his train. In holding as a matter of law that the plaintiff was outside his employment at the time, the court stated that plaintiff's mode of travel "was entirely a matter of his own voluntary choice for reasons personal to him. It was a matter over which the railroad exercised no direction nor control." Id. at 292.

In Getty v. Boston & Marine Corp., 505 F.2d 1226 (1st Cir. 1974), a railroad carman fell on his employer's property while going to board one of his employer's trains to travel to his place of employment. Again because the carman exercised his choice to use his employer's train to get to work, the commuter rule applied and the denial of FELA coverage was affirmed. Id. at 1228. The court in Getty makes it clear that the result may have been different if the carman had been required to face unique hazards or his freedom of choice as to means of travel had been taken away. Id. Again, choice and lack of control were considered as critical factors.

The significance of these factors was highlighted again in the recent case of Thompson v. National Railroad Passenger Corp., 774 F. Supp. 1087 (N.D. Ill. 1991), aff'd, 966 F.2d 1457 (7th Cir. 1992). In the Thompson case, summary judgment was

granted for the employer because its employee, a waiter, was not within the course of his employment when injured while riding on his employer's train to where he was to board his regular train. No issue of fact existed that the plaintiff was not required to ride his employer's train to work, and he was not at the time subject to the orders of his supervisors. Id. at 1088. Supporting the fact that the employer had no control over the plaintiff was the fact that the plaintiff was not paid for his time spent during the commute. Id.

Applying the common factors considered by these courts compels the conclusion that the court below properly granted summary judgment for Defendant. Ruiz voluntarily rejected going with the Defendant to the work site on the day of the accident, although Ruiz had the opportunity to do so and in fact customarily had submitted himself to the control and supervision of Defendant on previous occasions in getting to the work site. Plaintiff elected to go to the work site by himself in his own automobile for his own personal reason of having his car available to him to use in getting home from work earlier. In other words, he did not have to drive to the work site in his own car in order to do his work that day. He voluntarily drove for his own benefit.

In addition, because Plaintiff chose not to start his work at the work camp with his gang and go with them in Defendant's truck to the work site, Defendant had no control over when, or if, Plaintiff would leave the camp site or arrive at the work site to report for duty, nor did Defendant have any control over the Plaintiff's car or his use of his car. As further



evidence of the existence of these facts, Plaintiff voluntarily chose not to be paid until he reported for duty at the work site, and in fact, Defendant never has paid Plaintiff for that time he spent pursuing his own interests.

This case falls squarely within the reasoning of the commuter cases that deny FELA coverage. Therefore, the court below was correct in granting summary judgment as a matter of law.

### POINT III

THE LEGAL AUTHORITY RELIED UPON BY PLAINTIFF IS  
INAPPLICABLE ON THE FACTS BEFORE THE COURT.

Plaintiff does not deny the existence and affect of the line of cases known as commuter cases. In fact, he peripherally cites to many of those cases, yet without sufficient analysis to show that really they conclusively support the holding of the court below, in emphasizing other lines of cases. These other lines of cases apply to other factual situations that are inapplicable where an employee is travelling pursuant to his own choices and without the control or supervision of the employer to where he is to report for his work assignments. Plaintiff's cases, therefore, do not help Plaintiff on the facts of record before this Court.

#### A. Work Camp Cases

The first line of cases argued by Plaintiff pertains to the factual situation where an employee is injured at an employer provided work camp. These cases are referred to herein as "work camp" cases. See Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Kane, 33 F.2d 866, 868 (9th Cir. 1929), cert. denied, 280

U.S. 588 (1929) (laborer who was preparing for the day at his employer's work camp was within his employment because "he was necessarily on appellant's premises, and was making necessary preparations for the work in which he was to engage"); Mostyn v. Delaware, Lackawanna & Western Railroad Co., 160 F.2d 15, 17-18 (2nd Cir. 1947), cert. denied, 332 U.S. 770 (1947) (laborer who was asleep at his employer's work camp was within his employment because the camp was provided by the employer for its employees to use "to prepare themselves for their work, or to rest and recuperate"); Casso v. Pennsylvania Railroad Co., 219 F.2d 303, 305-06 (3rd Cir. 1955) (laborer who was at his employer's work camp and was returning to his bunk car, after having been away at town, was within his employment for the reasons stated in Mostyn, supra, and the fact that the employees using this housing were subject to call at anytime of day or night); Atlantic Coast Line Railroad v. Meeks, 208 S.W.2d 355, 358-59 (Tenn. App. 1947) (laborer who was in his employer's "shanty car" was within his employment because the employer furnished the camp in order to have the services of the laborer and the laborer was subject to call at any time so as to make the laborer's staying at the camp a necessary incident to his employment).

These work camp cases all involve negligence which occurred at the camp where the injured employee was required by his employer to stay. The employers in these cases clearly had control over the camp facilities and benefitted from the laborers staying at the work camps. These cases do not suggest that an employee choosing to leave a work camp in his own vehicle and for his own personal benefit remains covered by the FELA while he

operates his motor vehicle at any speed and in any manner of his own choosing. Neither do these cases contradict the reasoning of the applicable commuter cases discussed in Point II. Indeed, the Second Circuit in Mostyn specifically followed its earlier decisions in Young v. New York, New Haven & Hartford Railroad Co., supra, and stated in its analysis "that any activity undertaken by an employee for a private purpose is certainly not within his employment." Mostyn, 160 F.2d at 17.

The Tenth Circuit case of Atchison, Topeka & Santa Fe Railway Co. v. Wottle, 193 F.2d 628 (10th Cir. 1952) particularly is instructive on this point. In Wottle, a laborer, shortly after returning from the work site to his company provided camp site, left in his own automobile to go buy groceries for himself. The laborer was killed while still on his employer's property when attempting to drive over the tracks. Id. at 630-31. The court in Wottle found that the laborer's own choice to drive his own car in pursuit of his own objectives was not a necessary incident to his employment so as to bring him within the coverage of the FELA. To rule otherwise, the court reasoned, would in effect mean that "there is no limitation upon the coverage [of the FELA] so long as there is a possibility that the employee will return to his work-a-day duties," and then stated, "[o]bviously, the legislation was not intended to go so far." Id. at 631.

The Wottle decision was upheld recently in Loya v. Denver & Rio Grande Western Railroad Co., 993 F.2d 1551 (10th Cir. 1993) (unpublished opinion which is attached hereto). In Loya, summary judgment was affirmed where a laborer had left his

work camp to visit home, do laundry and buy particular foods he liked. It is noteworthy that he was held to have been outside his employment as a matter of law when he was injured while returning to his work camp in his own car even though he was paid a per diem while away. Even though he was compensated, because the laborer was returning from his own errands he was found not to be within the control of his employer. He was exercising his choice to pursue his own interests.

There is no dispute in the law that even when an employee is at work and would be within the course of his employment that he can take himself outside of the course of his employment by voluntarily pursuing personal objectives. For example, in addition to the cases just discussed, in Fowler v. Seaboard Coastline Railroad Co., 638 F.2d 17 (5th Cir. 1981), summary judgment for the employer was affirmed for this reason where an employee, during a time he would have been within the course of his employment and while on his employer's property, voluntarily chose to pursue a personal motorcycle excursion during which he crashed while speeding. Also, in Rogers v. Chicago & North Western Transportation Co., 947 F.2d 837 (7th Cir. 1991) summary judgment again was affirmed in favor of the employer where an employee, during a layover at the employer's expense, voluntarily chose to jog on his employer's property where he tripped in a hole. By choosing to pursue personal activities that did not benefit their employer, and over which the employer had no control, these employees were not acting within the course of their employment, as a matter of law, when they were injured.

In the case at bar, Ruiz was injured while driving his automobile for his own interest. He was not at the work site. He was not required to drive his own car in order to get to the work site that day. It was his idea and desire to drive his own vehicle that day. He was not under the control or direction of Southern Pacific at the time. Defendant did not receive any benefit from Plaintiff's choosing to drive his own car to the work site so he could conveniently get home sooner for the weekend. Plaintiff expressly agreed he would not be paid for the time it took him to drive to the work site in his own vehicle when he would have been paid had he travelled to the site under the supervision of his foreman in the company truck. Likewise, neither was Plaintiff injured while he was at the work camp. He was injured while pursuing his own interests. When he chose not to leave the work camp with his work gang in order to pursue his own interests he voluntarily took himself outside the course of his employment. The work camp cases relied upon by Plaintiff are inapplicable to the facts of this case.

B. Traversing the Work Site Cases

Plaintiff next relies on a line of cases that pertain to the factual situation where an employee is injured on or near his employer's property in order to perform the specific job to which he is assigned. These cases are different from the commuter cases because the employee is injured after arriving at the general area where his work is to be performed, and it is found that the employee's being in the area in which he is injured was necessary in order for the employee to get to precisely where he needed to be in order to accomplish his work.

These cases are referred to herein as "traversing the work site" cases. See North Carolina Railroad Co. v. Zachary, 232 U.S. 248, 260 (1914) (fireman who already had reported for duty and had prepared his employer's engine for a trip on which he soon would be leaving remained within his employment when injured while walking within the employer's yard from the engine to an unknown location, but assumed to be an adjacent boarding house, of which there was no evidence to indicate that he was on a personal errand as opposed to performing his duty to his employer); Erie Railroad Co. v. Winfield, 244 U.S. 170 (1917) (engineer who was injured when walking away from his employer's engine in his employer's yard after performing his duties, at the close of his shift, still was within his employment); Virginian Railway Co. v. Early, 130 F.2d 548 (4th Cir. 1942) (machinist who, after parking his car on his employer's lot, reported early to the shops where he worked then proceeded to walk in his employer's yard to a company endorsed lunch room established for the convenience of the employees, in order to get a cup of coffee, and was then injured in the yard on the way back to the shops to perform his duties was within his employment); Lukon v. Pennsylvania Railroad Co., 131 F.2d 327, 329 (3rd Cir. 1942) (laborer whose gang quit one-half hour early so that they could return their employer's tools to the tool house and who, without any tools, walked with his gang toward the tool house along the employer's right-of-way, which was in the same direction of his home and which was the course he usually took to leave his employer's premises, was

within his employment when injured while on the right-of-way)<sup>2</sup>; Morris v. Pennsylvania Railroad Co., 187 F.2d 837, 841 (2nd Cir. 1951) (employee who, after entering his employer's yard, had to cross over various railroad tracks to get to where he needed to be to report for work and perform his duties was within his employment when killed in the yard); Carter v. Union Railroad Co., 438 F.2d 208 (3rd Cir. 1971) (trainman who, after parking in a lot provided by his employer, was injured while walking across property owned by a third party, which the employer knew to be necessary in order for its employees to get to the shanty where they were to do their work, was within his employment); Caillouette v. Baltimore & Ohio Chicago Terminal Railroad Co., 705 F.2d 243 (7th Cir. 1983) (switchman who had arrived at his employer's yard and was injured when walking toward the carmen's shanty in order to call the yard master to request that an engine be sent to take him to the other end of the yard where he was to work that day was within his employment).<sup>3</sup>

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<sup>2</sup>The Third Circuit in the dissent of the more recent case of Sassaman v. Pennsylvania Railroad Co., 144 F.2d 950 (3rd Cir. 1944), discussed supra in Point II, confirmed that the plaintiff in Lukon was "still on the section on which he was ordinarily employed" when he was injured, yet because it was possible, although not customary, for the plaintiff to have taken another route home other than on his employer's property, the dissent at least thought the Lukon case had been overruled by the Sassaman case.

<sup>3</sup>These cases often refer to, as does Plaintiff, two non-FELA Supreme Court cases, Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928) and Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923). In both of these cases, the imposition of liability under the Utah Workmen's Compensation Act was affirmed because there was found to be a "causal connection" between the injury and the employment. 276 U.S. at 158; 263 U.S. at 423-24. In both cases, the employee was killed while crossing over railroad tracks adjacent to their work places which they necessarily had to cross in order to get to where they needed to be to perform their

In all of these traversing the work site cases, as opposed to the commuter cases, the employee was not pursuing his own interest, nor was he exercising his own choice as to the means by which he got to or from work. Rather in all of these cases, the employee already had arrived at work and was required by his employer to go in a particular manner to the place where the injury occurred as part of or in preparation for the performance of his duties. Clearly, what the employee is doing in these cases is for the benefit of his employer because it is incidental to the performance of his required duties.

These cases provide no help to Plaintiff under the facts of record. Ruiz left the camp site to pursue his own objective, as discussed above with respect to Plaintiff's work camp cases, and he had not yet arrived at the work site before he drove his car off of the road. He was 14 miles away from where he was to report to his supervisor and obtain his assignment for the day. He had not yet reported to work, and he was not traversing the work site to get to the exact location where he was to perform his duties for Defendant on that day.

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duties for their employers. Hence, although only a "causal connection" between the injury and the employment was held to be sufficient under the state compensation act, the analysis still required, as do the FELA cases set forth in the text, that the injury resulted from a risk that the employee necessarily had to take and not a risk the employee chose to, but did not have to, take in order to perform his duties for his employer. 276 U.S. at 159 ("it was necessary for the employees, in order to get to the place of work, to cross the tracks, and they were in effect invited by the employer to do so"); 263 U.S. at 426 ("Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work, and he was in effect invited by his employer to do so."). In the case at bar, Ruiz was invited to travel to the work site with his gang in Defendant's truck, but he voluntarily chose to drive his own car instead.



The fact that Plaintiff was on Defendant's property at the time of his accident is not significant. The traversing the work site cases do not find the employee to be within his employment because he is on his employer's property. Many of the employees were on their employer's property in the commuter cases, discussed in Point II, and the employees in the Wottle, Fowler and Rogers cases, discussed above in this point, were on their employer's property at the time of injury, yet they were found not to be within the course of their employment at the time. Conversely, in the Carter, Bountiful Brick and Cudahy Packing cases the employees were found to be within the course of their employment when not on their employer's property. Obviously, the very nature of the traversing the work site cases most likely will place the employee on his employer's property at the time of injury, and at least very close to where the employee's duties are to be performed. Nevertheless, contrary to Plaintiff's suggestion, whether or not an employee is on his employer's property is not a determinative factor in the analysis of whether the employee is within the course of his employment at the time of injury. See also Restatement (Second) of Agency § 229 cmt. c (1958) ("the fact that the acts are done upon the master's premises or with his instrumentalities is . . . not conclusive").

The law specifically provides that merely being on an employer's property in order to get to work, without the employer's control and the benefit to the employer that makes the reason for being on the property incidental to the employment, is not sufficient to bring the conduct within the course of

employment. In Aldredge v. Baltimore & Ohio Railroad Co., 20 F.2d 655 (8th Cir. 1927), cert. denied, 275 U.S. 550 (1927), for example, dismissal of an action was affirmed where the plaintiff, a switchman, was injured after he left his home to go to work and while walking along his employer's right-of-way. The court found the facts as follows:

On the night of the accident he left his home to go to his place of work. For his own convenience, he chose a route along the right of way of defendant instead of along the city streets. Both routes were feasible. He was under no orders until he reached his place of work. This right of way was not a railroad yard through which he must pass to reach his place of work. While on the right of way and still a quarter of a mile from his place of work, he met with the accident. (Id. at 658-59.)

On these facts, the court held, "we reach the unavoidable conclusion that plaintiff was not engaged in interstate commerce at the time of the accident. He was not on duty; he was simply going to a place where he would be on duty." Id. at 60.

Likewise, in Symonski v. Central Railroad Co., 131 A. 628 (N.J. 1926), aff'd, 135 A. 921 (1927) a judgment in favor of recovery was reversed because the injury occurred while the plaintiff chose to walk along the defendant's right-of-way and tracks to get to the train station from where he would then travel to the roundhouse where he was employed to perform his duties. The plaintiff chose this route rather than to approach the station by way of stairs provided by the defendant. Hence, just as in the commuter cases, the plaintiff's exercise of his own choice and the defendant's lack of control prevented the plaintiff from being able to recover under the FELA, even though

the employee was injured while on his employer's property. Id. at 629-30.

In the instant action, Ruiz had a way to get to the work site that was under the control of the Defendant. He could have travelled with the rest of his gang in Defendant's truck, as he had done prior to the accident. Had he done so on the day of the accident, Defendant could have assured his safety through, among other things, its maintenance of the truck, control of the speed it was driven and required use of seat belts. However, Plaintiff chose not to take advantage of the transportation provided by Defendant. Instead, for his own personal reasons, he chose to take his own car at his own time, and he crashed before he arrived at the work site. By driving his own car, Ruiz was not pursuing the interests of the Defendant. He was pursuing his own interests. This is not a case where Ruiz already had arrived at work and was necessarily traversing the work site to get to the exact location where he was to work that day. Plaintiff was exercising his own choice with respect to the manner and means by which he travelled to the work site.

C. On Call Case

Plaintiff also cites to Temple v. Southern Pacific Transportation Co., 164 Cal. Rptr. 780 (Cal.App.1 Dist. 1980) which is an "on call" case. In Temple, a brakeman, who was on a layover, was involved in a car accident when responding to a call from his employer to return to duty. After his period of rest, he was required by his employer to be available to report back to work when called by the dispatcher. His time was not his own. Id. at 782. Because the employee's acts, at the time of the

accident, were in response to the orders of his employer and were producing the result desired by his employer, it was held that an issue of fact existed as to whether he was within the course of his employment at the time. Id. at 783-83.

Ruiz was not on call to respond to his employer's needs when driving his car for his own purposes, nor was he responding to an order of his employer. If he had been responding to his employer's orders rather than his own wishes, he would have submitted himself to the control and direction of his supervisor at the camp site with the rest of the work gang rather than take his own car and leave at a time of his own choosing. Indeed, Plaintiff's choice as to the time when he left the work camp was directly related to the speed at which he would have to travel to catch up with the company truck by the time it reached the work site. Defendant had no interest in Plaintiff leaving latter than the others in order to go to the work site, nor did Defendant have any interest in Plaintiff speeding in order to get to the work site on time. As the lower court found, Ruiz was no more producing the desired result of his employer when driving his car than any commuter travelling to a work site. It is significant in supporting this conclusion that at the time of injury Plaintiff could not be contacted or controlled by Defendant in any way, and Plaintiff understood he would not be paid while acting on his own time for his own benefit.

Plaintiff has not refuted the legal authority of the commuter cases. He only has argued for the applicability of camp site cases, traversing the work site cases and an on call case to support his position. These cases, although endorsing similar

principles of choice and lack of control as found in the commuter cases, are factually distinguishable and provide no support for Plaintiff upon the undisputed facts of record. There is no factual dispute that Plaintiff voluntarily chose to drive his car for his own benefit. Defendant received no benefit from Plaintiff's conduct, and Defendant had no opportunity to control or direct Plaintiff until he arrived at the work site. Plaintiff, however, crashed his car 14 miles before he arrived at the work site. As a matter of law, Plaintiff cannot be found to have been within the course of his employment when he drove his car off the road before he arrived at where he was to work, and the summary judgment granted below should be affirmed.

#### POINT IV

##### NO ERROR WAS COMMITTED IN GRANTING SUMMARY JUDGMENT.

The district court's ruling is consistent with and supported by FELA case law, as discussed above. There is no conflicting case authority. Plaintiff merely misconstrues the law for his own benefit.

Contrary to Plaintiff's contentions of error, there is uncontroverted FELA authority for finding an employee to be outside the course of his employment when he voluntarily chooses to commute to work in his own vehicle on his own schedule and for his own benefit, during which time he was not furthering his employer's business and was not under the control or direction of his employer. Although no case is exactly on point factually, the commuter cases discussed in Point II, supra, provide the appropriate analytical framework and the closest analogy. These cases focus on the employee's exercise of his own choice and

conduct for his own benefit and the employer's lack of control and supervision. In fact, although factually distinguishable, even the reasoning of the other FELA cases relied upon by Plaintiff support the ruling of the lower court. Hence, summary judgment is completely in harmony with FELA principles and case law.

Plaintiff also suggests, without any legal authority, that the district court could not hold upon the facts before it that Plaintiff voluntarily took himself out of the course of his employment when he substituted personal transportation for company transportation for personal reasons, and removed himself from the control and supervision of his employer.<sup>4</sup> Plaintiff did not elect to take his car to the work site for the benefit of the Defendant and this election in no way benefitted the Defendant. In reality, the contrary is true. Plaintiff's voluntary election resulted in his leaving the camp site later than his co-workers. Had Plaintiff travelled at the same speed of those travelling under the control of the Defendant, the Plaintiff's choice would have made it impossible for him to have been at the work site as early as the rest of his work gang. Defendant has no interest in its employees pursuing personal objectives that make them late for work or for its employees to speed in order to get to work because they have pursued their own objectives. It is ludicrous for Plaintiff to argue that, in essence, no matter what he did for personal reasons he could not

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<sup>4</sup>Before the court below, Plaintiff argued that 45 U.S.C. § 152 prevented him from taking himself out of the course of his employment. Plaintiff has abandoned this argument on appeal for very sound reasons. See R. 479-81.

remove himself from the course of his employment. The Wottle, Loya, Fowler and Rogers cases, discussed above, expressly negate this argument.<sup>5</sup> There are no cases supporting Plaintiff's argument.

In addition, Plaintiff tries to argue that genuine issues of fact exist. However, Plaintiff does not clearly identify any issue of fact and what conflicting evidence exists to which Defendant can respond. It appears that Plaintiff simply is trying to create an issue of fact by arguing that the Union Agreement required Defendant to pay Plaintiff for the time he spent driving his own car to work, and that this fact supports the legal conclusion that Plaintiff was within the course of his employment. This straw-man argument fails because there is no competent evidence of record that the Union Agreement required that Plaintiff be paid for the time he spent driving his own car. The Union Agreement expressly provides that employees will not be paid when travelling for personal reasons. (R. 369.)

Moreover, even if Plaintiff was entitled to compensation under the Union Agreement, Plaintiff still would be outside the course of his employment. As in the Fowler case, when an employee who is at work pursues his own personal interests he takes himself out of the course of employment with respect to that activity; and as in the Loya case, this is true even when the employee is being compensated. Plaintiff clearly took himself out of the course of his employment by the very act of his pursuing his own interests separate and apart from his

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<sup>5</sup>See text, supra, at pp. 20-21.

agreement not to be paid in exchange for being released by his employer from his usual and customary duties of reporting to work with his gang and submitting to his employer's control and supervision. Hence, Plaintiff was outside the course of his employment regardless of whether or not the Union Agreement allowed Plaintiff to claim pay during his commute as a contractual benefit of his employment.

Finally, Plaintiff feebly argues that his agreement not to be paid in order to be free to pursue his own interests is an agreement to avoid FELA coverage in violation of 45 U.S.C. § 55. This argument is nonsensical. First, Plaintiff has not cited to any facts of record that the parties agreed that Defendant's future FELA liability would be limited. Plaintiff's voluntary agreement not to be paid for his time certainly was not done to limit FELA coverage. Nobody expected an accident to happen. This agreement simply is further evidence that, indeed, Plaintiff was pursuing his own objectives and not those of his employer, of which the legal result is that Plaintiff was outside the course of his employment and should not be paid. Second, if the case law is against Plaintiff on the course of employment issue, as established above, the FELA would not apply, including Section 55. Plaintiff was outside the scope of his employment as a matter of law even if there had been no agreement regarding compensation. Thus, it would be irrelevant that the agreement not to be paid also limited FELA coverage.

Plaintiff has not, and cannot, show any reversible error made by the district court. The law and the facts are clear and undisputed. Plaintiff's action fails as a matter of



law because there is no FELA coverage of his purely personal activity. The district court's ruling and order should be affirmed.

#### CONCLUSION

Plaintiff is not without recourse simply because the FELA is not applicable. Just as the FELA requires proof of negligence, so can Plaintiff pursue a common law negligence action against Southern Pacific as a landowner. In fact, the trial court advised Plaintiff of this option and Plaintiff has filed such a separate action against Defendant.

With respect to the instant FELA action, however, Plaintiff was not injured while performing any activity required for him to be able to do his work. He was pursuing personal objectives in getting to work that benefitted only him, as does every commuter who elects to drive his or her own car rather than take other available modes of transportation. Plaintiff could have gone, and was invited to go, to the work site in Defendant's truck. Because Plaintiff exercised his freedom to chose his own desires rather than to report for duty at Montello, Defendant had no control or ability to supervise him at the time he was injured while he was driving his own car.

Upon the undisputed facts, Plaintiff is not entitled to the benefits of the FELA because he was not within the course of his employment as a matter of law. The order of summary judgment in favor of Defendant must be affirmed. Pursuant to Rule 34,

Utah Rules of Appellate Procedure, the Court also should award Defendant its costs.

Dated this 13th day of June, 1995.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By Casey K. McGarvey  
E. Scott Savage  
Casey K. McGarvey

Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing BRIEF OF APPELLEE to be mailed, postage prepaid, this 13th day of June, 1995, to the following:

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ADDENDUM

Loya v. Denver & Rio Grande Western Railroad Co., 993

F.2d 1551 (10th Cir. 1993) (unpublished opinion).

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

**Marta LOYA, as Personal Representative  
of the Estate of Hector Loya, Plaintiff-  
Appellant,  
v.  
DENVER & RIO GRANDE WESTERN  
RAILROAD COMPANY, Defendant-  
Appellee.**

**No. 92-1076.**

United States Court of Appeals, Tenth Circuit.

May 5, 1993.

D.Colo., No. 91-N-575.

D.Colo.

**AFFIRMED.**

Before MCKAY and EBEL, Circuit Judges,  
and LEONARD, District Judge. [FN1]

**ORDER AND JUDGMENT [FN\*]**

EBEL, Circuit Judge.

**\*\*1** The Plaintiff-Appellant's deceased husband, Hector Loya, was a maintenance-of-way worker employed by the Defendant-Appellee, Denver and Rio Grande Western Railroad Company ["the Railroad"]. On Sunday, April 9, 1989, Mr. Loya was returning from his permanent home in Denver to his place of employment near Silt, Colorado, approximately 170 miles west of

Denver, when he was severely injured in an automobile accident. Mr. Loya's co-worker, who was driving the pick-up truck at the time of the accident, lost control of the truck on a snowy interstate highway. Mr. Loya was thrown from the windshield of the truck into oncoming traffic and died of his injuries on May 2, 1989.

Mrs. Loya brought this suit under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, as personal representative of Mr. Loya's estate. The district court granted the Railroad's motion for summary judgment on the ground that Mr. Loya was not acting within the scope of his employment at the time of his injury and thus was not covered by the FELA. The Plaintiff now appeals the dismissal of her case.

We review the grant of summary judgment de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law. *Rusillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir.1991). We view the record in the light most favorable to the Plaintiff. See *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

We hold that, taking the evidence in the light most favorable to the Plaintiff, the Railroad is entitled to judgment as a matter of law. Recovery under the FELA is permitted only if Mr. Loya's injury occurred "while he [was] employed by" the Railroad. 45 U.S.C. § 51. We have interpreted this provision as imposing liability for "not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto." *Atchison, Topeka & Santa Fe R. Co. v. Wottle*, 193 F.2d 628, 630 (10th Cir.1952). However, we also recognized that the FELA was not meant to cover all of a railroad employee's activities:

[G]iven the most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral



(Cite as: 993 F.2d 1551, 1993 WL 147505 (10th Cir, \*\*1.(Colo.)))

part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment.

Wottle, 193 F.2d at 630. Generally, employees injured while commuting to and from work are not considered to be within the scope of their employment for FELA purposes. See, e.g., *Getty v. Boston and Marine Corp.*, 505 F.2d 1226, 1228 (1st Cir.1974); *Metropolitan Coal Co. v. Johnson*, 265 F.2d 173, 178 (1st Cir.1959); *Quirk v. New York, Chicago & St. Louis R.R.*, 189 F.2d 97, 100 (7th Cir.), cert. denied, 342 U.S. 781 (1951); *Sassaman v. Pennsylvania R.R.*, 144 F.2d 950, 952-54 (3d Cir.1944); *Williams v. Norfolk So. Ry.*, 767 F.Supp. 756, 758-59 (E.D.Va.1991); *Spoonamore v. Louisville and Nashville R.R.*, 179 F.Supp. 290, 292 (E.D.Ky.1959). Although courts have been reluctant to establish a per se rule, this line of cases has led to a doctrine known as the "commuter rule."

**\*\*2** The Plaintiff contends that Mr. Loya was under the Railroad's control and therefore was acting within the scope of his employment when the accident occurred. She cites several undisputed facts in support of this contention: (1) the movable nature of Mr. Loya's employment site--at which the Railroad provided living quarters in a railroad car outfitted with bunks, a kitchen, and a bathroom--created the necessity for travel, because his family could not live with him nor could his children attend school even if they could live with him at the work site, Aplt.App. D-25; F-34; (2) Mr. Loya's employment contract stated that "[w]hen conditions of the work permit," Railroad employees "will be allowed to make weekend visits to their home," Aplt.App. F-35; (3) Railroad employees unable to return to work on Monday were required to notify the Railroad's Division Offices by 7:30 a.m. Monday, Aplt.App. D-19; (4) Mr. Loya went to Denver to do laundry, see his family, and buy groceries because he could not read English food labels and the grocery stores near his workplace did not carry the Mexican foods he liked, Aplt.App. H-41, 46; and (5) Mr. Loya

was paid a per diem of \$9.95 per day, including Saturdays and Sundays, as long as he was not voluntarily absent from work on Monday and Friday, Aplt.App. D-20, F-34.

Taking these facts as true, we nevertheless believe that no reasonable jury could find for the Plaintiff and that summary judgment was therefore proper. This case is governed by the commuter rule and Wottle. In Wottle, the railroad employee was responsible for providing food and bedding for his own use in the bunk car. We held that the employee's trip to purchase groceries could not be considered within the scope of FELA coverage because "he was on a mission wholly unconnected and unrelated to his employment." 193 F.2d at 631. Given that Mr. Loya made voluntary choices as to where to buy his food and how to travel to his permanent home, we decline to hold on the facts of this case that there existed the level of control by the Railroad necessary to constitute employment or acts incident thereto. Nor do we find indicative of Railroad control the fact that Mr. Loya had to notify the Railroad if he could not attend work on Mondays or the fact that Mr. Loya could be required to work on weekends.

The major distinction between Wottle and Mr. Loya's case is that Mr. Loya received a daily per diem for the purchase of food and linens, even when he did not work on Saturdays and Sundays. Although pay can be an indicia of control by the employer and therefore an indication that Mr. Loya was within the scope of employment, the per diem in this case merely served as an incentive for Mr. Loya to come to work on Monday because per diem was not paid for the weekend unless the employee showed up for work on Monday. The payment of a per diem, in the absence of other evidence of control by the Railroad, does not indicate that Mr. Loya was acting within the scope of his employment at the time of the accident.

**\*\*3** Indeed, a number of facts compel the conclusion that the Railroad exercised no control over Mr. Loya's weekend activities. Mr. Loya chose to go to Denver, chose when to



go to Denver and when to return to Silt, chose the means of transportation, and chose the route of travel. There are no facts supporting a finding that the Railroad exercised control over Mr. Loya at the time of the accident or that Mr. Loya was acting within the scope of his employment at the time of the accident. We therefore AFFIRM the district court's order granting the Railroad's motion for summary judgment.

FN1. The Honorable Timothy D. Leonard, United States District Judge for the Western District of Oklahoma, sitting by designation.

FN\* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

END OF DOCUMENT

