South Carolina Law Review

Volume 14 | Issue 4 Article 1

Summer 1962

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T. J. Lewis
Lewis, Lewis, Whaley and Cagle (Atlanta, GA)

FEDERAL EMPLOYERS LIABILITY ACT

T. J. LEWIS, JR.*

Justice Douglas of the Supreme Court of the United States has said of the Federal Employers Liability Act:

> The Federal Employers Liability Act was designed to put on the railroad industry some of the cost of the legs, arms, eyes and lives which it consumed in its operation .... The purpose of the act was to change that strict rule of liability to lift from the employees the prodigious burden of personal injuries that system had placed upon them, and to relieve men, who by the exigencies and necessities of life are bound to labor from the risks and hazards that could be avoided or lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.[1]

This is harsh language and to better understand the reason for this statement and the necessity of the enactment of the Federal Employers Liability Act, a background of the railroad industry prior to the passage of this act should be noted. In 1888, a railroad brakeman had one chance in five of dying a natural death. The average life expectancy of a railroad switchman in 1893 was seven years. In 1907, the year before the Act was passed, 4,534 railroad men were killed in railroad work and 87,634 were injured. In 1950, more men were engaged in railroad work but only 329 were killed and 22,000 injured, (this information is based on reports of the Interstate Commerce Commission).

In 1899, President Harrison said:

> It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.[2]

Prior to the passage of this Act, there was no uniform requirement that railroads provide any standard equipment. There

*Lewis, Lewis, Whaley and Cagle, Atlanta, Ga.

1. Wilkerson v. McCarthy, 336 U.S. 53, 93 L. Ed. 497 (1949).
2. Johnson v. Southern Pac. Co., 196 U.S. 1, 49 L. Ed. 363 (1904).

were no automatic couplers; there were no air brakes on trains. Consequently, the men had to go between cars to uncouple them by lifting a pin from a link. They also had to climb to the tops of cars to stop trains by the use of hand brakes.

Before 1908, all the common law defenses were available to the railroad employer. If the employee was injured through the negligence of a fellow servant, he was unable to recover damages for his injury. If he were guilty of negligence, that was likewise a defense available to the railroad. When an employee went to work for a railroad, he assumed all the risks normally incident to the job and almost anything that caused him to be injured was a risk that he had assumed.

As we know it today, the Federal Employers Liability Act provides essentially:

> 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, 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; . . . 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, . . . or other equipment.[3]

The Federal Employers liability Act is not a workmen's compensation act and in order for an employee who has been injured to recover under the act, he must prove that the carrier was, to some extent, negligent. A railroad employer is not an insurer of employees safety. Every case is different, of course, and it would be an impossibility to list here every example of a railroad's negligence which could result in a legitimate claim by an employee, but a few situations will be mentioned.

All railroad companies have an operating rule book which their employees are supposed to follow in carrying out their day's work. If an employee violates a company rule a fellow

3. 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

employee is injured, the railroad will be held responsible for that injury. On the other hand, however, if the injured employee has violated a safety rule or operating rule, that does not necessarily make his violation of that rule the sole proximate cause of his injury.

Under the decisions, employees have been allowed to recover on the basis of "hindsight". For instance, if an injured employee can show that the job which he was performing when he was injured could have been performed in a safer manner that that selected by his superior, then he will be entitled to recover.[4]

The maintenance of an unsafe place to work constitutes negligence on the part of the carrier and this can take many forms: objects too near the track; a frieght car improperly loaded;[5] rocks or lumps of coal[6] along the right-of-way; oil, grease, snow or even mud being present in a place where employees must walk and where they would likely slip if they stepped in or on the same. It has also been held that the actions of a fellow employee may render a place unsafe. An example of this might occur when an engineer makes a sudden or unusual stop or start causing a fellow employee to be thrown off balance and fall.

Quite vital to this Act is the fact that the carrier owes a non-delegable duty to furnish its employees with a safe place to work and safe appliances with which to perform their duties. This is a continuing duty from which the carrier cannot escape. This duty follows wherever the employee is sent to work, whether on the premises of the master or not, and whether the employer has control of the premises or not.[7]

A recovery in these cases is allowed for the same items as in any other negligence case, except that in a death case the law allows the personal representative of the estate of the deceased to recover only the pecuniary loss occasioned by the death of the deceased. In the case of an employe who has been killed in the line of duty, there is one other advantage that the plaintiff has in prosecuting the case that is not present under many state laws; this advantage is that the

4. Boston & M.R.R. v. Meech, 156 F. 2d 109 (1st Cir. 1946).
5. Webb v. Illinois Cent., 352 U.S. 512, 1 L. Ed. 2d. 503 (1957).
6. Cereste v. New York N.H. & H. R. R., 231 F. 2d. 50 (2d Cir. 1956).
7. Terminal R. Ass'n. of St. Louis v. Fitzjohn, 165 F. 2d. 473 (8th Cir. 1948).

deceased, if there were no eye witnesses to the occurrence, is presumed to have been in his proper place and in the proper performance of his duties.

It has not always been the case, but since the passage by Congress of the amendment to this Act in 1939, the Supreme Court has construed this Act most favorably to injured employees. In 1957, Justice Brennan of the United States Supreme Court said in an opinion:

> Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[8]

It should be pointed out that the engagement by the employer and employee in Interstate Commerce is one of the prerequisites for coming under the protection of this Act. Shortly after the passage of the Act in 1908, the courts were rather inconsistent in their holdings in this regard. At one moment, an employee could be engaged in Interstate Commerce and covered by the Act, and the next moment, engaged in Intrastate Commerce and not have the Act's protection. The amendment of 1939 eliminated this confusion by allowing protection if the employee was engaged in the furtherance of Interstate Commerce or if his duties closely and substantially affected such commerce.

Recently, the Supreme Court made it almost impossible to be employed by a railroad and not be engaged in Interstate Commerce or in the furtherance thereof by its decision in the Reed case.[9] This case involved a female employee who worked in an office building in Philadelphia and whose duties required that she take tracings from a filing cabinet and give them to a messenger who took them to a blueprint shop. There the blueprints were prepared and sent to various points on the lines of the Pennsylvania Railroad. She was injured when a cracked window pane blew in during a high wind. Her work was held to be in the furtherance of Interstate Commerce, and she was covered by the Federal Employers Liability Act.

It should be pointed out that this Federal law is uniform in every state and a railroad worker's cause of action cannot be defeated because of local rules of practice and procedure.

8. Rogers v. Missouri Pac. R. R., 352 U.S. 500, 1 L. Ed. 2d. 493 (1957).
9. Reed v. Pennsylvania R. R., 351 U.S. 502, 100 L. Ed. 1366 (1956).

> United States Supreme Court cannot accept as final, a State Court's interpretation of allegations in a complaint asserting a Federal right . . . Strict local rules of pleading cannot be used to impose unnecesssary burdens upon rights of recovery authorized by Federal laws . . . Certiorari was granted because the implications of the dismissal were important to a uniform application of the statute in state and federal courts.[10]

Though assumption of risks as a defense in these actions was eliminated by the 1939 amendment to the Act,[11] it still crept into cases occasionally. The Tiller case[12] clarified this when the Supreme Court declared:

> We hold that every vestige of the doctrine of the assumption of risks was obliterated from the law by the 1939 amendment and that Congress, by abolishing the defense of assumption of risks in that statute did not mean to leave open the identical defense for the master by changing its name to "non-negligence".

Whereas prior to 1939, contributory negligence was an absolute defense to an action of this type, it likewise was obliterated to the extent that an employee's claim was no longer defeated if he was contributorily negligent, the damages he was entitled to recover being diminished in proportion to the amount of negligence attributable to him. The effect of the Rogers decision, *supra,* was to allow an injured employee to recover even though he was 99% responsible for his own injury, if the railroads's negligence was responsible for the other 1% of his injuries.

In actions brought under this Act, the old common law defenses are eliminated, and contributory negligence serves only to diminish the damages the employee otherwise would be entitled to recover. The doctrine of res ipsa loquitur has also been held applicable in cases under the F.E.L.A.[13]

There have been cases where there were no witnesses to what occurred, but under some of these circumstances, obviously if human and mechanical operations had not been defective or negligently performed, the event would not have

10. Brown v. Western Ry. of Ala., 338 U.S. 294, 94 L. Ed. 100 (1949).
11. 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1958).
12. Tiller v. Atlantic C. L. R. R., 318 U.S. 54, 87 L. Ed. 610 (1943).
13. Jesionowsky v. Boston & M. R. R., 329 U.S. 452, 91 L. Ed. 416 (1947).

occurred. The agency or instrumentality which causes the injury or death must, of course, have been under the exclusive control of the defendant or its agents. In the case where an engineer was found dead from electric shock,[14] or in a derailment of a train or cars,[15] or the explosion of a boiler,[16] the injuries and/or deaths could not have occurred if everything had functioned properly and the jury in each instance was allowed to infer negligence and causation. As mentioned above, it is almost impossible to lay down any strict rules as to what constitutes negligence or what is res ipsa loquitur. However, in most instances of injury to a railroad employee, there is somewhere a negligent act, and the Supreme Court has declared that a jury trial is part and parcel of the relief afforded by Congress under this Act.[17] And it is rare when a court would be authorized to take a case away from a jury by directed verdict or otherwise.

SAFETY APPLIANCE ACT

Liability under the F.E.L.A. is predicated upon the common law basis of negligence. However, Congress has passed acts known as Safety Appliance Acts which require locomotives and freight cars to be equipped with certain safety devices, and a violation of any of these requirements (acts), imposes absolute liability without regard to negligence.[18] The F.E.L.A. and the Safety Appliance Acts are in pari materia. One provides the remedy, (Sec. 51-60); and the other the basis for the claim, (Sec. 2-23). The Safety Appliance Statutes do not provide for recovery by those injured nor do they specify the damage that the injured person might be entitled to recover. The acts merely require that locomotives and cars *in use* by carriers shall be equipped with certain devices, which are in safe and proper working order in accordance with the requirements of the Interstate Commerce Commission. The phrase "in use" as used above, does not mean necessarily that a car need be loaded with merchandise, and in route; it means simply that the car has not been withdrawn from service of the carrier.

14. Sweeting v. Pennsylvania R. R., 142 F. 2d. 611 (3d. Cir. 1944).
15. Jesionowsky v. Boston & M. R. R., 329 U.S. 452 91 L. Ed. 416 (1947).
16. Atlantic C. L. V. Weatherington, 245 Ala. 313, 16 So. 2d. 720 (1944).
17. Bailey v. Central Vt. Ry., 319 U.S. 350, 87 L. Ed. 1444 (1943).
18. Lilly v. Grand Trunk W. Ry., 317 U.S. 481, 87 L. Ed. 411 (1943).

If a railroad employee has been injured because of the failure or improper operation of any one of the designated safety appliances, the defenses of due or reasonable care may not be raised, and the carrier is not excused from liability no matter how diligent it may have been, for the action is not based upon negligence.[19] Also, it matters not when or where the defect or insufficiency occurs; if the appliance fails, there is liability on the part of the railroad which cannot be escaped.

Congress gave the Interstate Commerce Commission power to promulgate these specifications, rules and regulations and they have the force and effect of law.

In discussing the various safety appliances separately, we take first the automatic couplers.[20] This statute provides that it shall be unlawful for any common carrier to haul or use on its lines any car not equipped with couplers coupling automatically on impact and which can be uncoupled without the necessity of men going between the cars. This has been liberally interpreted by many courts so that now, in simple language, if anything at all goes wrong with an automatic coupler and an employee is injured thereby, he may recover. It is not necessary to show a "bad" condition of the coupler or that it had some particular defect. It is only necessary to show that when used in the usual and ordinary manner, it failed to properly function. If cars fail to couple automatically on impact, fail to remain coupled until released by some purposeful act, or if for any reason a trainman must go between railroad cars to adjust the coupling or to uncouple cars, the act has been violated, and the fact that the couplers may have performed properly before and after the occasion in question constitutes no defense. The test is whether the appliance functioned properly on the occasion in question. Similarly, in cases brought for a violation of the hand brake act, it is not necessary to show an actual break or visible defect—it need only be shown that the hand brake when used in the usual, customary and ordinary manner failed to perform properly. "The test, in fact, is the performance of the appliance."[22]

In addition to hand brakes just mentioned, Section 11 of Title 45, U.S.C. covers these appliances on railroad cars: sill

19. Brady v. Terminal Ry. Ass'n of St. Louis, 303 U.S. 10, 82 L. Ed. 614 (1938).
20. 27 Stat. 531 (1893), 45 U.S.C. 32 (1958).
22. Myers v. Reading, 331 U.S. 477, 91 L. Ed. 1615 (1947).

steps, ladders, grab irons, hand-holds and running boards. The same strict compliance is required with regard to these appliances, i.e., that they be secure and in a condition which meets the requirements of the Interstate Commerce Commission.

It has been held that even though the safety appliance which is defective is not being used by a trainman for the purpose for which it was or is intended, his claim is not defeated. If the defect was the proximate cause of the injury, he will be allowed to recover.[23]

The specific items that have been dealt with up to this point are safety appliances to be found on freight cars. On an engine, whether a steam locomotive or diesel, each part of the engine or locomotive is considered a safety appliance. Not only the couplers, the braking system, ladders, etc., but every nut, bolt and screw is a safety appliance.

Section 23, Title 45, U.S.C. provides that it shall be unlawful for any carrier to use on its line any locomotive unless said locomotive and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which they are put, and that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. In the *McCarthy v. Pennsylvania Railroad Co. case*[24] McCarthy, an engineer, noticed a "hot box" on the pony truck of his locomotive. This was a dangerous condition and McCarthy knew it. The condition was pointed out to him several times at different points on his run. He was even advised to put the engine off at the next station and get another engine, but he ignored this instruction and went on. A short while before he completed his run into Chicago, the pony truck broke down because of the hot box, the engine turned over and McCarthy was killed. Under the statutes, the defendant's duty was an absolute and continuing one to furnish plaintiff's decedent a locomotive in safe condition to operate. The decisions have held that it makes no difference where the defect occurs. The fact that it does occur is what gives rise to a cause of action.

> The defendant's answer tendered the issue that the sole proximate cause of the accident was the fact that the decedent continued to use the locomotive after he knew

23. Davis v. Wolfe, 263 U.S. 239, 68 L. Ed. 285 (1923).
24. 156 F. 2d. 877 (7th Cir. 1946).

> of its defective condition and failed to report it as was his duty under the rules. These acts constituted no defense. The decedent's acts were all concurring acts with the act of defendant in violation of the statute and were either acts of contributory negligence or assumption of risks of known danger from both of which as we have pointed out, the decedent had been relieved by the statute.

Railroads engaged in interstate commerce are required by this statute[25] to have locomotives equipped with power driving-wheel brakes and a sufficient number of cars in the train equipped with an air brake system so that the engineer can control the movement of the train by the train brake system and brakemen will not be required to use the hand brakes for that purpose. Here again it is not necessary to show any particular defect but only that the equipment failed to function properly or that an insufficient number of cars were coupled with air for the speed of the train to be controlled by the engineer.

The air brake system is not required on trains doing switching operations in freight yards but it has been held many times that, where an engine pulls cars over grade crossings within a city, this section of the act must be complied with.

This code section has been extended by court decisions so that it even covers a motor car operating over the tracks of a railroad if it is pulling other equipment.[26]

In all actions brought against railroads under the Safety Appliance Acts, contributory negligence does not enter the picture even to diminish damages as it does under the F.E.L.A. in negligence action.

> *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.[27]

Several other sections of this act should be mentioned in closing. The railroads are prohibited from entering into a contract or promulgating rules or regulations the purpose

25. 27 Stat. 531 (1893), 45 U.S.C. § 1 (1958).
26. Baltimore & O. R. R. v. Jackson, 233 F. 2d. 660 (D.C. Cir. 1956).
27. 35 Stat. 66 (1908), 45 U.S.C. § 53 (1958).

and intent of which shall be to enable the carrier to exempt itself from any liability created by this act.[28]

In personal injury actions brought under the Federal Employers' Liability Act the employee has three years in which to commence his action in a state or federal court in the district of the residence of the defendant, or in that district where the cause of action arose, or any jurisdiction in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the United States courts and the courts of the several states is concurrent.[29]

Railroads are prevented by statute[30] from interfering with employees who are called upon to give information to a person in interest as to the facts incident to the injury or death of any employee. This section provides for a penalty to be imposed on any person who attempts by contract, rule, regulation or by threats or intimidation to prevent a person giving voluntarily such information.

Railroading is still one of the most hazardous of occupations but Congress, through these Acts and the courts through liberal interpretation of them, have afforded a remedy.

28. 35 Stat. 66 (1908), 45 U.S.C. § 55 (1958).
29. 36 Stat. 291 (1910), 45 U.S.C. § 56 (1958).
30. 53 Stat. 1404 (1939), 45 U.S.C. § 60 (1958).