No. 2343

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

B. K. WHEELER, Esq., United States Attorney, of Butte, Montana, WALTER N. BROWN, Esq., Special Assistant to the Attorney General, of Washington, D. C.,

Attorneys for Plaintiff and Defendant in Error.

Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States, District of Montana.

No. 276.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 10th day of September, 1912, plaintiff filed its complaint herein in the words and figures following, to wit: [2]

*Page number appearing at foot of page of original certified Record.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Now comes the United States of America, by James W. Freeman, United States Attorney for the District of Montana, and S. C. Ford, Assistant United States Attorney for the District of Montana, and brings this action on behalf of the United States against the Northern Pacific Railway Company, a corporation organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Missoula, in the State of Montana; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

I.

For a first cause of action against said defendant, plaintiff complains and alleges:

1. That said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Montana.

2. Plaintiff further alleges that in violation of

the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:00 o'clock P. M. on May 1, 1912, upon its line of railroad **[3]** at and between the stations of Missoula, in the State of Montana, and Avon, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, B. D. Drew, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 10:00 o'clock P. M. on said date to the hour of 10:30 o'clock P. M. on May 2, 1912.

3. Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1654, said train being then and there engaged in the movement of interstate traffic.

4. Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

II.

For a second and further cause of action against said defendant, plaintiff complains and alleges:

1. That said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Montana.

2. Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:40 o'clock P. M. on May 1, 1912, upon its line of railroad at and between the stations of Missoula, in the State of Montana, and Elliston, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, V. Jenson, to be and remain on duty as such [4] for a longer period than sixteen consecutive hours, to wit, from said hour of 3:40 o'clock P. M. on said date to the hour of 4:00 o'clock P. M. on May 2, 1912.

3. Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1633, said train being then and there engaged in the movement of interstate traffic.

4. Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of one thousand dollars and its costs herein expended.

JAS. W. FREEMAN,
United States Attorney, District of Montana.
S. C. FORD,
Assistant U. S. Attorney, District of Montana. [5]

United States of America,
District of Montana,—ss.

S. C. Ford, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the District of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

S. C. FORD.

Subscribed and sworn to before me this 10th day of Sept., 1912.

[Seal] GEO. W. SPROULE,
Clerk U. S. District Court, District of Montana.
By C. R. Garlow,
Deputy Clerk.

Filed Sept. 10, 1912. Geo. W. Sproule, Clerk. [6]

Thereafter, on September 10, 1912, summons was duly issued herein in the words and figures following, to wit: [7]

[Summons.]

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting: To the Above-named Defendant, Northern Pacific Railway Company, a Corporation.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana, this 10th day of September, in the year of our Lord one thousand nine hundred and twelve, and of our independence the 137th.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. [8]

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within summons on the 10th day of September, 1912, and per-

sonally served the same on the 10th day of September, 1912, on Northern Pacific Railway Company, a corporation, by delivering to, and leaving with M. S. Gunn, Statutory Agent and Attorney for said defendant named therein personally, at Helena, County of Lewis & Clark, in said District, a certified copy thereof, together with a copy of the complaint, certified to by Clerk U. S. District Court attached thereto.

Dated this 10th day of September, 1912.

WILLIAM LINDSAY,
U. S. Marshal.
By Jas. A. Gillan,
Deputy.

[Endorsed]: No. 276. U. S. District Court, District of Montana. United States vs. Nor. Pac. Ry. Co. Summons. J. W. Freeman, Plaintiff's Attorney, Helena, Mont. Filed Sept. 10th, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [9]

Thereafter, on September 30, 1912, demurrer was filed herein in the words and figures following, to wit: [10]

In the District Court of the United States, District of Montana.

Case No. 276.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY CO., a Corporation,
Defendant.

Demurrer.

Now comes the defendant Northern Pacific Railway Company in said above-entitled cause and demurs to the first cause of action set forth in plaintiff's complaint on file herein upon the ground and for the reason:

1. That the said first cause of action set forth in plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

And the said defendant, Northern Pacific Railway Company, demurs to the second cause of action set forth in plaintiff's complaint upon the ground and for the reason:

1. That the said second cause of action set forth in plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

GUNN, RASCH & HALL,
Attorneys for Defendant.

Service of the within demurrer admitted and receipt of copy thereof acknowledged this 30th day of Sept., 1912.

J. W. FREEMAN,
Attorney for Plff.

Filed Sept. 30, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [11]

[Order Overruling Demurrer, etc.]

Thereafter, on December 10, 1912, an order was made overruling the demurrer herein in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

No. 276.

UNITED STATES

vs.

NORTHERN PACIFIC RAILWAY CO.

On motion of defendant, demurrer overruled and defendant granted 30 days to answer.

Entered, in open court, December 10, 1912. Geo. W. Sproule, Clerk. **[12]**

Thereafter, on January 31, 1913, answer was filed herein in the words and figures following, to wit: **[13]**

In the District Court of the United States, District of Montana.

No. 276.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Answer.

Now comes the defendant, Northern Pacific Railway Company, in said above-entitled cause, and for answer to the first cause of action of plaintiff's complaint herein:

1. Admits the allegations of paragraph 1 of the first cause of action set forth in plaintiff's complaint.

2. Denies each and every other allegation contained in said first cause of action of plaintiff's complaint.

And for further answer, and as a separate defense to said first cause of action of plaintiff's complaint, defendant alleges:

1. That the said train Extra No. 1634 east, on which said B. D. Drew was serving as fireman, left the City of Missoula, Montana, a district terminal on said defendant company's line of railroad, for the city of Helena, Montana, a division terminal on said line of road, at the hour of about 10:45 o'clock P. M. on said first day of May, 1912, and that under ordinary conditions, and according to schedule time, the run of said train from Missoula to Helena should, and could, have been made within from thirteen to fourteen hours from the time of departure, when said fireman would have been relieved from duty. That the said train arrived at the station of Avon, Montana, at the [14] hour of 11:02 o'clock A. M. on May 2, 1912, and was held there after such arrival, with the train crew, including said fireman Drew, on duty, until 1:15 P. M. of said day, at which time the said crew, including said fireman Drew,

had been on duty, engaged in, and connected with, the movement of said train a period of fifteen hours and thirty minutes. That after said train had proceeded eastward from the said city of Missoula, with but fifteen minutes' delay as far as Drummond, Montana, it encountered at, or immediately east of, Drummond, storms and snowfall of such unusual and unprecedented violence and severity that when said train arrived at said station of Avon the telegraph and telephone lines in both directions east and west had been broken and torn down, completely destroying and cutting off all means of communication with the operators and dispatchers at the stations of said defendant company in both directions from said station of Avon. That snow to the depth of fifteen inches had fallen, and was packed down upon said defendant company's railroad tracks, which fact, together with the fact that no means of communication were available in either direction from said station of Avon, made it impossible to proceed with said train, and the same was left at said station, and the crew of said train, including the said fireman, B. D. Drew, taken off and relieved from duty, after having been on duty, engaged in, and in connection with, the movement of said train but fifteen hours and thirty minutes, and no more. That thereafter the said B. D. Drew was not on duty on any part or portion of said second day of May, 1912, as a fireman, or in any other capacity engaged in, or connected with, the movement of said train, or any other train of said defendant company, but was merely watching and guarding the

engine of said train while said train so remained tied up and standing still at said station of Avon, on account of the conditions which existed, and which made any movement of said train **[15]** impossible. That no other person than the said B. D. Drew, competent and qualified to watch and look after said engine, while the same was standing still, was available for that purpose. And defendant alleges that the delay in the movement of said train, and the necessity for the watching and guarding of said engine by said B. D. Drew, were occasioned by, and due to, the act of God, and the result of causes which were not known to the said defendant company, or its officers, or agents in charge of said B. D. Drew at the time said B. D. Drew left said terminal at Missoula, and which could not have been foreseen.

And for answer to the second cause of action of plaintiff's complaint defendant:

1. Admits the allegations of paragraph 1 of said second cause of action of plaintiff's complaint.

2. Denies each and every other allegation contained in said second cause of action set forth in plaintiff's complaint.

And for further answer, and as a separate defense to said second cause of action of plaintiff's complaint, defendant alleges:

1. That the said train, Extra No. 1633, on which said V. Jenson was serving as a fireman, left the city of Missoula, Montana, a district terminal on said defendant company's line of railroad, for the city of Helena, Montana, a division terminal on said line of road, at the hour of 3:40 P. M. on said first day of

May, 1912, and that under ordinary conditions the run of said train from Missoula to Helena should, and could, have been made within from thirteen to fourteen hours after departure, when said fireman would have been relieved from duty. That the said train arrived at the station of Elliston, Montana, at the hour of 7:00 A. M. on May 2, 1912, at which time the said crew, including said fireman Jenson, had been on duty a period of fifteen hours and twenty minutes. That after said train had proceeded eastward from the city of Missoula, with but little **[16]** delay as far as Drummond, Montana, it encountered at, or immediately east of, Drummond, storms and snowfall of such unusual and unprecedented violence and severity, that when said train arrived at said station of Elliston the telegraph and telephone lines had been broken and torn down, both to the east and west of said station of Elliston, completely destroying and cutting off all means of communication with the operators and dispatchers at the station of said defendant company, in both directions from said station of Elliston. That snow to the depth of eighteen inches had fallen, and was packed down upon defendant company's railroad track, which fact, together with the fact that no means of communication in either direction from said station of Elliston were available, made it impossible to proceed with said train, and the same was left standing at said station of Elliston, and the crew of said train, including the said fireman, V. Jenson, taken off and relieved from further duty, after having been on duty, engaged in, and in con-

nection with, the movement of said train but fifteen hours and twenty minutes, and no more. That thereafter the said V. Jenson was not on duty on any part or portion of said second day of May, 1912, as a fireman, or in any other capacity engaged in, or connected with, the movement of said train, or any other train, of said defendant company, but was merely watching and guarding the engine of said train while the said train remained so tied up and standing still at said station of Elliston on account of the conditions which existed, and which made any movement of said train impossible. That no other person than the said V. Jenson, competent and qualified to watch and look after said engine while the same was standing still, was available for that purpose. And defendant alleges that the delay in the movement of said train, and the necessity for the watching and guarding of said engine by said V. Jenson, were due to the act of God and the result of causes which were [17] not known to said defendant company, its officers, or agents, in charge of said V. Jenson at the time said V. Jenson left said terminal at Missoula, and which could not have been foreseen.

WHEREFORE, having fully answered the plaintiff's complaint, defendant prays judgment that the said action be dismissed.

GUNN, RASCH & HALL,
Attorneys for Defendant.

State of Montana,
County of Lewis and Clark,—ss.

Carl Rasch, being first duly sworn, deposes and

says: That he is an officer of the defendant Railway Company, to wit, one of its Division Counsel for the State of Montana, and makes this verification in said defendant's behalf; that he has read the foregoing answer to plaintiff's complaint, and knows the contents thereof, and that the same is true to the best of affiant's knowledge, information and belief.

CARL RASCH.

Subscribed and sworn to before me this 30th day of January, 1913.

[Seal] W. W. PATTERSON,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires May 6, 1914.

Due personal service of within answer made and admitted and receipt of copy acknowledged this 31st day of Jany., 1913.

J. W. FREEMAN,
Attorney for Plaintiff.

Filed Jan. 31, 1913. Geo. W. Sproule, Clerk.

[18]

Thereafter, on June 27, 1913, the verdict of the jury was rendered and entered herein, in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant on the two causes of action set forth in the complaint.

JOHN W. WADE,
Foreman.

Filed June 27th, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. **[19]**

Thereafter, on June 27, 1913, judgment was duly rendered and entered herein, in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Judgment.

This cause came on regularly for trial on the 26th day of June, A. D. 1913, James W. Freeman, United States Attorney, and Walter N. Brown, Special Assistant to the Attorney General, appearing on behalf of the United States, and Messrs. Gunn, Rasch & Hall appearing on behalf of said defendant. Where-

upon a jury of twelve men were regularly impanelled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined, and after hearing the evidence and argument of counsel and the instructions of the Court, on the 27th day of June, A. D. 1913, the jury retired to consider their verdict, and subsequently returned into court and do say that they find a verdict for the plaintiff and against said defendant on the two causes of action set forth in the complaint on file herein; and thereupon it was by the Court ordered that judgment be entered against said defendant and in favor of the plaintiff in the sum of one hundred dollars upon each of the two causes of action set forth in said complaint.

WHEREFORE, by virtue of the law and by reason of the **[20]** premises aforesaid,

IT IS ORDERED and ADJUDGED that said plaintiff do have and recover from said defendant the sum of two hundred dollars, together with its costs and disbursements incurred in this action taxed in the sum of $143.05.

Judgment rendered and entered this 27th day of June, A. D. 1913.

GEO. W. SPROULE,
Clerk.

Attest a true copy:

GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States

District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 27th day of June, A. D. 1913.

[Seal] GEO. W. SPROULE,
Clerk.

[Indorsed]: No. 276. Title of Court and Cause. Judgment-roll. Filed June 27th, 1913. Geo. W. Sproule, Clerk. [21]

Thereafter, on September 24, 1913, defendant's bill of exceptions was duly settled and allowed and filed herein being in the words and figures following, to wit: [22]

In the District Court of the United States, District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant.

Bill of Exceptions.

APPEARANCES:

JAMES W. FREEMAN, United States District Attorney,

WALTER N. BROWN, Special Assistant to the Attorney General, Attorneys for Plaintiff.

Messrs. GUNN, RASCH & HALL, Attorneys for Defendant. [23]

In the District Court of the United States for the District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial before the above-entitled court, and a jury duly empanelled and sworn to try said cause, on the 26th day of June, 1913, upon the pleadings filed in said cause. James W. Freeman, United States District Attorney, and Walter N. Brown, Special Assistant to the Attorney General, appearing on behalf of the United States, and Messrs. Gunn, Rasch & Hall appearing on behalf of said defendant.

WHEREUPON the following proceedings were had and testimony introduced:

The following stipulation was made and filed in said cause, to wit:

(Title of Court and Cause.)

Stipulation [Re Facts].

Now come the plaintiff and the defendant in the above-entitled cause, by their respective attorneys, and, in order to facilitate the trial of same, hereby stipulate that the following facts are hereby conceded and admitted to be true in all particulars and are hereby submitted with the same force and effect as if proven upon the trial of said cause.

The defendant is a corporation organized and doing business [24] under the laws of the State of Wisconsin, and having an office and place of business at Missoula, Montana; it is, and was during all the times mentioned in plaintiff's complaint, a common carrier engaged in interstate commerce by railroad in the State of Montana.

FIRST CAUSE OF ACTION.

The defendant, on May 1 and 2, 1912, operated on its line of railroad, at and between the stations of Missoula, Montana, and Avon, Montana, its certain freight train known as Extra No. 1654 East, drawn by its locomotive engine No. 1654, said train being at all times engaged in the movement of interstate traffic.

Defendant, on above dates, required and permitted its fireman and employee, B. D. Drew, to be and remain on duty and engaged in and connected with the movement of said train as follows:

Train Extra No. 1654 East was scheduled to leave

Missoula, Montana, at 10:45 P. M. on May 1, 1912. Under the rules of said defendant company fireman Drew was required to and did report for duty 45 minutes prior to the time set for the departure of said train, or at 10:00 P. M. on May 1, 1912.

Train Extra No. 1654 East actually left Missoula, Montana, at 11:00 P. M. on May 1, 1912, and proceeded in an easterly direction towards Helena, Montana. It arrived at Avon, Montana, which is about 38 miles west of Helena, Montana, at 11:00 A. M. May 2, 1912, and was held there after such arrival with the train crew, including said fireman Drew, until 1:15 P. M. of said day, and the crew, with the exception of said fireman Drew, was then and there relieved from all duty in connection with said train on account of the so-called Federal Sixteen-hour Law, but said fireman Drew was required to remain and did remain in attendance upon the engine of said train as a watchman of said engine until 10:30 P. M. on May 2, 1912.

From 10:00 P. M. on May 1, 1912, to 10:45 P. M. on said date, fireman Drew was engaged in the preliminary work necessary to the preparation of said engine No. 1654 and train Extra No. 1654 East for [25] service, as required by defendant's rules.

From 10:45 P. M. on May 1, 1912, to 1:15 P. M. on May 2, 1912, fireman Drew was engaged in and connected with the actual physical movement of said train from Missoula, Montana, to Avon, Montana, in the capacity of locomotive fireman.

From 10:00 P. M. on May 1, 1912, to 1:15 P. M. on May 2, 1912, fireman Drew was not released from

duty, but was at all times performing service or held responsible for the performance of service in connection with the movement of said train.

At 1:15 P. M. on May 2, 1912, fireman Drew was relieved from all work in connection with the actual physical movement of said train, but was required and permitted to remain on said engine in the capacity of watchman from 1:15 P. M. on May 2, 1912, to 10:30 P. M. on said date. His duty, as watchman, was to keep up a small fire in the engine, so as to generate sufficient steam to pump water into the boiler to prevent the water from getting below the level of the crown sheet; to pump such water into the boiler when necessary for such purpose; and to prevent the engine from becoming dead.

SECOND CAUSE OF ACTION.

The defendant, on May 1 and 2, 1912, operated on its line of railroad, at and between the stations of Missoula, Montana, and Elliston, Montana, its certain freight train known as Extra No. 1633 East, drawn by its locomotive engine No. 1633, said train being at all times engaged in the movement of interstate traffic.

Defendant, on above dates, required and permitted its fireman and employee, V. Jenson, to be and remain on duty and engaged in and connected with the movement of said train as follows:

Train Extra No. 1633 East was scheduled to leave Missoula, Montana, at 4:25 P. M. on May 1, 1912. Under the rules of said defendant company fireman Jenson was required to and did report for duty 45 minutes prior to the time set for the departure of

said train, or at 3:40 P. M. on May 1, 1912.

Train Extra No. 1633 East actually left Missoula, Montana, at [26] 4:25 P. M. on May 1, 1912, and proceeded in an easterly direction toward Helena, Montana. It arrived at Elliston, Montana, which is about 29 miles west of Helena, Montana, at 7:00 A. M. on May 2, 1912, and the train crew, with the exception of said fireman Jenson, was then and there relieved from all work in connection with said train on account of the so-called Federal Sixteen-hour Law, but said fireman Jenson was required to remain and did remain in attendance upon the engine of said train as a watchman of said engine until 4:00 P. M. on May 2, 1912.

From 3:40 P. M. on May 1, 1912, to 4:25 P. M. on said date, fireman Jenson was engaged in the preliminary work necessary to the preparation of said engine No. 1633 and train Extra No. 1633 East for service, as required by defendant's rules.

From 4:25 P. M. on May 1, 1912, to 7:00 A. M. on May 2, 1912, fireman Jenson was engaged in and connected with the actual physical movement of said train from Missoula, Montana, to Elliston, Montana, in the capacity of locomotive fireman.

From 3:40 P. M. on May 1, 1912, to 7:00 A. M. on May 2, 1912, fireman Jenson was not released from duty, but was at all times performing service or held responsible for the performance of service in connection with the movement of said train.

At 7:00 A. M. on May 2, 1912, fireman Jenson was relieved from all work in connection with the actual physical movement of said train, but was required

and permitted to remain on said engine in the capacity of watchman from 7:00 A. M. on May 2, 1912, to 4:00 P. M. on said date. His duty, as watchman, was to keep up a small fire in the engine, so as to generate sufficient steam to pump water into the boiler to prevent the water from getting below the level of the crown sheet; to pump such water into the boiler when necessary for such purpose; and to prevent the engine from becoming dead.

Dated Helena, Montana, June 26, 1913. [27]

JAMES W. FREEMAN,
United States Attorney.
WALTER N. BROWN,
Special Assistant United States Attorney.
GUNN, RASCH & HALL,
Attorneys for Defendant.

Upon reading the foregoing stipulation to the jury the plaintiff rested.

Whereupon the defendant introduced the following testimony, in substance.

[Testimony of P. L. Gies, for Defendant.]

P. L. GIES, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is P. L. Gies. I live at Missoula, Montana. I am working at the present time for the Northern Pacific Railway Company, in the capacity of locomotive engineer. I was working on the first and second days of May, 1912, on Extra 1654 East from Missoula to Helena, as engineer. I just don't remember the time Extra 1654 left, but it was in the

(Testimony of P. L. Gies.)

night, before midnight sometime. I cannot remember how the conditions were there as to the weather. There was no unusual conditions that I recall. Where I remember of having first encountered snow was between Bearmouth and Drummond. Starting from Missoula, the town I came to first was Bearmouth and then Drummond. And after that I came to Garrison. Avon is east of Garrison and Elliston is east of Avon. It was early in the morning when I got to Bearmouth. The first time I remember seeing snow; that is, to notice it, was east of Drummond. At that place the snow was deep and heavy and wet; that is, it appeared that way. The wires were down in several places I noticed, and also the poles. That was caused by the snow. There was snow hanging on the wires and lots of it. I have been working on the railroad, on the Rocky Mountain Division about thirteen years. The Rocky Mountain Division is that branch of the road from Helena to Missoula, and west to Paradise. I think this snowstorm that I [28] encountered that night, was an extraordinary storm. I never noticed any storm at that time of the year of that nature. At Avon, if I remember right, it was over my shoe-tops. There was about eight or nine inches of snow. I got to Avon in the forenoon about eleven o'clock. I got to Avon—after I got to Avon the train tied up and the crew was relieved at 1:15 P. M. The reason we didn't get through before that time—we went to Avon for No. 3 and there was a flagman came there and laid us off for an extra west. We were tied up then. When

(Testimony of P. L. Gies.)

we were tied up the train crew, including myself, went into the caboose and the fireman watched the engine. The fireman's duty is to keep sufficient water in the boiler to avoid burning it, and sufficient steam to work the injector or to put water into the boiler. That is what the injector is for. This injector is used to pump water from the tank of the engine into the boiler. He is also to keep the engine from freezing up, the parts that were liable to freeze in cold weather. As to his having any duties with reference to the movement of the train during the time he was acting as watchman, they don't move the engine at all. He must keep the water over the fire-box, keep enough water in it, sufficient water over the crown-sheet to prevent the engine from burning. If there isn't any water in the engine, you couldn't do nothing with the engine, it would be useless. Before you could again use it, it would have to be brought some place to have the boiler refilled and the fire started. The boiler in that kind of an engine could not be refilled out there if the water got below the crown-sheet. You couldn't put any water in it; you would have no way of putting any in there. There are no facilities around that place for filling the boiler. Even if the water didn't get below the crown-sheet and the fire should be allowed to go out entirely, it would take a new crew to operate that engine and get up steam, about an hour and a half, if the engine was there seven or eight hours. If a little fire was kept up, and steam sufficient to work the injector it wouldn't take [29] at most thirty

(Testimony of P. L. Gies.)

minutes to start the engine up. If this train was tied up and they allowed the fire to go out during that time, there would be the likelihood of the water, during the next eight hours getting below the crown-sheet, if there was no pumping done. It would be liable to get below it. The crew that took this engine and train out after it was tied up was conductor Shaw and his brakeman and myself and fireman Daly. Fireman Drew dead-headed into Helena, I believe. The name of the fireman who accompanied me when I took the train out after the tie-up was John Daly.

Cross-examination by Mr. BROWN.

Just what were the weather conditions when I left Missoula—it was night-time and I didn't pay any attention. I couldn't say whether it was snowing or not when we left Missoula. I rather think it wasn't; I have a very faint recollection of the trip from Missoula to Bearmouth, or west of Bearmouth. I recall where I first encountered this heavy snow. It was just east of Bearmouth. Of course, I know there was snow between Bearmouth and Drummond; but the reason I thought it was heavy was because the poles were down and the wires down east of Drummond. I didn't notice any poles down up to the time I got to Drummond. I was not delayed materially up to the time I got to Drummond, by reason of this storm. I have been in the service of the Rocky Mountain Division for thirteen years; but nine years an engineer. All that length of time I worked on the Rocky Mountain Division. I never

(Testimony of P. L. Gies.)

saw a snowstorm like this before. I have seen lots more snow than that at other times of the year, and at other places on the division. It is not usual in the spring of the year to have this heavy, clammy snow. I never noticed any snow like that, at that time of the year. I cannot just recall whether I have noticed snow in May or not. I couldn't testify that I never did see snow in May. I don't remember two or three years ago when there was two or three feet of snow all over Montana. When I got to Avon the snow was eight or nine inches deep. The snow wasn't of sufficient depth [30] to prevent the physical movement of that train. The ordinary running time for a train of that size from Missoula to Helena is, ordinarily, about, I should judge, fourteen hours. From Missoula to Helena is one hundred and twenty miles. To go from Drummond to Garrison, I don't know just how long it did take us. Engine 1654 was Class W. I don't remember how many loads I had on that train. The tonnage rating of that engine between Missoula and Garrison at one time was twenty-four hundred tons. I do not know what the tonnage rating was at this time. The tonnage rating from Garrison to Elliston would be the same as I understand it, as it would be from Missoula to Elliston. That is, we handle them out of there with two engines. But I don't know just what their rating was. I had the usual train; about eleven A. M. I reached Avon and was held there until 1:15 P. M. The reason we were held at Avon was because a flagman came on Number 3 and told us to stay there

(Testimony of P. L. Gies.)

until an extra west arrived. If I remember right we went to Avon on No. 3's carded time, and we waited there in the clear for No. 3 to go by. We got an order from No. 3 to wait there for another train which was coming, with instructions from the flagman, signed by the conductor of No. 3 for us to remain there until this extra west arrived there. If we hadn't had to wait for this other train coming there we could have made the terminal of Helena with the engine and caboose. By leaving the train there and taking the engine and caboose and the train crew we could have made Helena within that time. I don't remember at what time that extra came along, but it must have been close to that time. I think it was before we tied up. At any rate, if I remember correctly, they came there too late for us to make Helena with the caboose. Ordinarily, we would have made Helena. We started out with the intention of going to Helena. I mean when we started on our trip from Missoula that was the intention of this train. Ordinarily we would have made it; we would have made it if we hadn't been detained there. I don't know that it is usual to go [31] in light under these circumstances, where it is possible to get in within sixteen hours. I have done it at times; and I haven't done it. I have received orders to do that. I have done it lots of times. The first poles and wires down that I noticed, as near as I can remember, was about two miles east of Drummond,—two miles and a half that the poles were not in an upright position; they were leaning over. I saw them

(Testimony of P. L. Gies.)
down as I went along; I didn't pay much attention to it. I have seen wires down before on account of storms. The only place I believe I have seen it is at Wallace, over between the Coeur d'Alene and Wallace. Over there the snow is pretty deep. When I got to Avon at eleven A. M. I didn't communicate with the dispatcher. I couldn't tell whether the wire was working at Avon or not. I cannot just remember whether I got a message or not; if I did I got it through the conductor. Handed to me by the fireman. But I cannot remember handling any message. It don't seem clear any more; I presume there was one likely. It is customary to receive a message to tie up. I have always been tied up with a message. I did not know of any trains passing while we were there at Avon. Of course we met Number 3, and an extra west I believe; I ain't sure about that though. I think we did meet an extra west but I don't remember of any trains going the other way. Myself and the rest of the crew were tied up, with the exception of Fireman Drew. The result would be, if the water should become too low in that boiler, and a fire in the fire-box, to burn the engine. If the crown-sheet became heated it might possibly cause an explosion, under some conditions it would. We would ordinarily have a small amount of steam; while he was watching her you know. It was possible to have killed that engine there. If that engine had been killed and the fire been put out of that engine, Fireman Drew could have been relieved, and he would have had no work to perform. It takes an hour and a

(Testimony of P. L. Gies.)

half to build the fire. If you had everything convenient and handy the same as he would have at the roundhouse. [32] We have no supplies in the engine to build a fire with. We carried no wood, or anything like that. After I reported for duty again, another fireman was sent to take the place of Fireman Drew. I don't know how he got there; I know he fired the engine for me out of that town. Of course, he was sent there from somewhere, I don't know where he came from. They maintain at Garrison, at different times, different numbers of train crews. I would say there are four or five. They maintain helper crews there, and they have engines there. If one of these firemen was sent down from Garrison, I suppose it would have been possible to have sent down a new engine, to relieve our crew which was stationed up there at Avon, but they didn't have any road engines at this station of Garrison to take the place of the road engine I was running; that is they don't keep them there. From Helena to Avon is about twenty-eight miles. They keep engines there. It would have been possible to have sent an engine from Helena to relieve this crew, if they had them. It is a terminal. Outside of the mere inconvenience and delay caused by rebuilding this fire and keeping water in the engine, this engine could have been killed there at Avon and the fireman could have been entirely relieved; but the cold weather, you have to arrange for that.

Redirect Examination by Mr. HALL.

Q. Well, how do the snowstorms during the winter months, when there is a heavy fall of snow, affect

(Testimony of P. L. Gies.)

the movement of the train and the wires, as compared with the snow that you saw there in May?

A. Well, the winter snows are more dry. The snow falls on them and falls off; while the wet snow just sticks up on both of them. It is like moss gathering on the rails.

I have never seen it to affect the wires like this. I testified that when we got to Avon that we would have had time to have taken our engine and caboose and came into Helena, had it not been [33] for the fact that we were delayed by the train on this siding. I understood the conductor had directions to do that in the event that we didn't get in.

Q. Well, do you know how it was that this extra west sent a flagman down to stop you at Avon, instead of wiring?

A. I suppose he was having trouble with the wires.

Q. Is it the usual and customary method to stop a train at telegraph points?

A. Yes, it is, in emergency cases.

Q. Well, I mean if everything is working all right, if the wires are all right?

A. No, if the wires are all right they don't do that.

When No. 3 passed and this flagman ordered us to wait for this extra going west, it left us right there on the siding and we couldn't move. They notified us to stay there for that extra west. After that extra west had gotten there, we did not then have time to go into Helena with the engine and caboose. We had orders out of Garrison to flag on No. 4 out of Avon. There is a rule regarding our tying up

(Testimony of P. L. Gies.)

after sixteen hours, in the event that we get no instructions to tie up. There is a bulletin or rule whereby the crews will tie up of their own accord.

Recross-examination by Mr. BROWN.

Why, I knew of the storm and the snow when we were at Garrison but I didn't have any information about the wire failure or anything like that. I never saw the wires down on account of snow, except in this place here.

[Testimony of J. R. Shaw, for Defendant.]

J. R. SHAW, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. HALL.

My name is J. R. Shaw; I live at Missoula, Montana. I am [34] working for the Northern Pacific Railway Company, and was on May 1st and 2d, 1912, in the capacity of conductor. I took a train out of Missoula, May 1, 1912, extra 1654 east, a freight train. As to the weather conditions, at the time we left Missoula I don't recall any; no unusual conditions. I first remember of seeing snow on that trip at Drummond when we stopped there to water. I got out of the caboose. I remember the snow wetting through my shoes. It was a heavy wet snow. I couldn't say the amount. The snow had started to melt at Avon, when we got there. There was probably—oh, must have been ten inches of snow, wet and heavy. I have been railroading on the Rocky Mountain Division six years. The snowstorm is the only one I have ever seen that was heavy enough to

(Testimony of J. R. Shaw.)

take the wires down. That kind of a snowstorm on the movement of the trains, as compared with a dry snow, is harder on the rails; the train pulls a little heavier. The engine slips and all such things as that. As to the wires, the delay may come from the wires being down. When we left Garrison I had an understanding or instructions from the dispatcher there as to what we should do with this train in the event that it developed that we could not reach Helena within sixteen hours. Our understanding was that I would set my train out and we would go in with the caboose. There was no instruction as to any particular place that we should do that, but any place where I saw I couldn't make it with the train. We were to take the caboose and go into Helena in time for the sixteen hours. When we arrived at Avon at eleven o'clock, we still had plenty of time to take the engine and caboose and go into Helena. We didn't do that because we went to Avon for three and when three came there was an extra west that came on through on account of the wires being down. They put a flagman on No. 3 and held us at Avon until they arrived. We tied up about one fifteen and he came about the time we tied up. I remember seeing the conductor. It was not possible for us to go on east until we got that word. After this west bound train came along and we found we couldn't reach Helena with the engine and [35] caboose we tied up; it was too late to make it. We had standing instructions to tie up any time we couldn't get into Helena before the sixteen hours expired. We always had those instruc-

(Testimony of J. R. Shaw.)

tions, not to violate the sixteen hour law. When we tied up, the engine was taken around behind the caboose, taken around before we tied up, so as to be ready to go. Everybody left the engine, except the fireman and he watched the engine.

Q. Why was it that this west-bound train sent a flagman on No. 3 to notify you—wasn't Avon a telegraph station?

A. No wires; could get no communication with the dispatcher.

Cross-examination by Mr. BROWN.

I did not see any poles or wires down at Avon. I didn't see the condition of the wires between Helena and Avon. It was night-time when we left there. The dispatcher was located at Missoula. We arrived at Avon at eleven o'clock in the morning. I do not know anything about the communications between Avon and Helena, at that time; at the time we arrived there I did not see any poles or wires down at that time. I would have no reason to communicate with Helena. I do not know whether or not the wires were down between Avon and Helena. I made no attempt to communicate with Helena. I would have no reason to; the dispatcher is in Missoula.

Q. Could you have communicated with him around by the way of Butte to Missoula?

A. Well, I knew no way of doing that; I don't know whether you could get around that way or not. That is on a foreign road.

Q. The dispatcher was located at Missoula?

(Testimony of J. R. Shaw.)

A. He was. Helena is a terminal. They have engines and crews stationed there, if they are not on the road, or west of here. They are not supposed to have any after the last one goes out until some more gets in. I don't remember whether I received an order to tie up at Avon. I couldn't say whether I did or tied up myself. I would [36] have tied up myself if I hadn't got it. If I hadn't received it I would. It is customary to receive an order to tie up.

Redirect Examination by Mr. HALL.

The operation of these trains between Helena and Missoula would be conducted from Missoula, from the dispatcher's office. There would not be anybody in Helena that would know the location of the various trains on the division at that time. I could not reach Missoula.

The COURT.—You have standing instructions to govern your conduct when you are caught out on the road? A. We have to abide by the law.

Q. Do those instructions provide that some man shall take care of the engine?

A. No, the only instructions to the train crew is, to all of us, not to violate the sixteen hour law. We all have a copy of the sixteen hour law.

As to the care of the engine, under the sixteen hour law, it had been customary up to that time to have the fireman look after it. On account of the fact that he is concerned with the movements of the trains, after the train is tied up his business is watchman, to take care of the engine.

(Testimony of J. R. Shaw.)

Recross-examination by Mr. BROWN.

As to whether I could have communicated by way of Logan with Missoula, that is too much for me to answer. I don't know the condition of the wires. I am not an operator and I had no way of communicating on the wires at all, only through an operator. I didn't make any effort to do it.

Redirect Examination by Mr. HALL.

I do not know where Mr. Drew is. I understood he was away on a vacation but I am not sure. [37]

Recross-examination by Mr. BROWN.

After this extra train had passed us there at Avon we didn't come on into the terminal at Helena because I didn't have time. It was one fifteen or after when this train got there; this extra, and my sixteen hours was up at one forty-five. The reason I didn't come in was because I couldn't get in within the sixteen hours. I left Avon after my eight hours rest. I was there nine hours and some minutes. Then I came through with the train. The same train and engine and a different fireman.

[Testimony of H. L. Davis, for Defendant.]

H. L. DAVIS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is H. L. Davis. I live at Missoula; am working for the Northern Pacific Railway as engineer. I was working for that company in that capacity on the second day of May, 1912. I run a train out of Missoula on the first day of May, 1912, extra

(Testimony of H. L. Davis.)

engine No. 1633, from Missoula to Helena. I left Missoula in the afternoon; As to the weather conditions at the time of leaving, I didn't notice anything. On that trip we encountered a snowstorm. I first observed snow about Bearmouth. I don't remember what time it was when we got to Bearmouth. It was at night sometime,—the evening. We got to Elliston in the morning about seven o'clock. The snow we found there was about half way up to your knees. The condition of the snow all along from Garrison up to Elliston was very heavy and wet. I have been working on the Rocky Mountain Division about fourteen years, about ten years an engineer. Prior to that I was fireman; traveling fireman. As to that snowstorm, I never saw anything as bad at that time of the year in my experience; that kind of a snow in May makes the track heavy and the poles and wires go down. It has [38] a great deal to do with the movement of trains. They had wire trouble. We couldn't get in communication with Missoula, as a result of that snow. When we got to Elliston about seven o'clock in the morning of the second, we were tied up there on account of the sixteen hour law. We had been on duty at seven o'clock that morning over fifteen hours; fifteen hours and twenty minutes, I think, when we were tied up. When we went in there I didn't have any tie up instructions. We stopped there because our sixteen hours were up. We headed in there because our sixteen hours were up. Went into the siding of my own accord. Upon tying up we all went to bed, except the fireman. He

(Testimony of H. L. Davis.)

watched the engine. There was nobody available and competent to watch the engine except him. The duty of a person who is watching the engine during the time the train is tied up, is to keep enough water in the boiler and enough fuel in to keep up steam to pump the water from the tank into the boiler. If an engine was allowed to die, or if the fire was allowed to go out entirely after the eight hours rest was up you couldn't move the engine until you got water into the boiler and fire enough to make steam. If the water in the meantime, by reason of leaking out of the boiler, or any other reason, had gotten below the level of the crown sheet, the top of the fire-box, you could not fire up the engine and pump water into the boiler. If that condition arose, that engine before you could put it into use, would have to be brought into some terminal point where we could get fuel and water. In the event the engine was dead you would have to take down the engine, disconnect the drive wheels from the piston rod, as there in no way of lubricating the valves and cylinders, which are lubricated from a lubricator or a cup that works by steam. So that if you had no steam you would have to disconnect the engine.

Q. How long would you say it would take for that to be done?

Mr. FREEMAN.—I don't see that this makes any difference at all. This is absolutely irrelevant and immaterial. [39]

The COURT.—Except to show hardship; it has no material bearing.

(Testimony of H. L. Davis.)

Mr. FREEMAN.—The law is plain upon that proposition.

The COURT.—Objection sustained.

Exception taken by the defendant.

This fireman was not required or supposed to move this locomotive or train during the time he was acting as watchman there. The crew took that train out after the period of rest was the same crew that I had in there, myself as engineer, and I had a fireman that relieved my fireman that I had; that is, the fireman who acted as watchman he did not act as fireman when we started out.

Cross-examination by Mr. BROWN.

It had always been the custom previous to this time for the fireman or the engineer to watch the engine when they were tied up. Sometimes we would have the fireman watch, and sometimes we would have the engineer watch her. I have watched her myself on some occasions. Elliston was a regular watering place. I did not attempt to communicate with Helena at all. I left that to the conductor; it was up to the conductor. The ordinary running time for trains of this kind from Missoula to Helena is twelve to fourteen hours. That is the average running time. We consumed in running from Missoula to Elliston about fifteen hours I think. The reason we went off duty at Elliston was because you couldn't make Helena within the sixteen hours. If it hadn't been for the storm I could have made Helena in sixteen hours. Eliminating the sixteen hour feature of

(Testimony of H. L. Davis.)

it, it was possible for us to proceed to Helena. The storm didn't prevent us from proceeding along provided the sixteen hour limit had not expired.

Redirect Examination by Mr. HALL.

That is, we could have got to Helena some time, if we had kept on,—in three or four days. Our instructions in regard to the [40] sixteen hour law, when we had been on duty sixteen hours, were to keep clear of the main track and tie up.

Recross-examination by Mr. BROWN.

Those instructions apply to the fireman as well as to the rest of the crew. They apply alike to all of the crew.

[Testimony of C. A. Bronson, for Defendant.]

C. A. BRONSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is C. A. Bronson. I live at Missoula, Montana; am working for the Northern Pacific Railway Company, and was working on the first and second days of May, 1912, for the Northern Pacific Railway Company, in the capacity of conductor. I had a train out of Missoula on the first of May, 1912, Extra 1633, running to Helena. We left Missoula in the evening, four or five o'clock, I think. As I remember it the weather was clear; I am not certain. I first remember seeing snow upon that trip between Bearmouth and Drummond. It was a wet, heavy snow. By the time we got to Elliston, there was

(Testimony of C. A. Bronson.)

ten inches, or something like that. I have been railroading on that division eight years. That was an unusual snowstorm for that time of the year. It would stick to the wires and make them heavy and break them down. In my experience I never knew of any other storm in that locality that had the same effect upon the wires. Because of the breaking down of the wires you could hardly get train orders for the movement of trains. It made the time slow coming over the road. We got to Elliston about seven o'clock A. M. We pulled into the side track and were tied up for orders. I think we had orders to tie up. We tied up at Elliston because we didn't have time to make Helena in our sixteen hours. The cause of this **[41]** failure to make the run within this sixteen hours to Helena was on account of the wires, the wire failure and the heavy snow.

[Testimony of B. Jensen, for Defendant.]

B. JENSEN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

My name is B. Jensen. I live at Missoula, Montana; am working for the Northern Pacific Railway Company, and was working in May, 1912, on an extra east as fireman. I had been working on the Rocky Mountain Division at that time about five years as fireman. When we left Missoula it was about the usual weather, I guess. We first ran into snow at Bearmouth. When we got to Elliston it was pretty deep, about ten inches I guess—along

(Testimony of B. Jensen.)

there. It had a bad effect upon the wires. After the train got to Elliston it was tied up there eight or nine hours. When the train tied up, I watched the engine for a period of about four hours, I think; something like that. From seven o'clock until they came to relieve me. A fireman came in on the first train to relieve me. I don't know which way he came, but he came on the first train. As soon as he came I was relieved.

Cross-examination by Mr. BROWN.

At that time it was customary for firemen to watch the engine after we were tied up as a result of being on sixteen hours.

Redirect Examination by Mr. HALL.

That is, that was the custom if no other men were available. **[42]**

[Testimony of H. E. Thompson, for Defendant.]

H. E. THOMPSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. HALL.

By name is H. E. Thompson. I live in Missoula. At present I am night chief dispatcher for the Northern Pacific Railway Company. May 2d, 1912, I was dispatcher at Garrison. I was acting as night chief. His duties were to relieve the day operator at eight o'clock in the evening, and assume the duties of the day chief, or any other official that may not be present, who has the disposition of all power at terminals, and direct the supervision of the move-

(Testimony of H. E. Thompson.)

ment of the trains on the division. A train running between Missoula and Helena at that time would always be handled from Missoula. That is the only point at which we have dispatchers located on the Rocky Mountain division. There was no dispatcher at Helena who had anything to do with the movement of the trains. The outlying points are controlled only by telegraph operators who take orders and deliver them to the parties to whom they are addressed. The main offices are located at division points. They operate the Montana division in a similar manner in which the chief operator at Missoula operates and controls the Rocky Mountain division. The chief operator at Livingston on the Montana division has no authority or control of a train west of Helena. He would be in no better position, no position to move the train than—well, he would be absolutely at sea, as though he did not control any wires at all, because he would consume at least, possibly five or six hours, in getting the location of the various trains on the Rocky Mountain division, in finding out where they all were. You see there might be extras going west and extras coming east. They wouldn't dare to give one man an order against another one, until he had found out where they all were.

That, of course, would take a great deal of time before he could get hold of the various operators along the line and find out the leaving [43] time and the location of each train. I have the train sheets with me covering the movements of the trains

(Testimony of H. E. Thompson.)

from Missoula east on May 1st and 2nd, 1912. I can tell from those train sheets, what the weather conditions were at the time No. 1633 left Missoula between four and five o'clock on May 1st. The dispatcher gets information from operators at various points along the line indicating the weather conditions at different times of the day, at four P. M. we will say and again at eight o'clock in the morning. The weather reports were en route between Missoula and Helena at four o'clock on the afternoon of May 1st. At four o'clock P. M. the weather indications were at Helena, cloudy, light northwest winds; at Blossburg the summit of the Continental divide, cloudy and light northwest wind. Elliston, cloudy, strong northwest wind, 38 above. At Garrison, strong northwest wind, cloudy, calm, 47 above; no rain. At Missoula was cloudy and light rain. The next is just a little notation made by the track dispatcher at five P. M. and he says, "Snowing at Blossburg, Drummond and Garrison to Avon. Snow two or three inches deep on the ground." No depth of snow mentioned from Blossburg to Drummond. At eleven forty P. M. fourteen inches of snow at Blossburg, sleet and rain. That is the only reference made to weather conditions on that day. At two o'clock the next morning the wires were all down east of Missoula. In Missoula the weather was cloudy, calm, and raining, with light snow. That was twelve, after midnight; east of Missoula the wires all went down at eleven forty and twelve o'clock at night. Communication was shut off from

(Testimony of H. E. Thompson.)

Missoula east. How far that condition extended east, I am unable to say. At the time 1633 was ordered out on the afternoon of the first there was not any weather condition at Missoula, or reports along the line, that would indicate difficulties in the moving of these trains. The weather report there shows that the temperature was some place between 42 and 60. Up to the time, and prior to the time, No. 1654 left there at about eleven o'clock, we had no report of **[44]** wire trouble. At the time that each of those trains were ordered out we were not able to foresee any unusual condition—no other than could be controlled by the reduction of tonnage, for instance. After the wires were down I made two attempts to communicate with these train crews from Missoula, and after waiting an hour or two hours after midnight, I am not entire positive, but when I saw the wires were down and that I couldn't get any communication east at all, I sent a message by way of Spokane, that is west, Spokane, Washington and routed via the Great Northern, by the way of Whitefish, Havre, Montana, and then Montana Central by way of Great Falls. It was received at the relay office here in Helena and transmitted to the dispatcher at Garrison.

Q. Do you recall what instructions you sent around in that roundabout way?

A. I remember making an attempt to get hold of the line to find out where the trains were and the various positions they occupied on the road east of Missoula and telling the time that the various crews

(Testimony of H. E. Thompson.)

that were moving the trains had been on and what time their sixteen hours expired. I am not positive whether I told him to relieve them or not. That would be understood, when he had information that the period expired, that would be sufficient. My idea was to advise him at the time each one of those crews had gone on duty at Missoula, and the time they should be released. Then a second attempt was also made, for the Great Northern might have been having similar trouble and I sent a message by way of Spokane and routed it by way of the Short Line coming up by way of Pocatello and by way of Butte. The wires were down between Butte and Garrison. I don't know whether it was received in Butte or not.

Q. What was the condition between Garrison and Elliston? **[45]**

A. Very similar to what they were west of Garrison, that is, relative to the wire condition west?

Q. Yes.

A. The same condition existed at Garrison when I got up there at nine thirty, which was the next morning. We had no wire communication to Helena.

Q. You came up to Garrison the next morning?

A. I came up to Garrison on Number 4 when we lost communications west. I got on No. 4 the next morning and moved east, with the intention of going until I did get in communication, and the period of time which elapsed between the time the wires went down and we established communication in a roundabout way was about six hours and thirty

(Testimony of H. E. Thompson.)
minutes, approximately.

There was a period of six hours and thirty minutes approximately that we had absolutely no communication whatever. I arrived at Garrison about two hours and fifty minutes after they had received my message, too late to act upon it. The information I had given them in my line-up was of no avail at the time it reached them. From condition of the wires east of Garrison it was impossible to control the movement of these two trains after they got out of Garrison. The same condition existed from Blossburg west; the wires were down at various points. On No. 4 going up I noticed the snow was wet and heavy and hanging, sticking, on to the wires, so that it would stick up six or eight, or possibly ten inches, and then every little while you would see a foot or two fall off. Take poles 180 feet apart, the snow wet and as heavy as it was, you could just get an idea of the weight that the wire was sustaining.

Poles and wires were down coming up from Garrison. Quite a number in about a half of mile, just guess at it. There wasn't a place for a quarter of a mile from Blossburg down that **[46]** the wires were not affected that way. That is, between Garrison and Drummond. Then east of Garrison, I have no personal knowledge of that, other than they had a gang working at it, a lot of section men and a gang of line men to repair. The cause of this train having to be tied up at Elliston was because the first train 1633 was there and unable to get in com-

(Testimony of H. E. Thompson.)

munication with the dispatcher to be instructed to reduce his train so that he could handle it sufficiently easy to get it into Helena. They did proceed afterwards from Drummond east, but they had to run to Garrison to get more coal and the snow was piled up on the rails to such an extent that it made it slippery and the engine would slip on account of the snow, the drivers would slip, and they used so much sand; they even had to run into Garrison for more coal and go back and get the train. All these delays occurred. Had they had communication and had known the actual conditions, the train would have been reduced so as to make it possible to have made Helena within the limit. I arrived at Garrison before No. 1654 pulled out of Garrison.

They were just getting ready to leave Garrison as I got off the train there, and either through myself, or the trainmaster,—I don't remember which one—instructed the crew we were talking to, but he asked me which way they would need the engine, whether we would need the engine and crew at Helena or at Missoula, and I told him at Helena, and I believe he told him. I am not positive, but I might have told them myself to go as far as they could, and then go back and take the engine and caboose and go to Helena. He still had time to go to Helena, set off the train at some siding and then take the engine and caboose and go to Helena, in the sixteen hours. They could best judge of the speed they could obtain and would know how long it would take

(Testimony of H. E. Thompson.)

them to get in. I have been working [47] on the Rocky Mountain division nine years, possibly ten. Seven years prior to that time I was employed as stenographer on the superintendent's car, the greater part of the time going over the road. Part of the time I was in the office in a clerical capacity. As to the character of the snowstorm in question as to being an ordinary or an extraordinary storm, I never had heard of anything just exactly like it before. When they told me the wires were broke down from the weight of the snow, I was skeptical, I had never seen anything like it and I had never heard anything like it. I remember my astonishment when I noticed the condition that did exist in the way of snow; the way it had piled up on the wires.

Before or since, I never had seen that. They have wet snow on the Coeur d'Alene and Lookout Mountain and in the Bitter Root range, but for a heavy, wet snow in the spring I don't think they have the wire troubles as bad as that was, because the wires there are those heavy wires, and they can sustain more weight. In other words they put up wires to meet that condition.

Cross-examination by Mr. BROWN.

The tonnage of train No. 1654 was 2,249 tons, and fifty-five loaded cars. The tonnage of No. 1633 was 55 loaded cars, 2244 tons. The tonnage rating of engine 1654 from Missoula to Garrison was 2,200 tons, and its rating from Garrison to Elliston was 1,600 tons. Engine 1633 in the same class. This

(Testimony of H. E. Thompson.)

train 1654 was loaded in excess of the maximum tonnage without taking into consideration the car limit, 60-car limit. It was a heavy moving train. It was up to the maximum.

As to who gave the orders for this extra west to proceed from Helena, I am under the impression that the orders were issued by the operator at Helena. The operator at Helena had no right to issue orders for that train. He took it upon [48] himself to act as dispatcher. These orders were supposed to be issued from Missoula.

Q. If that operator there could order trains out of Helena down to and past Avon, he could likewise have ordered another train out of there to relieve this crew, couldn't he?

A. No, because he wasn't in communication only as far as Blossburg. He called up Blossburg and gave him orders against all trains. He protected the track only as far as Blossburg.

The orders protected the movement of the extra only as far as Blossburg and when this extra got to Blossburg he would have been without any orders at all. He would have to have taken the siding and waited until he got orders to go out. The difficulty arose when he got to Austin. No. 3 passed him there and he put the block on No. 3 to guarantee his movement from Blossburg to Garrison, the double track.

Q. If this operator hadn't sent this extra 1633 out of Helena, train 1654 with the engine and caboose would have had time to reach Helena within the sixteen hours, would it not?

(Testimony of H. E. Thompson.)

Mr. HALL.—We object to this line of testimony as conjecture. There is no charge here of any negligence on the operator at Helena, or what might have happened if conditions had been different and all these conjectures are wholly incompetent, irrelevant and immaterial.

Mr. FREEMAN.—We admit as far as that is concerned at that time, the custom was if the train got tied up for any cause by reason of the sixteen-hour law, when the train had to be tied up and the crew relieved, it was the custom for the fireman to be left in charge of the train.

Mr. HALL.—Yes.

The COURT.—Well, suppose that is so, would that be at all material? **[49]**

Mr. FREEMAN.—The view we take of it is that it is not material at all, except that it goes to answer the defense which is already in, which has already been put in by witnesses for the defendant that the extra service of the fireman was required because of the storm.

The COURT.—Suppose they were compelled to tie up at Avon because of the storm, failing to get into Helena on time, and suppose this storm was of such severity that it would be classed as an act of God, they could have come on into Helena, even running over-time, and not be liable.

Mr. FREEMAN.—Yes, they could have continued right along, but they didn't.

The COURT.—But if they could have continued on, why should they stop; why couldn't they keep

(Testimony of H. E. Thompson.)

this fireman employed, necessarily because of the act of God, just the same as if they were running on the road?

It comes down to this: If they stopped there because of the storm and this train was suffered to come out of Helena, it wouldn't be very material anyhow.

Objection overruled.

Exception taken by the defendant.

Yes, they would have had ample time, with the engine and caboose, to have made Helena within the sixteen hour limit.

The COURT.—Do we understand that at points on the road all of the crew cut loose from the train and take the engine and caboose?

The WITNESS.—Yes, take the engine and caboose to Helena, where we would not have to protect the west bound train possibly, and getting them in where the engine would receive proper attention in the roundhouse, and not leave it to be tied up on the road without firing it, or without either water or fire, [50] because unless it is properly attended to it might cause damage and expense to the engine.

No. 1638 west left Helena after seven A. M. and passed Elliston at twelve. No. 4 arrived at Elliston at 10:32. That came from Missoula. It left Missoula at 7:57 A. M. A relief crew was not sent out on that train because we had no knowledge that 1633 was tied up. We had no way of knowing but what they had made Helena within the sixteen hour limit. No. 3 left Helena at 9:50 A. M. on the 2d. Arrived

(Testimony of H. E. Thompson.)

at Elliston at 11:09 A. M.

The crew of this train that was tied up could not have been relieved, there and a new engine have been sent out on this night train No. 6 at 8:40 P. M., because it would be dangerous to run a freight engine on a passenger train. I mean a double-header, of course. The freight engine of the type we were using at that time couldn't make the speed a passenger train would make.

A freight engine on a passenger train on a mountain grade, under its own steam, I believe is prohibited—it is prohibited by our rules, I won't say by law. It could have been coupled on.

No. 5 left Helena on May 2d at 8:55 P. M. Arrived at Avon at 10:40 P. M. In ten minutes the crew had been relieved.

Redirect Examination by Mr. HALL.

Relief came to the fireman at Elliston on the first train that passed there, after the tie-up. At the time train 1633 started out of Missoula on the afternoon of the first, the weather conditions as reported showed no unusual condition at all. There was no reason why that train shouldn't carry its full tonnage capacity. Conceding that there was snow and that I had heard there was snow upon the track up the road before I started out No. 1654, the effect of train No. 1633, a few hours ahead, would be to clear the rail of the—push the snow all off the rail and leave just a damp rail unless the weather was dry enough to absorb the dampness off the rail. In either event the rail would be clear, and it would be just the same as

(Testimony of H. E. Thompson.)

if there had been no snowstorm after the preceding train had passed over it.

At the time I started the second train, I hadn't heard of any wire trouble.

Q. Just explain, briefly, Mr. Thompson, how it is that passenger trains can move more rapidly when the wires are down than freight trains.

A. Well, the point is this: That passenger trains as [51] specified here have a given time and when he comes along he can go on that time and move right down the line, orders or no orders; and a freight train, extra, must have orders to move; it cannot leave terminals without orders of some kind.

When it leaves any place, he must first leave a terminal and he must have orders to leave a terminal, and when he gets into the next siding, he has gone the limit, and when he gets there he has to have another order.

Now, when you receive an order a train starts from Garrison with an order to meet a train at the first station east of Garrison, ten miles out.

Q. What would this extra have to do after it gets in there and makes that meet?

A. Had we had wires we would have reduced that train so that he could have moved. Another train was delayed from 11:00 A. M. until 1:15 P. M., on account of not having wires.

Mr. FREEMAN.—There is no evidence whatever here that these trains were delayed by any wire trouble. I object, in view of the fact that it has already been shown that the cause of this delay was

(Testimony of H. E. Thompson.)

the man down here sending out a train.

No ruling.

Q. As to the movement of an extra after it comes to a meeting point, anywhere between Missoula and Helena?

Mr. FREEMAN.—I object to that because there is no evidence that there is any meeting point of any of these trains at all.

The COURT.—Are any of these extras?

The WITNESS.—Both of them extras.

The COURT.—That is two freights?

The WITNESS.—Yes, two freights.

The COURT.—He may answer.

A. When it gets into the sidetrack to meet any train, it [52] cannot leave there until that train arrives, unless in an extreme emergency the conductor is permitted to take one of his brakeman off his train and put him on a train that is going past him. That brakeman will go on to a point designated by the conductor and get off there and follow the conductor's instructions as to holding opposing trains. For instance, this extra east has an order to meet at Avon, where No. 4 or any train that can pass him goes by, he can stop No. 4 and take his brakeman and send him to Elliston to hold another train. That is the only way he can move against that train without other orders, from Missoula.

The COURT.—I understand that this second train wasn't troubled by snow in its running.

A. Yes, the actual cause. The first train had encountered a great deal of snow and a great deal of

(Testimony of H. E. Thompson.)

delay by the engine slipping and running out of coal and going up against snow. Then the other man with the same number of cars, the same class of engine, with practically the same tonnage, with only a few tons difference, went over the track with practically no delay, went on to Garrison, where he was delayed on account of inability to get in communication with the dispatcher. The second delay almost of the same kind was caused at Avon on account of the inability to get orders to pass.

This second train was delayed at Garrison. The conductor reported that the time he was delayed at Garrison was three hours and fifteen minutes on account of wire failure. That was train No. 1654. That delay doesn't show on the train sheet because the dispatcher had no actual knowledge of the condition of the delayed train. That occurred while the wires were down and the dispatcher would have no opportunity to ascertain except by hearsay afterwards what the delay was.

Q. I will ask you to refer to Defendant's Exhibit 1 and [53] state if that is a bulletin issued by the company. A. Yes, sir.

Mr. HALL.—I now offer in evidence Exhibit 1, Defendant.

Which said exhibit was admitted without objection and is in the words and figures following, to wit:

[Defendant's Exhibit No. 1—Bulletin No. 103, Dated Missoula, March 28, 1912, Issued by Northern Pacific Railway Company.]

EXHIBIT 1—DEFENDANT.

"Missoula, March 28th, 1912.

Bulletin No. 103.

All Train and Engine men and others concerned.

The law requires that train and engine men must not be required nor permitted to remain on duty for a longer period than sixteen hours.

When a conductor or engineer is unable to communicate with the dispatcher on account of wire failure or other cause and has been on duty nearly sixteen hours, he must take the matter into his own hands and tie up at the first available point, in order to prevent a violation of the law. The dispatcher must be advised at the earliest opportunity.

A. M. BURT, Superintendent.

Recross-examination by Mr. BROWN.

This matter of superior trains is simply an arrangement of the railroad company for the movement of its trains. Rules and regulations made by the railroad company to expedite their movements.

[Testimony of R. F. Young, for Defendant.]

Whereupon R. F. YOUNG was called and sworn as a witness on behalf of the defendant and testified substantially as follows:

Direct Examination by Mr. HALL.

My name is R. F. Young. I live in Helena. I am in charge of the weather bureau. The local bureau

(Testimony of R. F. Young.)

of observation make [54] reports to me of their observation of the weather. We have substations in different parts of the state. We have substations in the vicinity of Elliston and Avon. As to snowfall as reported from those stations, May 1st and 2d, 1912—the station of Ophir ten or twelve miles north of Elliston, the first and second, the snowfall at that station was ten and a half inches. It began about midnight of the first. The name of the other station is Hatfield Creek south of Elliston, about five or six miles; I don't know the distance. The snowfall on the 2d of May was 13 inches. It started about four P. M. of the first. Hatfield is somewhat closer, to Avon,—I think two or three miles. These stations are in the neighborhood of 18 miles apart. Elliston is in between them. It is an unusual fall of snow for May.

Cross-examination by Mr. BROWN.

There is usually some snow in May, almost every year, at those stations. The average snowfall for May for Ophir is about 12 inches. This May there was ten and a half inches on those two days. The average snowfall at Hatfield creek for May is eleven inches; the total fall for the two days is 13 inches.

Redirect Examination by Mr. HALL.

When I speak of the average snowfall for May I mean for the entire month.

Defendant rests.

Mr. FREEMAN.—We have no rebuttal.

The foregoing is, in substance, all the evidence introduced at said trial. [55]

Mr. HALL.—Comes now the defendant and moves the Court at the close of all the evidence to direct a verdict in favor of the defendant, upon the following grounds, to wit:

1. The plaintiff's evidence is insufficient to sustain the charges as to the first cause of action, in that it fails to prove that Fireman Drew, after the sixteen hour period had expired, was engaged in and connected with the movement of said train.

2. That there is a fatal variance between the allegations of the complaint and the proof, in that the plaintiff has failed to prove that the defendant required and permitted its fireman, Drew, to be and remain on duty as such, for a longer period than sixteen consecutive hours.

3. That the evidence shows conclusively that the cause of the delay, making it necessary to have Drew act as watchman of said engine, after the sixteen hours had expired, was the result of an act of God.

4. That the evidence shows conclusively that the situation making it necessary to have Drew act as watchman of said engine, after sixteen hours had expired, was the result of a cause not known to the defendant, or its officers or agents in charge of said employee, at the time said employee left the terminal at Missoula, and it could not have been foreseen at that time.

These four grounds apply to the first cause of action, and we make the same motion as to the second cause of action upon exactly the same grounds, substituting the name of Jensen for that of fireman Drew.

Mr. FREEMAN.—On behalf of the Government, we move the Court to direct the jury to return a verdict for the plaintiff, for the reason the testimony of defendant fails to establish a legal [56] defense to the charges set forth in the complaint of the plaintiff, as to both causes of action.

The above motions of plaintiff and defendant were argued to the Court, and at the conclusion of such argument the Court denied the motion of the defendant and granted plaintiff's motion, and directed the jury to return a verdict in favor of the plaintiff on each cause of action.

To which ruling of the Court in granting the motion of plaintiff, and instructing the jury to return a verdict for the plaintiff, and in denying defendant's motion for a directed verdict, the defendant then and there duly excepted.

Thereupon the jury, pursuant to such direction of the Court, rendered its verdict in favor of the plaintiff, as follows:

"We, the jury in the above-entitled cause, find for the plaintiff and against the defendant on the two causes of action set forth in the complaint."

That thereafter, and on June 27, 1913, by consent of counsel for plaintiff, the Court granted defendant sixty days, in addition to the time allowed by law, to prepare and serve bill of exceptions in said cause.

That thereafter, and on the 27th day of June, 1913, the Court rendered and entered judgment in favor of the plaintiff and against the defendant in the sum of $100.00 upon each of the two causes of action set forth in said complaint, together with plaintiff's

costs and disbursements, taxed in the sum of $143.05.

Now comes the defendant, within proper time, and serves this, its proposed bill of exceptions.

GUNN, RASCH & HALL,
Attorneys for Defendant. [57]

Service admitted, and receipt of a copy of the foregoing proposed bill of exceptions acknowledged this 28 day of August, 1913.

J. W. FREEMAN,
WALTER N. BROWN,
Attorneys for Plaintiff.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated that the foregoing bill of exceptions is correct, and may be settled and allowed by the Court.

WALTER N. BROWN,
JAS. W. FREEMAN,
Attorneys for Plaintiff.
GUNN, RASCH & HALL,
Attorneys for Defendant.

[Order Settling and Allowing Bill of Exceptions.]

I, Geo. M. Bourquin, Judge of the United States District Court, for the District of Montana, do hereby certify that the foregoing bill of exceptions is true and correct, and is hereby settled and allowed by me.

Dated this 24th day of Sept., 1913.

GEO. M. BOURQUIN,
Judge.

Filed Sept. 24, 1913. Geo. W. Sproule, Clerk. [58]

Thereafter, on November 1, 1913, defendant filed its assignment of errors herein in the words and figures following, to wit: **[59]**

In the District Court of the United States, in and for the District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant, Northern Pacific Railway Company, plaintiff in error, and files the following assignment of errors, upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

1. That said Court erred in denying the motion of defendant and plaintiff in error for a directed verdict in favor of defendant on the first cause of action.

2. That said Court erred in denying the motion of defendant and plaintiff in error for a directed verdict in favor of the defendant on the second cause of action.

3. That said Court erred in granting the motion of plaintiff and defendant in error for a directed

verdict in favor of plaintiff on the first cause of action, and in instructing the jury to return such a verdict.

4. That said Court erred in granting the motion of plaintiff and defendant in error for a directed verdict in favor of plaintiff on the second cause of action, and in instructing the jury to return such a verdict.

5. That said Court erred in rendering judgment in said cause in favor of plaintiff and defendant in error, and that said judgment, **[60]** is contrary to the law and facts established in said cause.

WHEREFORE, the said defendant and plaintiff in error prays that the said judgment of the said District Court of the United States, in and for the District of Montana, be reversed and the case dismissed, or that the said District Court be directed to grant a new trial therein.

GUNN, RASCH & HALL,

Attorneys for Defendant and Plaintiff in Error.

Filed Nov. 1, 1913. Geo. W. Sproule, Clerk. **[61]**

Thereafter, on November 1, 1913, petition for writ of error and order allowing same were duly filed and entered herein, being in the words and figures following, to wit: **[62]**

In the District Court of the United States, in and for the District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Petition for Writ of Error and Supersedeas of the Defendant, Northern Pacific Railway Company.

The Northern Pacific Railway Company, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court and the judgment entered in said cause, on the 27th day of June, 1913, for the sum of One Hundred ($100.00) Dollars, on each of the two causes of action set out in the complaint in said cause, and for the further sum of One Hundred Forty-three and 05/100 ($143.05) Dollars costs, comes now, by Gunn, Rasch & Hall, its attorneys, and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed

until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioner will ever pray.

GUNN, RASCH & HALL,
Attorneys for Defendant. **[63]**

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of Gunn, Rasch & Hall, attorneys for the defendant Northern Pacific Railway Company, the foregoing petition for a writ of error is hereby granted, and it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, on the 27th day of June, 1913, and that the amount of bond on said writ of error be, and hereby is, fixed at the sum of three hundred dollars.

GEO. M. BOURQUIN,
Judge.

Filed and Entered Nov. 1, 1913. Geo. W. Sproule, Clerk. **[64]**

Thereafter, on November 5, 1913, bond on writ of error was duly filed herein, being in the words and figures following, to wit: **[65]**

In the District Court of the United States, in and for the District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Northern Pacific Railway Company, as principal, and the National Surety Company, a corporation, organized and existing under the laws of the State of New York, and duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Three Hundred ($300.00) dollars, to be paid to the United States of America, for which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 3d day of November, 1913.

WHEREAS, lately, at a session of the District Court of the United States, in and for the District of Montana, in a suit pending in said court between the United States of America, plaintiff, and North-

ern Pacific Railway Company, defendant, a final judgment was rendered against said defendant, and the said Northern Pacific Railway Company, defendant, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said United States of America, plaintiff, is about to be issued, citing and admonishing said plaintiff to be **[66]** and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California:

NOW, THEREFORE, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Dated this 3 day of November, 1913.

NORTHERN PACIFIC RAILWAY COMPANY,

By GUNN & RASCH,
Division Counsel.

[Corporate Seal]

NATIONAL SURETY COMPANY,
By W. K. ARMSTRONG,
Its Attorney in Fact, Hereunto Duly Authorized,
Surety.

The foregoing bond is hereby approved.

BOURQUIN,
Judge.

Filed Nov. 5, 1913. Geo. W. Sproule, Clerk. **[67]**

Thereafter, on November 5th, 1913, writ of error was duly issued herein, which said writ of error is hereto annexed and is in the words and figures following, to wit: **[68]**

In the District Court of the United States, in and for the District of Montana.

No. 276.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable, the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court before you, between the Northern Pacific Railway Company, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Northern Pacific Railway Company, the plaintiff in error, as by its petition herein appears:

We, being willing that error, if any hath happened, should be duly corrected and full, and speedy

justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of December, 1913, next, in the said Circuit Court **[69]** of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that which what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 5 day of November, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, in and for the District of Montana.

Allowed by:

GEO. M. BOURQUIN,
District Judge.

Service of the within Writ of Error, and receipt of a copy thereof, is hereby acknowledged this 5th day of November, 1913.

W. N. BROWN,
B. K. WHEELER,
Attorneys for Defendant in Error. **[70]**

Answer of Court to Writ of Error.

The Answer of the Honorable, the Judge of the District Court of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court,

[Seal] GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk. **[71]**

[Endorsed]: No. 276. District Court of the United States, District of Montana. United States of America, Plaintiff, vs. Northern Pacific Railway Company, a Corporation, Defendant. Writ of Error. Filed Nov. 5, 1913. Geo. W. Sproule, Clerk. **[72]**

Thereafter, on November 5, 1913, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: **[73]**

Citation [on Writ of Error].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the United States of America and B. K. Wheeler, the United States District Attorney for Montana, and Walter N. Brown, Special Assistant to the Attorney General of the United States:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, in and for the District of Montana, wherein the Northern Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 5 day of November, 1913, and of the Independence of the United States the one hundred and thirty-eighth.

GEO. M. BOURQUIN,
United States District Judge.

Service of the foregoing citation received and

copy thereof admitted, this 5th day of November, 1913.

W. N. BROWN,
B. K. WHEELER,
Attorneys for Defendant in Error. **[74]**

[Endorsed]: No. 276. United States District Court, District of Montana. The United States of America, Defendant in Error, vs. Northern Pacific Railway Company, a Corporation, Plaintiff in Error. Citation. Filed Nov. 5, 1913. Geo. W. Sproule, Clerk. **[75]**

[Certificate of Clerk U. S. District Court to Record.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 76 pages, numbered consecutively from 1 to 76, inclusive, is a true and correct transcript of the pleadings, process, orders, verdict and judgment, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included in said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript

of record amount to the sum of Twelve and 25/100 Dollars ($12.25), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 18th day of November, A. D. 1913.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. [76]

[Endorsed]: No. 2343. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received and filed November 21, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF FACTS.

The defendant in error, hereinafter for convenience called the plaintiff, filed a complaint against the plaintiff in error, herenafter for convenience called the defendant, containing two causes of action, each charging the defendant with a vio-

lation of the Federal Sixteen-hour Law (Tr. pp. 2 to 5.)

The first cause of action relates to a fireman by the name of Drew, employed on an extra interstate freight train, No. 1654, going east from the terminal at Missoula, Montana, to the terminal at Helena, Montana, a distance of 120 miles. Drew was called and reported for duty at ten p. m. on May 1, 1912, and the train departed from Missoula at eleven p. m. It arrived at Avon, eighty-two miles east of Missoula, at eleven a. m. May 2 and was held there with the train crew, including Fireman Drew, until one fifteen p. m. of said day (Tr. p. 21.) Then, pursuant to a standing order, bulletin No. 103 (Tr. p. 58) the crew, including Drew, having been on duty ffteen hours and fifteen minutes, and not having time to make the remaining thirty-eight miles to the terminal at Helena, were laid off and "relieved from all work in connection with the actual physical movement of said train" (Tr. pp. 22 and 37.)

Fireman Drew was then required and permitted to remain on said engine, standing on a side track, in the capacity of watchman for several hours until a suitable man could be procured to relieve him. It was his duty to keep a small fire in the engine so as to geenrate sufficient steam to pump water into the boiler to prevent the water from getting below the level of the crown sheet, and to pump water when necessary for such purpose to prevent the

engine from becoming dead (Tr. p. 22.)

If an engine is allowed to die, or the fire is allowed to go out entirely, the engine cannot be moved until there is water in the boiler and fire enough to make steam. In the meantime, if the water in the boiler, by reason of leaking out, or for any other reason, gets below the level of the crown sheet, it is impossible to fire up the engine so as to pump water into the boiler. The boiler cannot be filled in any other way, and the engine becomes dead and has to be disconnected and hauled to a terminal for the boiler to be filled (Tr. pp. 26 and 39.)

Upon these facts, which stand admitted or are undisputed, the defendant denied any violation of the Federal Sixteen-hour Law in permitting Drew to act as watchman of said engine.

The second cause of action relates to a fireman by the name of Jenson, employed on an extra interstate freight train, No. 1633, also going east from the terminal at Missoula to the terminal at Helena. Jenson was called and reported for duty at three-forty p. m. of May 1, 1912, and the train departed from Missoula at four twenty-five p. m. It arrived at Elliston, ninety-one miles east of Missoula, at seven a. m. May 2nd. Then, pursuant to said bulletin No. 103 (Tr. p. 58) the crew, including Jenson, having been on duty fifteen hours and twenty minutes, and not having time to make the remaining twenty-nine miles to the terminal at Helena, were

laid off and "relieved from all work in connection with the actual physical movement of said train." (Tr. pp. 23 and 38.)

Fireman Jenson was required and permitted to remain on said engine, standing on the side track, in the capacity of watchman for several hours until a suitable man could be procured to relieve him (Tr. pp. 24 and 43.) His duties as watchman and the necessity for a watchman being the same as stated above in connection with the first cause of action.

Upon these facts, which stand admitted or are undisputed, the defendant denied any violation of the Federal Sixteen-hour Law in permitting Jenson to act as watchman of said engine.

To each of said causes of action the defendant in its answer also pleaded a further and separate defense (Tr. pp. 10 and 12), alleging that after the trains left Missoula, they encountered storms and snow fall of such unusual and unprecedented violance and severity that telegraph and telephone lines were broken and torn down, completely destroying and cutting off all means of communication with the dispatchers and operators, making it impossible to proceed with said trains; that the delay in the movement of said trains, and the necessity of watching said engines by the firemen, were occasioned by, and due to, the Act of God, and the result of causes which were not known to the defendant, or its officers, at the time the trains left the

terminal and could not have been forseen.

In support of these further defenses defendant introduced evidence showing: That at the time the trains departed from Missoula, no reports had been received of any unusual snow storm, nor any report of wire trouble (Tr. pp. 45 and 46); that at five p. m. May 1st, two or three inches of snow was reported at Blossberg, Drummond and Garrison to Avon, and no further report of snow was received at Missoula until eleven forty p. m., which was forty minutes after extra No. 1654 had departed, when it was reported that snow fourteen inches in depth had fallen at Blossberg (Tr. p. 45.)

Starting from Missoula, the stations above referred to are passed in the following order: Bearmouth, Drummond, Garrison, Avon, Elliston (Tr. p. 25) and Blossberg, the last mentioned point being on the Rocky Mountain divide which extends between Elliston and Helena (Tr. p. 51.)

At the time the report was received at eleven forty p. m., stating that there was fourteen inches of snow at Blossberg, there was nothing to indicate the peculiar character of such snow, and no information of broken wires was received until two p. m. of May 2nd (Tr. p. 45). The snow was a wet and heavy snow, stuck to and piled up on the wires from six to eight inches high (Tr. p. 48), and by the morning of May 2nd was from ten to fourteen inches deep all the way from Drummond to Bloss-

berg. Its weight on the wires had broken them, and had thrown over telegraph and telephone poles at various places along the line of the railroad (Tr. pp. 25, 33, 38, 41 and 48.) Five railroad men, who had been working upon the Rocky Mountain Division between Missoula and Helena from five to fourteen years, testified that the storm was an extraordinary one; that they had never before seen one like it, and had never before seen a storm that broke the wires and poles down (Tr. pp. 25, 33, 38, 41 and 48.)

R. F. Young, in charge of the weather bureau, coroborated these witnesses to the effect that it was an unusual fall of snow (Tr. p. 59.)

The cause of the delays is explained by the witnesses as follows:

> "The delay came from the wires being down." (Tr. p. 34.) "That kind of snow in May makes the track heavy and the poles and wires go down. It has a great deal to do with movement of trains. They had wire trouble. We couldn't get any connection with Missoula, as a result of that snow" (Tr. p. 38.) "Because of the breaking down of wires you could hardly get train orders for the movement of trains. It made the time slow in coming over the road. * * * The cause of this failure to make the run within this sixteen hours to Helena was on account of the wires, the wire

failure and the heavy snow" (Tr. p. 42.) "A train running between Missoula and Helena at that time would always be handled from Missoula" (Tr. p. 44.) "There was a period of six hours and thirty minutes approximately that we had absolutely no communication whatever. * * * From conditions of the wires east of Garrison it was impossible to control the movement of these two trains after they got out of Garrison. The same condition existed from Blossburg west; wires were down at various points" (Tr. p. 48.) "Every train, extra, must have orders to move. * * * When it leaves any place, he must first leave a terminal and he must have orders to leave a terminal, and when he gets into the next siding he has gone the limit, and when he gets there he has to have another order" (Tr. p. 55.) "When it gets into the side track to meet any train it cannot leave there until that train arrives unless in an extreme emergency the conductor is permitted to take one of his brakemen off his train and put him on the train that is going past him. That brakeman will go on to a point designated by the conductor and get off there and follow the conductor's intsructions as to holding opposing trains" (Tr. p. 56.) "The actual cause. The first train had encountered a great deal of snow and a great deal of delay by the engine

slipping and running out of coal and going up against snow. Then the other man with the same number of cars, the same class of engine, with practically the same tonnage, with only a few tons difference, went over the track with practically no delay, went on to Garrison, where he was delayed on account of inability to get in communication with the dispatcher. The second delay almost of the same kind was caused at Avon on account of the inability to get orders to pass."

This second train was delayed at Garrison. The conductor reported that the time he was delayed at Garrison was three hours and fifteen minutes on account of wire failure. That was train No. 1654." (Tr. pp. 56 and 57.)

No evidence was offered to contradict this testimony of defendant's witnesses, (Tr. p. 69). At the close of the evidence the defendant moved the court for a directed verdict in its favor on each cause of action, (Tr. p. 60), which the court denied, but granted plaintiff's motion, and instructed the jury to return a verdict for the plaintiff on each cause of action, (Tr. p. 61).

ASSIGNMENT OF ERRORS.

1. The court erred in denying the motion of defendant for a directed verdict in its favor on the first cause of action.

2. The court erred in denying the motion of defendant for a directed verdict in its favor on the second cause of action.

3. The court erred in granting the motion of plaintiff for a directed verdict in favor of plaintiff on the first cause of action, and in instructing the jury to return such a verdict.

4. The court erred in granting the motion of plaintiff for a directed verdict in favor of plaintiff on the second cause of action, and in instructing the jury to return such verdict.

5. The court erred in rendering judgment in favor of the plaintiff and against the defendant. (Tr. pp. 63 and 64.)

ARGUMENT.

There are three questions presented by the assignment of errors in this case:

1. Were fireman Drew and Jenson, after the further movement of the train had been abandoned by the crews, and while they were acting as watchmen of their engines until other men could be procured from the nearest available point, still on duty

as firemen within the meaning of the federal 16-hour law—that is, were they still "*actually engaged* in, or connected with, the *movement* of" trains.

2. Was the delay or tie-up of the trains, under the circumstances disclosed by the record, which necessitated the employment of the firemen as watchmen of their engines, caused by an act of God, relieving the defendant from responsibility.

3. If the tie-up was not caused by an act of God, was it the result of a cause not known to the carrier or its officer or agent in charge of such employees at the time said employees left the terminal, and which could not have been forseen, in which case there would likewise be no liability.

I.

On the first question we find no authority directly in point. The courts have construed the law in a number of cases, and have held that "trivial interruptions" do not relieve an amploye from duty so as to break a consecutive service of sixteen hours. The term "trivial interruptions" appears to have been adopted by the courts as a term to define the usual delays or stops occasioned by meeting of trains, eating of meals, the period intervening after a crew has been called for duty and the time their train actually leaves the terminal, etc.

During such periods of "trivial interruptions" the train crew is held to be on duty and "actually

engaged in or connected with the movement of" a train.

United States v. C. M. & P. S. Ry. Co., 197 Fed. 624;

United States v. Denver & R. G. Ry Co., 197 Fed. 629;

United States v. Atchison T. & S. F. Ry. Co., 220 U. S. 37—55 L. Ed. 361.

It is apparent, however, that the principle of these cases is not applicable to the facts of the case at bar. Here the crews had been on duty almost sixteen hours. The train was side-tracked and the crew relieved for the express purpose of complying with the 16-hour law. Their duties connected with the *movement* of the trains had terminated as fully as if they had reached the terminal or point of destination. This was not a "trivial interruption." The abandonment of the train made it necessary to leave someone in charge of the engine, but no one was available for the time being except the fireman.

WATCHMAN NOT ACTUALLY ENGAGED IN THE MOVEMENT OF THE TRAIN.

Were said firemen during the time they were employed *as watchmen* of said engines "*actually* engaged in or *connected* with the *movement* of any train," within the meaning of the Act of March 4,

1907, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employes theerin"? (1909 Supplement to U. S. Annotated Statutes, p. 581—U. S. Compiled tSatutes Supplement, 1909, p. 1170.)

The title of this act declares that it is an act "to *promote* the *safety* of *employees* and *travelers,*" and the last sentence of section 1 of said act clearly defines the class of "employes" of railroads to whom the provisions of the act shall apply. It reads as follows:

> "And the term 'employees' as used in this act shall be held to mean persons *actually* engaged in or *connected* with the *movement* of any train." (Italics ours.)

Therefore the word "employee" as used in section 2 of said act is limited to those defined in section 1 thereof.

Section 2 of said act reads as follows:

> "That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee *subject to this Act* to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off

duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no *operator, train dispatcher,* or *other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements* shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a wenty-four-hour period on not exceeding three days in any week:" (Italics are ours.)

The tenor and context of the act, including the title thereof, shows that congress intended thereby more fully to protect travelers and employees on *moving trains* from the many accidents, wrecks and dangers known to result from neglect and mistakes of employees *actually* engaged in, or connected with, the *movement* of such trains and caused by over-

work or too many hours on duty under the severe strain necessarily incident to the movement of trains.

It was the *safety* of such persons, rather than *limiting* the hours of labor of railroad employees generally, that the act is intended to "promote." That is, the law is intended to promote the *safety* of all persons on trains, whether "travelers" or "employees," by limiting the hours of duty of the employees *actually* engaged in, or *actually* connected with, the movement of trains.

The act is in the nature of the "safety appliance law" intended for the *protection* of the traveling public, including such employees as necessarily travel on trains in performance of their duties and not in the nature of a labor law, such as "eight-hour laws," intended primarily to benefit the individual performing the labor.

Limiting the hours of service of operators, train dispatchers, engineers, conductors and other employees covered by the act, was done for the purpose of promoting the safety of those persons whose lives may be endangered by a too long continuous service of the employes actually engaged in, or connected with, the movement of trains.

It is worthy of note that the title of this act employs the same language as appears in the title of the "safety appliance" act of March 2, 1893, which reads as follows:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," etc.

Not only does the title of the act indicate that such was the sole purpose of the act (and the title of an act may be referred to where the meaning of the body of the act is doubtful, (Church of Holy Trinity v. U. S., 143 U. S. 457—36 L. Ed. 226—36 Cyc. 1133), but the language of the last sentence of section 1, which expressly defines what employees it covers, shows the same purpose.

Furthermore, the language of section 2 makes the same limitation by naming the class of employees "*connected* with the movement of any train," namely, "operators, train dispatchers or other employe who, by use of the telepgraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting *train movements,*" who shall not be required or permitted to remain on duty in excess of a certain period.

The persons "actually *engaged* in * * * the movement of any train," within the meaning of section 1, are the train crew while the train is moving, which includes the period of "trivial interruptions" pointed out in the cases cited above; while the persons "actually *connected* with the movement of any train" are the classes of persons enum-

erated in section 2, such as operators, etc. The enumerations of these employes in section 2, shows what class of employees are covered by the words "connected with," as used in the last sentence of section 1, and materially assists in determining why such words, as well as the words "engaged in," were there employed.

Manifestly the law does not apply to section men, bridge gangs, civil engineers, hostlers in a roundhouse, nor to a watchman of an engine which has been set out on a side track to remain standing for a definite period of eight or ten hours.

The hours of service of a watchman has no more connection with the *safety* of travelers or employees on a *moving train*, than do the hours of service of a section man, bridge man, civil engineer or hostler, and none of such employees are "actually engaged in, or connected with, the movement of any trian," and do not come within the provisions of said law.

The act of congress was carefully analyzed and construed in the case of Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612—55 L. Ed. 878.

In that case the court said:

> "No difficulty arises in the construction of this language. The first sentence states the application to carriers and employees who are 'engaged in the transportation of passengers or

property by railroad' in the District of Columbia or the territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms 'railroad' and 'employees' shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employees must be engaged in order to come within the provisions of the statute. If the definition in the last part of the sentence, of the words used in the first part, be read in connection with the latter, the meaning of the whole becomes obvious. The section, in effect, thus provides: 'This act shall apply to any common carrier or carriers, their officers, agents, and employees (meaning by 'employees' persons *actually engaged* in or *connected* with the *movement* of any train.), engaged in the transportation of passengers or property by railroad (meaning by 'railroad' to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any territory * * * or from one state * * * to any other state,' etc. * * *

"In the present statute, the limiting words govern the employees as well as the carriers. * * *

"The fundamental question here is whether a restriction upon the hours of labor of em-

ployees who are connected with the *movement of trains* in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours or service has direct relation to the efficiency of the human agencies upon which *protection to life* and *property necessarily depends.* This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitable to provide for the *safety* of *employees* and *travelers,* Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the *strain of excessive* hours of duty on the part of *engineers, condutcors, train despatchers, telegraphers, and other persons embraced within the class defined by the act.* And in imposing restrictions having *reasonable relation* to this end there is no interference with liberty of contract as guaranteed by the Constitution." (Italics are ours.)

As thus construed by the court of last resort, it is clear that the act is one enacted for the protection of life and property, and applicable only to "engineers, conductors, train dispatchers, telegraphers," and other employees, required to perform like

or similar duties, as is contended for by defendant in this case.

In the case of United States v. Kansas City So. Ry. Co., 189 Fed. 471, the court, in discussing the purposes of the act, said:

> "The act being remedial, for the purpose of *preventing accidents to trains* and *consequent injuries* to *passengers* and *employes,* it is the duty of the courts to construe it liberally in order to accomplish the purpose of its enactment. Johnson v. Southern Pacific R. R. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363." (Italics ours.)

Were it not for the word "actually" as used in the last sentence of section 1 of the act, it might be urged that sectionmen, bridge men, hostlers, or watchmen of an engine, were engaged in, or connected with, the movement of trains. *Constructively* they would be, as the proper condition of the roadbed, bridges, care of the engine in the roundhouse, or on a side track, is *"virtually"* or *"constructively"* connected with the movement of trains.

But the word *"actually"* must have been inserted for a purpose. It canont be ignored. It is a word often used in legal phraseology and means the opposite of *"constructive"* or "virtual."

In Cutting v. Patterson, 85 N. W. (Minn.) 172, the court said:

> "The word 'actual' is usually used in a

statute in opposition to 'virtual' or 'constructive', and calls for an open, visible occupancy. Black, Law Dict. pp. 230, 290. The same definitions are found in 2 Bouv. Law Dict. pp. 254, 349."

Anderson's Law Dictionary defines "actual" as follows:

"Existing in act; really acted; real at present time; as a matter of fact.

"Opposed, constructive, speculative, implied, legal."

See also:

1 Words & Phrases, pp. 151 et seq.

1 Cyc. 761, note 34.

In Bunting v. Saltz, 24 Pac. (Cal.), 167, the court defined "actual" as follows:

" 'Actual' means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, virtual or theoretical."

In McIntyre v. Sherwood, 22 Pac. (Cal.) 937, the court said:

"This word 'actual' is not unusual in legal phraseology, and is used as the opposite of 'constructive.' Thus we speak of actual possession, actual notice, actual fraud. But, whatever may be the strict and literal signification of the word, it is not to be unnecessarily assumed that in such documents as constitutions

and Codes, or even decisions, words are used without meaning. Therefore, it is fair to presume that the law-givers meant something by the use of the word 'actual:' that they supposed it added something to the meaning of the word 'settlers.' ''

So in the construction of this act, it is fair to presume that Congress intended that the word "actually" as used in the last sentence of section 1 should mean something and be given some effect, and the meaning of the word having been judicially fixed and defined, it must be presumed that it was used in that sense and was intended to be given effect according to its meaning as defined by the courts.

We submit that there was a break in the sixteen-hour consecutive period of service contemplated by the statute, when the train and engine were sidetracked; that when the firemen took charge of the engines, *as watchmen,* they were no longer *actually engaged* in, nor *actually connected* with the *movement* of a train, and therefore were not permitted or required to be or remain on duty for a longer period than sixteen hours while actually engaged in, or connected with, the movement of said trains.

REASONABLE CONSTRUCTION.

Furthermore, in constructing an act intended to promote the protection of life and property endangered by the movement of trains, which, as we have shown, is the purpose of this act, it must be given a reasonable construction to that end, and not a construction that would work great hardships, cripple the motive power of the company, and retard the prompt movement of trains, without adding anything to the protection of life and property sought to be promoted by the act. In Baltimore & O. R. Co. v. Interstate Commerce Commission, above, the court after pointing out the objects and purposes of the act, said:

> "And in imposing restrictions having *reasonable relation to this end* there is no interference with liberty of contract as guaranteed by the Constitution."

The evidence conclusively shows that when a train crew, with a modern engine, fails to reach terminals or destinations before the expiration of the sixteen-hour period and ties up the train on a siding in order to comply with the law, it is necessary to have a watchman take charge of the engine; if that is not done and a little fire is not kept in the engine and water, in the boiler, the engine becomes useless, is hauled as dead freight to a terminal, and in many cases before it can be so hauled,

the drive wheels have to disconected, etc. (Tr. pp. 26 and 39.)

Davis, the engineer of extra No. 1633, testified as follows:

> "The duty of a person who is watching the engine during the time the train is tied up, is to keep enough water in the boiler and enough fuel in to keep up steam to pump the water from the tank into the boiler. If an engine was allowed to die, or if the fire was allowed to go out entirely after the eight hours rest was up you couldn't move the engine until you got water into the boiler and fire enough to make steam. If the water in the meantime, by reason of leaking out of the boiler, or any other reason, had gotten below the level of the crown sheet, the top of the fire-box, you could not fire up the engine and pump water into the boiler. If that condition arose, that engine before you could put it into use, would have to be brought into some terminal point where we could get fuel and water. In the event the engine was dead you would have to take down the engine, disconnect the drive wheels from the piston rod, as there is no way of lubricating the valves and cylinders, which are lubricated from a lubricator or a cup that works by steam. So that if you had no steam you would have to disconnect the engine." (Tr. p. 39.)

We submit that a construction of the law which will prevent a railway company from protecting its equipment, when tied up, so as to avoid a practical suspension of operation for the time being and future delays in the movement of trains, by using a member of the crew to watch the engine until a suitable person can be procured to replace him, is unreasonable and not in harmony with the true intent of the law. Particularly is this so where the duties of a watchman of an engine, standing on a side track, are such that they have no relation to the actual movement of trains, and in no way lessen the safety to life and property involved in the movement thereof.

The following language from the opinion of Chief Justice White in Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, applies with equal force in construing this statute.

> "c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, *it inevitably follows that the*

provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used *for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.* * * *

"If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the *rule of reason becomes the guide,* and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because, the construction which we have deduced from the history of the act and the analysis of its test is simply that in every case where it is claimed that an act or

acts are in violation of the statute, *the rule of reason,* in the light of the principles of law and the public policy which the act embodies, must be applied." (Italics ours.)

The same court, in the case of Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. Ed. 226, also said:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

"* * * Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the

Legislature; and therefore cannot be within the statute."

Plaitiff cited in the District Court the case of United States v. Missouri Pac. Ry. Co., 206 Fed. 847, but it is clearly distinguishable. The facts involved there are so different from those presented here, that even if District Judge Pollock's construction of the law in that case is correct, it is not in point here. The question considered there is stated by the court as follows:

> "Shall the time spent by the fireman as watchman in charge of his engine being drawn by aonther engine to the terminal station be computed in the hours of service as contemplated by the statute?"

As construed by Judge Pollock, the primary intent of the act is to give the employee rest and relaxation after being on duty sixteen consecutive hours, regardless of the character of his work, but we respectfully insist that such is not the true intent of the act, and was not so construed by the supreme court in Baltimoer & O. R. Co. v. Interstate Commerce Commission, above.

Furthermore, great stress is laid by Judge Pollock in the fact that the engine of which the fireman had charge, as watchman, was in a *moving train* while so in his charge, and, in this connection, said:

> "Looking alone to the safety of the employe

and others, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep, he should permit the water in the boiler to be entirely consumed, the danger from *wreck of the train* or other disaster by explosion involving himself and *others is apparent.*" (Italics are ours.)

It is made evident, however, from the testimony of Engineer Davis (Tr. p. 39, quoted above) that where one engine is drawn by another, the watchman in charge of it is practically required to *run* such engine, "as there is no way of lubricating the valves and cylinders which are lubricated from a lubricator or cup that works by steam." In such a case he is required to keep up steam for the purpose of lubricating the valves and cylinders which are *in motion,* the same as if the engine were hauling the train. Whereas, when the engine is left standing on a side track, he is only required to keep a slight fire sufficient to generate steam to pump water into the boiler in case it should leak out.

An engine hauled in a moving train may possibly endanger life and property on such train when it is necessary for a person in charge of such engine to keep up steam and has already been on duty sixteen hours.

There may be some merit in the contention that under such circumstances a person in charge of an

engine in a moving train is actually *connected* with the movement of such train, although Judge Pollock does not pretend to be certain about it. He says:

> "While it is quite clear a watchman so in charge of an engine has no control over the train movement, hence is not actually engaged in such movement, it is not so clear that he is in no manner connected with the movement of the train."

With all due deference and respect to the opinion of Judge Pollock, we believe that he has given to the word "movement" a meaning not intended by congress. In other words, we cannot agree to the proposition that a person riding in an engine, hauled in a train exactly the same as a caboose or box car is hauled, is connected with the *movement* of such train within the meaning of the act. However, whether Judge Pollock's construction of the law and its applicability to the facts in that case are correct or not, we submit that it is an unreasonable construction of the law to say that a watchman in charge of an engine *tied up on a side track,* is *actually connected* with the *movement* of a train during such time.

For the reason above stated we contend that in the case at bar, the court should have directed a verdict in favor of defendant on each cause of action, upon the first ground stated in its motion for a directed verdict.

VARIANCE BETWEEN ALLEGATIONS AND PROOF.

This is a penal law and the complaint must be strictly construed. In each cause of action it is charged that the defendant "required and permitted its certain *fireman* and employee * * * to be and remain on duty *as such* for a longer period than sixteen consecutive hours," but the proof shows that neither fireman was on duty *as such*, that is, *as fireman,* for a period in excess of fifteen and a half hours. After that time they were employed *as watchmen*—a wholly different service and one in which the employee is not actually engaged in, or connected with, the movement of any train.

For instance, if the crew had reached a terminal in fifteen and a half hours, and the engineer or firemen then had gone into the roundhouse and worked several hours as hostler, and a complaint were filed charging that the company required and permitted said firema,n or or engineer, to be and remain on duty *as such,* for more than sixteen hours, would proof of their work as hostler sustain such a charge? We can see no distinction between such a case and the case at bar. We submit that the second ground of defendant's motion for a directed verdict, on each cause of action, should have been sustained.

II.

The next question presented is whether the facts in this case show the delay necessitating a watchman on the engine was caused by an act of God within the exceptions contained in section 3 of said act, which reads as follows:

> "Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."
>
> (1909 Supplemet U. S. Statutes Annotated, p. 583.)

We contend that the facts of the case bring it within both exceptions mentioned in the Act.

ACT OF GOD.

The evidence shows that the snow storm which broke down the wires and caused the delays was so unusually violent and unprecedented in character in that section of the country and in that season of the year as to be an Act of God within the accepted meaning of that term.

In the opinion in the case of Gleason v. Vir-

ginia Midland Ry. Co., 140 U. S. 445, 35 L. Ed. 458, the court said:

> "There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the Company to have guarded. *Extraordinary floods, storms of unusual violence*, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be 'acts of God;' but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered." (Italics ours.)

Had the evidence in the case just cited disclosed a storm such as was shown in this case, it would have been held an act of God. The following cases hold that unusual or extraordinary *snow storms,* delaying the movement of trains, are acts of God:

> Balletine v. Mo. Ry. Co., 39 Am. Dec. (Mo.) 315;
>
> Black v. C. B. & Q. Ry. Co., 46 N. W. (Neb.) 428.

In the latter case the court said:

> "The rule seems to be that a carrier of live-

stock is an insurer of the safety of the property while it is in his custody, subject to certain well-defined exceptions. He is not liable for injuries resulting unavoidably from the nature and propensities of the property, nor for damages resulting from the act of God, or the public enemy. The evidence brings this case within the exception to the geenral rule. An unprecedented snowstorm, of such violence as to obstruct the moving of trains, falls within the term 'act of God.' ''

See also:

1 Words and Phrases, under snow and storm, p. 125;

1 Cyc. 758, and cases cited.

"A storm, flood or freshet to constitute an act of Providence need not be unprecedented, if it is unusual, extraordinary and unexpected."

People v. Utica Cement Co., 25 Ill. App. 159.

The term "act of God" may be applied to the breaking of an electric wire by a storm.

Cook v. Wilmington City Electric Co., 32 Atl. (Del.) 643.

III.

If this snow storm was not so unusual in character as to constitute an act of God within the accepted meaning of that term, still the evidence clearly brings the case within the other exception mentioned in said proviso, as it conclusively shows that the failure to reach the terminal within the sixteen hours was the result of the snow breaking the wires used in sending orders controlling the movement of such trains.

It is further shown by the undisputed evidence that such condition of the wires was not known and could not have been known at the time the trains left the terminal at Missoula. In fact it was not known at that time that a violent snow storm unusual in character would be encountered. Despatcher Thompson testified as follows:

> "At the time 1633 was ordered out on the afternoon of the first there was not any weather condition at Missoula, or reports along the line, that would indicate difficulties in the moving of these trains. The weather report there shows that the temperature was some place between 42 and 60. Up to the time, and prior to the time, No. 1654 left there at about eleven o'clock, we had no report of wire trouble. At the time that each of those trains were ordered out we were not able to foresee any unusual

condition—no other than could be controlled by the reduction of tonnage, for instance." (Tr. p. 46.)

While it has been decided that the proviso of section 3 "does not exempt a railroad company for liability for delays resulting from things of "common occurrence," such as hot boxes, engines getting out of order, coal being bad," etc. (Washington P. & C. Ry Co. vs. Magruder, 198 Fed. 218) it is manifest that a snow storm breaking down miles of telegraph wires and poles, and of such a nature that employes, who had worked in the same territory from five to fourteen years, had never seen anything like it (Tr. pp. 25, 33, 38, 41 and 48) was certainly not a thing of "common occurrence," nor one that could have been known or foreseen by the officer or agent in charge of such crews at the time they left the terminal.

Why the breaking of the wires so materially delays freight trains and particularly extra freights is explained by Despatcher Thompson, as follows:

"Q. Just explain, briefly, Mr. Thompson, how it is that passenger trains can move more rapidly when the wires are down than freight trains.

"A. Well, the point is this: That passenger trains as specified here have a given time and when he comes along he can go on that time and move right down the lien, orders

or no orders; and a freight train, extra, must have orders to move it; it cannot leave terminals without orders of some kind.

"When it leaves any place, be must first leave a terminal and he must have orders to leave a terminal, and when he gets into the next siding, he has gone the limit, and when he gets there he has to have another order." (Tr. p. 55.)

Therefore, if this case comes within either of the exceptions, it necessarily follows that the law did not apply to either of said train crews, and they could legally have continued on to the terminal at Helena after the sixteen hour period had expired.

If the entire crew could legally have come on to the terminal with the train then why could not one member of such crew continue as watchman of the engine without violating the law? The United States District Attorney admitted that such result would follow if the delays were the result of the snow storm (Tr. p. 52.)

In Black v. Charleston & W. C. Ry Co., 69 S. E. (N. C.) 230, the court construed the Federal Sixteen-hour Law, which had been pleaded by defendant as an excuse for not carryig plaintiff to his destination within a reasonable time. Defendant claimed that it had to tie up the train to comply with such law. The court, in discussing the defense, said:

"Moreover, by its terms, the act does not apply in cases of casualty, unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier, when the employes left a terminal, and which could not have been foreseen. Therefore, *if the delay was due to any of said causes, it would not have been a violation of the act of Congress to permit the crew to remain on duty more than* 16 *hours, and, in that event, the act can be no defense.*"

Plaintiff contended in the district court, and may do so here, that when extra No. 1654, involved in the first cause of action, arrived at Avon at eleven a. m. May 2, the caboose and engine could have been detached and the crew taken to Helena within the sixteen hour period, thus avoiding the necessity of putting a watchman in charge of the engine, had it not been for the fact that they were held at Avon by a flagman on passenger train No. 3, which compelled them to wait there to meet an extra west bound freight which did not arrive until one fifteen p. m. when it was too late to reach Helena with the engine and caboose within sixteen hours.

This is merely begging the question. A flagman would not have been used on No. 3 if the wires had not been down, nor would they have been compelled to wait at Avon after the arrival of the extra west if

the wires had been up. In emergency cases, such as the wires being down, it is customary to move certain trains by means of flagmen, but, of course, with the extra delays necessarily incident thereto (Tr. pp. 32 and 56.)

Conductor Shaw testified as follows:

"Q. Why was it that this west-bound train sent a flagman on No. 3 to notify you—wasn't Avon a telegraph station?

"A. No wires; could get no communication with the dispatcher." (Tr. p. 35.)

So the failure to get to Helena with the caboose and engine is traced back to the original cause, namely, the snow storm breaking the wires down.

Also the fact that the operator at Helena started out an extra west bound freight and the fact that the conductor on said extra west placed a flagman on passenger train No. 3 when it passed, who flagged extra east No. 1654 at Avon, are wholly immaterial. They were emergency matters resulting from the unusual and extraordinary conditions which existed, and such conditions existed only because of the wire failure, which prevented transmission of orders covering the movement of trains from the dispatcher's office at Missoula, from which point all orders for the movement of trains between Missoula and Helena, were issued (Tr. p. 44.)

As the wire failure was due solely to the snow storm we are again back to the real cause of the

delays—the extraordinary snow storm which was not known or could not have been foreseen at the time the trains left the terminal. Therefore the fourth ground of defednant's motion for a directed verdict, on each cause of action, should have been sustained.

We respectfully submit that the court erred in directing a verdict in favor of plaintiff and in rendering judgment thereon, and that the same should be reversed and the case dismissed.

Respectfully submitted,

GUNN, RASCH & HALL,

Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals, Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, plaintiff in error,
v.
UNITED STATES OF AMERICA, DEFENDANT in error.
No. 2343.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This suit was brought by the United States against the Northern Pacific Railway Company to recover penalties for violations of the act of Congress, commonly known as the Federal hours of service law (34 Stat. L., 1415). The complaint is in 2 counts, each charging a violation of the statute in that the defendant required and permitted one of its employees to remain on duty for a longer period than 16 consecutive hours, the period of consecutive service being 24 hours and 30 minutes in the case of Fireman B. D. Drew, and 24 hours and 20 minutes in the case of Fireman V. Jenson. The former was alleged to have been on duty at and between stations of Missoula, Mont., and Avon, Mont., and to have been engaged in

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and connected with the movement of defendant's freight train, extra 1654, while the latter was alleged to have been on duty at and between the stations of Missoula, Mont., and Elliston, Mont., and to have been engaged in and connected with the movement of defendant's freight train, extra 1633, both trains being engaged in the movement of interstate traffic.

By its answer defendant pleaded as to count 1 that after train extra 1654 had left its terminal, Missoula, it encountered storm and snow fall of such unusual and unprecedented violence that when it arrived at the station of Avon the telegraph and telephone lines were down in both directions, destroying all means of communication with the operators and dispatchers at the stations in both directions from said station of Avon; that the fact that snow to the depth of 15 inches had fallen and was packed down on defendant's tracks, together with the fact that no means of communication were available from said station of Avon, made it impossible to proceed with the train, and the train was left at that station, and the crew, including Fireman B. D. Drew, released from duty in connection with the movement of the train, having been on duty 15 hours and 30 minutes; that Fireman Drew was not thereafter on duty in connection with the movement of said train, but was merely watching and guarding the engine of said train while the train remained tied up and standing still at the station of Avon.

Similar circumstances and conditions were pleaded in defendant's answer to count 2 as to the service of Fireman Jensen on train extra 1633, the train in that instance being tied up at Elliston, Mont.

It was further alleged that the delay in the movement of said trains and the necessity for the watching and guarding of said engines by said firemen were occasioned by, and due to, the act of God and the result of causes which were not known to said defendant company, its officers or agents in charge of said firemen at the time they left said terminal at Missoula, and which could not have been foreseen.

At the trial certain facts which were stipulated by parties as to the two counts of the complaint, and which are briefly summarized as follows, were read to the jury and the plaintiff then rested:

Count 1.—Fireman B. D. Drew reported for duty at 10 p. m., May 1, 1912, and was thereafter until 1.15 p. m., May 2, 1912, at all times performing service or held responsible for the performance of service in connection with the movement of train extra 1654 between Missoula and Avon. At 1.15 p. m., May 2, 1912, at Avon, the train crew, with the exception of fireman Drew, was relieved from all duty in connection with said train on account of the so-called Federal 16-hour law, but said fireman Drew was required to remain and did remain in attendance upon the engine of said train as watchman until 10.30 p. m., May 2, 1912. His duty as watchman was to keep up a small fire in the engine, so as to generate sufficient steam to pump water into the boiler to prevent the water

from getting below the level of the crown sheet; to pump such water into the boiler when necessary for such purpose; and to prevent the engine from becoming dead.

Count 2.—Fireman V. Jenson reported for duty at 3.40 p. m. May 1, 1912, and was thereafter until 7 a. m. May 2, 1912, at all times performing service, or held responsible for the performance of service in connection with the movement of train extra 1633, between Missoula and Elliston. At 7 a. m. May 2, 1912, at Elliston, the train crew, with the exception of Fireman Jenson, was released from all duty in connection with said train on account of the so-called Federal 16-hour law, but said Fireman Jenson was required to remain and did remain in attendance upon the engine of said train as watchman until 4 p. m. May 2, 1912. Fireman Jenson, as watchman, performed similar duties to those performed by Fireman Drew.

Defendant introduced further testimony in support of its answer, and at the close of all the evidence, each party having requested a directed verdict in its favor, the court directed the jury to return a verdict in favor of the plaintiff on each cause of action. The action of the court in granting the motion of the plaintiff and refusing that of the defendant is here assigned as error.

QUESTIONS INVOLVED.

This case presents the following questions for the determination of this court:

1. Is a locomotive fireman on duty within the meaning of the hours-of-service act if, after the expiration of approximately 16 consecutive hours in road service as fireman, he is required and permitted for an additional period of time to remain on the engine for the purpose of watching and guarding same while the train is tied up and standing still on a sidetrack?

2. Does the evidence establish the fact that the delay in the movement of the trains in question and the necessity for the watching and guarding of the engines were occasioned by the act of God, and were the result of causes not known to the defendant or its officers or agents in charge of said employees at the time said employees left a terminal, and which could not have been foreseen?

3. Did the court below err in directing a verdict for the plaintiff?

THE STATUTE.

[34 Stat., 1415.]

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States,

or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or

other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being

lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

SEC. 5. That this act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11.50 a. m.

ARGUMENT.

I.

Is a locomotive fireman on duty within the meaning of the hours-of-service act if, after the expiration of approximately 16 hours in road service as fireman, he is required and permitted for an additional period of time to remain on the engine for the purpose of watching and guarding same while the train is tied up and standing still on a sidetrack?

The first section of the statute makes its provisions applicable to common carriers and employees engaged in the transportation of passengers or property by railroad in interstate commerce, and provides that "the term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 2 makes it unlawful for any common carrier subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours, and that whenever any such employee shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty.

The plaintiff in error takes the position that a fireman watching an engine under the circumstances outlined is not, while so employed, engaged in or connected with the movement of any train and is therefore not "on duty" within the meaning of this statute.

It is submitted that this is not a proper construction of this statute. The contention made by the plaintiff in error is based on a misconception of the meaning of the clause in the act defining the term "employees."

The definition of the word "employees" in the first section of the act is merely for the purpose of limiting the *class of employees* to which the act applies, namely, those employees who are engaged in or connected with the movement of trains, as distinguished from other employees of a common carrier engaged in interstate commerce whose duties may have no relation to interstat commerce. This is clear from the decision of the Supreme Court of the United States in the case of *B. & O. R. Co.* v. *Interstate Commerce Commission* (221 U. S., 612), where the court in construing this statute said:

> The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 33 Stat., 232, which was before this court in the *Employer's Liability cases* (207 U. S., 463). There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employee, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employees as well as the carriers.

The second section of the act does not limit the *time* of service to time *wholly used* in the movement of a train. For men whose duties *generally* relate to or are connected with train movement *no* service in excess of the statutory period is permitted. If an employee is that *kind* of an employee defined by the act, then he is subject to the provisions of the act. The second section of the statute provides that no employee shall be required to be "on duty" for a longer period than 16 consecutive hours. There is here no limitation of the *kind* of duty.

The courts have held that the expression "on duty" in this statute means "to be actually engaged in work or to be charged with present responsibility for such, should occasion for it arise." (*U. S.* v. *D. & R. G. R. Co.*, 197 Fed., 629; *U. S.* v. *Illinois Central R. Co.*, 180 Fed., 630.)

In the case first cited, a train was held on a sidetrack for 55 minutes waiting for the arrival of another train, the time of its arrival being uncertain. During the period of waiting on the sidetrack the switch was locked, the headlight of the locomotive was extinguished, the conductor was reading, and the brakemen were asleep. The court held that these employees were "on duty" within the meaning of this statute during this period, and its decision was cited with approval by the Supreme Court of the United States in the recent decision in the case of

M. K. & T. Ry. Co. of Texas v. *United States* (231 U. S., 112). In this case the Supreme Court said:

> One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued they were not on duty during this period, and that if it be deducted, they were not kept more than 16 hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. (*U. S.* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed., 624, 628; *U. S.* v. *D. & R. G. R. Co.*, 197 Fed., 629.)

The statute in terms prohibits an employee being required or permitted to remain on duty for a longer period than 16 consecutive hours, and further provides that when an employee has been on duty for 16 consecutive hours he shall be relieved and not required or permitted again to go on duty until he has had 10 consecutive hours off duty.

Bearing in mind the language of the statute, let us suppose a case of a fireman who has been on duty for 16 consecutive hours in connection with the actual physical movement of a train, and who is then required to act as engine watchman for an additional period of 10 hours. Plaintiff in error would contend that during the 10 consecutive hours such fireman was watching the engine he was not "on duty" within the meaning of the statute. Now, if plaintiff in error's contention is sound and this fireman was not "on duty" during the time he was watching the

engine, he must have been "off duty." Having been "off duty" for 10 consecutive hours, he could then immediately be sent out on a train for another 16 hours, then required to watch the engine for 10 consecutive hours more, and so on indefinitely, and thus the purpose of this statute would be absolutely defeated.

Service of more than 16 consecutive hours being prohibited by the statute, *no other requirement* of the carrier can justify it in permitting any employee to remain on duty in excess of that period. This seems to have been determined by the decision of the Supreme Court of the United States in the case of *B. & O. R. Co.* v. *Interstate Commerce Commission* (221 U. S., 612), in which case Justice Hughes said:

> If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power can not be defeated either by prolonging the period of service through *other requirements of the carriers* or by the commingling of duties relating to interstate and intrastate operation. [*Our italics.*]

When for the statutory period service is rendered which *does* relate to the movement of trains, the fact that *excess* service may *not* relate to the movement of trains does not excuse the carrier for permitting such excess service.

When the full period of permitted service under the act has elapsed, no detention of the employee by the

carrier for work, attendance, or service of any kind or character beyond that period is permissible.

Of what avail is the limitation of the hours of service if, after service to the permitted limit, service of any other kind or character is permitted beyond that limit?

The Government contends that any service watching an engine after the 16-hour limit of service is a service of an important character having a direct relation to the safety of travel. And this is so even if the engine so watched is upon a sidetrack for the whole period of extra service.

The possibility of an explosion of a locomotive boiler caused by letting its water get too low even when such a locomotive is upon a sidetrack is a menace to trains passing on the main track. So the fact that the engine is on a sidetrack ought not to render such extra service negligible in reckoning hours of service.

The position of the plaintiff in error on the proposition here under discussion is very clearly stated in the opinion of the court in the case of *United States* v. *Great Northern Ry. Co.* (206 Fed., 838). Judge Dietrich there said:

> From this abstract of the facts, as stipulated, it appears that Burgen was actually engaged as fireman a little less than 16 hours, but as fireman and engine watchman he was on duty continuously for 24 hours; and the question for determination, therefore, is whether, under the circumstances, his service as engine watch-

man brings the case within the statute. Conceding, as urged, but not deciding, that Burgen's service as engine watchman was not directly or indirectly connected with the movement of the train, he was primarily a locomotive fireman, and as such an "employee" as defined by the act, and was therefore subject to its operation. The defendant takes the position that by temporarily turning aside from his regular duty the employee becomes and for the time being remains exempt; but to this view I am unable to assent. While the statute is susceptible to such a construction, its prohibition is not, in terms at least, limited to service having to do directly or indirectly with the movement of trains. The language of the second section is: "It shall be unlawful * * * to permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours." There is here no express limitation of the operation of the act to a specific duty or class of duties; the limitation is rather to a class of employees, namely, those "actually engaged in or connected with the movement" of trains. The act must therefore be construed and, being remedial in its nature, it must receive such construction as will give to its general purpose reasonable effect. (*United States* v. *Kansas City S. Ry. Co.*, 189 Fed., 471; *United States* v. *Missouri Pacific Ry. Co.* (decided by District Court for District of Kansas, Mar. 22, 1913).) Now, the defendant's position is that the time Burgen was engaged in watching the engine is not to be counted, because during such

period he was performing a duty having no connection with the movement of any train. Plainly in that view the test, and the only test, is the relation of the specific service to the movement of trains. Logically, therefore, it is wholly immaterial whether the service as watchman follows or precedes the service as fireman or intervenes. It has no more connection with the movement of trains in the one case than in the other, and if want of such connection operates to exclude it from consideration it is to be excluded the same in one case as in another. But clearly the purpose of the act could in part be very easily frustrated if an employee could be lawfully kept on watch for 8 hours and then immediately be required to fire an engine in transit for 15 hours and 59 minutes, or if he could be required to fire for 8 hours, then watch for 8 hours, and then fire again for 8 hours, all consecutively. It is not to be assumed that such a contingency, which is entirely possible under the construction urged by the defendant, was contemplated in the passage of the act. True, the violation of the spirit of the statute is more apparent in such a case, where the service precedes the service as fireman, than where, as here, it follows such service, but the difference is one of degree only, and the courts can not with nicety distinguish between service which materially impairs and that which impairs only to an inappreciable extent the efficiency of a trainman. That 24 hours of continuous service without sleep is unnatural can not be gainsaid,

and if persisted in for any considerable length of time, even with liberal intervals of rest, it might injuriously affect the trainman's efficiency is not unreasonable to believe. I can not avoid the conclusion that it was the intent and purpose of Congress that men charged with the responsibility of safely moving trains in interstate commerce should not be required or permitted to work continuously for more than 16 hours at any one time. It has been suggested that the carrier has no power to compel employees to rest, and when given the opportunity for rest they may use the time in laboring upon their own account or for some other employer, but such a contingency is remote in the extreme; at least it is one with which we are not presently concerned. Without further discussion, my conclusion is, that under proper construction of the act locomotive firemen, engineers, conductors, and other members of train crews, being "employees," as that term is defined, can not be permitted to be on duty for more than 16 consecutive hours, regardless of the question whether such duty consists in whole or only in part of work directly connected with the movement of trains. In this view, and upon the facts stipulated, it must be held that the defendant is guilty.

In the case of *United States* v. *Great Northern Ry. Co.*, No. 705, District Court of Minnesota, decided by Judge Willard, June 4, 1913, on motion of counsel for defendant for verdict in its favor, the following

colloquy took place between counsel for defendant and the court:

The COURT. I will hear you upon that, Mr. Lindlay.

Mr. LINDLAY. It is the contention of the defendant that the use of the fireman to watch the engine, under the circumstances that obtained in this case, is not in violation of the spirit and purposes of the hours of service act. The text of the act, I think, shows that the object and purpose of the act is the safety of the employees and of the traveling public; and in construing the act that purpose should be kept in view, in my opinion, and such construction given as will best subserve the purposes which the act has in view. It is our contention that when a train is taken out of service, when its operation is killed, its movement is ended and it is placed upon either a siding or a passing track, that it is no longer a train in movement, and that the employee who does nothing more than watch the engine is not engaged, within the terms of the act, in connection with the movement of any train.

The COURT. Suppose after a crew had been on service for five hours the train was delayed at a station, say, for five hours, and the crew has absolutely nothing to do during those five hours; would you claim that you can take that five hours out of the 16 hours, and run the employees five hours after the expiration of the 16 hours?

Mr. LINDLAY. Not unless they were definitely relieved. If they were not relieved, you could not.

The COURT. After he has been on duty for 16 hours this fireman is required to watch the engine for four hours more; is it your theory that you can put him on duty again before 10 hours? As I understand it, your theory is that the time does not count that he is not engaged in the movement of a train.

Mr. LINDLAY. Yes, sir.

The COURT. After five more hours have elapsed, is it your theory that you can put him on in five hours again?

Mr. LINDLAY. No, sir.

The COURT. Why not?

Mr. LINDLAY. Here is a practical situation, and by observing this practice which we contend for, it does not put any man in the active charge of a train or operation of a train for more than 16 hours.

The COURT. If you had taken this fireman off the train and put him in the roundhouse or machine shops and worked him 10 hours, could you put him back again upon a train?

Mr. LINDLAY. No, sir.

The COURT. Why not; if your theory is correct?

Mr. LINDLAY. Because it might be a violation of the theory or the purpose of the act.

* * * * *

The COURT. When we come to the determination of the question as to whether these firemen while they were watching the engine were connected with or engaged in the movement or operation of any train, we come to a question which has already been decided by this court, both by Judge Morris and by myself. I have

held several times, and I think that Judge Morris has held once, that such a fireman is engaged in the movement or operation of a train, and does come within the law. I have held, though I do not know whether Judge Morris has so held, that there can be a prosecution not only for such a violation of this law, but for a failure to report the violation, which seems to me to be an extremely hard case, because it appeared that the railroad company did not understand that the use of the fireman was a violation of the law. Notwithstanding that, I felt compelled to impose a penalty. So that, in order to decide this case for the defendant I would have to overrule not only my own decision, but that of Judge Morris, which I do not feel inclined to do, because I can not see any reason for so doing.

I am still of the opinion that the use of these firemen does come within the meaning of the law; that they were connected with the movement or operation of a train while they were watching these engines. To be sure the trains were standing still. If the time is to be eliminated while the engine is standing in the yard, then I do not see why the time should not be taken out when a train is standing still at a station, and a brakeman is standing there and has nothing to do.

I am satisfied that these men come within the law relative to the movement and operation of a train and are connected with it. The evidence is undisputed that they were employed and were required to work more than 16 hours. It is a matter of no signifi-

> cance as to the severity of the work, whether it was light or arduous. The question to be determined is whether they were required to be on duty. That they were required to be on duty appears from the testimony of the men themselves and from the testimony of other witnesses engaged in the service of the railroad company.
>
> * * * * *

Though not at all essential to the maintenance of the Government's contention that the general duties of the employees here in question were such as to bring them within the act, it may be contended fairly that, in a broad way, the care of a standing train, completely made up, in the time intervening between movements is a duty which is "connected with" the movement of trains.

In the case of *United States* v. *Missouri Pacific Ry. Co.* (206 Fed., 847), Judge Pollock said:

> While the question presented is, so far as I find, of first impression, yet considering the remedial nature and humane purpose of the act, the character of the duties imposed upon such watchman as stipulated by the parties, and all the facts and circumstances presented by the record to which consideration should be given, I am forced to the conclusion the time so spent by a locomotive fireman in watching his engine must be computed as hours of service within the purview of the act, and for the following, among other ressons which might be given:
>
> The humane feature of the statute being considered, it must be thought the Congress

intended, at or before the expiration of the 16-hour period of service provided therein, an employee engaged in the movement of the train would, from exhaustion of body and mind, be in need of relaxation and rest, freed from all responsibility and care for the safety of himself and others. That the cab of a moving engine in which such watchman is required to ride is not such place as in the absence of any duty to be performed is conducive to that rest and relaxation required by the statute is a matter of common experience and knowledge However, when to this self-evident fact, as in this case, there is superadded the duties imposed on one so situated, as by the parties stipulated, the question of relaxation, rest, and sleep required by the statute must be almost, if not altogether, impossible.

Again, aside from the humane purpose of the act, regarded from the standpoint of the welfare of the employee himself, and looking alone to the safety of the employee and others, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep he should permit the water in the boiler to be entirely consumed, the danger from wreck of the train or other disaster by explosion, involving himself and others, is apparent.

All things considered, I am of the opinion it must be held such watchman is in a manner actually engaged in connection with the movement of the train, and to such extent as brings the time so consumed within the hours of

service as contemplated by the act. If such construction of the statute is correct, and it shall impose a burden too severe on railroad companies, the remedy lies with the lawmaking power, not the courts.

In the following additional cases the question here under discussion has been passed upon by the district courts, and we know of no instance in which it has been held that these engine watchmen were not on duty within the meaning of this statute:

U. S. v. *M., St. P. & S. S. M. Ry.*, District of Minnesota, April 1, 1913.

U. S. v. *S. P. L. A. & S. L. R. Co.*, Southern District of California, October 3, 1913.

II.

Does the evidence establish the fact that the delay in the movement of the trains in question, and the necessity for the watching and guarding of the engines were occasioned by the act of God and were the result of causes not known to the defendant or its officers or agents in charge of said employees at the time said employees left a terminal, and which could not have been foreseen?

By this portion of its answer defendant sought to bring itself within the terms of the proviso of section 3 of the act, which is as follows:

> *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

It was alleged that after these trains left Missoula they encountered such unusual snowfall that when they arrived at the stations where they were eventually tied up the wires were down and no means of communication were available in either direction; that because of this fact and on account of the snow it was impossible to proceed with the trains, and the crews, with the exception of the firemen, who were required to watch the engines, were relieved from all duty.

It is further alleged that the delay in the movement of said trains and the necessity for watching and guarding of the engines were due to the act of God and the result of causes which were not known to said defendant company at the time they left said terminal at Missoula, and which could not have been foreseen.

In the first place it is submitted that this portion of the answer has no material bearing on this case. There is really but one question in this case and that is whether these firemen were on duty within the meaning of the statute while they were watching the engines at these stations. In other words, the defense is that when the trains involved arrived at Avon and Elliston, respectively, they found that the wires were down and they were compelled to remain there, and the crews were accordingly relieved from all duty, with the exception of the firemen, who were required to watch the engines. Nothing that happened on the trip caused the rest of the train crews to exceed the 16-hour limit, and the firemen would

not have exceeded it but for the fact that they were required to watch the engines. The real cause of the violation of this statute, if there was one, was the requirement of the carrier that the firemen watch the engines. This was merely a matter of economy and convenience, as shown by the evidence. (Record, pp. 26, 30, 39, 53.)

This was the view of the court in a similar case, *United States* v. *Great Northern Ry. Co.* (District of Minnesota, supra), where the fireman was required to watch the engine after the train had been tied up on a sidetrack and the rest of the crew relieved at the expiration of 16 hours. On the question of admissibility of evidence to show that this train had been delayed before reaching that point by causes named in the proviso, Judge Willard said:

> I passed upon the question of the materiality of this evidence when it was offered, and ruled it out on the theory that if an unavoidable accident did occur which delayed a train 5 hours, and I will say for the sake of illustration, the first 5 hours out of the 16 hours, so that the obstruction caused by unavoidable accident was entirely removed and the train started again after 5 hours, that that would not justify a railroad company in running that crew by any number of stations where it could be tied up, or running by a station when the 16 hours had expired. The theory of the defendant is that the delay having been caused by an unavoidable accident for 5 hours, the company had the right to use the crew for so

> much longer. I am satisfied that this is an incorrect construction of the statute, and on that theory I ruled it out.

In the case of *United States* v. *Southern Ry. Co.* (Western District of South Carolina), decided October 30, 1913, not yet reported, Judge Smith held that where a train is delayed by reason of some cause mentioned in the proviso, the hours of service of train employees may be extended in such cases beyond the period fixed in the statute only so far as may be necessary to permit the train to be operated to a point at which the train crew could be relieved. In ruling on defendant's exception to its charge, the court said:

> On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act would be suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to 10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only

> so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

But aside from this, and even assuming that this portion of the answer was material to the issues, there is nothing in the evidence which would justify a finding that the trains in question were delayed by the act of God or as the result of causes not known at the time the trains left a terminal, and which could not have been foreseen.

The burden was on the defendant to bring itself strictly within the letter and spirit of the proviso. The rule of construction is that laid down by Mr. Justice Story in *United States* v. *Dickson* (15 Peters, 141, 175):

> The general rule of law which has prevailed and become consecrated almost as a maxim in the interpretation of statutes is that where an enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any exception must establish it as being within the words as well as within the reason thereof.

The exceptions which excuse excess service are unforeseen emergencies and accidents of such exceptional and unusual occurrence that they are unavoidable and practically inevitable. In other words, only causes of a grave and serious nature are specified in the proviso as excuses—"casualty," "unavoidable accident," "act of God," and "which could not have been foreseen."

The evidence introduced by defendant may be briefly summarized as follows:

The weather conditions between Missoula and Helena on May 1, 1912, as reported to the dispatcher's office at Missoula, were as follows (Record, p. 45):

> *4 p. m.:* Missoula, cloudy and light rain; Garrison, strong northwest wind, cloudy, calm, 47 above, no rain; Elliston, cloudy, strong northwest wind, 38 above; Blossburg, cloudy, light northwest wind; Helena, cloudy, light northwest wind.
>
> *5 p. m.*, snowing at Blossburg, Drummond, and Garrison to Avon. Snow 2 or 3 inches deep on the ground.
>
> *11.40 p. m.*, 14 inches of snow at Blossburg sleet and rain.

COUNT 1.

This train, extra 1654, left Missoula for Helena about 11 p. m., May 1. (Record, p. 46.)

Engineer Gies testified that, starting from Missoula and going east, he came to the following stations in their order (Record, p. 25): Bearmouth, Drummond, Garrison, Avon. That he first noticed snow east of

Drummond; that it appeared heavy and wet; that the wires and poles were down in several places, due to the snow; that he never noticed a storm of that nature at that time of the year; that when he got to Avon, about 11 a. m. on the morning of May 2, there were about 8 or 9 inches of snow; that they went to Avon to wait for No. 3, a passenger train coming from Helena.

On cross-examination he testified (Record, p. 27) that he didn't notice any poles down until he got to Drummond and that he was not delayed materially by the storm up to the time he got to Drummond; that the snow was not sufficient to prevent the physical movement of the train; that they went on the sidetrack at Avon to wait for No. 3 to go by and that they got an order signed by the conductor of No. 3 to wait there for another train (extra west) (Record, p. 29); that he did not know whether the wire was working at Avon or not (Record, p. 30); that if they had not had to wait for this extra west they would have had time to go to the terminal, Helena, taking the engine and caboose and train crew, within the 16-hour period (Record, p. 29); that after this extra west arrived they did not then have time to go into Helena with the engine and caboose within the 16 hours (Record, p. 32), and accordingly the train was tied up and the crew, with the exception of the fireman, relieved.

Conductor Shaw's testimony was to the same effect. He further testified that when he left Garrison he had instructions from the dispatcher there

to the effect that if they found that they could not make Helena with the whole train within the 16 hours they were to take the engine and caboose and go on in. (Record, p. 34.) He did not see any poles or wires down at Avon and he didn't know the condition of the wires between Avon and Helena.

COUNT 2.

This train, extra 1633, left Missoula for Helena between 4 and 5 p. m. May 1 (Record, pp. 41, 45), or about six hours previous to the departure of the train involved in count 1.

Engineer Davis testified (Record, p. 38) that he first observed snow about Bearmouth the evening of the 1st; that they arrived at Elliston on the morning of May 2 about 7; that the snow there was halfway up to the knees and was very heavy and wet all along from Garrison to Elliston; that he never saw anything as bad at that time of the year; that when they got to Elliston they were tied up there on account of the 16-hour law, having been on duty over 15 hours; that they went into the siding there because their 16 hours was up and the crew went to bed, except the fireman, who watched the engine.

On cross-examination he testified that the reason they went off duty at Elliston was because they couldn't make Helena within the 16 hours; that the storm did not prevent them from proceeding to Helena. (Record, p. 41.)

The testimony of the remainder of the crew was to the same general effect.

Chief Dispatcher Thompson testified (Record, p. 44) that from between 11.40 p. m. May 1 and midnight the wires all went down east of Missoula. How far that condition existed he was unable to state. After the wires were down he made two attempts to communicate with these trains from Missoula, and after waiting an hour or two hours after midnight, after he saw that he could not get any communication east, he sent a message over foreign lines via Spokane, which was received at Helena and transmitted to Garrison. (Record, p. 46.) In the morning he went to Garrison on a passenger train, arriving there at 9.30, May 2, 2 hours and 50 minutes after they had received his message. When he arrived at Garrison at 9.30 a. m., May 2, there was no communication between Garrison and Helena. (Record, p. 47.) His purpose in sending the message was to advise the dispatcher at Garrison the time these crews should be released. (Record, p. 47.) It was impossible to control the movement of these two trains after they left Garrison on account of the wires. (Record, p. 48.) He arrived at Garrison before No. 1654 pulled out of Garrison. (Record, p. 49.) Never heard of a storm just exactly like it before. (Record, p. 50.) They have wet snow on the Coeur d'Alene and Lookout Mountain and in the Bitter Root Range, but for a heavy, wet snow in the spring he didn't think they had the wire troubles as bad as that was, because the wires there are those heavy wires, and they can

sustain more weight. In other words, they put up wires to meet that condition. (Record, p. 50.) The tonnage of extra 1654 was 2,249 tons—55 cars—and the tonnage of extra 1633 was 55 loaded cars—2,244 tons. The tonnage rating of both of these engines is 2,200 tons from Missoula to Garrison and 1,600 tons between Garrison and Elliston. Under the impression that the orders for the movement of the extra west from Helena were issued by the operator at Helena. Operator at Helena had no right to issue orders for that train. These orders were supposed to be issued from Missoula. If this operator had not sent this extra out of Helena, train 1654, with the engine and caboose, would have had ample time to reach Helena within the 16 hours. (Record, pp. 51–53.)

An "act of God" has been generally defined as something which occurs exclusively by the violence of nature; at least an act of nature which implies an entire exclusion of all human agencies.

In *Gleeson* v. *V. M. R. R. Co.* (140 U. S., 435, 439) Mr. Justice Lamar, delivering the opinion of th, court, said:

> It appears that the accident was caused by a landslide, which occurred in a cut some 15 or 20 feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think

> such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths, and illnesses have been held to be "acts of God"; but we know of no instance in which a rain of not unusual violence and the probable results thereof, in softening the superficial earth, have been so considered.

In *The Majestic* (166 U. S., 375, 386; 17 S. Ct., 597; 41 L. Ed., 1039) it was held that the "act of God" which would exempt one from liability is an act in which no man has any agency whatever.

The snow was not sufficient to prevent the physical movement of the train, and the most that can be said of it is that it was an unusual storm for *that time of the year*. The wires should have been heavy enough to sustain the weight of the snow at all times of the year. Dispatcher Thompson testified (Record, p. 50) that on the Coeur d'Alene and Lookout Mountain and Bitter Root Range they do not have wire troubles as bad as that because they put up heavy wires to meet that very condition.

In the case of *Gleeson* v. *Virginia Midland R. R. Co.* (supra), the Supreme Court of the United States said:

> To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the traveling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

It is submitted that the language and reasoning of this opinion apply with equal force to the facts in the case at bar.

The evidence fails to show any substantial delay due either to the snowstorm or to the wire failure. There is no substantial evidence as to where they were delayed or to what extent they were delayed.

Thompson testified that he sent a message from Missoula to Garrison which was received at Helena and sent from there to Garrison, being received at Garrison 2 hours and 50 minutes before he arrived there. As he arrived there at 9.30 a. m. May 2, the wires must have been open between Helena and Garrison at 6.40 a. m. As extra 1633 arrived at Elliston and tied up at 7 a. m. May 2, it could not

have been materially delayed on account of the wires being down between Garrison and Helena.

Furthermore, both of these train crews knew the time they went on duty and when their 16 hours were up, and they had standing instructions that when they were unable to communicate with the dispatcher on account of wire failure or other cause they were to take the matter in their own hands and tie up at the first available point to prevent a violation of the law. (Record, p. 58.) As a matter of fact, both of these crews did tie up, and but for the fact that the firemen were required to watch the engines no service of any kind in excess of 16 hours would have occurred.

Both of these trains were loaded in excess of the maximum tonnage, and it may well have been that their movement was more or less impeded by this fact.

Thompson testified that it was impossible to control the movement of these two trains after they left Garrison on account of the wires. (Record, p. 48.) He further testified that he arrived at Garrison before extra 1654 pulled out of there and that he gave them instructions there. This was at 9.30 on the morning of May 2; this train had left Missoula at 11 p. m. the night before. The crew went on duty at 10 p. m., so that before leaving Garrison they had been on duty 11 hours and 30 minutes. From Missoula to Helena it is 119 miles; from Missoula to Garrison it is 68 miles; so that they had but 4 hours and 30 minutes to complete the remaining 51 miles.

At Garrison they maintained four or five train crews, and they also have helper crews and engines there. (Record, p. 31.)

Before this train, extra 1654, left Garrison, Thompson knew of the storm; he knew that the wires were down between Missoula and Garrison; he knew that there was no communication between Garrison and Helena; he knew that this train was loaded in excess of the maximum tonnage; he knew how long the crew had already been on duty; he knew that it would be impossible to control the movement of this train after it left Garrison on account of the wires, and yet, notwithstanding all these, he allowed this train to proceed toward Helena.

The evidence fails to show that any attempt was made to reduce the tonnage of this train at Garrison or that any effort was made to utilize the crews there.

Even after this train had left Garrison, and after it arrived at the station of Avon, they still had time to take the engine and caboose and go on into Helena with the crew in accordance with instructions they had received from the dispatcher at Garrison, and they would have done so if they had not received an order to wait there until an extra west arrived from Helena. Thompson testified that the order for the movement of this extra west out of Helena was issued by the operator who had no right to issue the order, but took it upon himself to do so.

The operator knew the condition of the wires; knew that the trains in question were out on the road; knew the time of 16 hours was up. (For the

message which Thompson sent from Missoula to Garrison was received at Helena and transmitted from there to Garrison.) (Record, p. 46.)

The act provides that in all prosecutions the common carrier shall be deemed to have knowledge of all the acts of all its officers and agents. The delays were therefore the result of causes known unto the carrier and which could have been foreseen.

The purpose and object of the statute was well described in the unanimous opinion of the Court of Appeals of Kentucky (140 S. W. Rep., 672), *St. Louis, I. M. & S. R. Co.* v. *McWhirter:*

> Its aim is the protection of the lives of employees of the railroad companies, and also the lives and property entrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation * * * are needful to the health and safety of the men engaged in the hazardous work of railroading, and that the benefit it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the provision of the statute may sometimes bear harshly upon an offending railroad company, but on the whole their just enforcement, in all proper cases, is found to be promotive of the public welfare.

See also the case of *United States* v. *Chicago, Milwaukee & P. S. Ry. Co.*, eastern district of Washington (197 Fed., 624), in which the court says:

> The purpose of the statute, as indicated by its title, is to promote the safety of employees

> and travelers upon railroads by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent and cause accidents leading to injuries and destruction of lives. (*N. Y.* v. *Erie R. Co.*, 198 N. Y., 369.) And while the statute is penal in its nature, it is in some aspects remedial and should be so construed to promote the apparent policy and object of the legislature and not entirely defeat its purpose. (*Johnson* v. *Southern Pac. Co.*, 196 U. S., 1.)

In view of the purpose of this statute to protect human life, a construction ought not to be permitted which would make the negligence of a railroad company and lack of care in operation and in the maintenance of its instrumentalities a license to work its employees beyond the limits established by the Congress in the interest of the safety of travelers and employees. Any cause to which the negligence of the railroad company in any manner contributes ought not to be allowed as an excuse for violation of the terms of this act. Where the negligent act of the carrier, or of its officers, agents, or employees, in the conduct and management of its business, either in the maintenance of its instrumentalities or in compliance with time schedules, results in a delay to a train crew there should be no suspension of the wholesome and reasonable obligation of the act.

The reasoning of the court in the case of *Newport News & Mississippi Valley Co.* v. *United States* (61 Fed., 488) is particularly applicable to the facts in

the case at bar. Lurton, circuit judge, delivering the opinion of the court, said:

> The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willfully" fail to comply with the requirements.
>
> This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.
>
> It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of

> cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." * * *
>
> An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence.

In construing this proviso to the hours-of-service act, the Circuit Court of Appeals for the Eighth Circuit, in the case of *United States* v. *Kansas City Southern Ry. Co.* (202 Fed., 828), said:

> The act under consideration does not employ the words knowingly and willfully. The carrier is made liable if it requires or permits any employee to be or remain on duty in violation of stated provisions. This case then falls within that class where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. (*Armour Packing Co.* v. *United States* (C. C. A.), 153 Fed., 1; same case, 209 U. S., 56; *Chicago, St. P., M. & O. Ry. Co.* v. *United States* (C. C. A.), 162 Fed., 835.) By the terms of the proviso the carrier is excused "where the delay is the result of a cause not known * * * at the

time said employee left a terminal, and which could not have been foreseen." Not merely which was not foreseen, but which could not have been foreseen. The phrase "by the exercise of due diligence and foresight" is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier; that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We can not assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad. Conformably to this view, it has been uniformly held by the courts that ordinarily delays in starting trains by reason of the fact that another train is late; from sidetracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and, in short, from all the usual causes incidental to operation are not, standing

alone, valid excuses within the meaning of this proviso. The carrier must go still further and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded.

The terms "casualty," "unavoidable accident," "act of God," "and causes which could not have been foreseen," all indicate an intention on the part of Congress to require the railroad to comply with the provisions of the law under all the circumstances which can be regarded as reasonably within its control.

The proviso relieves the railroads of the penalties only in cases where there has been no failure on the part of the railroad to guard against the delay. Where the delay is the result of a cause within the control of the carrier and is avoidable and could have been foreseen, it should have been foreseen as an ordinary incident of railroading. It is submitted that such a cause does not relieve the carrier from the penalties of the act which was intended in good faith to limit the employment of men in train service.

III.

Did the court below err in directing a verdict for the plaintiff?

In conclusion, we desire to call attention to the following settled rule of law:

Where each party has moved for a directed verdict, the finding of the court can not be disturbed if there was any substantial evidence to support it, but

the appellate court is limited to the consideration of the correctness of the finding on the law.

We quote from *Beuttell* v. *Magone* (157 U. S., 154):

> Both parties asked the court to instruct a verdict; both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are therefore concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. (*Cases cited.*)

See also *Phenix Ins. Co.* v. *Kerr* (129 Fed., 723), and cases there cited.

In reviewing a similar case to the one at bar, where the defendant sought to bring itself within the proviso to the hours-of-service act and where, both parties having requested a directed verdict, the court below directed a verdict for the Government, the Supreme Court of the United States in the case of *Missouri, Kansas & Texas Ry. Co. of Texas* v. *United States* (231 U. S., 112) said:

> It is urged that in one case the delay was the result of a cause—a defective injector—that was not known to the carrier and could not have been foreseen when the employees left a terminal, and that therefore by the proviso in section 3 the act does not apply. But

the question was raised only by a request to direct a verdict for the defendant, and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known. (See *Gleeson* v. *Virginia Midland Ry. Co.*, 140 U. S., 435; *The Majestic*, 166 U. S., 375, 386.)

Wherefore it is respectfully submitted that there was no error in the ruling of the court below, and the judgment should be affirmed.

B. K. Wheeler,
United States Attorney.
Philip J. Doherty,
Walter N. Brown,
Special Assistant United States Attorneys.