No. 2310

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN 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 Idaho, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 2310

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN 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 Idaho, Northern Division.

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

INDEX OF 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.]

Index Page

[Names and Addresses of Attorneys.]

CHARLES S. ALBERT, Esq., THOMAS BALMER, Esq., Residence, Spokane, Washington,

HERMAN H. TAYLOR, Esq., Residence, Sandpoint, Idaho,

Attorneys for Plaintiff in Error.

C. H. LINGENFELTER, Esq., Residence, Boise, Idaho,

Attorney for Defendant in Error.

In the District Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Complaint.

Now comes the United States of America, by Curg H. Lingenfelter, United States Attorney for the District of Idaho, and brings this action on behalf of the United States against the Great Northern 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 Laclede, in the State of Idaho; 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.

FOR A CAUSE OF ACTION,

Plaintiff alleges 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 Idaho.

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, [1*] beginning at the hour of 6:00 o'clock A. M., on July 10, 1912, upon its line of railroad at and between the stations of Hillyard, in the State of Washington, and Laclede, in the State of Idaho, within the jurisdiction of this court, required and permitted its certain Fireman and employee, to wit, Ed. Burgen, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 6:00 o'clock A. M. on said date, to the hour of 6:00 o'clock A. M., on July 11, 1912.

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. 1151, said train being then and there engaged in the movement of interstate traffic.

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.

---

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

WHEREFORE, plaintiff prays judgment against said defendant in the sum of Five Hundred Dollars and its costs herein expended.

C. H. LINGENFELTER,
United States Attorney.

[Endorsed]: Filed October 29, 1912. A. L. Richardson, Clerk. [2]

[Title of Court and Cause.]

Summons.

The President of the United States to Great Northern Railway Company, the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Coeur d'Alene, in said District, and answer the complaint filed against you in the above-entitled action, within twenty days from the date of the service of this Summons upon you, if served within the Northern Division of said District, or if served within any other Division of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the Court for the relief demanded in the complaint, to wit: For judgment in the sum of Five Hundred ($500.00) Dollars and for its costs herein expended. The facts more fully appearing in plaintiff's complaint, a certified copy of which is served herewith, hereby referred to and made a part hereof. [3]

And this is to COMMAND you the MARSHAL of

said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Boise, in said District, this 29th day of October, 1912.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 442. In the District Court of the United States for the District of Idaho, Northern Division. The United States vs. Great Northern Railway Company. Summons. Returned and filed December 12, 1912. A. L. Richardson, Clerk.

U. S. Attorney,
Boise, Idaho,
Attorney for Plaintiff.

Marshal's Return.

This is to certify that I received the within Summons together with a certified copy of the complaint at Lewiston, Idaho, on the 1st day of November, 1912, and served the same upon the Great Northern Railway Company at Sandpoint, in Kootenai County, Idaho, on the 14th day of November, 1912, by handing to and leaving with Herbert Mustell, Agent of the Great Northern Railway Company, at Sandpoint, Idaho, a duplicate of the within summons, together with the certified copy of the complaint.

Dated Nov. 22d, '12.

S. L. HODGIN,
U. S. Marshal.
By Wm. Schuldt,
Deputy. [4]

[Title of Court and Cause.]

Answer.

Now comes the above-named defendant, Great Northern Railway Company, and for its answer to the complaint of the plaintiff herein:

I.

Denies each and every allegation, matter and thing in said complaint contained, except as is hereinafter specifically admitted.

II.

Admits that it is now, and during all the times mentioned in said complaint has been, a corporation, but specifically denies that it was either organized or doing business under the laws of the State of Wisconsin, and alleges, on the contrary, that it was organized, exists and does business under and by virtue of the laws of the State of Minnesota.

III.

Said defendant admits that it has an office and place of business at Laclede, in the State of Idaho, but denies any information or knowledge, sufficient upon which to form a belief, as to whether the above-entitled action was brought either upon the suggestion of the Attorney General of the United States, or at the request of the Interstate Commerce Commission, or upon information furnished by said Commission, and therefore denies [5] the same.

IV.

Said defendant further admits that it is now, and during the times mentioned in said complaint has been, a common carrier by rail for hire, and has been

engaged in interstate commerce by railroad in the State of Idaho, but denies that it was at all times engaged in said interstate commerce in the State of Idaho, and alleges that it was sometimes during the times mentioned in said complaint, engaged in interstate commerce and sometimes engaged in interstate commerce by railroad in the State of Idaho.

V.

Said defendant specifically denies that either in violation of the act referred to in said complaint, as contained in 34 Statutes at Large, at page 1415, or otherwise, said defendant either beginning at the hour of six o'clock A. M. on July 10th, 1912, upon its line of railway at or between the stations of Hillyard in the State of Washington, and Laclede in the State of Idaho, or otherwise, or within the jurisdiction of the above-entitled court, either required or permitted its certain fireman and employee, to wit, Ed Burgen, to be or remain on duty as such fireman for a longer period than sixteen consecutive hours, either from said hour of six o'clock A. M. on said July 10, 1912, to the hour of six o'clock A. M., July 11, 1912, or otherwise.

VI.

Said defendant specifically denies that said employee, Ed Burgen, was required or permitted to be or remain on duty for a longer period than sixteen consecutive hours, or at any time in excess of said sixteen hours, or was engaged in or connected with the movement of defendant's train No. Extra, drawn by its own locomotive engine No. 1151, or otherwise, or that said Ed Burgen was engaged in or connected

with the movement of any train engaged [6] in the movement of interstate traffic, after the expiration of said sixteen hours.

VII.

Said defendant specifically denies that either by reason of the facts alleged in said complaint, or otherwise, said defendant is liable to plaintiff in the sum of Five Hundred Dollars ($500), or that said defendant violated any act of Congress.

WHEREFORE, defendant prays that plaintiff take nothing herein, and that it be dismissed with its costs and disbursements.

CHARLES S. ALBERT,
THOMAS BALMER,

P. O. Address: Spokane, Spokane County, Washington,

HERMAN H. TAYLOR,
Sandpoint, Idaho,
Attorneys for Defendant.

State of Idaho,
County of Bonner,—ss.

Herman H. Taylor, being first duly sworn, deposes and says, that he is one of the attorneys for the defendant named in the foregoing answer; that the defendant is a nonresident corporation, and that affiant is the duly designated agent of the defendant for the service of process in the State of Idaho, under the laws thereof, and that he makes this affidavit as such, for and on behalf of the defendant. That he has read the foregoing Answer, knows the contents thereof, and believes the facts therein stated to be true.

HERMAN H. TAYLOR.

Subscribed and sworn to before me this 5th day of December, 1912.

[Notarial Seal] E. W. WHEELAN,
Notary Public in and for Bonner County, State of Idaho.

Due service by copy of the within and foregoing Answer hereby admitted this 12th day of December, 1912.

C. H. LINGENFELTER,
U. S. Attorney.

[Endorsed]: Filed Dec. 16, 1912. A. L. Richardson, Clerk. [7]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that on the 10th day of June, 1913, the above-entitled cause came on for trial before the above court, upon an agreed statement of facts, a jury having been expressly waived, and the cause having been submitted to the above-entitled court for final decision and judgment upon the pleadings and facts agreed upon.

Hon. FRANK S. DIETRICH presided over said court. The plaintiff appeared by C. H. Lingenfelter, its counsel, and defendant appeared by Charles S. Albert, Herman H. Taylor and Thomas Balmer, its counsel, and the following proceedings were had: Plaintiff offered in evidence the agreed statement of facts, a copy of which agreed statement of facts is hereto attached:

[Title of Court and Cause.] [34]

Agreed Statement of Facts.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, plaintiff and defendant, in the above-entitled cause, each acting herein through its respective counsel of record, that each of the parties to this action hereby waives the right to have tried by jury the issues of fact created by the pleadings in this case, and each of the parties hereto submits this cause to the above-entitled court for final decision and judgment upon the pleadings in this cause and the facts agreed upon by the parties as set forth in the following statement of facts:

IT BEING ESPECIALLY AGREED by and between the parties to said cause, that all of the facts herein stated are hereby admitted to be and shall be taken as true, and shall, for all the purposes of this action and its final determination be treated in all respects as if duly and fully established, subject to the objection which either party may make as to the competency, materiality or relevancy of such facts.

The facts agreed upon as aforesaid are as follows, to wit:

I.

The facts agreed upon as aforesaid as to plaintiff's alleged cause of action set forth in the complaint herein are as follows, to wit:

1. That the defendant, Great Northern Railway Company, is and during all the times herein mentioned was, a common carrier, engaged in interstate commerce by railroad in the State of Idaho.

2. That at Hillyard, in the State of Washington, on the 10th day of July, 1912, at the hour of 6 o'clock A. M. on said day, said defendant called and directed one Ed Burgen, named in the complaint herein (who was then and there a locomotive fireman in its employ), to fire one of its steam locomotive engines, #1151, which was then and there about to proceed, and which did thereafter, as hereinafter related, proceed to pull a certain [35] freight train of said defendant, commonly called a way freight train, from said station or town of Hillyard, on that portion of said defendant's railway commonly called its Spokane Division, over and across a portion of said Spokane Division of said defendant to the station or town of Laclede, in said State of Idaho, and thence to the station or town of Troy, in the State of Montana, on the Kalispel Division, which said freight train was then and there, and at all times herein mentioned, loaded with commercial freight and property destined for shipment and being shipped and moved except as hereinafter set forth, from points without the State of Montana, and especially from points within the State of Washington, to points within the State of Montana, and that in the movement of said engine and train, said defendant was, and its employees were, and especially the said Ed Burgen, was engaged in the movement of interstate commerce until 9:59 P. M. on said tenth day of July, 1912, and that thereafter said Ed. Burgen was not engaged in or connected with the movement of any train in interstate commerce or otherwise, except as the same may hereafter appear.

3. That at said time and place, the said Edward Burgen, as such fireman and employee responded to said call, and thereupon, as such employee, proceeded to, and did, in accordance with the permission and direction of said defendant fire said locomotive engine at said Hillyard, and without interruption or rest, and without being off duty as such fireman and employee thereafter, throughout the course of the movement and operation of said train from said Hillyard to said Laclede; that said engine so fired and being fired by said Ed Burgen, left said station of Hillyard, at 6 A. M. on said day, and proceeded westerly over a portion of said Montana Division to and arrived at said station of Laclede at 9:59 P. M. on said day, during the whole of [36] which time the said Ed Burgen was the fireman upon and was engaged in firing the said steam locomotive engine, and thereby in generating the steam by which the said engine was propelled; that thereupon, the said engine and train was run into the siding, or sidetrack, leading out of and into the main line of said defendant's said Spokane Division of its railway tracks at said Station of Laclede, so that thereupon the whole of said train occupied only the said sidetrack, leaving the said main line free and clear for the unobstructed movement of trains approaching, passing through and leaving said station of Laclede, and the switches at each end of said sidetrack were thereupon locked and thereafter remained locked in such a position that said train could not leave said sidetrack, and no train could proceed from said main line to or upon said sidetrack, and thereupon also the brakes

on said engine and train were set so that said engine and train could not move unless said brakes should be released by some person or persons; that thereupon the crew of said train other than the said Ed Burgen having been on duty connected with and having been actually engaged in or connected with the movement of said train for sixteen hours, retired to rest upon said train, and the orders of said train, constituting the orders under which it had any right to proceed or move, and constituting its only orders, were annulled, and said train lost its right to move further without additional instructions being given for the movement thereof, and said train could not move thereafter without additional instructions being given to persons then and there on said train, or thereafter to be on said train, and the crew of said train other than the said Ed Burgen were relieved from any and every duty connected with the movement of said train, or of any train, and were relieved from any and every duty whatsoever and were not thereafter required or permitted by defendant to go [37] on duty and did not thereafter go on duty, and were not thereafter engaged in or connected with the movement of any train until they had had ten consecutive hours off duty of every kind; that said operation of so placing said train on said sidetrack and the events following the same are commonly called, and are hereinafter referred to as "tying up" the said train. That all of the foregoing occurred at or before 10:30 o'clock P. M. on the tenth day of July, 1912, at or before which time the said train was, as aforesaid, tied up on said siding.

4. That after said train was so placed on said siding, and after the same had been tied up as aforesaid, and after 10:30 o'clock P. M. on said day, the said engine or train did not move to any extent whatsoever in either direction but remained stationary on said siding, and no member of its crew, or person on said train, including the said Ed Burgen, received, or was obliged or permitted to receive any order, direction or suggestion with reference to the future movement of said engine or train, and none of the employees thereon, including the said Ed Burgen, after 10:30 o'clock P. M. on said day, were actually or otherwise engaged in or connected with the future movement of said train. Provided, however, and it is hereby expressly stipulated and agreed, between the parties hereto, anything herein to the contrary notwithstanding, that after said 10:30 o'clock P. M. on said tenth day of July, 1912, the said Ed Burgen did remain on said engine continuously after said 10:30 o'clock P. M. until 6:00 o'clock A. M. on July 11th, 1912, during which time he was on duty merely as an engine watchman, and was charged with performing, and did perform, no other duties or work other than the duties and work of an engine watchman, as such duties and work are hereinafter set forth.

5. That the duties of an engine watchman, and the [38] duties with which an engine watchman is and at all times herein mentioned was charged, and the work done by such engine watchman, and the sole function, duty and work of an engine watchman consists, and at all times herein mentioned did con-

sist, merely in watching the quantity of water in the boiler of the engine which he was employed to watch and in replenishing the same so that said engine will and would always have an adequate supply of water whereby steam could be adequately and efficiently and promptly generated, so that when said engine might again be moved or was again to be moved, it could be moved and could move under its own steam and without the delay incident to waiting until the engine should have again developed sufficient steam and likewise to watch the fire in the fire-box of said engine and to replenish the same with fuel, so that the said fire would be kept up to such an extent that steam would be generated so that when it was next desired to move said engine or to have the same moved, the same could be moved or could move without delay by means of the steam so generated and being generated by means of said fire; that the duties of and work done by said engine watchman at the times aforesaid, had nothing to do, directly or indirectly, with the safety of trains or of any person or persons on or about the same, and had merely the effect of keeping the engine, which was being watched, in a condition so that it might be used at any time, and had merely the effect of avoiding the delay and expense incident to putting out fires and draining the engine and thereafter rebuilding said fires and replenishing the water supply of said engine, and putting said engine again in a condition for operation.

6. That said Ed Burgen remained on duty on said engine only as engine watchman and performing

the duties of and doing only the work of an engine watchman, from 10:00 P. M. on said [39] 10th day of July, 1912, until 6:00 A. M. on July 11, 1912, at which time he was relieved by another fireman in the employ of said defendant, who had been sent out on another train by this defendant, from said Hillyard to said Laclede, with no duties to discharge, and in fact, discharging no duties and doing no work in the course of his transportation from said Hillyard to said Laclede, and not on duty during said time, for the sole purpose of relieving said Ed Burgen and for the purpose of firing said engine from said Laclede to said Hillyard, when the remaining crew of said engine and train should have had at least ten consecutive hours off duty; that thereupon and upon the arrival of said other fireman at said Laclede the said Ed Burgen was no longer on duty or engaged in performing duties of any kind whatsoever, and retired to said train for rest, and did not again go on duty or perform duties of any kind until he had had five days off duty; that upon the arrival of said other fireman at said Laclede, and after the remainder of said crew on said engine and train had had at least ten consecutive hours off duty, the said remainder of said crew with said other fireman on said engine, operated said train into Hillyard.

7. That the portion of said line of railroad upon which said train was proceeding was, as aforesaid, a portion of said defendant's Spokane Division of its line of railroad, which said division was at all times herein mentioned in charge of a single superintendent and divided into three districts; the first district

extending from the terminal of Troy westerly to the terminal of Hillyard, a distance of 136 miles; the second district extending from said terminal of Hillyard westerly to the said terminal of Wilson Creek, a distance of 103 miles; and the third district extending westerly from the said terminal of Wilson Creek to the terminal of Leavenworth, a distance of 98.7 [40] miles; that said terminals are located at the distances which usually obtain on transcontinental railroads, in the same character of country and under similar conditions as exist on said Spokane Division; that they are established and maintained with reference to the usual custom of operating railways and the necessity of complying with the reasonable and ordinary conditions in the operation of said railway lines, and with a view to securing efficient operation, render sufficient service to the public, and affording reasonable hours of work and rest for men, under usual and ordinary conditions.

8. That unless said defendant had had said engine watched at said Laclede, it would have been necessary to have drawn the water out of said engine, in order to have prevented the same from seriously and permanently imperiling the usefulness and efficiency of said engine and necessitating serious repairs upon the same being made, and it would have been necessary, also, then and there, and at all times, and in any weather to have dumped the fire in said engine or to have put out said fire; that if said water had been drawn or said fire dumped or put out, said engine could not have again been used until the same had been towed, by

some other engine, to a watertank, where its water supply could again be replenished and likewise could not again be used until its fire had been again rebuilt and sufficient steam had again thereby been generated to move said engine and any train to be attached thereto and the rebuilding of its said fire would alone consume the period of three hours, during which the said engine would necessarily remain idle and could not be used for locomotive purposes.

9. That when no unusual or extraordinary delays were encountered in transportation, it ordinarily occurred on the Spokane Division, and still occurs under the circumstances aforesaid, [41] that by reason of the crews of engines or trains having been engaged in or connected with the movement of trains, it has been and will be necessary to tie up trains in the manner aforesaid at various sidings on said Spokane Division about fifteen times a month throughout said entire Spokane Division, but, by the exercise of reasonable care, defendant has not been able to and cannot ascertain, until close to the time when said train has been, or will be actually tied up, whether or not, or where, said tie-up will be necessary, and experience has shown that said tie-ups have occurred at every one of the stations existing on said Spokane Division of said defendant; that in order to have a person available as an engine watchman, who could reach engines whenever the same should tie up, without the necessity of calling upon the fireman of said engine to do such engine watching, it would be, and during the times aforesaid would have been, necessary for defendant to have such engine

watchmen located along its said Spokane Division at approximately every 20 miles, and this would necessitate, and would have necessitated, employing about fifteen additional engine watchmen for its Spokane Division alone, at an expense of not less than $50.00 a month for each watchman, or at an additional expense of $9,000 a year, in order to supply engine watchmen for said Spokane Division alone of said defendant company; that said defendant operates between each of said terminals each month about 970 trains; that in general, the country tributary to said Spokane Division (outside of Hillyard and Spokane) is, and during all times mentioned was, sparsely settled, and the population of said stations or towns, beginning with Troy in the western part of Montana, to Leavenworth at the western extremity of said Spokane Division, is set forth in the following table, and where in said table an "X" appears, the same indicates that said station or town [42] has a population of less than half a dozen persons, and where the letters "N. P. O." appear opposite said stations, the same indicates that there is no United States postoffice at said stations or towns, and the letters "N. A." indicate that said station and town is of such a character that defendant, exercising a reasonable judgment in that particular, maintains no agent or other representative there:

Name of Station.	Population.	Postoffice.	Agency.
Troy.			
Yakt.		N. P. O.	N. A.
Leonia			

Name of Station.	Population.	Postoffice.	Agency.
Katka		N. P. O.	N. A.
Crossport		N. P. O.	N. A.
Bonners Ferry	1,071		
Moravia	25		N. A.
Naples	75		
McArthur's Spur	15		N. A.
Elmire	25		N. A.
Ewing's Spur	x	N. P. O.	N. A.
Pack River Spur	25	N. P. O.	N. A.
Iola		N. P. O.	N. A.
Caribou Spur		N. P. O.	N. A.
Colburn			N. A.
Bronx		N. P. O.	N. A.
Humbird Spur		N. P. O.	N. A.
Sandpoint	2,993		
Hornby		N. P. O.	N. A.
Pearsons Spur		N. P. O.	N. A.
Wrencoe			N. A.
McKinney Spur			N. A.
Laclede			
Thalma		N. P. O.	N. A.
Priest River	248		
Albany Falls	10	N. P. O.	N. A.
Albany Falls Spur	x	N. P. O.	N. A.
River Spur		N. P. O.	N. A.
Newport	1,199		
Penrith	50		N. A.
Scotia	200		
Graham's Spur		N. P. O.	N. A.
Arctic Ice Co. Spur		N. P. O.	N. A.
Camden	50		N. A.

Name of Station.	Population.	Postoffice.	Agency.
Phoenix Spur	x	N. P. O.	N. A.
Elk	100		
Wash. Mill		N. P. O.	N. A.
Milan	250		
Chattaroy	100		N. A.
Dean			
Davies Spur		N. P. O.	N. A.
Morse		N. P. O.	N. A.
Hillyard	3276		
[43]			
O. W. R & N. Jct.		N. P. O.	N. A.
Spokane	104,402		
S. P. & S. Jct		N. P. O.	N. A.
Fort Wright	600		
Military Spur		N. P. O.	N. A.
Highland		N. P. O.	N. A.
Lyons			N. A.
Galena			N. A.
Espanola	37		N. A.
Waukon	75		N. A.
Edwall	300		
Canby		N. P. O.	N. A.
Bluestem	75		N. A.
Harrington	661		
Morocco		N. P. O.	N. A.
Mohler	75		N. A.
Downs	75		
Lamona	100		N. A.
Nemo		N. P. O.	N. A.
Odessa	885		
Seward		N. P. O.	N. A.

Name of Station.	Population.	Postoffice.	Agency.
Irby	200		
Krupp	250		
Wilson Creek	405		
Wilson Creek Terminal		N. P. O.	
Stratford	90		N. A.
Adrian	75		
Soap Lake	450		
Ephrata	323		
Naylor		N. P. O.	N. A.
Winchester	100		N. A.
Quincy	264		
Crater		N. P. O.	N. A.
Trinidad	75		
Vulcan		N. P. O.	N. A.
Columbia River	150		
Rock Island		N. P. O.	N. A.
Malaga	250		N. A.
Wenatchee	4,050		
Monitor			N. A.
Cashmere	625		
Dryden	50		N. A.
Sherman Spur		N. P. O.	N. A.
Peshastin	50		
Leavenworth	1,551		

10. That said engine and train, in the course of said transportation from Hillyard to said Laclede, encountered the following delays, due to the following causes:

At Hillyard, 1 hour, 15 minutes, in waiting for brakeman, 40 minutes in meeting trains Nos. 1 and 43 and allowing said trains to pass.

At Morse, 20 minutes in meeting train No. 2 and allowing said train to pass, 20 minutes local work. [44] .

At Dean, 45 minutes in meeting trains No. 263 and No. 401 and allowing said trains to pass.

At Milan, 45 minutes local work.

At Elk, 25 minutes in meeting trains Nos. 23 and 44 and allowing said trains to pass; 40 minutes local work.

At Camden, 20 minutes local work.

At Scotia, 25 minutes local work.

At Penrith, 50 minutes in meeting trains Nos. 27 and 2/411 and allowing said trains to pass.

At Newport, 35 minutes in meeting Train No. 3 and allowing said train to pass, 1 hour 20 minutes local work, 40 minutes meeting and passing No. 264.

At Priest River, 30 minutes local work.

Dated this 27th day of May, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.
CHARLES S. ALBERT,
HERMAN H. TAYLOR,
Attorneys for Defendant.

[Motion for Judgment in Favor of Defendant.]

This concluded the testimony, and the foregoing constitutes all the testimony in the case. Both parties rested. Whereupon the defendant moved the Court in the following language:

Defendant now challenges the legal sufficiency of the evidence adduced to sustain the cause of action

alleged in the complaint herein, or any other cause of action, and moves the Court to hold, as a matter of law, that the evidence in the case shows that judgment should be rendered and entered herein, in favor of the defendant, and moves that the Court order judgment to be rendered and entered herein, in favor of the defendant, upon the following grounds:

1. That no cause of action in favor of the plaintiff against the defendant, has been proven.

2. That no cause of action against the defendant has [45] been proven under the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employees and Travelers upon Railroads, by limiting the Hours of Service of Employees thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

3. That the fireman named in said complaint, to wit, Ed Burgen, at the time claimed in said complaint to have been and have remained on duty from the hour of ten o'clock P. M. on July 10, 1912, to the hour of six o'clock A. M. on July 11, 1912, was not actually engaged in, or connected with the movement of any train, nor did said fireman remain on duty, nor was he engaged in or connected with the movement of any train on the said 10th day of July, 1912, or the said 11th day of July, 1912, for a longer period than sixteen consecutive hours.

4. That to allow the plaintiff herein to recover any judgment against the defendant herein, on account of the cause of action alleged in said com-

plaint, or to allow any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of the statute above referred to, as the hours of Service Act, and would deprive the defendant of its property, without due process of law, and would be contrary to the provisions of Article 5 of the amendment to the Constitution of the United States, and contrary to the provisions of Section 1 of Article XIV of the Amendment to the Constitution of the United States.

5. That to allow the said Court to take and assume jurisdiction over the subject matter of this action or this defendant, or to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from said defendant any moneys or any judgment, either in **[46]** this action or in this court, or by reason of any action brought in this court, upon the subject matter of this action, or to allow the above-entitled court to assume or retain jurisdiction of this action, or of this defendant in this action, or to enforce any judgment therein, would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to Section 1 of Article XIV, in addition

to and amendatory of the Constitution of the United States.

CHARLES S. ALBERT,
THOMAS BALMER,
HERMAN H. TAYLOR,
Attorneys for Defendant.

Whereupon the Court denied the motion of the defendant.

Whereupon it was stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant, as follows:

[Stipulation for Allowance of a Certain Exception or Exceptions.]

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled action, that the exception or exceptions hereto attached have been duly taken in the above-entitled action, and that the same may be signed and allowed by the Honorable Frank S. Dietrich, Judge of said Court.

Dated this 10th day of July, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.
CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant.

[Exception Taken by Defendant.]

The defendant excepts to the denial by the Court of the motion of the defendant heretofore made and filed herein upon the 10th day of June, 1913, which

motion challenged the legal [47] sufficiency of the evidence adduced to sustain the cause of action alleged in the complaint, and moved the Court to hold that the evidence in the case showed that judgment should be rendered and entered in favor of the defendant, and moved the Court that judgment be rendered and entered in its favor, which exception is allowed by the Court.

FRANK S. DIETRICH,
District Judge.

Whereupon the Court duly allowed said exception.

Thereafter, and upon the 9th day of July, 1913, the Court, by Honorable Frank S. Dietrich, Judge thereof, made and filed in said action his opinion, order and finding in the following language:

Opinion.

DIETRICH, District Judge:

The action is brought to recover the penalty prescribed in what is popularly known as "The Hours of Service Act," (34 Stat. 1415). The act is entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon." The term "employee" is therein defined as meaning "persons actually engaged in or connected with the movement of any train;" and common carriers are thereby prohibited from requiring or permitting any employee to remain on duty for a longer period than sixteen consecutive hours. The Government charges that in the year 1912 the defendant permitted one of its locomotive firemen, Ed Burgen, to remain on duty continuously from 6 o'clock A. M. of July 10th to 6

o'clock A. M. of July 11th, upon a train running from Hillyard in the state of Washington to La Clede in the State of Idaho.

From the written stipulation of facts upon which the cause has been submitted, it appears that the defendant is a common carrier engaged in interstate commerce by railroad in and through the States of Washington, Idaho and Montana. Upon July 10, 1912, it directed Burgen, one of its locomotive firemen, to [48] fire its locomotive engine which was to pull, and did pull, a freight train carrying commodities moving in interstate commerce, from Hillyard to Laclede, over what is known as the Spokane division of the defendant's railway system. He began firing and the train left the station of Hillyard at 6 o'clock A. M. on July 10th, and he continued to discharge his duties as fireman while the train was moving to Laclede, at which point it arrived at 9:59 o'clock P. M. of the same day, a period of 15 hours and 59 minutes. Upon the arrival of the train at Laclede it was run into the siding or sidetrack leading out of and into the main line of the defendant's main track, and thereupon it occupied only the sidetrack, leaving the main line clear for the unobstructed movement of trains approaching and passing through Laclede station. The switches at each end of the sidetrack were thereupon locked, and thereafter remained locked in such position that the train could not leave the side track, and no other train could pass from the main line to and upon the side track. The brakes were set so that neither the train nor the engine could move without first releas-

ing the brakes. After the train was thus "tied up," as the process is called, at 10:30 o'clock P. M. on July 10th, it remained stationary on the siding, and no member of its crew, including Burgen, received or was obliged or permitted to receive any order with reference to the future movement of the train or engine. Burgen, however, was permitted and required to remain upon the engine continuously thereafter, until 6 o'clock the next morning, during which time he was on duty as an engine watchman, charged with the performance of no other duty or work than that of engine watchman. These duties consisted of watching the quantity of water in the boiler of the engine and in replenishing the same so that the engine would always have an adequate supply of water whereby steam could be efficiently and promptly generated, so that when the engine was again to be moved it could be moved under its own steam, and without the delay incident to waiting until steam could be generated afresh; and in watching the fire in the fire box, and replenishing the same with fuel, so that there would always be a sufficient fire to generate steam.

At six o'clock in the morning of July 11th Burgen was relieved by another fireman, and thereupon he retired to the train for rest, and did not again go on duty or perform duties of any kind until after he had five days of rest.

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 watchman 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, [49] 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 employee, 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 vs. Kansas City S. Ry. Co.,* 189 Fed. 471. *United States vs. Missouri Pacific Ry. Co.* (decided by District Court for District of Kansas March 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 eight hours, and [50] 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 eight hours, then watch for eight hours, and then fire again for eight 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 as watchman precedes the service as fireman than where, as here, it follows such service, but the difference is one of degree only, and the Courts cannot 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 cannot be gainsaid, and that 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 cannot 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 its 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 a proper construction of the act, locomotive firemen, engineers, conductors, and other members of train crews, being "employees" as that term is defined, cannot 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 [51] connected with the movement of trains. In this view, and upon the facts stipulated, it must be held that the defendant is guilty.

As to the penalty, I entertain no doubt that the defendant acted in good faith, upon the belief that it was not violating the law, and it is therefore thought that a fine of $100.00 will satisfy the ends

of justice. Judgment will be entered for that amount.

Whereupon, it was stipulated and agreed by and between the plaintiff and the defendant as follows:

[Stipulation for Allowance of Certain Exceptions.]

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled action, that the exception or exceptions hereto attached have been duly taken in the above-entitled action, and that the same may be signed and allowed by the Honorable Frank S. Dietrich, Judge of said Court.

Dated this 10th day of July, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.
CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant.

[Exceptions Taken by Defendant.]

Defendant excepts to the finding by the Court that it, the defendant, was guilty of the violation of the Act of Congress known as the Hours of Service Act, entitled, "An act to Promote the Safety of Employees and Travelers upon Railroads by limiting the Hours of Service of Employees thereon", found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415, and 1416, approved March 4, 1907, as charged in the complaint herein, which exception is allowed by the Court.

Defendant excepts to the order of the Court, imposing a fine of one hundred dollars upon it for said alleged violation of said Hours of Service Act, which exception is allowed by the [52] court.

Defendant excepts to the finding by the court, in favor of the plaintiff herein, assessing a fine upon said defendant in the sum of one hundred dollars, which exception is allowed by the court.

FRANK S. DIETRICH,
District Judge.

Whereupon said exceptions were allowed by the Court.

Thereafter and upon the 14th day of July, 1913, judgment was entered in favor of the plaintiff and against the defendant, in the following language:

[Title of Court and Cause.]

Judgment.

This cause came on regularly to be heard before the Honorable Frank S. Dietrich, Judge, the plaintiff appearing by C. H. Lingenfelter, United States Attorney, and the defendant appearing by Charles S. Albert, attorney for defendant. A trial by jury having been expressly waived and stipulation of the facts having been filed by the respective parties, and after argument of counsel, and the Court being fully advised in the premises, found for the plaintiff and assessed the fine at $100.00.

It is, therefore, ordered and adjudged that the plaintiff, United States, have and recover from the defendant the sum of $100.00, together with costs taxed at $44.96.

Dated this 14th day of July, 1913.

[Stipulation for Allowance of a Certain Exception.]

Whereupon it was stipulated and agreed by and between the [53] plaintiff and defendant as follows:

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled action, that the exception or exceptions hereto attached have been duly taken in the above-entitled action, and that the same may be signed and allowed by the Honorable Frank S. Dietrich, Judge of said Court.

Dated this 10th day of July, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.
CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant.

[Exception Taken by Defendant.]

Defendant excepts to the rendering and entering of the judgment in the above-entitled action, ordering and adjudging that the plaintiff herein have and recover from the defendant the sum of one hundred dollars, together with costs, dated and entered on the 14th day of July, 1913, and to said judgment, which exception is allowed by the Court.

FRANK S. DIETRICH,
District Judge.

Whereupon said exception was duly allowed by the Court. [54]

[Title of Court and Cause.]

Stipulation [for Settlement and Allowance of Bill of Exceptions].

IT IS HEREBY STIPULATED, that the foregoing is conformable to the truth and contains all the evidence offered or introduced at the trial of the above-entitled action, and also the findings of the Court in full and all objections, rulings, orders and all other proceedings had upon said trial, and that the same shall be settled and allowed as the settled case and bill of exceptions herein by the Honorable Frank S. Dietrich, Judge of said Court, without further notice.

C. H. LINGENFELTER,
Attorney for the United States.
By CAVANEY,
Assistant.
CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant. [55]

[Certificate and Order Settling and Allowing Bill of Exceptions.]

[Title of Court and Cause.]

I HEREBY CERTIFY that the foregoing case and bill of exceptions has been examined by me and found conformable to the truth, and contains all the evidence offered or introduced on the trial of said cause, and also the findings of said Court in full, and

all objections, rulings, orders and all other proceedings had upon said trial, and I hereby settle and allow the same as the settled case and bill of exceptions herein.

Dated at Boise, Idaho, August 2, 1913.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed, August 2, 1913. A. L. Richardson, Clerk. [56]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

Defendant in the above-entitled cause feeling itself aggrieved by the findings of the Court and the judgment entered on the 14th day of July, 1913, comes now by Charles S. Albert, Herman H. Taylor and Thomas Balmer, its attorneys, and petitions said 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 defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of 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.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,
Attorneys for Defendant.

Due service of the within Petition by a true copy thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 2, 1913. A. L. Richardson, Clerk. [57]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant 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, from the findings and the judgment made by this Honorable Court on the 9th day of July, A. D 1913, in the above-entitled cause:

I.

That the United States District Court, in and for the District of Idaho, Northern Division, erred in denying the motion of the defendant, that the Court hold, as a matter of law, that the evidence in the case showed that judgment should be rendered and entered in favor of said defendant.

II.

That the said Court erred in denying the motion of the defendant that judgment be rendered and en-

tered in said action in favor of said defendant.

III.

That the Court erred in overruling and denying the motion made by said defendant at the close of all the testimony, that the Court hold, as a matter of law, that the evidence in the [58] case shows that judgment should be rendered and entered in favor of said defendant, upon the following grounds:

1. That no cause of action in favor of the plaintiff against the defendant, has been proven.

2. That no cause of action against the defendant has been proven under the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employees and Travelers upon railroads, by limiting the Hours of Service of Employees thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

3. That the fireman named in said complaint, to wit, Ed Burgen, at the time claimed in said complaint to have been and have remained on duty from the hour of ten o'clock P. M. on July 10, 1912, to the hour of six o'clock A. M. on July 11, 1912, was not actually engaged in, or connected with the movement of any train, nor did said fireman remain on duty, nor was he engaged in or connected with the movement of any train on the said 10th day of July, 1912, or the said 11th day of July, 1912, for a longer period than sixteen consecutive hours.

4. That to allow the plaintiff to recover any judgment against the defendant herein, on account of the cause of action alleged in said complaint, or to allow

any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of the statute above referred to, as the Hours of Service Act, and would deprive the defendant of its property, without due process of law, and would be contrary to the provisions of Article 5 of the amendment to the Constitution of the United States, and contrary to the provisions of Section 1 of Article XIV of the Amendment to the Constitution [59] of the United States.

5. That to allow the said Court to take and assume jurisdiction over the subject matter of this action, or this defendant, or to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from said defendant any moneys or any judgment, either in this action or in this court, or by reason of any action brought in this Court, upon the subject matter of this action, or to allow the above-entitled Court to assume or retain jurisdiction of this action, or of this defendant in this action, or to enforce any judgment therein, would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to Section 1 of Article XIV, in addition to and amendatory of the Constitution of the United States.

IV.

That the said Court erred in finding that the defendant was guilty of a violation of the Act of Congress, known as the Hours of Service Act, entitled,

"An Act to Promote the Safety of Employees and Travelers upon railroads, by limiting the Hours of Service of Employees thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

V.

That the Court erred in ordering judgment to be entered herein, and imposing a fine of one hundred dollars upon said defendant.

WHEREFORE, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the District [60] Court of the United States for the District of Idaho, Northern Division, be reversed, and that said District Court be directed to grant a new trial of said cause.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Plaintiff in Error, Defendant in the Lower Court.

Due service of the within Assignment of Errors by a true copy thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [61]

Order Allowing Writ of Error.

At a stated term, to wit, the May Term, A. D. 1913, of the District Court of the United States of America of the Ninth Judicial Circuit, in and for the District of Idaho, Northern Division, held at the courtroom in the City of Boise, Idaho, on the 2d day of August, in the year of our Lord 1913. Present, Hon FRANK S. DIETRICH, District Judge.

[Title of Court.]

Upon motion of Charles S. Albert, Herman H. Taylor and Thomas Balmer, Esqs., attorneys for defendant and upon filing a petition for writ of error and an assignment of errors:

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, and that the amount of bond on said writ of error be and hereby is fixed at five hundred dollars, which said bond may be executed by said defendant as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this Court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted, pending [62] the determination of such writ of error.

FRANK S. DIETRICH,
District Judge.

Due service of the within Order by a true copy

thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [63]

[Title of Court and Cause.]

Order Allowing Bond.

Defendant, Great Northern Railway Company, having this day filed its petition for a writ of error from the findings, decision and judgment thereon, made and entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed:

NOW, THEREFORE, IT IS ORDERED, that upon the said defendant, Great Northern Railway Company, filing with the clerk of this Court, a good and sufficient bond in the sum of five hundred dollars, to the effect that if the said defendant, Great Northern Railway Company, plaintiff in error, shall prosecute said writ of error to effect, and answer all

damages and costs if it fails to make its plea good, then the said obligation [64] to be void, else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this Court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 2d day of August, 1913.

FRANK S. DIETRICH,
District Judge.

Due service of the within order by a true copy thereof is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [65]

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto the United States of America, in the full and just sum of five hundred 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 by these presents.

Sealed with our seals and dated this 2d day of August, 1913.

WHEREAS, lately at the May Term A. D. 1913 of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between the United States of America, plaintiff, and Great Northern Railway Company, defendant, a final judgment was rendered against the said defendant, and the said defendant, Great Northern Railway Company 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 is about to be issued, citing and admonishing it to be and appear at the United States [66] Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if the said Great Northern 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 effect.

GREAT NORTHERN RAILWAY COMPANY,
By CHARLES S. ALBERT,
THOMAS BALMER,
HERMAN H. TAYLOR,
Its Attorneys.

[Seal of National Surety Co.]

NATIONAL SURETY COMPANY,
By JAMES A. BROWN,
Resident Vice-President.
S. A. MITCHELL,
Resident Assistant Sec'y.

Plaintiff is satisfied with the within bond and the surety thereon.

C. H. LINGENFELTER,
Attorney for Plaintiff.
By CAVANEY,
Assistant.

The foregoing bond is approved as to form, amount and sufficiency of surety this 2d day of August, 1913.

FRANK S. DIETRICH,
Judge of the United States District Court, Northern District of Idaho.

Due service of the within Bond by a true copy thereof is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 2, 1913. A. L. Richardson, Clerk. [67]

[Title of Court and Cause.]

Stipulation as to Making of Record.

IT IS HEREBY STIPULATED between the plaintiff by its attorney and the defendant, by its attorneys, that the transcript of the record on the writ

of error in the above-entitled cause shall be made up of the following papers:

Summons and Complaint.

Answer.

Agreed Statement of Facts.

Motion of Defendant for Judgment in Favor of Defendant.

Opinion and Finding of the Court and Order for Judgment.

Judgment.

Stipulation for and Bill of Exceptions.

Order Settling Bill of Exceptions.

Petition for Order Allowing Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error.

Order Fixing and Allowing Bond.

Bond on Writ of Error.

Writ of Error.

Citation and Admission of Service.

Stipulation as to Making Up Record.

Defendant's Exceptions and Stipulations.

Dated this 2d day of August, 1913.

C. H. LINGENFELTER,

Attorney for Defendant in Error and Plaintiff, United States of America.

CHARLES S. ALBERT,
THOMAS BALMER,
HERMAN H. TAYLOR,

Attorneys for Plaintiff in Error and Defendant, Great Northern Railway Company.

[Endorsed]: Filed Aug. 2, 1913. A. L. Richardson, Clerk. [68]

[Title of Court and Cause.]

Stipulation as to Printing Record.

IT IS HEREBY STIPULATED AND AGREED between the plaintiff in error, by its attorney, and defendant in error, by its attorney, that in printing the record in the above-entitled cause, the clerk shall cause the following to be printed for consideration of said court on appeal:

Summons and Complaint.
Answer.
Stipulation for and Bill of Exceptions.
Order Settling Bill of Exceptions.
Petition for Order Allowing Writ of Error.
Assignment of Errors.
Order Allowing Writ of Error.
Order Fixing and Allowing Bond.
Bond on Writ of Error.
Writ of Error.
Citation and Admission of Service.
Stipulation as to Making Up Record.

And it is further stipulated, that in printing said record, there may be omitted therefrom the title of the court and cause on all papers, excepting the first page, and that in lieu of said title of court and cause there be inserted in the place and instead thereof, the following words: "Title of Court and Cause." [69]

Dated this 2d day of August, 1913.

CHARLES S. ALBERT,
HERMAN H. TAYLOR,
THOMAS BALMER,

Attorneys for Plaintiff in Error and Defendant, Great Northern Railway Company.

C. H. LINGENFELTER,

Attorney for Defendant in Error, and Plaintiff, United States of America.

[Endorsed]: Filed August 2, 1913. A. L. Richardson, Clerk. [70]

[Writ of Error (Original).]

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the District of Idaho, Northern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the May term 1913 thereof, between United States of America, plaintiff, and Great Northern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, plaintiff in error, as by its complaint appears;

We being willing, that error, if any hath been, 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 and all things con-

cerning 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 29th day of August next, in the said Circuit Court of Appeals to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, 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 of America, this 2d day of August, 1913, of the Independence of the United States the one hundred thirty-eighth year.

[Seal] A. L. RICHARDSON,
Clerk of the District Court for the District of Idaho, Northern Division. [73]

Allowed by

FRANK S. DIETRICH,
District Judge.

Service of the within writ of error and receipt of a copy thereof, is hereby admitted this 2d day of August, 1913.

C. H. LINGENFELTER,
Attorney for Defendant in Error. [74]

[Endorsed]: No. 442. In the District Court of the United States for the District of Idaho, Northern Division. United States of America, Plaintiff, vs. Great Northern Ry. Co., Defendant. Writ of Error. Filed Aug. 2, 1913. A. L. Richardson, Clerk. [75]

[Citation on Writ of Error (Original).]

The President of the United States, to the United States of America and C. H. Lingenfelter, Its Attorney, Greeting.

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 hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein United States of America is plaintiff and you are defendant in error and the said Great Northern Railway Company is defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the 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 2nd day of August, A. D. 1913, on the Independence of the United States the one hundred thirty-eighth year.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho, Northern Division.

[Seal] Attest: A. L. RICHARDSON,

Clerk. [76]

[Endorsed]: No. 442. In the District Court of the United States for the District of Idaho, Northern

Division. United States of America, Plaintiff, vs. Great Northern Ry Co., Defendant. Citation. Filed Aug. 2d, 1913. A. L. Richardson, Clerk. [77]

Due service of the within citation by a true copy thereof, is hereby admitted at Boise, Idaho, this 2d day of August, A. D. 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [78]

[Endorsed]: No. 2310. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern 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 Idaho, Northern Division.

Received and filed August 25, 1913.

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

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This case comes before this Court upon a Writ of Error to the Northern Division of the District Court of the United States for the District of Idaho, the plaintiff in error being the defendant in the Court below. Hon. Frank S. Dietrich, District Judge, presided over the trial.

The action was brought under the Hours of Service Act (34 Statutes at Large, p. 1415), to recover a penalty for the use of fireman Ed Burgen on the

10th and 11th days of July, 1912. It was claimed that the defendant had used its fireman, Ed Burgen, for more than sixteen consecutive hours, from 6 o'clock a. m., July 10, 1912, to 6 o'clock a. m., July 11, 1912, Burgen being a fireman on Extra 1511. (*Record p. 2*).

Defendant by its answer admitted its incorporation, operation through Idaho, and the fact that it was at times engaged in interstate commerce, but denied that it permitted Burgen to remain on duty as a fireman for a longer period than sixteen consecutive hours, or that he was engaged in or connected with the movement of defendant's extra train 1151, or the movement of any train engaged in interstate traffic, after the expiration of sixteen hours. (*R. p. 5*).

The case came on for trial before Judge Dietrich on June 10, 1913, at Coeur d'Alene, Idaho, and was tried upon an agreed statement of facts. (*R. p. 8*).

Upon the conclusion of the trial the defendant moved the Court to hold, as a matter of law, that the evidence in the case showed that judgment should be rendered and entered in favor of the defendant, Great Northern Railway Company, plaintiff in error here, upon the grounds that no cause of action had been proven under the Hours of Service Act, and that during the time for any period in excess of sixteen hours he was not actually engaged in or connected with the movement of any train, nor did he remain on duty. The defendant below contended that to allow the plaintiff to recover any judgment would be contrary to the provisions of the act, and

would deprive it of its property, without due process of law, contrary to the provisions of Article 5 and of Section 1 of Article 14 of the Amendments to the Constitution of the United States. (*R. p. 22*).

The motion was denied and exception allowed· (*R. p. 25*).

Judge Dietrich filed an opinion (*R. p. 25*), finding that the defendant was guilty of a violation of the act, and ordered judgment to be entered against the defendant for one hundred dollars. Exceptions were taken to the finding that the defendant was guilty of a violation of the act, to the order of the Court imposing a fine of one hundred dollars upon it, and to the finding assessing such fine. (*R. p. 32*).

Judgment was entered upon the order and finding, to which exception was duly taken. (*R. p. 34*).

The Bill of Exceptions was stipulated to, and order made settling it. (*R. p. 35*). Thereafter a writ of error was duly petitioned for, assignment of errors filed, and order made allowing writ of error. The case is now before this Court upon such writ of error. (*R. pp. 41-55*).

STATEMENT OF FACTS.

The facts in the case were all stipulated, both parties reserving the right to make objections upon the trial, but making no objections when the case was tried. (*R. p. 9*).

The stipulation shows these facts.

The Great Northern Railway Company is a common carrier, engaged in interstate commerce in the State of Idaho. At Hillyard, Washington, on July 10, 1912, at 6 o'clock a. m., it called Ed Burgen, a fireman, to fire engine 1151, attached to a way freight train from Hillyard, on the Spokane division, to LaClede, Idaho, and thence to Troy, Montana. Both the defendant and its fireman Burgen were engaged in interstate commerce until 9:59 p. m. on July 10, 1912, and it was agreed that after that he was not engaged in or connected with the movement of any train in interstate commerce, except as might further appear under the agreed facts. (*R. p. 10*). Burgen fired his engine at Hillyard, and thereafter to LaClede, where the train arrived at 9:59 on the same day (which was just within the sixteen hours).

Thereupon, the said engine and train was run into the siding or sidetrack, leading out of and into the main line of said defendant's said Spokane division of its railway tracks at said Station of LaClede, so that thereupon the whole of said train occupied only the said sidetrack, leaving the said main line free and clear for the unobstructed movement of trains approaching, passing through and leaving said station of LaClede, and the switches at each end of said

sidetrack were thereupon locked and thereafter remained locked in such a position that said train could not leave said sidetrack, and no train could proceed from said main line to or upon said sidetrack, and thereupon also the brakes on said engine and train were set so that said engine and train could not move unless said brakes should be released by some person or persons; that thereupon the crew of said train other than the said Ed Burgen, having been on duty connected with and having been actually engaged in or connected with the movement of said train for sixteen hours, retired to rest upon said train, and the orders of said train, constituting the orders under which it had any right to proceed or move, and constituting its only orders, were annulled, and said train lost its right to move further without additional instructions being given for the movement thereof, and said train could not move thereafter without additional instructions being given to persons then and there on said train, or thereafter to be on said train, and the crew of said train, other than the said Ed Burgen, were relieved from any and every duty connected with the movement of said train, or of any train, and were relieved from any and every duty whatsoever and were not thereafter required or permitted by defendant to go on duty and did not thereafter go on duty, and were not thereafter engaged in or connected with the movement of any train until they had had ten consecutive hours off duty of every kind; that said operation of so placing said train on said sidetrack and the events

following the same are commonly called, and are hereinafter referred to as "tying up" the said train. All of the foregoing occurred at or before 10:30 o'clock p. m. on the tenth day of July, 1912, at or before which time the said train was, as aforesaid, tied up on said siding.

After said train was so placed on said siding, and after the same had been tied up as aforesaid, and after 10:30 o'clock p. m. on said day, the said engine or train did not move to any extent whatsoever in either direction, but remained stationary on said siding, and no member of its crew, or person in said train, including the said Ed Burgen, received, or was obliged or permitted to receive any order, direction or suggestion with reference to the future movement of said engine or train, and **none of the employees thereon, including the said Ed Burgen, after 10:30 o'clock p. m. on said day, were actually or otherwise engaged in or connected with the future movement of said train.** Provided, however, and it is hereby expressly stipulated and agreed, between the parties hereto, anything herein to the contrary notwithstanding, that after said 10:30 o'clock p. m. on said tenth day of July, 1912, the said Ed Burgen did remain on said engine continuously after said 10:30 o'clock p. m. until 6:00 o'clock a. m. on July 11th, 1912, during which time he was on duty merely as an engine watchman, and was charged with performing, and did perform, no other duties or work other than the duties and work of an engine watchman, as such duties and work are hereinafter set forth.

It was then agreed as to the subsequent period that the duties of and work done by said engine watchman had nothing to do, directly or indirectly, with the safety of trains or of any person or persons on or about the same, and had merely the effect of keeping the engine, which was being watched, in a condition so that it might be used at any time, and had merely the effect of avoiding the delay and expense incident to putting out fires and draining the engine and thereafter rebuilding said fires and replenishing the water supply of said engine, and putting said engine again in a condition for operation. (*R. p. 14*).

Burgen finished his work as engine watchman at 6 o'clock a. m., July 11, 1912, when another fireman came out and took the engine, firing the same from LaClede to Hillyard. Burgen retired to the train for rest, and did not again perform duty of any kind until he had five days off duty. The remainder of the crew had ten consecutive hours off duty, and then operated the train with a new fireman into Hillyard. (*R. p. 15*).

The Spokane division is divided into three districts. First, Troy to Hillyard, 136 miles; second, Hillyard to Wilson Creek, 103 miles; third, Wilson Creek to Leavenworth, 98.7 miles. These terminals are located at the distances which usually obtain on transcontinental railroads, in the same character of country and under similar conditions as exist on said Spokane division. They are established and maintained with reference to the usual custom of operating railways and the necessity of complying with the reasonable and ordinary conditions in the operation of said railway lines, and with a view to securing efficient opera-

tion, render sufficient service to the public, and affording reasonable hours of work and rest for men, under usual and ordinary conditions. (*R. p. 16*).

It was further agreed that unless said defendant had had said engine watched at said LaClede, it would have been necessary to have drawn the water out of said engine, in order to have prevented the same from seriously and permanently imperiling the usefulness and efficiency of said engine and necessitating serious repairs upon the same being made, and it would have been necessary also, then and there, and at all times, and in any weather to have dumped the fire in said engine or to have put out said fire; that if said water had been drawn or said fire dumped or put out, said engine could not have again been used until the same had been towed, by some other engine, to a water tank, where its water supply could again be replenished and likewise could not again be used until its fire had been again rebuilt and sufficient steam had again thereby been generated to move said engine and any train to be attached thereto, and the rebuilding of its said fire would alone consume the period of three hours, during which the said engine would necessarily remain idle and could not be used for locomotive purposes. (*R. p. 17*).

Ordinarily, it occurs on the Spokane division there are about fifteen tieups a month to comply with the sixteen hour law. By the exercise of reasonable care, defendant has not been able to and cannot ascertain, until close to the time when said train has been, or will be actually tied up, whether or not, or where,

said tieup will be necessary, and experience has shown that said tieups have occurred at every one of the stations existing on said Spokane division of said defendant; that in order to have a person available as an engine watchman, who could reach engines whenever the same should tie up, without the necessity of calling upon the fireman of said engine to do such engine watching, it would be, and during the times aforesaid would have been, necessary for defendant to have such engine watchmen located along its said Spokane division at approximately every 20 miles, and this would necessitate, and would have necessitated, employing about fifteen additional engine watchmen for its Spokane division alone, at an expense of not less than $50.00 a month, for each watchman, or at an additional expense of $9,000 a year, in order to supply engine watchmen for said Spokane division alone of said defendant company; that said defendant operates between each of said terminals each month about 970 trains. (*R. pp. 17, 18*).

In general, the country tributary to the Spokane division, outside of Hillyard and Spokane, is very sparsely settled, and the ~~po~~sti population shows that of the 88 stations on this divison, there are 35 of them which have no postoffice, nor are there agents at 55. There are only six of them which have a population of over 1,000 inhabitants, a great many of them having nothing at the station but a signboard. (*R. pp. 18-21*).

The delays encountered between Hillyard and LaClede were due to the following causes:

At Hillyard, 1 hour, 15 minutes, in waiting for brakeman, 40 minutes in meeting trains Nos. 1 and 43 and allowing said trains to pass.

At Morse, 20 minutes in meeting train No. 2 and allowing said train to pass, 20 minutes local work.

At Dean, 45 minutes in meeting trains No. 263 and No. 401 and allowing said trains to pass.

At Chattaroy, 20 minutes local work.

At Milan, 45 minutes local work.

At Elk, 25 minutes in meeting trains Nos. 28 and 44 and allowing said trains to pass; 40 minutes local work.

At Camden, 20 minutes local work.

At Scotia, 25 minutes local work.

At Penrith, 50 minutes in meeting trains Nos. 27 and 2/411 and allowing said trains to pass.

At Newport, 35 minutes in meeting train No. 3 and allowing said train to pass, 1 hour 20 minutes local work, 40 minutes meeting and passing No. 264.

At Priest River, 30 minutes local work. (*R. p.* 21, 22).

SPECIFICATION OF ERRORS.

The following errors specified, which are relied upon, each of which is asserted in this brief and intended to be urged, are the same as those set out in the assignment of errors appearing in the printed record. (*R. p. 37*).

I.

That the United States District Court in and for the District of Idaho, Northern Division, erred in denying the motion of the defendant, that the Court hold, as a matter of law, that the evidence in the case showed that judgment should be rendered and entered in favor of said defendant. (*Record, p. 37; Assignment of Error No. 1*).

II.

That the Court erred in denying the motion of the defendant that judgment be rendered and entered in said action in favor of said defendant. (*Record, p. 38; Assignment of Error No. 2*).

III.

That the Court erred in overruling and denying the motion made by said defendant at the close of all the testimony, that the Court hold, as a matter of law, that the evidence in the case shows that judgment should be rendered and entered in favor of said defendant, upon the following grounds:

1. That no cause of action in favor of the plaintiff against the defendant has been proven.

2. That no cause of action against the defendant has been proven under the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employes and Travelers upon railroads, by limiting the Hours of Service of Employes thereon," found in 34 U. S. Statutes at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907.

3. That the fireman named in said complaint, to-wit, Ed Burgen, at the time claimed in said complaint to have been and have remained on duty from the hour of 10 o'clock p. m. on July 10, 1912, to the hour of 6 o'clock a. m. on July 11, 1912, was not actually engaged in, or connected with the movement of any train, nor did said fireman remain on duty, nor was he engaged in or connected with the movement of any train on the said 10th day of July, 1912, or the said 11th day of July, 1912, for a longer period than sixteen consecutive hours.

4. That to allow the plaintiff to recover any judgment against the defendant herein, on account of the cause of action alleged in said complaint, or to allow any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of the statute above referred to, as the Hours of Service Act, and would deprive the defendant of its property, without due process of law, and would be contrary to the provisions of Article 5 of the amendment to the Constitution of the United States, and contrary to the provisions of Section 1

of Article XIV. of the Amendment to the Constitution of the United States.

5. That to allow the said Court to take and assume jurisdiction over the subject matter of this action, or this defendant, or to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from said defendant any moneys or any judgment, either in this action or in this Court, or by reason of any action brought in this Court, upon the subject matter of this action, or to allow the above entitled Court to assume or retain jurisdiction of this action, or of this defendant in this action, or to enforce any judgment therein, would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to Section 1 of Article XIV., in addition to and amendatory of the Constitution of the United States. (*Record pp. 3839; Assignment of Error No. 3*).

IV.

That the said Court erred in finding that the defendant was guilty of a violation of the Act of Congress, known as the Hours of Service Act, entitled, "An Act to Promote the Safety of Employees and Travelers upon railroads, by limiting the Hours of Service of Employes thereon," found in 34 U. S. Statutes, at Large, Chapter 2939, pages 1415 and 1416, approved March 4, 1907. (*Record, p. 39; Assignment of Error No. 4*).

V.

That the Court erred in ordering judgment to be entered herein, and imposing a fine of one hundred dollars upon said defendant. (*Record p. 40; Assignment of Error No. 5*).

ARGUMENT.

I.

IN USING A FIREMAN AS A WATCHMAN, THE RAILWAY COMPANY DID NOT REQUIRE OR PERMIT A PERSON ACTUALLY ENGAGED IN OR CONNECTED WITH THE MOVEMENT OF A TRAIN, TO BE OR REMAIN ON DUTY FOR A LONGER PERIOD THAN SIXTEEN CONSECUTIVE HOURS.

The Railway Company was charged with a violation of the Hours of Service or Sixteen Hour Act, in permitting or requiring an employe to be or remain on duty for a longer period than sixteen consecutive hours. Such employes are defined by the act to mean, "persons actually engaged in, or connected with the movement of any train."

The agreed facts show that Burgen, a fireman, fired his engine for nearly sixteen hours, from 6 o'clock a. m. to 9:59 p. m. on July 10, 1912; that the engine and train were then placed on a sidetrack; that the main line was left clear, the switches were locked so that the train could not leave the sidetrack or any train proceed upon it, the brakes were set, the rest of the crew retired for rest, all orders for the train were annulled, the train lost its right to

move further without additional instructions, and that the train was tied up. It was further specifically agreed that the train did not move to any extent whatever, but remained stationary on the siding, no orders were received by Burgen, nor was he obliged or permitted to receive them. After he began his work as a watchman, it was expressly agreed **that none of the employes, including Burgen, were actually, or otherwise, engaged in, or connected with the future movement of said train,** but that he was on duty as an engine watchman, which duties required him to watch the quantity of water in the boiler and to replenish the same, so that when it came time to move the engine it could be done without delay, and also to watch the fire in the firebox and replenish it, to generate the steam, without the necessity of rekindling the fire. (*R. p. 10-13*).

It was agreed that:

The duties of and work done by said engine watchman had nothing to do, directly or indirectly, with the safety of trains, or of any person or persons on or about the same, but that it had the mere effect of keeping the engine in condition to be used at any time, and avoid the delay and expense of putting out fires and draining the engine thereafter, rebuilding the fire and replenishing the water supply. Burgen was relieved at 6 o'clock a. m. on July 11, and did not go back to work for five days. (*R. p. 13-15*).

The question here involved is whether Burgen, at the time he was watching the engine, was actually

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

The learned trial judge took the position that because Burgen was a "fireman," that it made no difference what he was doing at the time of the alleged violation, he must be an employe within the meaning of the act, for the reason that a fireman's duties are such as usually connect him with the movement of the train, and that if the fireman had been used in connection with the movement of a train for sixteen hours, he could not do any further work until after the expiration of ten hours of rest.

This construction comes within neither the language nor the meaning of the statute. The act prohibits the permitting of an employe, actually engaged in, or connected with the movement of a train, to be or remain on duty for a longer period than sixteen consecutive hours. The duty prohibited is that of being actually engaged in, or connected with the movement of any train. He is not allowed to remain on such duty when his work, as is stipulated in this case, had nothing to do with the movement of any train. Consequently, Burgen was not permitted or required to remain on duty, within the meaning or language of the statute.

This construction of the statute is emphasized by the language of Section 2 of the act, by which it is stated that whenever any *such* employe shall have been continuously on duty for sixteen consecutive hours, he shall be relieved, and not required or per-

mitted again to go on duty until he has had at least ten consecutive hours off duty.

It is urged by the Government, and that is the position taken by the Court below, that the purpose of the act was to relieve the employes engaged in, or connected with the movement of a train from further service of any kind, after the expiration of sixteen hours, in order that the trainman's efficiency might not be impaired by anything which would interfere with his rest between the hours of service.

We do not contend that it is within the power of the railroad to return the fireman to work after ten hours have intervened between the time he exercised his duty as a fireman and the time he returned to such duty again. We do contend that the purpose of the act was to prevent any continuous, arduous service by the engine or train crew, beyond sixteen hours, in their duties as such engine men or train men, so that their efficiency might be thereby lessened to do the very acts and duties in which their efficiency should be the highest, and which have the most to do with the safety of persons and property. The evil sought to be remedied by the act was the use of these men for twenty-four or thirty-six hours at a stretch, when during all this time persons and property were subject to the efficient discharge of their duties as engine men and train men. The statute was passed for the purpose of eliminating such service, in connection with the movement of any train, after the expiration of sixteen hours. When the subsequent service has no such connection, then the object of

the statute is not defeated, and if, as in this case, the man has a long period of rest before again assuming the duties of fireman, certainly his efficiency for operating, while engaged in or connected with the movement of a train, is not impaired.

If the contention of the Government is correct, then it is incumbent upon the Railway Company, not only to refrain from allowing its train employes to do any work of any kind after the expiration of sixteen hours, but to see to it that they rest and refrain from doing anything which will interfere with their efficiency when on duty.

The stipulated facts emphasize the distinction between the case at bar and the decisions upholding the infliction of penalties for requiring employes to work more than sixteen hours.

"The duties of and work done by said engine watchman had nothing to do, directly or indirectly, with the safety of trains, or of any person or persons on or about the same." (*R. p. 14*).

"None of the employes thereon, including said Ed Burgen, after 10:30 o'clock p. m. on said date, were actually, or otherwise, engaged in or connected with the future movement of said train." (*R. p. 13*).

The case principally relied upon by the Government and cited as authority by the Court below in its opinion is that of *U. S. v. Missouri Pacific Ry. Co.,* decided by the District Court of Kansas, March 22, 1913. (_____ Fed. _____). This case

is readily distinguishable from the instant case, but the language used by the Court demonstrates that it was not the purpose of Congress to include in the purview of the act, persons not actually engaged at the time of the alleged violation in the movement of trains.

In that case a fireman was used as an engine watchman, while his engine was on the main line and being pulled by another engine. The Court very properly held that the fireman was connected with the movement of a train. But the Court said:

"The humane feature of the statute being considered, it must be thought that Congress intended, at or before the expiration of the sixteen hour period of service provided therein, *an employe 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. * * *

"Again, aside from the humane purpose of the act, regarded from the standpoint of the welfare of the employe himself, *and looking alone to the safety of the employes 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."

This construction of the act shows very plainly that its purpose was one of safety. And when it is stipulated, as it is in this case, that the duties and work done by the engine watchman had nothing to do with the safety of the train or persons, the reason for holding a fireman engaged as an engine watchman within the prohibition does not exist. The

language of Judge Pollock in this Missouri Pacific case clearly shows that the act was intended to apply to those employes only who are actually engaged at the time, in the movement of trains, and whose continued employment would endanger the safety of persons or property. This position is supported by the reports of the Interstate Commerce Commission, published prior to the passage of the act, and upon whose recommendation the act was passed.

"The part played by excessive hours of labor in causing railroad accidents is a question that calls for serious consideration. The bulletins published by the commission record many accidents, where the employes involved had been on duty an excessive number of hours, and many complaints from employes that they had been required to work for excessive periods of time have been brought to the attention of the commission. There are a few roads that have stringent rules, to guard against the overworking of trainmen, but in most cases the matter is left entirely to the discretion of the men and to subordinate officials immediately in charge. These subordinate officials, in their eagerness to keep traffic moving, frequently overtax the men, and in many cases the men themselves, through greed for making big pay willingly remain on duty for excessive periods of time. If there is a reason for limiting the hours of labor in any employment, it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent upon the alertness and intelligence of train employes."

Eighteenth Annual Report of the Interstate Commerce Commission for the year 1904, p. 105.

"The Hours of Service Law is of undoubted value, and it will in time conduce most strongly to the promotion of public safety."

Twenty-second Annual Report of the Interstate Commerce Commission, for the year 1908, p. 52.

The Interstate Commerce Commission, by Ruling 74 of its administrative rulings on the Hours of Service Law, held that "employes deadheading on passenger or freight trains, and not required to perform any service in connection with the **movement of the train** upon which they are deadheading, are not while so deadheading, on duty."

Hours of Service Law and Administrative Rulings and Opinions of Interstate Commerce Commission, printed March 25, 1912.

It is a well known fact that under the present arrangement, employes are entitled to receive pay in returning from points where they have been tied up for the sixteen hour period, and as relief crews for time spent in going to such points to relieve the tied up crews. If the contention of the Court below and the Government is correct, that during such period, because employes receive pay, that they are on duty within the meaning of the act, then it becomes unlawful for the carrier to use the employes for any period of time in excess of the sixteen hours from the time the relief crew starts from the terminal to relieve the crew tied up, and further makes it unlawful for the carrier to use the engine crew in any way for a period in excess of sixteen hours, which time must include both the time on duty con-

nected with the movement of the train, and the time required to deadhead back to the terminal point. This construction, furthermore, would necessitate the abrogation of the schedules in force, which allow pay to train employes for the time consumed in returning from the points of tieup, for, under the construction of the Court below, if they are paid for their time, they must be on duty. It is apparent that this was not the intention of Congress, and the ruling of the Interstate Commerce Commission, heretofore quoted, shows that the Commission never thought of construing the act in that way. The Commission specifically rules that although being paid, they are not on duty while deadheading to or from the point of tieup. Unless this were so, it would be unlawful for the carrier and the employe to contract that the employe should receive pay for the time spent in going from the place where the train is tied up to the terminal.

The Esch bill, as **originally** introduced on April 26th, 1906, being H. R. 18671, provided:

"The term 'employes' as used in this act shall include **conductors, brakemen, engineers, firemen, train dispatchers and telegraph operators** or other persons actually engaged in train operation or train service and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or contract."

"Sec. 2. That from and after the first day of July, 1906, it shall be unlawful for any common carrier, its officers or agents subject to this act, to require or permit any employe, subject to this act, to be or remain on duty for a longer period than sixteen con-

secutive hours, and whenever any such employe 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 **of rest,** and no such employe who has been relieved from duty after a service of any period less than sixteen hours, shall be required or permitted to go on duty again until he has had eight consecutive hours **of rest."**

In the amendment to this bill, as shown by H. R. Report No. 4567, made upon May 31st, 1906, and which in substance was the act which became a law, the Congress demonstrated that it was not its intention that the act should be construed in the manner in which it has been construed by the trial Court in this case, or in the manner in which the Government contends it should be construed.

It was the contention of the trial Court and the Government that the act was intended not to apply to those persons while they were engaged in or connected with the movement only of any train, but was intended to apply to those persons who were actually engaged in or connected with the movement of any train, as a class. In other words, that the application of the act was determined by the class of the service of the employes, and not by the duty which they performed. The Congress struck from the first section of the act, in its definition of employes, the words "conductors, brakemen, engineers, firemen, train dispatchers, telegraph operators or other persons," and inserted in their place, the clause "the term 'employes' as used in this act shall include all

persons actually engaged in or connected with the movement of any train operation." This language was subsequently changed by omitting the word "operation."

From this it will be seen that it was the intention of Congress to eliminate the class definition and the prohibition of the use of firemen as a class, and to prevent the use of firemen while actually engaged in or connected with the movement only of any train.

That it was the purpose of Congress to limit the prohibition to the use of firemen on duty as such firemen, is clearly shown by the changes made in Section 2 of the act, as originally proposed. This act required that the employe "should not be permitted again to go on duty until he has had at least ten consecutive hours **of rest**," and the same provision with reference to the eight consecutive hours **of rest**. If it had been the intention of Congress to prohibit the use of firemen or other employes in any service, it would have allowed the act to remain as originally drawn, and require at least ten consecutive hours **of rest**, before the fireman could again be used as fireman. Instead of that, however, Congress' attention having been specifically called to the use of the words "of rest" by this report 4567, by the subsequent enactment into law of the bill as changed, it limited the use of the firemen to ten consecutive hours *"off duty."* If it had been Congress' intention to absolutely prohibit the use of firemen in any service, it would have required ten consecutive hours of rest from service of any kind. But having defined the duty prohibited,

as that which was actually engaged in or connected with the movement of any train, it chose to require him to be off duty with respect to such movement, and limited the prohibition to this extent. So that, if the fireman, during the ten consecutive hours off duty, or after the sixteen hours on duty, was not actually engaged in or connected with the movement of any train, the prohibition in the act did not apply.

(We have appended a copy of Report No. 4567 as Exhibit A to this brief.)

The use of these firemen as watchmen carries out the very spirit of the act of Congress. It is impossible to determine beforehand in railroad operation, just where the sixteen hours will expire, impossible to have at every isolated siding or sign-board, a skilled engine man, in readiness to care for the engine and protect the train, and it is furthermore impossible, in efficient railroad operation, to send a special engine or train crew to every point where there is a tieup. To use a fireman to kill an engine would necessitate his use beyond the period prescribed by the act, and would result in long and tedious delays in the transportation of freight and passengers. (*Record p. 14*).

The use of this fireman is purely incidental to a strict endeavor on the part of the carrier to comply, not only with the terms of the act, but with its spirit. It is an effort upon its part to give the other employes on the train, not only their eight or ten hours "off duty," but to ensure to them the same period "of rest" —going beyond the terms of the statute. The engine

man, as soon as he is relieved by another fireman, is given not only the eight or ten hours prescribed by the statute, but, as in this case, is given a considerably greater layoff, amounting here to five days.

There can be no question but that during the period in which Burgen was engaged in watching the engine, neither the safety of the train employes, nor traveling public, was in danger, nor that after his watch was over was he unfitted for future service, because he had more hours off duty and more rest than was ever thought necessary by the most extreme advocates. His employment as watchman was only casual and incidental, and had nothing to do with the safety of the traveling public or the train, which was emphasized in the debates of Congress in support of the act, and in the decisions which have upheld its validity and application. This employment is so casual and incidental that it cannot be believed that Congress intended to prohibit it, or to eliminate it and place upon the carrier the great burden which must necessarily follow, if engines cannot be taken care of in this manner.

There are, upon the Spokane division of this company, about 15 tieups a month. In order to provide engine watchmen at points at which they can conveniently be used upon the 300 miles of this division, located through a sparsely settled and thinly populated country, the carrier must supply itself with at least 15 additional watchmen, who, at even the low wage of $50 per month, would entail a burden upon

this division alone of $9000 a year. Of of the 970 trains a month operated by the company, only fifteen of them are tied up, and these tieups have occurred and are likely to occur at almost every one of the stations on the division. If skilled firemen had to be employed to be used as watchmen, the expense and burden to the company would be undoubtedly double the $9000 a year, or something in the neighborhood of $18,000 or $20,000, and this would have to be borne for the purpose of averaging one employment of eight or ten hours for each of fifteen employes, and in an average working month of thirty days would necessitate the idling of 15 employes for 29 days, or the wasting of 435 working days, for the purpose of ensuring against the use of 15 half days of firemen as watchmen, whose only duty would be to replenish the water in the boiler and watch the fire in the fire~~room~~box. (*Record p. 4*). That Congress never intended to impose such a burden upon railway companies is fully shown by the debates which are cited in this brief, and by the decisions of all the courts who have passed upon the act.

A fundamental fact, which should have a controlling influence in the decision of this case, is that the railway company in using Burgen as a watchman, was doing its very best to enforce the provisions of the act and carry out its spirit. What was being done was the obeying of the mandate of the law, in stopping the movement of the train and taking the men off duty connected therewith or actually engaged therein. This practice shows not only the evident intention

of the railway company to comply, but the actual compliance with the spirit of the act. Such compliance is conducive to the conservation of the ultimate object thereof—commerce—of all regulatory laws enacted by Congress under the Commerce clause.

The construction contended for by the Government is unreasonable, and is more technical than has been sanctioned by the Supreme Court of the United States, or by any of the courts dealing with the act, in decisions in which the question of purpose and intent of such act were in issue. That such unreasonable results will obtain, if the contention of the Government is correct, is fully shown by the stipulation of facts and the foregoing statement and proposition.

The spirit and purpose of a statute will control, as against a technical construction of the language thereof, if such technical construction appears to work unreasonable results.

"Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit or reason of the law will prevail over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely imperative. So the meaning of general terms may be restrained by the spirit or reason of the statute."

State v. People's Nat'l Bank, 75 N. H. 27, 70 Atl. 542.
Wilkinson v. Leland, 2 Pet. 627, 7 Law Ed. 542.
Rigney v. Plaster, 88 Fed. 686.
People v. Lacombe, 99 N. Y. 43, 49; 1 N. E. 599.
Winters v. Duluth, 82 Minn. 127; 84 N. W. 788.
Parker v. Nothomb, 65 Neb. 308; 91 N. W. 395; 93 N. W. 851; 60 L. R. A. 699.
36 *Cyc.,* 1108.

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended."

U. S. v. Jackson, 143 Fed. 783.
People v. Earl, 42 Col. 238; 94 Pac. 294.
Coggeshall v. Des Moines, 138 Iowa, 730; 117 N. W. 309.
36 *Cyc.,* 1110.

"The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage."

Pickett v. United States, 216 U. S. 456; 30 Sup. Ct. Rep. 265; 54 L. Ed. 566.

"In *Henderson v. New York,* 92 U. S. 259, 268, 23 L. Ed. 543, 547, which involved the question whether a statute of New York was, in any real sense, a regulation of commerce with foreign nations, the court said that, in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Western Union Tel. v. Kansas ex. rel. Coleman, 216 U. S. 1; 30 Sup. Ct. Rep. 190; 54 L. Ed. 355.

"Every statute ought to be expounded, not according to its letter, but according to the legislative intent, as manifested from all parts of the act; and the literal import should not be followed if the result would be absurd, provided any more reasonable view can be taken."

United States v. Hogg, 112 Fed. 909. (Circ. Ct. of Appeals 6th Circ. 1902).

"Any construction that leads to absurd results should be avoided, where the trend of the act admits of a different, sensible application."

Interstate Drainage & Inv. Co. v. Board of Comm'rs. of Freeborn Co., Minn., 158 Fed. 270. (Circ. Ct. of App. 8th. Circ. 1907).

"When the literal sense of a statute, if adopted as the legislative meaning, would lead to some absurd result, or shock the ordinary sense of justice, it is to be rejected, if some other meaning which is reasonable can be readily read therefrom by the aid of any rule for judicial construction which is applicable and, can reasonably be seen to be the real intent of the Legislature."

State v. Chicago & N. W. Ry. Co. (Wis. 1906) 108 N. W. 595.

The decision of the Supreme Court of the United States in *U. S. v. A. T. S. & F. Ry., 220 U. S., 37,* indicates that that Court does not intend to make a captious construction of the act, in order to be over technical in imposing penalties upon carriers. There an endeavor was made to recover a penalty for permitting a telegraph operator to remain on duty for a longer period than nine hours, in any twenty-four, in stations continuously operated night and day. The station in question was shut from 12 to 3 by day and by night. The Government contended that this was

a place continuously operated, night and day, and that when nine hours passed from the moment of beginning work, the operator could not be again worked until after the expiration of fifteen hours. The Court held that the nine hours referred to need not be consecutive, and that the operator might work for six hours, with an interruption and then for three, without the Railway Company incurring any penalty under the act. The Government's suggestion that he might be worked for two hours and then two hours off, and so on, was dismissed as hardly practicable.

"We see no reason to suppose that Congress meant more than it said."

Congress defined the employes included as those engaged in, or connected with the movement of a train. It did not intend to include those not so connected, and when the employe is not so connected, he is not included in the prohibited class.

The Supreme Court of the United States in the B. & O. case says that it was the purpose of Congress to limit the scope of the act to the ensuring of safety, by controlling the movements of those directly connected with the agencies upon which protection to life and property necessarily depends.

"The length of hours and 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 officials reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes

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 of engineers, conductors, train dispatchers, telegraphers and other persons embraced within the class defined by the act."

Baltimore & Ohio R. Co. v. Interstate Com. Com., 221 U. S., 612.

The act should be considered in the light of its purpose and object. The thought is, primarily, safety. Mr. Chief Justice Fuller said in the Safety Appliance Cases:

"The primary object of the act was to promote public welfare by securing the safety of employes and travelers, and it was in that aspect remedial; while for violations a penalty of $100, recoverable in a civil action, was provided for, and in that respect it was penal."

Johnson v. Southern Pac. Co., 196 U. S. 17.

This construction of the act is the one adopted by another trial court, whose very opinion is cited to sustain the opinion of the court below in this case.

"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 the enactment.

Experience has shown that many serious accidents to trains, causing great loss of life or permanent disabilities to passengers as well as employes, are often due solely to the fact that members of the train crew had become exhausted by reason of being required or permitted to remain on duty for too long a period, and therefore unable to give that care and attention

necessary for the safety of the train. To prevent accidents from such causes, the Congress in its wisdom, enacted this statute, prohibiting the railroads, not only from requiring any employe subject to the act to remain on duty for a longer period than sixteen consecutive hours, but also "permitting it."

U. S. v. K. C. S. R. Co., 189 Fed. 471.

The opinion of the Court of Appeals of Kentucky in *St. Louis, Iron Mountain S. Ry. v. McWhirter,* is no longer authority for the extreme application of the statute, contended for by the Government, having been reversed by the Supreme Court of the United States in *33 Sup. Ct. Rep. 858.*

Judge Rudkin in the C. M. & P. S. case very clearly shows that the purpose of the act is to limit its application to those persons in control of dangerous agencies.

"The purpose of the statute as indicated by its title, is to promote the safety of employes and travelers upon railroads, by limiting the hours of labor of those 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 life."

U. S. v. C. M. & P. S. Ry. Co., 197 Fed. 624.

Congress had in mind the reducing of accidents occasioned by permitting employes to remain in charge of dangerous agencies for a longer period of time than that prescribed by the statute, or by permitting them to again become in charge of such agencies, without having had the requisite number of hours of rest. It singled out two particular classes of employes which

it considered were likely to endanger their own lives and the lives of passengers, should they become fatigued by long hours of service when in control of dangerous agencies, or should they be permitted to resume control of such agencies without having certain number of hours of rest. The act assumes that it is practically safe for trainmen to operate trains for sixteen consecutive hours, and that it is unsafe for them to remain in charge of such trains over sixteen hours, or to take charge of a train without the requisite number of hours of rest, after having had charge of such a train.

It is perfectly apparent that when a train has been placed upon a sidetrack, taken out of operation, orders annulled and the switches locked, the train no longer endangers the safety of employes or passengers, persons, or property. It is so specifically stipulated in this case. Certainly, a fireman would not, in such work by reason of negligence occasioned by fatigue or otherwise, endanger the safety of employes or passengers. Having had five days' rest, after watching the engine, the purpose of the law is not contravened by a fatigued employee being entrusted with a dangerous agency.

The title of the act emphasizes the purpose of Congress in passing it as a safety measure. It is "An Act to Promote Safety of Employes and Travelers upon railroads by limiting the hours of service of employes thereon."

The President's Message to the Third Session of the 58th Congress, concerning the necessity of legislation, demonstrates that safety was the purpose in his mind.

"I would also point out to Congress the urgent need of legislation in the interest of public safety, limiting the hours of labor for railroad employes in train service upon railroads engaged in Interstate Commerce."

The debates in Congress show that this was the purpose of Congress.

Senator LaFollette in his speech on January 9th, 1907, reported in Volume 41 of Congressional Records, page 810, devotes most of his time to showing the number of railroad accidents occasioned by the use of engine men on duty as such engine men for excessive periods of time.

Senator Patterson at page 823 said:

"I heartly concur in everything that had been said about the necessity for a measure of this kind, not so much for the benefit of the railway men as for the traveling public. * * * I think the real necessity for this measure or a similar measure that can be made effective, is for the protection of the traveling public. The many accidents that have occured resulting in deplorable loss of human life and the horrible maiming annually of thousands of people by reason of railway accidents, the result of the overworking of employes, constitute an apepal to Congress for legislation of this kind, which should be heeded."

Senator Dolliver at page 820 says:

"I have no doubt myself that the necessity of such legislation has been pressed upon the attention of nearly

everybody in the United States by the series of train disasters, involving both property and life, occuring all over the United States, many of them traceable to the overworking of employes—to the working of men during such intolerable hours of service as leaves them practically unable to discharge the business which is committed to their hands."

And Senator Bacon, in referring to the remark of Senator Dolliver, says on page 822:

"Mr. President, I do not wish the Senator to resign the floor for the present, but I want to say to him that I think he uses an incorrect term when he speaks of the suggestion as a criticism upon the bill, because the suggestion is not in the way of criticism, but in the line of an effort to perfect the bill, to relieve it from imperfections, if possible, to put it in such a shape as not only to serve the purpose which the Senator has in view, of protecting the traveling public, but at the same time of imposing as little hardship as possible both upon the railroads and their employes."

Representative Richardson says on February 18th in Volume 41 of the Congressional Record at page 3302:

"The protection of the lives of the people, as well as the lives of the employes themselves, is at stake. It is simply appalling to note in the public press the daily account of the loss of life by reason of some accident on railroads * * * It is a question of protecting the lives of the traveling public by administering proper punishment to a common carrier who requires or permits an employe to remain on duty so long that his physical senses are exhausted, and he becomes unfit to discharge his responsible duties."

In the discussion of the bill on January 8th in the Senate, in Volume 41 Congressional Record, page 763, occurs the following colloquy:

"Mr. Bacon: In other words, without elaboration, it means to affect every railroad in the United States, long or short, within a State or crossing from one State to another.

Mr. LaFollette. Where the operation of the trains upon the line would jeopardize the lives of people who were being conveyed by a train engaged in interstate traffic.

Mr. Bacon: Mr. President, I presume none of us differ as to the desirability that there shall be protection as to the trains, whether they are trains upon railroads which are limited entirely to one State or trains upon railroads which pass from one State to another. But that does not necessarily carry with it the conclusion that the Federal Government should be given charge of the business of furnishing this desired protection. It is the desire of us all, without difference, that there shall be no murder committed, and that all who commit murder shall be punished. That does not in any manner make it proper that the Federal Government, because the end is desirable, shall overstep its legitimate power for the purpose of accomplishing it."

The decided cases relating to train service, holding the companies liable to the penalties of the act, all show that the employe either had been left in charge of a train more than sixteen hours, or had been put in charge of the train without the requisite number of hours of rest. They violated the very object and purpose of the law by permitting a fatigued employe to be in charge of a train, thus endangering the safety of himself, fellow employes, passengers and property.

The Hours of Service cases are as follows:

U. S. v. A. T. S. & F. Ry., 220 U. S. 37.
A. T. S. & F. Ry. v. U. S., 177 Fed. 114.
U. S. v .Missouri Pac., Dist. Ct. of U. S. for Dist. of Kansas, First Div. Mch. 22, 1913.
U. S. v. Houston Belt & Terminal Ry. Co., Dist. Ct. of U. S. So. Dist. of Texas May 5, 1913.
B. & O. R. R. Co. v. Interstate Com. Com., 221 U. S. 612.
N. P. Ry. v. State of Washington, Ex. Rel., 222 U. S. 370.
U. S. v. Ill. Central Ry. Co., 180 Fed. 630.
U. S. v. St. L. S. W. Ry. Co. of Texas, 189 Fed. 954.
U. S. v. C. C. C. & S. L. Ry. Co., Dist. Ct. of U. S. for So. Dist. of Ohio, Dec. 12, 1911.
Black v. C. & W. C. Ry. Co., 69 S. E. 230.
U. S. v. Galveston H. & S. A., Dist. Ct. of U. S. for Dist. of Texas.
St. L. I. M. & S. Ry. v. McWhirter, 140 S. W. 672; reversed by U. S. Sup. Ct. 33 Sup. Ct. Rep. 858;———U. S.———
U. S. v. C. M. & P. S. Ry., 197 Fed. 624
U. S. v. D. & R. G. R. Co., 197 Fed. 629.
U. S. v. C. M. & P. S. Ry. Co., 195 Fed. 783.
U. S. v. Missouri Pac., decided May 8, 1913 by the District Court Western District of Missouri, Western Div., Judge Von Valkenberg.

U. S. v. Missouri Kans. & Texas Ry. Co., decided January 13, 1913, District Court District of Kansas, First Division, Pollock, District Judge.

The cases referred to by Court and date of decision have not yet been reported, but are published in pamphlet form by the Interstate Commerce Commission.

Judge Willard in the Schweig case in the District Court of Missesota, held that an employe who was load-

ing cars of stock, ordered to another part of the yard to see if eight other cars which were to be taken in the same train were ready for loading, who stepped upon the rear footboard of the engine for the purpose of complying with this order, and who was killed while riding thereon, is not actually engaged in or connected with the movement of any train; that the employe must be engaged in work which had some connection with the safety of the train or with the safety of persons, who might be injured by the movement of the train.

Schweig v. C. M. & St. P. Ry., 205 Fed 96.

In addition to these cases the act has been commented upon and referred to in the following cases:

Kansas City Southern Ry. Co. v. Quigley et. al., 181 Fed. Rep. 190.
Missouri v. Wabash R. Co., 141 S. W. Rep., 646.
State v. Chicago, M. & St. P. Ry. Co., 136 Wis. 407; 117 N. W. Rep. 686.
People v. Erie R. Co., 198 N. Y. Rep 369; 91 N. E. 849.
Lloyd v. No. Carolina R. Co., 66 S. E. Rep. 604; 57 Am. & Eng. R. Cas. N. S. 144.
State v. Missouri Pac. Ry. Co., 212 Mo. 658; 111 S. W. Rep. 500.
Montana v. Nor. Pac. Ry. Co., 93 Pac. Rep. 945.
State v. Texas & New O. R. Co., 124 S. W. 984.

There have also been cases decided by Judge Willard of the District Court of the United States for the District of Minnesota, which have not been reported.

U. S. v. M. & St. L. Ry.
U. S. v. G. N. Ry. Co.

Plaintiff in error does not contend for a decision that the law permit a fatigued employe to be in charge of a train, endangering the safety of persons or property. Neither do we claim the right to keep a fireman in the service of a train "in operation" over sixteen hours, nor the right to permit him to again go on duty and be placed in charge of a train in operation, without having had the full number of hours of rest. The purpose of the law is not contravened in this case. The object of the act was furthered by the taking of a train out of service, tying it up, and sending all the other members of the crew away from it, until after the expiration of the ten hour period. There could not be a more complete taking of a train out of service, than was done in this case.

The company does not countenance a practice which would lead to contravention of the law. It is apparent that there can be no incentive on the part of the railroads to encourage such a practice. There is every reason calling for the reduction, to a minimum, of the practice of having to tie up trains at all.

There are only two ways in which the use of a fireman as a watchman can be obviated. One is by killing the engine; the other by always having a sufficient number of men stationed along the line, so that a watchman would always be available at any point. If the engine is killed every time there is a tieup, it greatly reduces the efficiency of railroad systems. Every train that is killed must lose considerable time, because of the necessity of securing a fresh crew, re-

kindling the fire and awaiting the placing of the engine in condition for hauling the train. This would result not only in curtailing the working time of the crews themselves, to a great extent, but would also result in a great burden on the service to be afforded the public.

The placing of watchmen at each station is impracticable. It would not be reasonable to require the carrier to have a set of men known as watchmen, idling most of their time away at stations along the line, merely being held in readiness in the event that they might be needed to watch engines.

The stipulation shows that of the 88 stations along the line of the Spokane Division,, 35 have no post-office and 55 are merely names, without substantial population. It would seem impossible for a transcontinental line, traversing such a thinly populated country, to have such men in readiness at each station, besides placing the burden upon the carrier, at a large and needless expense.

The terminals of this system are located at the distances which usually obtain on transcontinental railroads in the same character of country, and under similar conditions as exist on the Spokane Division, and are established and maintained with reference to the usual custom of operating railroads, and the necessity of complying with the reasonable and ordinary conditions in the operation of such railway lines, and with a view to securing efficient operation, render sufficient service to the public, and affording reasonable hours

of work and rest for men, under usual and ordinary conditions.

What more can be reasonably asked of any carrier? Certainly, Congress did not contemplate by the passage of this act the requirement of anything more than was furnished by this plaintiff in error.

The tieups occuring at every station and siding along the line, it would be necessary for the carrier to have at least fifteen additional watchmen, located every twenty miles along the line. There are on the Spokane Division 970 trains operated a month, and out of this number there are but fifteen tieups. It is not reasonable to suppose that Congress intended that the carrier should employ these fifteen additional men on this division alone, for the purpose of taking care of these fifteen tieups, at an expense of at least $9000 a year.

The plaintiff in error is not asking the Court to countenance a practice that is designed to contravene the law. It is asking it for a reasonable interpretation of the act, which will allow the carrier to continue a practice fully consonant with the dominant purpose of the law, and conducive to a more efficient, economical and satisfactory service to the public.

The primary purpose of the Hours of Service Act is the protection of the traveling public, and incidentally, that of the employes, in order to accomplish the traveling public's protection. The evil to be remedied by the act was the prevention and prohibition of the use of engine and trainmen for ex-

cessive periods of time, in the duties which involved the safety of the public. Congress, in passing the act, expressly repudiated the theory of protecting the employees, as a class, and by the change of the wording of the bills from the inclusion of a class of engineers, firemen, conductors, operators, etc. to "employes actually engaged in or connected with the movement of any train," and the elimination of the words "of rest" and the substitution of the words "off duty," declared that the purpose of the act was to prevent men who were tired out or fatigued by engaging in moving trains from continuing in such movement, and not to ensure a certain number of hours of work for such employes, regardless of the connection of such employes with the safety of the traveling public. The use of this fireman as a watchman was designed for the purpose, and did carry out the intent and spirit of the act. It worked no circumvention of the law. His use had nothing to do with the safety of trains or of persons or property on or about the same, nor did his duties have anything to do with the movement of the train. The train was on a sidetrack, out of operation, orders annulled and switches locked.

The situation here presented is different from that presented in any other case which has been decided by the courts in that the fireman under the circumstances of this case was neither left in train service after the expiration of the limitation prescribed by the statute, nor permitted again to resume service in connection with train operation until after

the requisite number of hours prescribed by the statute.

The construction of the statute contended for by the Government is unreasonable, and does not conform to its spirit. If such construction were enforced it would work injustice, and place a burden upon the railway company and upon commerce, the safety and conservation of which is the object of the law, which would be intolerable to the public and to the carriers. The railway company endeavored to, and did comply with the act, its spirit and intent, aided in the enforcing of its provisions and adopted a practice permitted by the terms of the law. It should not be fined for its endeavor to further the spirit of the law, and to protect the traveling public.

Respectfully submitted,

E. C. LINDLEY,
F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Attorney's for Plaintiff in Error.

Appendix.
Exhibit A.

59th CONGRESS
1st Session

H. R. 18671.

(Report No. 4567.)

IN THE HOUSE OF REPRESENTATIVES.

April 26, 1906.

Mr. Esch introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

May 31, 1906.

Reported with amendments, referred to the House Calendar, and ordered to be printed.

[Omit the part struck through and insert the part printed in talics.]

A BILL

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 and 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 corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall include ~~conductors, brakemen, engineers, firemen, train dispatchers, telegraph operators, or other~~ *all* persons actually engaged in *or connected with the movement of any* train operation or ~~train service,~~ and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract.

SEC. 2. That ~~from and after the first day of July, nineteen hundred and six,~~ 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 ~~of rest~~ *off duty*; and no such employee who has been relieved from duty after a *continuous* service of any period ~~less~~ *more* than ~~sixteen~~ *ten* hours shall be required or permitted to go on duty again until he has had eight consecutive hours ~~of rest~~ *off duty*.

~~SEC. 3. That the Interstate Commerce Commission may, by its order, from time to time, upon full hearing and for good cause, reduce the maximum hours of continuous duty or uninterrupted rest specified in section two hereof. Such reduction shall be set forth in an order of the Commission, to be served upon the carrier and posted by said carrier upon its bulletin boards. Such order of the Commission shall remain in force and effect until changed by the Commission; and a failure to observe such order of the Commission by any common carrier, its officers or agents, shall be subject to the same penalty as is a violation of section two hereof.~~

Sec. 4. *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, ~~or in violation of a lawful order of the Commission made under section three hereof~~, shall be liable to a penalty of one *not to exceed five* hundred dollars for each and every violation, to be recovered in a suit or suits 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 duly verified information being lodged with him of such violation having occurred; *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: *Provided,* That the provisions of this Act shall not apply in any case where, by reason of unavoidable ~~or unforseen train~~ accident or act of God ~~occurring after such employee has~~ *not known to the carrier or its agent in charge of such employee at the time he* left a terminal, he is prevented from reaching his terminal within the time specified in section one of this Act: *Provided further, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.*

Sec. 4. *That this Act shall take effect and be in force six months after its passage.*

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Upon Writ of Error in the United States District Court of Idaho, Northern Division.

Brief of Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Defendant in Error, the United States, answering the brief of Plaintiff in Error, finds that the issues are compassed, as follows:

The Government contends that the fireman, Ed Bergen, was on duty longer than sixteen hours within the meaning of the Hours of Service Act. The record discloses that said fireman remained on duty continuously from July 10, 1912, at 6:00 a. m. to July 11, 1912, at 6:00 a. m., but, it is claimed by the railroad company that from July 10, at 9:59 p. m., to July 11th at 6:00 a. m. that the said

Bergen, while watching and keeping the engine alive, was not continuously engaged in or connected with the movement of any train.

The facts as stipulated show that the said fireman left the station at Hillyard on July 10th at 6:00 a. m. and continued to discharge his duties as fireman while the train was moving to Laclede, at which point it arrived at 9:59 p. m. of the same day. After the arrival at Laclede the train was sidetracked, leaving the line clear for the movement of any trains passing through Laclede station. The switches were locked at each end of the siding and remained locked until the fireman went off duty, so that no train movement was effected during the time the train was sidetracked. It is also stipulated that neither the train nor the engine could move without first releasing the brakes, and that during this time no orders were received pertaining to the movement of the train or permitted to be received. That said fireman, notwithstanding the foregoing conditions, was required to remain on the engine continuously from July 10th at 9:59 p. m. until July 11th at 6:00 a. m. to watch the quantity of water in the engine and replenish same so that the engine would always have a sufficient supply of water whereby steam could be efficiently and promptly generated so that when the engine was again to be moved it could do so under its own steam without delay in rebuilding fire in the firebox or generating steam to start with. It is further stipulated that on July 11th at 6:00 a. m. Bergen was relieved by another fireman and retired to the train for rest and did not go again on duty or perform duty of any kind until after he had rested five days.

From this summary of facts the question to be deter-

mined is: Was Bergen, the fireman, on duty more than sixteen hours within the meaning of the said Act?

The primary purpose of the Hours of Service Act is to protect persons and property being transported by the carrier as well as to secure the safety of the employees engaged in the service of the carrier. The Act therefore is one of paramount importance, dealing as it does with the safety of persons and the protection that should be accorded to property in transit.

Counsel for the railroad company have amplified on the debates in Congress at the time of the passage of the Act and have labored assiduously and earnestly to place a construction upon the word 'employee" not contemplated by the framers of the law. The contention of the railroad company is that Bergen, the fireman, was not actually engaged in the movement of any train after July 10th at 9:59 p. m. and the company therefore is not amenable to the Hours of Service Act.

The language defining an employee under Section No. 1 of the Act is held to mean "persons actually engaged in, or connect with, the movement of any train." The word "connected" is significant in this case, bearing on the question involved. There can be no question but what the fireman was performing service in connection with the movement of the train. It was incumbent on the fireman to keep the train in condition ready to start without delays incident to refiring or generating steam. The construction contended for by the railroad company would in many instances cause the act to become inoperative. The reasoning advanced by the trial court, as set forth in his able opinion, is unanswerable: "That if the fireman could watch the engine after the time limit, he could do so before the time limit began and thus frustrate the real

purpose and spirit of the Act." To bring itself within the exceptions mentioned in the law, the carrier must be held to as high a degree and foresight as may be consistent with the object aimed at and the practical operation of its railroad. The delays incident to train operation, such as sidetracking, stopping for meals, switching, defects in equipment, and passing trains, are not sufficient to bring the carrier within the proviso as the time thus consumed is not taken into account in determining the sixteen-hour period of employment. How then by parity of reason can it be said that a fireman who has been engaged for fifteen hours and fifty-nine minutes can continue longer (the entire period in this case being twenty-four hours), why not for forty-eight hours and ad infinitum, and thus escape the penalties imposed by the act? Such a construction would be a perversion of the meaning intended and would place the operation of the road into the hands of men whose senses are deadened by long and strenuous hours of service and thus imperil the lives of those entrusted to their care and protection.

The case referred to in the brief of Plaintiff in Error, decided by Judge Pollock of the District of Kansas (not reported), is entitled to careful consideration as the questions involved in that case are similar to those before this Court. The facts as stipulated by the parties in that case were:

> "The defendant permitted its locomotive fireman, Roy Scott, to go on duty on October 18, 1911, at 6 a. m. The run of this engine was from Pueblo, Colorado, to the station of Horace, Kansas. That at 10 p. m. on the night of that day the engine, not having completed its run, and having reached the station of Keyser, Kansas, the fireman signed the 'rest register,' but was by defendant company thereafter permitted to remain on his engine as watchman in

charge until the engine was drawn by another engine to the end of the run, Horace station, which was reached at 11:30 p. m. that night, the hours of continuous service of Scott on that day being as locomotive fireman from 6 a. m. to 10 p. m., as watchman in charge of the engine from 10 p. m. to 11:30 p. m.; total, 17 1-2 hours.

"From the statement made it is obvious the question presented is, Shall the time spent by the fireman as watchman in charge of his engine being drawn by another engine to the terminal station be computed in the hours of service as contemplated by the statute?

"As stated in the stipulation of the parties, the duties of the fireman so engaged as watchman in charge of his engine are to keep a certain amount of fire in the furnace, to see the water does not run too low in the boiler, and that a certain amount of steam pressure is preserved. Aside from such duties the engine employed in drawing the train is in charge of another crew, as is the movement of the train itself.

"The term 'employee,' as employed in and defined by the act itself, is 'persons actually engaged in or connected with the movement of any train.' 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 he is in no manner connected with the movement of the train. 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 reasons which might be given.

"The human feature of the statute being considered, it must be thought the Congress intended, at or before the expiration of the sixteen-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 situate, 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 law-making power, not with the courts."

The case of U. S. vs. C. M. & P. S. Ry. Co. (197 Fed. 624), the decision being rendered by Judge Rudkin of the Eastern District of Washington and referred to by Plaintiff in Error, merits consideration as it is claimed by the railroad company in that case that the continuity was broken by the laying-off of the train crew while waiting for a helper engine for an indefinite time which proved to be about three hours. The Court says:

"Nor should the brief periods allowed for meals be deducted from the time of service, in order to break its continuity. The statute uses the terms, 'sixteen consecutive hours,' and 'continuously on duty;' and while, literally speaking, 'consecutive' means succeeding one another in regular order, with no interval or break, and the word 'continuously' means substantially the same, yet it is manifest that no such strict or literal meaning of these expressions was intended. The purpose of the statute, as indicated by its title, is to promote the safety of employes 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 life. New York vs. Erie R. Co. 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 39 Am. St. Rep. 828, 19 Ann. Cas. 811.

"And while the statute is penal in its nature, it is in some aspects remedial and should be so construed as to promote the apparent policy and object of the Legislature, and not entirely defeat its purpose. Johnson vs. Southern Pac. Co. 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

"Thus, in U. S. vs. St. Louis S. W. Ry. Co. of Texas (D. C.), 189 Fed. 954, it was held that an office which was closed four times a day, for a period of one hour each, was continuously operated night and day, within the meaning of the proviso to the section now under consideration. And in the case of U. S. vs. Atchison, T. & S. F. Ry. Co. 220 U. S. 37, 31 Sup. Ct. 362, the court rather intimated that a station closed for two periods of three hours each day was operated continuously night and day, within the meaning of the same proviso. In the course of its opinion in the case last cited the court said:

" 'A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.'

"I can not believe that by the expressions, 'sixteen consecutive hours,' and 'continuously on duty,' Con-

gress intended to include only those who are employed for 16 hours, without interruption for meals or otherwise. Congress was no doubt mindful of the fact that no laboring man works for 16 consecutive hours, or is on duty continuously for that period, without food or drink, except in cases of dire necessity, and the act should not be so restricted. It may be said that trainmen are on duty and subject to call during meal hours, but this is only because such is the will of their employers. If a railroad company may relieve its employees from service during meal hours, it may also relieve them from service every time a freight train is tied up on a sidetrack waiting for another train, and thus defeat the very object the Legislature had in view. The brief interruptions for meals were 'trifling interruptions,' in the language of the Court in the Atchison case, *supra*. * * *

"The facts in relation to the twenty-second and five succeeding counts are as follows: The train crew in question ran from Seattle to Laconia, and on the 16th day of June, 1911, left the former station at about 1:30 a. m. At some point on the line they were to be met by a helper to assist them up the mountain grade. They arrived at the point where the helper was to join them at 9:55 a. m. Upon their arrival there the helper was delayed for some cause, and the trainmaster, or some officer of the railway company immediately relieved the crew from duty until the helper should arrive. This, as it afterwards transpired, was a period of about three hours, or not until 1 p. m. The crew then proceeded upon its way and arrived at its destination at about 7:25 p. m. If the three hours' lay-off is deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if not so deducted, the time of service exceeded that limited by law. If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service. Atchison Case, *supra*. But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a delayed engine. They did not know at what mo-

ment the train might move, and had no place to go except to a bunk house, or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption.

"The facts in this case demonstrate the absurdity of the company's claim. According to its view of the law, it may work its employes for the full period of 16 hours, allow them two hours and forty-five minutes off for their meals, lay them off for three hours at a siding in the mountains to wait for a helper, and thus leave them two hours and fifteen minutes for sleep and recreation. Such a policy would illy protect the safety of either the employees or the traveling public. I therefore adjudge the defendant guilty as to these six counts also."

Judge Hanford of the Western District of Washington, in the case of U. S. vs. C. M. & Puget Sound Ry. Co. 193 Fed. 783, defines an employee as one who is on duty when he is at his post in obedience to rules or requirements by his superior and ready and willing to work whether actually at work or awaiting for orders, or for the removal of hindrances from any cause.

The words "on duty" appear to have been intelligently chosen and used in the composition of the statute to bar all excuses for non-compliance with its requirements by any pretext or misunderstanding of its meaning.

U. S. vs. Ill. Cen. Ry. Co. 180 Fed. 630.

The Act further provides in Section No. 1 that the term "employees" as used in the act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Held, that where an interstate carrier had a rule requiring engineers to report thirty minutes before leaving time, during which they were required to overlook their engines in preparation for the trip, to see if they were properly oiled and the brakes O. K. and to connect the engines with their trains, the time

so occupied constitutes a part of their time of duty; and this, though it was the custom of the carrier not to strictly enforce the rule." * * * Idem.

District Judge Morris says:

"In my opinion this man was on duty within the meaning of the act, from the time he went there and commenced to supervise, or overlook that engine in preparation for the trip. It does not make any difference whether he was paid for his time or not. That was the time his work and the strain on him began. The work of an engineer and an employee of the railroad begins when under the rule of the company he is there and is at work in connection with the preparation of the engine for the moving of the train. He must look over that engine. He must see that it is oiled up. He must see that the air brakes are all right. He must move the engine down over the tracks and across the switches to connect it with the train. And in my opinion he is on duty within the meaning of the act during the time he is doing these things. If he goes there half an hour before the time to start to do these things, during the time he is there doing them he is on duty." Idem.

The term "employee" as used in the act shall be held to mean persons actually engaged in or connected with the movement of any train.

The pivotal question in this case is the meaning to be placed upon the phrase "connected with the movement of any train" as used in the first section of the act. The words "in connection with that company's railways" as used in the order of Court directing a Receiver of a railroad to pay laborers and employees of the company for labor and services actually done "in connection with that company's railways" are the equivalent of "in the interest and upon the employment of that company in and about its railway and the operation and management thereof, and all matters connected with, relating to, and growing

out of the proper and legitimate business of the company as the possessor and operator of such railways." The phrase was intended to and does embrace every employment for the performance of any service in promoting the interest and enforcing and defending the rights of the company as a railway corporation in respect to its railways in its possession and under its management.

Gurney vs. Atlantic & G. W. R. Co. 58 N. Y. 358, 371.

Vol. 4, Words and Phrases, p. 3470.

The words "connected with" are here used in a generic sense and must include every duty devolving on one engaged in train service. While Burgen's duties are apparently circumscribed after 9:59 p. m. on July 11th, yet he was performing a valuable service, requiring diligence, and he would have been called upon in case of disturbance to defend with such force as he could have commanded the company's rights. Burgen's duties were therefore active and not passive, and related to any train not necessarily a moving train, and comes within the purview of the act.

The act, being remedial in its nature, must receive such construction as will give to its general purpose reasonable effect.

U. S. vs. Kansas City Ry. Co. 189 Fed. 471.

No error having been made by the trial court, the judgment should be affirmed.

Respectfully submitted,

C. H. LINGENFELTER,

United States Attorney for the District of Idaho, and Attorney for Defendant in Error.