

1994

Jose Ruiz v. Southern Pacific Transportation Company: Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Donald S. Britt, Esq.; Gerald J. Adler, Esq.; The Crow Law Firm; Erik M. Ward, Esq.; Gridley, Ward, Havas, Hamilton, and Shaw; Attorneys for Plaintiff/Appellant.

E. Scott Savage, Esq.; Byron J. Benevento; Van Cott, Bagley, Cornwall, and McCarthy; Attorneys for Defendant/Appellee.

Recommended Citation

Brief of Appellant, *Jose Ruiz v. Southern Pacific Transportation Company*, No. 940661 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/6281

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JOSE RUIZ,)	
)	Appellate Court No. 940661-CA
Plaintiff/Appellant)	
)	
v.)	Priority Classification 15
)	
SOUTHERN PACIFIC)	
TRANSPORTATION COMPANY,)	
)	
Defendant/Appellee)	

BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 940661-CA

E. Scott Savage, Esq.
Bryon J. Benevento
VAN COTT, BAGLEY, CORNWALL &
MCCARTHY
50 South Main St., Ste. 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Attorneys for Defendant/
Appellee

Erik M. Ward, Esq. (3380)
GRIDLEY, WARD, HAVAS,
HAMILTON & SHAW
635 25th Street
Ogden, Utah 84401
Attorneys for Plaintiff/Appellant

Donald S. Britt, Esq.
Gerald J. Adler, Esq.
THE CROW LAW FIRM
700 E Street
Sacramento, California 95814
Attorneys for Plaintiff/Appellant

FILED
APR 12 1995

IN THE UTAH COURT OF APPEALS

JOSE RUIZ,)	
)	Appellate Court No. 940661-CA
Plaintiff/Appellant)	
)	
v.)	Priority Classification 15
)	
SOUTHERN PACIFIC)	
TRANSPORTATION COMPANY,)	
)	
Defendant/Appellee)	
)	

BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

E. Scott Savage, Esq.
Bryon J. Benevento
VAN COTT, BAGLEY, CORNWALL &
MCCARTHY
50 South Main St., Ste. 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Attorneys for Defendant/
Appellee

Erik M. Ward, Esq. (3380)
GRIDLEY, WARD, HAVAS,
HAMILTON & SHAW
635 25th Street
Ogden, Utah 84401
Attorneys for Plaintiff/Appellant

Donald S. Britt, Esq.
Gerald J. Adler, Esq.
THE CROW LAW FIRM
700 E Street
Sacramento, California 95814
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

	Page
Table of Authorities	iii
I. JURISDICTIONAL STATEMENT	1
II. STATEMENT OF ISSUES AND STANDARD OF REVIEW	2
III. DETERMINATIVE STATUTE	2
IV. STATEMENT OF THE CASE	3
V. STATEMENT OF FACTS	4
VI. SUMMARY OF ARGUMENTS	8
VII. ARGUMENT	9
1. Federal law is determinative of the employment status of plaintiff at the time of his injury	9
A. Supremacy of federal law	9
B. The term "employed"	10
C. The 1939 amendment	11
2. Plaintiff was "employed" under the Federal Employer's Liability Act prior to and at the time of his injury	12
A. Plaintiff was "employed" while in his trailer	12
B. Plaintiff was "employed" when injured enroute to the work site	16
(1) The cases finding coverage	16
(2) The cases denying coverage	22
(3) Factual application of the legal principles	25

Table of Contents (continued)

3. The trial court erred in granting summary judgment to defendant	28
A. The court's ruling	28
B. The court failed to utilize FELA principles	29
C. The court failed to recognize triable factual issues	31
D. An agreement to waive FELA coverage is void	32
VIII. CONCLUSION	33
ADDENDUM	
A. 45 U.S.C. section 51	
B. Ruling, January 11, 1994	
C. Order, January 22, 1994	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Atchison, T. & S. F. Ry. Co. v. Wottle,</u> 193 F.2d 623 (10th Cir. 1952)	24, 28
<u>Atlantic Coast Line R. R. v. Meeks,</u> 30 Tenn.App. 520, 280 S.W.2d 355 (1947)	15
<u>Bountiful Brick Co. v. Giles,</u> 276 U.S. 154, 72 L.Ed. 507, 48 S.Ct. 221 (1928)	17, 26
<u>Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co.,</u> 705 F.2d 243 (7th Cir. 1983)	21, 27
<u>Carter v. Union R.R. Co.,</u> 438 F.2d 208 (3d Cir. 1971)	20, 27
<u>Casso v. Pennsylvania R.R. Co.,</u> 219 F.2d 303 (3d Cir. 1955)	14
<u>Chesapeake & Ohio Ry. Co. v. Kuhn,</u> 284 U.S. 44, 76 L.Ed. 157, 52 S.Ct. 45 (1931)	1, 10
<u>Chicago, M., St. P. & P. R.R. Co. v. Kane,</u> 33 F.2d 866 (9th Cir. 1929)	13
<u>Cudahy Packing Co. v. Parramore,</u> 263 U.S. 418, 68 L.Ed. 366, 44 S.Ct. 153 (1923)	11, 16, 26
<u>Erie R.R. Co. v. Winfield,</u> 244 U.S. 170, 61 L.Ed 1057, 37 S.Ct. 556 (1917)	16, 26
<u>Fowler v. Seaboard Coastline R.R. Co.,</u> 638 F.2d 17 (5th Cir. 1981)	25, 28
<u>Johnson v. Morton Thiokol, Inc.,</u> 818 P.2d 997 (Utah 1991)	1
<u>Lukon v. Pennsylvania R.R. Co.,</u> 131 F.2d 327 (3d Cir. 1942)	18, 27
<u>Metropolitan Coal Co. v. Johnson,</u> 265 F.2d 173 (1st Cir. 1959)	24, 28
<u>Morris v. Pennsylvania R.R. Co.,</u> 187 F.2d 837 (2d Cir. 1951)	20, 27

<u>Mostyn v. Delaware L. & W. R.R. Co.</u> , 160 F.2d 15 (2d Cir.) <u>cert. denied</u> , 332 U.S. 770, 92 L.Ed 355, 68 S.Ct. 82 (1947)	13
<u>New York Central R.R. Co. v. Winfield</u> , 244 U.S. 147, 61 L.Ed. 1045, 37 S.Ct. 546 (1917)	9
<u>North Carolina R.R. Co. v. Zachary</u> , 232 U.S. 248, 58 L.Ed. 591, 34 S.Ct. 305 (1914)	16, 26
<u>Quirk v. New York C. & St. L. R.R. Co.</u> , 189 F.2d 97 (7th Cir.) <u>cert. denied</u> , 342 U.S. 871, 96 L.Ed. 655, 72 S.Ct. 105 (1951)	23, 28
<u>Reed v. Pennsylvania R.R. Co.</u> , 351 U.S. 502, 100 L.Ed. 1366, 76 S.Ct. 958 (1956)	12
<u>Robinson v. Baltimore & Ohio R.R. Co.</u> , 237 U.S. 84 59 L.Ed. 849, 35 S.Ct. 491 (1915)	10
<u>Sassaman v. Pennsylvania R.R. Co.</u> , 144 F.2d 950 (3d Cir. 1944)	19, 23, 27
<u>Southern Pac. Co. v. Gileo</u> , 351 U.S. 493, 100 L.Ed 1357, 76 S.Ct. 952 (1956)	11
<u>Temple v. Southern Pacific Trans. Co.</u> , 105 Cal.App.3d 988, 164 Cal.Rptr. 780 (1980)	21
<u>Thompson v. Missouri Pac. R.R. Co.</u> , 15 F2d 28 (8th Cir. 1926)	33
<u>Virginian Ry. Co. v. Early</u> , 130 F.2d 548 (4th Cir. 1942)	18, 26
<u>Weese v. Davis County Comm'n</u> , 854 P.2d 1 (Utah 1992)	1
<u>Young v. New York, N.H. & H. R.R. Co.</u> , 74 F.2d 251 (2d Cir. 1934)	22, 27
<u>Young v. New York, N.H & H. R.R. Co.</u> , 79 F.2d 844 (2d Cir. 1935)	22, 27

Table of Authorities (continued)

Pages

Statutes and Rules

Federal Employers' Liability Act, Section 1:

Act April 22, 1908, ch. 149 § 1, 35 Stat. 65	1, 9
Act August 11, 1939, ch. 685, § 1, 53 Stat. 1404	11
45 U.S.C. Section 51	2, 4, 11
45 U.S.C. Section 55	32, 33
Utah Code Ann. section 78-2a-3(2)(k) (1987)	1
Utah Rules of Appellate Procedure, Rule 3(a)	1

I. JURISDICTIONAL STATEMENT

This court has jurisdiction of this appeal from a final order granting summary judgment pursuant to Rule 3, subdivision (a), Utah Rules of Appellate Procedure and Utah Code Annotated section 78-2a-3(2)(k) (1987).

II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

The primary issue is whether the trial court erred in ruling as a matter of law that the plaintiff, Jose Ruiz, was not employed in commerce at the time of his injury and was, therefore, not entitled to the benefits of the Federal Employers' Liability Act (FELA).

On appeal from summary judgment, an appellate court resolves only legal issues. It determines whether the trial court erred in applying governing law and whether the trial court correctly held that no genuine issue of fact was in dispute. Weese v. Davis County Comm'n, 834 P.2d 1 (Utah. 1992). When reviewing an order granting summary judgment, the evidence and all inferences that may be reasonably drawn from the evidence must be literally construed in favor of the party opposing the motion. Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991).

When reviewing an order concerning the rights and obligations of parties in a Federal Employers' Liability Act case, the court is bound by federal law interpreting the statute. Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U.S. 44, 46-47, 76 L.Ed. 157, 160, 52 S.Ct. 45 (1931).

The issues concerning employment and coverage by the statute were raised by appellant in his Memorandum in Opposition to Defendant's Motion for Summary Judgment (R. at 243), his Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment (R. at 235) and his Memorandum of Points and Authorities in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment (R. at 395).

III. DETERMINATIVE STATUTE

The applicable statute, codified as 45 U.S.C. section 51, is reproduced verbatim in the addendum. In relevant part, with emphasis added, it provides that:

Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . track, roadbed, works . . . or other equipment.

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

IV. STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Dispositions Below

This action, brought pursuant to the provisions of the Federal Employers' Liability Act and arising from injuries to plaintiff Jose Ruiz on May 18, 1990, was filed on March 7, 1991 (R. at 1). Defendant Southern Pacific Transportation Company filed a motion for summary judgment on January 22, 1993 on the basis that "plaintiff was not within the scope of his employment at the time he was injured." (R. at 164). On November 5, 1993, before the court ruled on defendant's motion, plaintiff filed a motion for partial summary judgment on the scope of employment issue. (R. at 233).

The court issued a ruling on January 11, 1994 which concluded that, as a matter of law, plaintiff was not in the course of his employment. (R. at 429, see Addendum). The order granting defendant's motion for summary judgment and denying plaintiff's motion for partial summary judgment was filed on January 22, 1994. (R. at 436, see Addendum).

Plaintiff filed a motion for new trial with supporting memorandum on February 7, 1994. (R. at 448). The motion was denied by order filed August 8, 1994. (R. at 548). Notice of appeal from both the Order Granting Defendant's Motion for Summary Judgment and the Order Denying Plaintiff's Motion for New Trial was filed on August 31, 1994. (R. at 551). Plaintiff hereby abandons his appeal from the order denying the new trial and will proceed

only as to the court's order granting summary judgment in favor of defendant.

V. STATEMENT OF THE FACTS

Jurisdictional Basis

1. Defendant Southern Pacific Transportation Company is a common carrier by railroad employed in interstate commerce. (R. at 7).

2. Plaintiff Jose Ruiz was an employee of defendant at the time of the accident. (R. at 7, 166, 287).

3. This is an action for personal injuries by a railroad employee pursuant to the Federal Employers' Liability Act, 45 U.S.C. section 51 et seq. (R. at 287).

Employment Status Prior to 5:00 a.m. on May 18, 1990

4. Plaintiff was a maintenance of way worker assigned to Extra Gang 11 working out of Montello, Nevada. (R. at 252-53, 321-22, 418).

5. Extra Gang 11 was a trailer gang working between various points and could be moved from Ogden, Utah to Sparks, Nevada. (R. at 252-53).

6. Trailer gang members received extra pay for living in trailers and moving to different locations. (R. at 255).

7. The collective bargaining agreement between plaintiff's union and defendant governs rates of pay, hours of service and working conditions for maintenance of way employees. (R. at 289-90, 335).

8. Employees in trailer gangs are assigned to living quarters

owned and maintained by defendant, receive a meal expense, are provided with bedding and bath supplies or in-lieu payment, receive water and ice, may be designated as camp tenders and are expected to maintain their quarters in a clean and sanitary condition. (R. at 370-72).

Designated Assembly Point

9. Plaintiff's foreman and the foreman's supervisor understood the "on-duty point" for Extra Gang 11 to be Montello, Nevada. (R. at 304, 381, 414).

10. Under the collective bargaining agreement, employees' time starts and ends at regular designated assembly points. (R. at 352).

11. When an employee's living quarters is a trailer furnished by defendant, the trailer is established as the employee's headquarters. (R. at 353).

12. An employee's headquarters is the designated assembly point. (R. at 353).

13. Employees are not allowed time while traveling between their homes and designated assembly points. (R. at 367).

14. Under the collective bargaining agreement, plaintiff was entitled to be compensated starting at Montello on the day of his accident. (R. at 418-19).

15. Defendant provided transportation by truck for Extra Gang 11 members from Montello to its work sites. (R. at 167, 288, 304).

16. On the day of the accident, when the crew was to fix railroad tracks at Lakeside, Utah, pursuant to permission from his

foreman, plaintiff was allowed to drive his own vehicle to the work site so that he could drive from there directly home to Ogden, Utah for the weekend. (R. at 167, 288, 431).

17. Extra Gang 11 members traveling in defendant's truck from Montello to Lakeside on May 18, 1990 were considered to be on-duty and were paid overtime from 5:00 a.m. until 7:00 a.m. for the two-hour commute. (R. at 167, 260, 287, 293, 314).

18. Plaintiff's foreman told plaintiff that since he would not be under defendant's supervision, he would not be compensated for his time or reimbursed for the use of his vehicle or gas. (R. at 167).

19. Neither plaintiff's foreman nor the foreman's supervisor were aware of any written policy or documents of defendant stating that plaintiff would be considered off-duty for the trip from Montello to Lakeside in his private vehicle. (R. at 398-99, 412, 415-16).

20. Plaintiff's foreman testified by affidavit that plaintiff understood he would not be compensated for the commute but that it was worth giving up the pay to get home earlier. (R. at 167).

21. Plaintiff has been adjudicated mentally incompetent, functions at the level of a three year old, is not capable of participating in a deposition and is unavailable as a witness. (R. at 283-84).

22. Plaintiff's foreman did not have authority under the collective bargaining agreement to alter plaintiff's starting time for purposes of compensation. (R. at 418).

23. At about 5:00 a.m. on May 18, 1990, plaintiff was dressed for work and advised his foreman that he would be right behind the truck and that they would meet at Lakeside. (R. at 311-13).

24. Plaintiff was injured while driving his private vehicle from Montello in a rollover accident approximately 14 miles from the work site at Lakeside while on a private gravel road owned and maintained by defendant which ran parallel to the railroad tracks. (R. at 7, 166-68, 287, 395).

25. Plaintiff's foreman was responsible to report the time worked by plaintiff. (R. at 289).

26. Plaintiff's foreman was of the opinion that plaintiff had not yet reported for duty at the time of the accident and did not log plaintiff as having performed any work on the day of the accident. (R. at 168, 289).

27. Plaintiff was not compensated for his time on May 18, 1990. (R. at 168).

28. The collective bargaining agreement requires that all claims or grievances be presented in writing within sixty days from the date of the occurrence on which the claim or grievance is based. (R. at 374).

29. Plaintiff suffered a severe injury to his head from the automobile accident on May 18, 1990 but did not have a conservator appointed until July 8, 1991. (R. at 274, 282)

VI. SUMMARY OF ARGUMENTS

1. Applicability and scope of federal law to plaintiff's employment status.

A. The rights and obligations of the parties in a Federal Employers' Liability Act case are controlled by federal law.

B. The term "employed" as used in the Federal Employers' Liability Act of 1908 was intended to describe the conventional relationship of employer and employee.

C. By amendment in 1939 Congress expanded the benefits of the Federal Employers' Liability Act so as to avoid narrow distinctions and to comprehensively expand coverage.

2. Plaintiff's employment status prior to the accident

A. Plaintiff Jose Ruiz was covered by the Federal Employers' Liability Act before leaving his trailer headquarter on the day of the accident.

B. Because plaintiff's trip from his headquarters to the work site was a necessary incident of his employment, he was covered by the act during the entirety of his trip prior to the accident.

C. Because plaintiff was on defendant's private road leading to the actual work site, he was covered by the act during at least that portion of his trip.

3. The trial court's errors.

A. Plaintiff's mode of travel did not remove him from the act's coverage.

B. Neither the willingness of plaintiff to forego pay nor the understanding of his supervisor in that regard removed plaintiff from the act's coverage and benefits.

C. The trial court erred in not ruling as a matter of law, against defendant's motion for summary judgment.

D. At the very least, the trial court erred in not ruling that there were material triable issues of fact.

VII. ARGUMENT

1. Federal law is determinative of the employment status of plaintiff at the time of his injury.

A. Supremacy of federal law

As enacted in 1908 the Federal Employers' Liability Act issue would have been framed as whether plaintiff Jose Ruiz suffered injury while he was "employed" by the defendant in interstate commerce. See 45 U.S. C. § 51, (paragraph 1, Determinative Statute, supra), Act April 22, 1908, ch. 149, § 1, 35 Stat. 65.

The United States Supreme Court has made clear from the earliest days of the statute that "there are weighty considerations why the controlling law should be uniform and not change at every state line." New York Central R.R. Co. v. Winfield, 244, U.S. 147, 149, 61 L.Ed 1045, 1047-48, 37, S.Ct. 780 (1917). The Court restated the point some years later:

[I]n proceedings under that Act, wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the Federal courts. . . . That statute, as interpreted by this

Court, is the supreme law to be applied by all courts, Federal and State. (Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U.S. 44, 46-67, 76 L.Ed. 157, 160, 52 S.Ct. 45 (1931).

B. The term "employed"

In an early interpretation, the Supreme Court expressed its "opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." Robinson v. Baltimore & Ohio R.R. Co., 237 U.S. 84, 94, 59 L.Ed 849, 853, 35 S.Ct. 491 (1915).

That conventional relationship as it bore upon the questions of causal connection to employment was expanded upon by the Court a few years later, referring to both English and American cases:

"An accident arises out of the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind." . . .

"If it is the normal risk merely which causes the accident, the answer must be that the accident did not arise out of the employment. But if the position which the work must necessarily occupy in connection with his work results in excessive exposure to the common risk, or if the continuity or exceptional amount of exposure aggravates the common risk, then it is open to conclude that the accident did not arise out of the common risk, but out of the

employment." . . .

The basis of these decisions is that, under the specific facts of each case, the employment itself involved peculiar and abnormal exposure to a common peril, which was annexed as a risk incident to the employment. (Cudahy Packing Co. v. Parramore, 263 U.S. 418, 424-25, 68 L.Ed. 366, 370, 44 S.Ct. 153 (1923), citations omitted).

C. The 1939 amendment

In 1939 the act was amended "to cure the evils of hypertechnical distinctions which had developed in over 30 years of FELA litigation which "were replete with very fine distinctions in determining whether an employee was engaged in interstate commerce within the contemplation of the act so as to entitle him to bring suit for damages thereunder for injuries incurred while in the carrier's employ." Southern Pac. Trans. Co. v. Gileo, 351 U.S. 493, 497, 498, 100 L.Ed. 1357, 1363, 1364, 76 S.Ct. 952 (1956).

That amendment added the second paragraph as codified at 45 U.S.C. section 51, so that the "employed/employee" status is now clarified to cover "[a]ny employee . . . , any part of whose duties . . . shall be the furtherance of interstate . . . commerce; or shall, in any way directly or closely and substantially, affect such commerce " See 45 U.S.C. § 51 (paragraph 2, Determinative Statute, supra). Act August 11, 1939, Ch. 685, § 1, 53 Stat. 1404. In the view of the Supreme Court:

Although the amendment may have been prompted by a specific desire to obviate certain court-made rules limiting coverage, the language used goes far beyond that narrow objective. It evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding coverage. Under the amendment, it is the "duties" of the employee that must furnish or affect commerce, and it is enough if "any part" of those duties has the requisite affect. . . .

"The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic." . . .

Similarly, those duties which "in any way directly or closely and substantially affect" interstate commerce in the railroad industry must necessarily be worked out through the process of case-by-case adjudication. This definition and the "furtherance" definition of employment in interstate commerce in the 1939 amendment are set forth in the disjunctive. In some situations, they may overlap. (Reed v. Pennsylvania R.R. Co., 351 U.S. 502, 506, 507, 100 L.Ed. 1366, 1374, 76 S.Ct 958 (1956)).

The balance of this section of the brief will examine that "case-by-case adjudication" and define the "periphery" in situations which bear on and control the issue of plaintiff's employment status at the time of the accident.

2. Plaintiff was "employed" under the act prior to and at the time of his injury.

A. Plaintiff was "employed" while in his trailer.

(1) The Cases

In Chicago M., St.P. & P. R.R. Co. v. Kane, 33 F.2d 866 (9th Cir. 1929), plaintiff was an extra gang member living in company quarters. Prior to the breakfast hour preceding the scheduled work day, he was killed while going from the bunk to the toilet. The court held that plaintiff was employed in interstate commerce and covered by the act. Although "he had not yet lifted a pick or stuck a shovel into the ground . . . his employment was definite, and the nature and place of his service for the day was clearly understood." Id. at 868. Of further significance is the prescient comment of the dissent:

As I understand the majority opinion, a railroad employee who happens to sleep and take his meals in a section house, bunk house, or car furnished by the railway company on its right of way is continuously employed in interstate commerce, even during the hours devoted to sleep. If this be true, a large number of railway employees who make their houses, temporarily or permanently, in quarters furnished by railway companies on their rights of way, are continuously employed in interstate commerce, even though their time of actual employment does not exceed eight or ten hours per day. (Id. at 870).

That this was indeed the law was demonstrated some years later in an opinion by Judge Learned Hand. In Mostyn v. Delaware L. & W. R.R. Co., 160 F.2d 15 (2d Cir. 1947), plaintiff was one of a gang of track workers housed and fed in bunk cars. Upon returning to his bunk car after a day off and personal errands in town, he opted to sleep outside because of the verminous condition

of his bunk. He chose a poor place to sleep and lost a foot to a passing railroad car. The railroad argued that plaintiff was not employed under the act when he went to town and that he did not resume employment upon his return. In upholding the jury's verdict for plaintiff, Judge Hand replied:

[A]lthough Mostyn was not "employed" on Friday while he was in town, when he came back that night to sleep he was as much and as little "employed," as he would have been had he been working during the day.
. . .

It seems to us that when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its "employ." Unless that is true, we are driven back to including only the very work itself with the addition of going to or away from it. . . . [W]e hold that, had Mostyn been sleeping in one of the "bunk cars," he would have been in the "employ" of the railroad. (Id. at 17-18).

In another track employee case, Casso v. Pennsylvania R.R. Co., 219 F.2d 303 (3d Cir. 1955), plaintiff was returning to his bunk car living quarters after a day off in town. In upholding a verdict for plaintiff, against defendant's argument that plaintiff was not back in his employment until he returned to the bunk car, the court said:

We do not think that the ascertainment of when a man is under the protection of the Act is to be determined by any such mechanical rule as the defendant contends. This is no baseball game in which the runner must touch base in order to be safe. . . .

[T]he trial court was right in telling the jury that this man, when injured, was sufficiently in the course of his employment to have the benefit of the Act if his case otherwise came within it. (Id. at 306).

Among cases cited in support of the proposition, (id. at 306 n.2), was Atlantic Coastline R.R. v. Meeks, 30 Tenn.App 520, 208 S.W.2d 355 (1947), in which an employee, after spending a day in town, returned to his bunk car and was injured by an exploding oil tank. The court held that he was in the scope of his employment.

(2) Factual Application

Thus in this case in which plaintiff was assigned to living quarters owned and maintained by defendant, received expenses and supplies from defendant, was subject to designation as a camp tender and had responsibilities for his quarters (R. at 370-72, Statement of the Facts, supra, para. 8), it cannot be doubted that plaintiff was "employed" by defendant for purpose of the act at and prior to the time when his foreman came to plaintiff's trailer prior to departure for the work site.

B. Plaintiff was "employed" when injured enroute to the work site

(1) The Cases Finding Coverage

In North Carolina R.R. Co. v. Zachary, 232 U.S. 248, 58 L.Ed. 591, 34 S.Ct. 305 (1914), an important subsidiary issue was whether the deceased plaintiff, killed on defendant's premises by a passing engine, was on a personal errand, rather than on the company's business, when he headed toward his off-premises boarding house just prior to departing on his run. To the court it was "clear that the man was still 'on duty,' and employed in commerce" at the time. Id. at 260, 58 L.Ed. at 596.

The principle was shortly thereafter extended to an employee killed on railroad premises by an engine at the close of his work day. The Court held:

In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. (Erie R.R. Co. v. Winfield, 244 U.S. 170, 173, 61 L.Ed. 1057, 1065, 37 S.Ct. 556 (1917), citation omitted.)

The rule was extended again in a case which arose under the Utah Workmen's Compensation Act but which has been cited repeatedly for its application to the Federal Employers' Liability Act. In that case, Cudahy Packing Co. v. Parramore, supra, Argument, part 1B, plaintiff was killed before reaching his

employer's premises. In upholding the award to decedent's dependents, the Court said:

Here, the location of the plant was at a place so situated so as to make the customary and only practical way of immediate ingress and egress one of hazard. 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 fact invited by his employer to do so. . . .

The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose. (*Id.*, 263 U.S. at 426, 68 L.Ed. at 370).

Similarly, in another case arising out of the Utah act which is also repeatedly cited for its persuasive impact on FELA cases, Bountiful Brick Co. v. Giles, 276 U.S. 154, 158, 72 L.Ed. 507, 509, 48 S.Ct. 221 (1928), the Court stated:

[E]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee is injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, . . . the injury is one arising out of and in the course of employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the

place where the work to be done is reached.

Application of these principles to the Federal Employers' Liability Act has thereafter continued in the appellate courts. Analysis of those cases makes it clear that in this case, plaintiff Jose Ruiz was "employed" while enroute from his trailer to the work site.

In Virginian Ry. Co. v. Early, 130 F.2d 548 (4th Cir. 1942), plaintiff's decedent died from complications of an accident which occurred on railroad property prior to starting work on his return from a private lunchroom about one-fourth of a mile from the shops in which he worked. The defendant railroad requested a directed verdict or at least a jury submission on the scope of employment issue. The trial court rejected both requests and decided the issue for plaintiff as a matter of law. In upholding that ruling the appellate court reviewed the applicable cases and stated that:

[T]he scope of employment includes not only actual services, but also those things necessarily incident thereto, such as going to and from the place of employment on the employer's premises. (Id. at 550).

The same year the issue was raised defensively in Lukon v. Pennsylvania R.R. Co., 131 F.2d 327 (3d Cir. 1942), a case arising from the death of a railroad section hand walking along the tracks from work toward his home. Despite the fact that there was an available alternative route home along public roads, the court

was "of the opinion that Lukon was clearly entitled to the protection of the act and that the contention of the defendant to the contrary cannot be sustained." Id. at 329. In support it stated an often repeated theme:

The Federal Employers' Liability Act was designed to be applied liberally for the protection of railroad and other employees. (Id. at 329).

The thrust of the cases to that point in time was summarized in Sassaman v. Pennsylvania R.R. Co., 144 F.2d 950, 952, 953 (3d Cir. 1944), as follows:

[I]t must be made to appear that his injuries were sustained either upon the premises where he normally performed the duties of his employment or upon premises so closely adjacent thereto as to be a part of the working premises in the sense that the employee was required to traverse them in going to or upon leaving his work. In other words, the employee's presence upon the premises where he receives his injuries must have been a necessary incident to the discharge of the duties of his employment. . . .

In short, the condition which makes possible a claim for injuries suffered as in the course of employment, but which are actually received on premises away from the employee's place of employment is the fact that the employee must, of necessity, traverse such other premises in order to reach or depart from the place of the discharge of his duties. In such circumstances, he is upon the adjacent or other premises, as a requisite of his employment either with the knowledge and consent or the approval of his employer, at the least, legally implied from the knowable situation.

The issue reached a federal appellate court again in Morris v. Pennsylvania R.R. Co., 187 F.2d 837 (2nd Cir. 1951), a case in which an employee was killed by a railroad car 45 minutes before he was to report for work manning a freight-handling platform truck. The employee had entered the yard at a forbidden but commonly used entrance. All entrances, however, required passing over various railroad tracks. Against the railroad's "formalistic" argument that decedent was not in the course of his employment when he was killed, the court responded:

It is now too late to argue that a worker is within his employment only when actually on the job Here, where the decedent was killed on the defendant's property only shortly before he was to report for work, there can be no doubt that he was in the course of his employment (Id. at 841).

In Carter v. Union R.R. Co., 438 F.2d 208 (3d Cir. 1971), the principle was identified again and applied in favor of a railroad employee injured on adjoining non-railroad premises enroute from a parking area to his agreed starting point on those premises. Although the railroad exercised no control over the path where plaintiff was injured, the court noted that his use of the property "was within the expectation and intentions of the railroad" and held that "he was clearly within the course of his employment." Id. at 210.

A state appellate court followed "the rule that the Federal Employers' Liability Act will be liberally construed by the courts to effectuate its purpose of benefiting and protecting

railroad employees" in Temple v. Southern Pacific Trans. Co., 105 Cal.App.3d 988, 992, 164 Cal.Rptr. 780, 782 (1980). In that case plaintiff was injured in a private vehicle driven by his engineer while enroute back to work from a layover point. The court applied the overriding federal rule and the scope of employment principle developed in the California state courts and held that the trial court had erred in concluding that plaintiff was not acting in the scope of his employment when injured.

Finally on point in this series of cases finding for plaintiff on the employment status issue is Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co., 705 F.2d 243 (7th Cir. 1983). There plaintiff had entered a switching yard from a different than usual entrance, intending to call a switch engine to the side where he was supposed to report to work. He was injured before calling the engine. The railroad argued that he was still in the process of commuting to work and thus outside the scope of the Federal Employers' Liability Act. In concluding that the case came within FELA coverage, the court analyzed the commuter cases as follows:

Commuters are excluded from coverage for two reasons -- they are not required to commute on their employer's trains, and, while commuting, they are in no greater danger than any other member of the commuting public. Employees traversing the work site are covered because this is a necessary incident of the days work. (Id. at 246, citations omitted).

(2) The cases denying coverage

The principle that divide coverage from noncoverage is best demonstrated by comparing the foregoing cases to those which have denied coverage. The following cases, spread from 1934 to 1981, show when and why FELA coverage is excluded.

In Young v. New York N.H. & H. R.R. Co., 74 F.2d 251 (2d Cir. 1934), the plaintiff locomotive fireman was injured going to his home in New Haven after completing his work. With his engineer he had walked a mile on a public road, taken a public bus, and "dead-headed" on one of defendant's trains before finally riding on one of defendant's locomotives past the New Haven station to Cedar Hill in order to pick up his street clothes. His election to ride the locomotive to obtain his clothes from the Cedar Hill station was his own choice instead of the alternative of continuing with the engineer and taking a trolley home. In ordering a new trial after a verdict for plaintiff, Judge Learned Hand said that plaintiff's desire to obtain his street clothes "was natural enough, but it had nothing to do with his employment, and could scarcely concern his relations with the defendant; he must arrange for it on his own responsibility." Id. at 253.

On retrial and further appeal from a judgment for plaintiff, the court again reversed, noting that plaintiff "had signed off at 6:45 p.m. and the accident happened at 9:00 p.m. His duty to appellant had ended." Young v. New York N.H. & N. R. R. Co., 79 F.2d 844, 845 (2d Cir. 1945). "Since the ride to Cedar Hill had no relation to interstate transportation, either past,

present, or future, the appellee fails to bring himself within the prescribed provisions of the Federal Employers' Liability Act" Id. at 846. In Sassaman v. Pennsylvania R.R. Co., supra, the plaintiff train dispatcher, "after having discharged, for the day, the duties of his employment" (id., 144 F.2d at 951), was injured when alighting from one of defendant's passenger trains onto a platform which was in a bad state of repair. On appeal plaintiff argued that "he was still upon the defendant's premises consequent upon and incident to his taking leave of his place of employment to return home" Id. at 952.

The court disagreed. Because after employment "he was free to travel home or go elsewhere, as suited his desires, by whatever means of transportation he chose [and] was not required to travel on the defendant's train. . . [or] upon a particular train[,] [t]here was absent . . . the employer compulsion as to the mode of travel to and from work which serves to attach or continue the employee relationship away from the place of employment, and makes an interstate employee's right of recovery for injury remediable under the Federal Employers' Liability Act." Id. at 953.

In Quirk v. New York C. & St. L. R.R. Co., 189 F.2d 97 (7th Cir. 1951), plaintiff's decedent was a general foreman who, after his gang had quit work for the day, left work at Muncie without notifying his supervisor and was bound for home. He drove a fellow employee's private automobile to Tipton and then used one of defendant's motor cars. He died in a collision with another motor car.

The court affirmed dismissal of the action holding that "decedent's employment relationship ceased at the time he departed from Muncie in a privately owned automobile. . . . 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. As for the trip from Tipton toward home: "It was only a continuation of the same engagement, without any alteration of motive or purpose." Id. at 101.

In Atchison, T. & S.F. R. R. Co. v. Wottle, 193 F.2d 628 (10th Cir. 1952), plaintiff's decedent, a section hand, and his bunk mate left their bunk house by automobile an hour after quitting time in order to obtain food and bedding, neither of which was provided by the railroad. Before reaching their destination twelve miles away, both were killed by a train.

Noting that it was decedent's sole responsibility to obtain the food and bedding, the court's majority concluded that: "When, therefore, after his day's work, he set out in his own car to obtain groceries for himself, he was on a mission wholly unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in commerce within the meaning of the Act." Id. at 631.

In Metropolitan Coal Co. v. Johnson, 265 F.2d 173 (5th Cir. 1959), plaintiff, a freight train flagman, boarded one of defendant's passenger trains to go from his home in Rhode Island to join his freight train crew in Boston. Plaintiff was injured enroute as a result of a children's prank which shattered a window.

In ruling against FELA coverage, the court noted that plaintiff was not required to go to work on defendant's passenger train and could have taken other routes, trains or means of transportation. Id. at 178.

Beyond that "plaintiff's employment as a flagman on a freight train did not subject him to any peculiar or abnormal danger while he was riding to work on one of his employer's passenger trains. On that train, he was exposed to no other or greater hazard than any other passenger." Id. at 178. The court refused "to extend the coverage of the Act to an employee who is miles away from his job and only proceeding to it in a public conveyance" Id. at 178.

Finally, in this series of cases denying coverage, there is Fowler v. Seaboard Coastline R.R. Co., 638 F.2d 17 (5th Cir. 1981). There plaintiff, a railroad clerk, during work hours on an enforced paid lunch break and on his employer's property, was killed after being thrown from a motorcycle recently purchased by another employee. Decedent's duties did not require him to use a motorcycle and the vehicle bore no relation to decedent's job as a clerk. Both the trial and appellate court found as a matter of law "that the motorcycle excursion was a purely private activity totally unrelated to the employment and denied recovery" under 45 U.S. C. section 51. Id. at 20.

(3) Factual application of the legal principles

This review of the cases has demonstrated that because plaintiff's activity, while enroute to his work site was totally

related to his employment, he was "employed" under the Federal Employers' Liability Act. See Statement of the Facts, supra, paragraphs 15, 16, 17, 23, and 24.

Plaintiff was not "on a personal errand" but was rather "on the company's business" when he headed toward the work site. See North Carolina R.R. Co. v. Zachary, supra.

He "was but discharging a duty of his employment"; "it was a necessary incident of his day's work; and it partook of the character of that work as a whole" See Erie R.R. Co. v. Winfield, supra.

The location of the work site "was at a place so situated so as to make the customary and only practical way of immediate ingress and egress one of hazard"; plaintiff "could not, at the point of the accident, select his way"; "[h]e had no other choice than to go over the railway[']s private gravel road] in order to get to his work"; and "he was in fact invited by his employer to do so." See Cudahy Packing Co. v. Parramore, supra.

Plaintiff was "injured" while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises." Bountiful Brick Co. v. Giles, supra.

"[T]he scope of employment includes not only actual services, but also those things necessarily incident thereto, such as going to and from the place of employment on the employer's premises." Virginian Ry. Co. v. Early, supra.

"The Federal Employers' Liability Act was designed to be

applied liberally for the protection of railroad and other employees." Lukon v. Pennsylvania R.R. Co., supra.

Plaintiff's injuries were sustained "upon premises so closely adjacent [to the premises where he normally performed the duties of his employment] as to be a part of the working premises in the sense that [he] was required to traverse them in going to . . . his work." See Sassaman v. Pennsylvania R.R. Co., supra.

Plaintiff was injured "on the defendant's property only shortly before he was to report for work" Morris v. Pennsylvania R.R. Co., supra.

Plaintiff's use of the road "was within the expectations and intentions of the railroad" Carter v. Union R.R. Co., supra.

"Employees traversing the work site are covered because this is a necessary incident to the day's work." Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co., supra.

On the other hand, the cases denying FELA coverage, clearly are inapposite.

Plaintiff's trip "had nothing to do with his employment"; "it had no relation to interstate commerce." See Young v. New York N.H. & H. R.R. Co., supra., 74 F.2d at 253, 79 F.2d at 846.

Plaintiff "was free to travel home or go elsewhere, as suited his desires" Sassaman v. Pennsylvania R.R. Co., supra.

Plaintiff "was engaged solely in a personal activity unrelated to his duties as an employee of the defendant." Quirk v. New York C. & St. L. R.R. Co., supra.

Plaintiff "was on a mission wholly unconnected and unrelated to his employment" Atchison, T. & S. F. R.R. Co. v. Wottle, supra.

"Plaintiff's employment . . . did not subject him to any peculiar or abnormal danger while he was riding to work" Metropolitan Coal Co. v. Johnson, supra.

Plaintiff's "excursion was a purely private activity totally unrelated to the employment" Fowler v. Seaboard Coastline R.R. Co., supra.

Thus the travel of plaintiff Jose Ruiz from his trailer headquarters, where he was clearly covered under the Federal Employers' Liability Act, enroute to the work site was also a covered activity. It most certainly was a covered activity once he reached defendant's private gravel road which provided access to the actual work site.

The next question is whether anything else even arguably removes that coverage. It is that question to which we now turn.

3. The trial court erred in granting summary judgment to defendant.

A. The court's ruling

The trial court's primary basis for granting summary judgment to defendant was the court's conclusion that plaintiff had changed his "on-duty" location from Montello to Lakeside. (R. at 432, see Addendum, Ruling at 4). That conclusion was based on the

court's finding relating to the permission given to plaintiff to drive his own vehicle to Lakeside. (R. at 430-31, See Addendum, Ruling at 2-3, findings 4-6). Because the court viewed the agreement between plaintiff and his foreman as one which was made "for personal reasons and having no causal relationship with his employment" and because plaintiff would not be "under the control and supervision of the defendant" while driving, the court concluded that plaintiff "was commuting from Montello to Lakeside" (R. at 432-33, see Addendum, Ruling at 4-5).

The court recognized that the use of plaintiff's own vehicle was "not controlling" but "pivotal" was the agreement that plaintiff would "be on his own time" until he arrived at Lakeside. Also persuasive to the court were the "other circumstances of not being compensated and reimbursed expenses for the travel" and "of using his personal vehicle for the trip" Thus the court was persuaded that plaintiff "was not in the course of his employment but pursuing personal objectives." (R. at 433, see Addendum, Ruling at 5).

Although the court recognized that "it may be said that plaintiff's driving of his car to Lakeside was done in the furtherance of defendant's business . . . it did so no more than any commute" The court's view was that plaintiff had not "reported to work" in Montello; "he needed to be available for work and under the supervision and control of the employer." (R. at 434, see Addendum, Ruling at 6).

B. The court failed to utilize FELA principles

Most striking in the court's ruling is its total failure to focus on the principles of the FELA cases defining the words "employed" as used in the statute. As a result, the court failed to recognize the following:

(1) Plaintiff was "employed" under the statute even while in his trailer before leaving on the drive to Lakeside.

(2) Plaintiff remained "employed" while on the drive to Lakeside.

(3) Plaintiff was most certainly "employed" when driving on defendant's private gravel road enroute to the actual place of work at Lakeside.

(4) There is no FELA authority for removing "employed" status pending "reporting for duty" or the report "to work" of an employee living in a railroad work camp.

(5) There is no FELA authority for removing "employed" status because an employee uses his personal vehicle enroute from a work camp to a work site.

(6) There is no FELA authority for removing "employed" status because an employee is willing to waive pay or expenses.

(7) There is no FELA authority for removing "employed" status because an employee is not under the direct control or supervision of his employer.

As a result of these failures, the court's conclusion that plaintiff "was not in the course of his employment as a matter of law" cannot stand.

C. The court failed to recognize triable factual issues.

Although it is the view of plaintiff that, as a matter of law he was "employed" at the time of his injury, it must be pointed out that even under the trial court's view of material facts, there were material factual issues in dispute. Those issues concern plaintiff's "on-duty" point, the validity of any agreement to change that point and plaintiff's entitlement to pay.

In its findings and ruling, the court determined that plaintiff's request to drive his own vehicle to the work site constituted a request to report to work at Lakeside, Utah and, therefore, change his "on-duty" location from its usual location at Montello, Nevada. That purported change in "on-duty" location, by the court's analysis, converted the trip to the work site into a "commute" during which plaintiff was "not in the course of his employment."

In making these finding and ruling, the court ignored the following evidence:

(1) Under the collective bargaining agreement, employees' time starts at regular designated assembly points. (R. at 352, 418).

(2) When an employee's living quarter is a trailer furnished by the railroad, the trailer is established as the employee's headquarters and designated assembly point. (R. at 353, 418).

(3) Plaintiff's foreman did not have authority to

alter plaintiff's starting time. (R. at 418).

(4) Plaintiff "assembled" at his headquarter point at Montello, Nevada. (R. at 418-19).

The court also found persuasive the fact that plaintiff was not compensated by defendant for his travel time after leaving the work camp enroute to the work site. However, the preceding evidence, also established that plaintiff was entitled to be compensated for that time. In addition, there was other competent evidence, relating to the pay issue, which was presented by the general chairman of plaintiff's union, that under the collective bargaining agreement, plaintiff was entitled to be compensated starting at Montello on the day of his accident. (R. at 417-19).

Thus, even if the FELA were ignored, as the trial court did, and everything turned on plaintiff's "agreement" and on the issue of pay, the trial court ignored evidence relating to the validity and effect of the "agreement" as it related to both the designated assembly point and plaintiff's entitlement to pay for his time going to the work site.

On this analysis alone the court erred in concluding as a matter of law that plaintiff was not in the scope of his employment.

D. An agreement to waive FELA coverage is void

Finally, the purported "agreement" between plaintiff and his foreman, as construed by the court would be void under provisions of 45 U.S.C. section 55. The reason the "agreement" is void is because it fits within the statutory prohibition contained within

the Federal Employers' Liability Act at 45 U.S.C. section 55, which in relevant part provides that:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void .

. . .

Section 55 has been interpreted to invalidate any company rule, policy or individually bargained for agreement which in any way limits or attempts to limit the carrier's liability under the FELA. See, e.g., Thompson v. Missouri Pac. R.R. Co., 15 F.2d 28 (8th Cir. 1926) (employee's agreement upon hiring). In this instance the "agreement" between plaintiff and his supervisor was done to limit plaintiff's on-duty status and therefore, to limit FELA liability as to an employee transporting himself between the work camp and the work site. Thus the "agreement" is void under Section 55.

VIII. CONCLUSION

Plaintiff has demonstrated that as a matter of law he was "employed" and entitled to the benefits of the Federal Employers' Liability Act at the time of his injury.

He has also demonstrated that even on the court's non-FELA analysis, material triable issues of fact existed.

On either alternative, the trial court erred in concluding that defendant was entitled to summary judgment.

Plaintiff respectfully requests this Court to reverse the trial court and remand this matter for further proceedings.

Dated: April 10, 1995

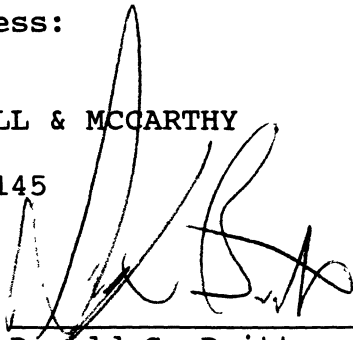
By: 

Donald S. Britt
Attorney for
Plaintiff/Appellant

CERTIFICATE OF MAILING

I, DONALD S. BRITT, hereby certify that on April 11, 1995, I served two copies of the attached BRIEF OF APPELLANT upon Bryon J. Benevento, the counsel for the Appellee/Defendant in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Bryon J. Benevento
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
P.O. Box 45340
Salt Lake City, Utah 84145



Donald S. Britt

Tab A

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

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

EMPLOYERS' LIABILITY

45 USCS § 51

by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

(Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

Tab B

10:00:21 AM 2 47

JAN 11 1994

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

JOSE RUIZ,

Plaintiff,

vs.

SOUTHERN PACIFIC
TRANSPORTATION,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

RULING

Case No. 910900648

Both parties move for partial summary judgment on the issue of whether plaintiff, a railroad employee, was within the scope of his employment when he was injured. These motions are made in the context of the Federal Employers' Liability Act.

The court grants defendant's motion for partial summary judgment. In doing so, it finds the following facts, viewed most favorably to the plaintiff:

Findings

1. The plaintiff suffered serious injuries on May 18, 1990, as a result of a one-car accident. His injuries left him mentally incompetent, and this court has appointed a guardian and conservator for him.

2. At the time of his accident, he was an employee of defendant, Southern Pacific Transportation Company. He was also a permanent resident of Ogden, Utah, but he temporarily resided at a workcamp in Montello, Nevada, to facilitate his dispatch to worksites directed by the defendant.

3. Montello had been plaintiff's ordinary "on-duty" location since January 1990. As such, defendant paid him from the time he reported to work there each day, and it also provided transportation for him and other employees to various worksites.

4. Prior to the accident, plaintiff sought permission to report to work at a worksite in Lakeside, Utah, instead of at Montello, on Friday, May 18. He made this request because he wanted to go home to Ogden the night before, and the drive back for him was closer to the worksite than to Montello.

5. His foreman, Andrew Gonzales, granted his request, subject to the agreement, discussed on several occasions prior to May 18, that because he would not be in company transportation and under company supervision, he would start and end his work at Lakeside. Accordingly, he would be on his own time and would not be compensated for his travel time to Lakeside, for which he was normally paid overtime, and, further, he would not be reimbursed for operating his private vehicle. He agreed because his proposed arrangement would also allow him to leave directly from Lakeside to Ogden and thus get home three hours sooner for the weekend. Gonzales made this agreement based on his understanding of company policy.

6. Plaintiff subsequently changed his mind about going to Ogden on Thursday night, probably because his crew worked late that day, and he stayed in Montello. His decision to drive his personal vehicle to Lakeside the next morning and to leave directly from Lakeside to Ogden did not change, however. About 5:00 a.m. the morning of the accident, Gonzales knocked on plaintiff's trailer door to inquire if he would be coming with the rest of the work crew who were in the gang truck; he declined. Instead, the plaintiff, who was dressed for work but still fixing his lunch and not assembling for work with the other crew members, said he would drive his own car and join them in Lakeside, where the crew would fix railroad tracks.

7. Enroute from Montello to Lakeside, plaintiff rolled his vehicle on a road owned by the defendant. Defendant paid plaintiff no wage compensation or travel expense for May 18, 1990.

Issues

In opposing defendant's motion, plaintiff presents two issues for determination. First, are Gonzales' declarations concerning plaintiff's statements regarding his personal travel arrangements and his status at the time of the accident objectionable hearsay under Rules 803 and 804, Utah Rules of Evidence? Second, was plaintiff's on-duty location in Lakeside or Montello on May 18, 1993?

Analysis

Based on the facts presented, the court concludes and rules as follows:

Admissions Are Not Hearsay

By his legal position, plaintiff maintains that he was within the scope of his employment at the time of his accident. His statements made to Gonzales prior to and on May 18 controvert that position. Plaintiff seeks to exclude those statements under Rules 803 and 804 on the basis that they are hearsay made inadmissible because plaintiff, who is mentally incompetent, is unavailable as a witness at trial.

Plaintiff's status is more than a witness; he is a party. Consequently, the subject statements, which are his own statements and are offered against him, are party-admissions not hearsay. See Rule 801(d)(2), Utah Rules of Evidence. These statements are, therefore, admissible. Furthermore, Rule 804, which is inapplicable in this case, is an exception to the hearsay rule to allow, not exclude, the admission of hearsay statements against interest if the declarant is "unavailable." It is a rule of necessity, having a predicate of unavailability, to avoid the loss of critical evidence.

Plaintiff Changed His On-Duty Location from Montello to Lakeside

Instead of reporting for duty at Montello with the other employees on the morning of May 18, plaintiff remained in his trailer fixing his lunch. Under his prior agreement with his foreman, Gonzales, he changed his on-duty location to Lakeside for

personal reasons and having no causal relationship with his employment. By changing his on-duty location and substituting company transportation for personal transportation, he, unequivocally, was not under the control and supervision of the defendant when he left Montello for Lakeside. In point, his employer could not supervise his conduct if he chose to exceed the speed limit or to drive without a seat belt, and thus minimize its exposure to liability. Unlike the other crew members who were in the gang truck and under the direction of their foreman and, thus, were ready to perform work as directed, plaintiff was subject to that direction only after he arrived in Lakeside. In short, he was commuting from Montello to Lakeside in his own vehicle.

The mere use of his own vehicle is not controlling in the court's determination. Plainly, the law allows an employee to drive his own vehicle with permission of the employer and still be in the course of his employment. Pivotal in the court's ruling is the agreement between plaintiff and Gonzales to change plaintiff's on-duty location to Lakeside and to be on his own time until he arrived there, thus making the ride from Montello to Lakeside a commute. The other circumstances of not being compensated and reimbursed expenses for the travel between Montello and Lakeside and of using his personal vehicle for the trip only further persuade the court that he was not in the course of his employment but pursuing personal objectives.

Ruling
Ruiz v. Southern Pacific
Case No. 910900648
Page 6

While it may be said that plaintiff's driving of his car to Lakeside was done in the furtherance of the mission of defendant's business, because he was needed on the job, and thus that act benefitted the business, it did so no more than any commute by an employee to a business so that he can perform his duties. Likewise, plaintiff's mere presence in the workcamp in Montello, away from his permanent residence in Ogden, did not establish that he had reported to work; he needed to be available for work and under the supervision and control of the employer.

The court concludes, therefore, that there is no issue as to any material fact and that defendant was not in the course of his employment as a matter of law. Defendant's counsel shall prepare, please, an appropriate order for the court's signature.

Dated this 11 day of January 1994.


MICHAEL D. LYON, Judge

Ruling
Ruiz v. Southern Pacific
Case No. 910900648
Page 7

CERTIFICATE OF MAILING

I hereby certify that on the 17th of January 1994, I sent a true and correct copy of the foregoing Ruling to counsel as follows:

E. Scott Savage
Bryon J. Benevento
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, UT 84145

Donald S. Britt, Esq.
BRITT & SIMLICK
Capital Legal Center
906 "G" Street, Suite 500
Sacramento, CA 95814

Erik M. Ward, Esq.
GRIDLEY, ECHARD & WARD
635 25th Street
Ogden, UT 84401


Deputy Court Clerk

Tab C

814963

MICROFILM ROLL **173** PAGE **592**

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

E. Scott Savage (2865)

Bryon J. Benevento (5254)

Attorneys for Defendants

50 South Main Street, Suite 1600

P. O. Box 45340

Salt Lake City, Utah 84145

Telephone: (801) 532-3333

DISTRICT COURT
WEBER COUNTY

'94 JAN 27 PM 4 24

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

JOSE RUIZ,

Plaintiff,

vs.

SOUTHERN PACIFIC

TRANSPORTATION COMPANY, and

JOHN DOES I - X, inclusive,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Civil No. 910900648

Honorable Michael D. Lyon

JAN 28 1994

Defendants' Motion for Summary Judgment and plaintiff's Motion for Partial Summary Judgment came before this Court for hearing on Thursday, December 9, 1993 at 11:15 a.m. The Honorable Michael D. Lyon presided. Plaintiff was represented by Donald Britt and Erik Ward. Defendants were represented by Bryon J. Benevento. Based upon Defendants' Motion for Summary Judgment, Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Affidavit of Andrew Stephen Gonzales, Plaintiff's Motion for Partial Summary Judgment, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, Defendants' Reply to Plaintiff's Memorandum in

Opposition to Defendants' Motion for Summary Judgment; and Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Plaintiff's Memorandum of Points and Authorities in Reply to Defendants' Motion to Plaintiff's Motion for Summary Judgment, Declaration of Robert Douglas, Defendants' Motion to Strike Affidavit of Robert Douglas, Memorandum of Points and Authorities in Support of Defendants' Motion to Strike Affidavit of Robert Douglas, and oral argument of counsel and for other good cause appearing thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the facts presented by the parties, viewed most favorably to the plaintiff, demonstrate that as a matter of law plaintiff was not within the scope of his employment at the time he was injured. Therefore, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Motion for Partial Summary Judgment is denied. The case is hereby dismissed.

DATED this 27 day of Jan, 1994.

BY THE COURT

Michael D. Lyon
Michael D. Lyon
Second Judicial District Court Judge

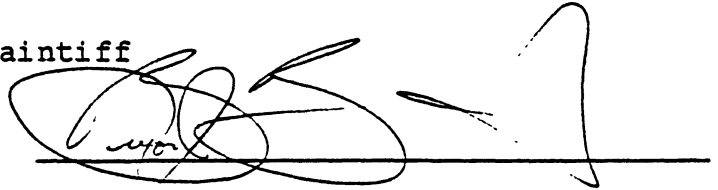
CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT to be mailed, postage prepaid, this 31st day of January, 1994, to the following:

Donald S. Britt, Esq.
BRITT & SIMLICK
Capital Legal Center
906 "G" Street, Suite 500
Sacramento, California 95814

Erik M. Ward, Esq.
GRIDLEY, WARD & HAVAS
635 25th Street
Ogden, Utah 84401

Attorneys for Plaintiff

A handwritten signature, likely of Erik M. Ward, is written over a horizontal line. The signature is stylized and cursive.