Employment in Interstate Commerce under Federal Employers' Liability Act

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WHEN Congress in 1908 enacted the present Federal Employers’ Liability Act, conflicting state legislation concerning assumption of risk, fellow-servant rule, contributory negligence, and certain other defenses, yielded — where applicable — to the uniform rule prescribed by the Federal statute. Namesake of the English act of 1880 but bearing little resemblance thereto, it has been suggested that a better name, or at least one less confusing, would have been the “Federal Fellow-Servant Act.” The title of the act declares it to be “An Act relating to the liability of common carriers by railroad to their employees in certain cases.” An amendment was enacted in 1910, but no subsequent amendments have been passed in the succeeding twenty-five years. Therefore, at this writing, the act embraces only common carriers by railroad. It has been held not to include express companies or sleeping-car companies. Efforts have been made, however, through bills introduced into Congress, to extend its provisions to express, freight-forwarding, and sleeping-car companies.

1 Member of the Illinois Bar; alumna of Chicago-Kent College of Law.
3 43 and 44 Vict., c. 42.
4 18 R. C. L. 825, sec. 279, Master and Servant.
5 Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205 (1920).
7 H. R. 2901, introduced by Mr. Weaver, 74th Congress, 1st session, January 3, 1935.
The act governs the liability of the carriers in certain cases. These are cases where the common carrier by railroad is engaging in interstate commerce (except actions arising in the territories, the District of Columbia, the Panama Canal Zone or other possessions) and where the injury or death of the person employed in such commerce is due in whole or in part to the negligence of the officers, agents, or employees of the carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. To bring an injured employee within the protection of the act there must have been negligence—and causal negligence—on the part of the carrier. It is obvious also that both the carrier and the employee must have been employed in interstate commerce at the time of the injury. When both the subjects fall within its terms, the Federal act is exclusive. It is held that it is immaterial that the employee, whose negligence caused the injury was not engaged in interstate commerce, or, with reference to actions based on safety appliance violations, that the defective instrumentality causing the injury was not used in such commerce at the time of the accident.

The practical importance of deciding at the outset, when a given state of facts exists, whether or not the

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Federal statute applies, lies in the fact that it is a condition precedent to recovery that the action shall be commenced within two years from the day the cause of action accrues. One who mistakenly pursues his remedy under the common law or state statute may find his action under the Federal act barred by the time he learns that it is exclusive on the subject. The Supreme Court has held that there is no liability if suit is not brought within the two-year period. It behooves the practitioner, therefore, to examine well the question before he brings his suit; for further investigation will develop that under this act, unlike the ordinary action, no provision exists for tolling the statute, and the plaintiff cannot avail himself of infancy, fraud and deceit in inducing him not to sue, insanity, or the protection of another Federal statute. Furthermore, the limitation applies although the defendant does not affirmatively plead it.

Definitions

Section 7 provides that the term "common carrier" used in the act shall include its receivers or those charged with the duty of managing and operating its business. Beyond this, the act is barren of guiding definitions, and aid must be sought in the decisions of those courts which control the construction of a Federal statute. It is pointed out that the act uses the term "interstate commerce." It has been held that the term "com-

14 Gillette v. Delaware, Lackawanna and Western R. Co., 91 N. J. L. 220, 102 A. 673 (1917). Plaintiff was injured when under age. One year after reaching his majority, but nearly six years after the accident, he sued. The court concluded that the minority of the plaintiff did not suspend the operation of the section of the act which requires that suit be brought within two years from the day the cause of action accrues.
merce" comprehends more than the mere exchange of goods; that it embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land. This definition is found in the Second Employers' Liability Cases\textsuperscript{10} wherein the constitutionality of the act was upheld. The court in those cases stated that the power of Congress over commerce among the states extends incidentally to every instrument and agent by which such commerce is carried on, but that it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

To avoid an extended consideration of the definition of a carrier engaging in interstate commerce, suffice it to say that interstate commerce is generally understood to mean the movement of traffic from one state or territory into, or through, some other state or territory.\textsuperscript{20} It has been held to cover all stages of transportation from acceptance by the carrier at point of shipment to final delivery to consignee at destination\textsuperscript{21} as well as handling at terminal points.\textsuperscript{22} The character of a railroad as a medium of interstate transportation is not derived from one particular mile of road, one particular station or terminal. It is conceivable, of course, that a road would lie wholly within one state, isolated and with no connections, and that it would never carry an interstate passenger or a pound of interstate freight. This, however, is an extreme situation. In the main, the railroads all engage in interstate transportation and some of their employees come within the act. Therefore, to determine when an employee is in interstate commerce is a question of large importance.

As stated, this is a Federal statute on which decisions

\textsuperscript{10} 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (1912).
\textsuperscript{20} United States v. Chicago Great Western Ry. Co., 162 F. 775 (1908).
\textsuperscript{21} Philadelphia and Reading Ry. Co. v. Hancock, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907 (1920).
\textsuperscript{22} St. Louis, San Francisco and Texas Ry. Co. v. Scale, 229 U. S. 156, 33 S. Ct. 651, 57 L. Ed. 1129 (1913).
The initial inquiry, therefore, is whether or not the Supreme Court of the United States has considered the question and what test, if any, it has laid down for applying the act to particular facts. A suggestion of the perplexity of the courts touching the application of the act is found in the decision of a district judge in a case which was decided in 1910:

I do not know how far this employer’s liability act will be extended as to the class of employees held to be engaged in interstate commerce; but it seems reasonably clear to me that a man engaged in repairing bridges and doing bridge work generally, even though he worked in different states for the railroad company, is not engaged in interstate commerce within the meaning of this act.

The Supreme Court arrived at exactly the opposite result in Pedersen v. Delaware, Lackawanna and Western Railroad Company.

**Supreme Court Cases**

The Pedersen case, decided in 1913, comes in the vanguard of decisions following the Second Employers’ Liability Cases. Pedersen and a fellow employee, in the course of their duties, were carrying from a tool car to a bridge some rivets which were to be used that night or early the following morning in removing an existing girder from the bridge and inserting a new one. While passing over an intervening temporary bridge en route to the bridge to be repaired, Pedersen was run down by an intrastate passenger train. Both bridges were regularly used in interstate and intrastate commerce. The majority opinion—that the employee was in interstate commerce at the time of his injury—was based on the ground that tracks and bridges are instrumentalities indispensable to interstate commerce, that the security and efficiency of the commerce is in large

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measure dependent on their being kept in repair, that the rivets were necessary to the repair of the bridge, and that the act of taking them to the bridge was part of the removal of the girder. The court said:

Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? . . . The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?

Dissenting, Justice Lamar—with whom Justices Holmes and Lurton concurred—pointed out the distinction between employees engaged in commerce, that is, transportation, and those engaged in other departments of its business. The nub of the opinion follows:

It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when we must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

It will be conceded, as pointed out so clearly in the minority opinion, that the mere employment by a carrier engaging in interstate commerce does not bring the employee within the act, for if it did, then every clerical employee would be included—a result obviously not intended by Congress. In a Mississippi case, the court held
that a claim agent was not engaged in interstate commerce when returning from the performance of duties in connection with his regular work.\(^{26}\) It would not be seriously contended that office employees of interstate carriers engaging in commerce between the states are subjected by reason of such employment to greater hazards than office employees in other pursuits of industry and commerce.

Returning to the test as expounded in the Pedersen case, we find the court a year later considering the case of *Illinois Central Railroad Company v. Behrens.*\(^{27}\) Behrens, a fireman, was a member of a crew which handled interstate and intrastate commerce indiscriminately, frequently moving both at once and at times turning directly from one to the other. When he was injured, the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement the crew was to have gathered up and moved to other points several other cars as a step in their transportation to destinations within and without the state. Applying the test laid down in the Pedersen case, the court said:

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.

In the Pedersen case the court, in stating the test, used the term "interstate commerce." Three years later in *Shanks v. Delaware, Lackawanna and Western Railroad Company,*\(^{28}\) the court expressed the view that Congress in adopting the act spoke of interstate commerce, not

\(^{26}\) Gulf, Mobile and Northern R. Co. v. Myers, 145 Miss. 555, 110 So. 444, cert. den. 273 U. S. 766, 47 S. Ct. 570, 71 L. Ed. 881 (1927).

\(^{27}\) 233 U. S. 473, 34 S. Ct. 646, 58 L. Ed. 1051 (1914).

\(^{28}\) 239 U. S. 556, 36 S. Ct. 198, 60 L. Ed. 436 (1916).
in a technical legal sense, but in a practical one, and that the true test of employment in such commerce in the sense intended was this: Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it? In thus substituting the word "transportation" for "commerce" the court sought to confine the application of the test to cases where the employee was engaged in the actual movement of persons and things or in work closely related to the act of transportation. The employee's duty in the Shanks case was to repair locomotive parts in a shop where the railroad company repaired both interstate and intrastate equipment. At the time of the injury he was engaged solely in the removal of a heavy shop fixture which was used to communicate power to machinery utilized in repairing parts of engines some of which were used in interstate transportation. The court held that the connection between the fixture and interstate transportation was too remote from interstate transportation to be practically a part of it. In its opinion the court said:

Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation.

The test in the Shanks case was applied in New York Central Railroad Company v. White, where the court held that a night watchman was not engaged in interstate transportation while guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad.

Another case which applied the test was Southern Pacific Company v. Industrial Accident Commission of California. Here the employee was an electric lineman. The company, a common carrier by railroad, maintained a power house where it manufactured the electric current which moved its cars in both interstate and intra-

30 251 U. S. 259, 40 S. Ct. 130, 64 L. Ed. 258 (1920).
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state commerce. From the generators, this current passed along the main lines or cables, through a transforming station, to the trolley wires, and thence to the motors. The employee was atop a pole, wiping insulators, when he received an electric shock which caused him to fall to his death. He was working at the time on one of the main lines necessary to be kept in serviceable condition. The court said:

Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation, and an essential part of it.

In Industrial Accident Commission v. Davis, the employee was injured while working on an engine sent for overhauling, from exclusive employment in interstate commerce to the general repair shops, where it remained for more than two months. At the time of the injury the engine was nearly stripped and dismantled, although it was returned to interstate commerce comparatively soon after the accident. The court said:

We refrain from a review of our cases. They pronounce a test and illustrate it. We are called upon to apply it to the present controversy. The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; but so are all attached to the railroad company—official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are

31 259 U. S. 182, 42 S. Ct. 489, 66 L. Ed. 888 (1922).
brought to a consideration of degrees, and the test declared, that
the employee, at the time of the injury, must be engaged in
interstate transportation or in work so closely related to it as
to be practically a part of it, in order to displace state juris-
diction and make applicable the Federal act.

The court illustrated the difference in the instrumental-
ities, adding that it was impossible to declare a standard
invariable by circumstances. The injured man was held
not to come within the provisions of the Federal act.

That the court recognized the distinction between the
word "commerce" and the word "transportation" as
used in stating the test appears from its decision in 1931
in the case of Chicago and North Western Railway Com-
pany v. Bolle, which came up from Illinois. The injury
occurred while a locomotive which had been temporarily
substituted for a stationary engine—utilized to generate
steam for a passenger depot and other structures used
for general railroad purposes, suburban coaches waiting
to be taken up by interstate trains, bunk cars, and for
keeping a turntable from freezing—was being moved
about four miles distant for coal. The sole object of the
movement was to get the coal supply to generate steam
and, although it was attached during its movement to
three other locomotives each of which was about to be
used in interstate transportation, it was unrelated to
the contemplated employment of the other locomotives.

In commenting on the distinction between the terms
"commerce" and "transportation," the court said:

The appellate court, in holding upon the first appeal that
respondent was not engaged in interstate commerce, applied the
rule laid down in the Shanks case, . . . supra; and in so doing
was clearly right.

It will be observed that the word used in defining the test
is "transportation," not the word "commerce." The two words
were not regarded as interchangeable, but as conveying different
meanings. Commerce covers the whole field of which transpor-
tation is only a part; and the word of narrower signification was

284 U. S. 74, 52 S. Ct. 59, 76 L. Ed. 173 (1931).
chosen understandably and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it.

Since the decision in the Shanks case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated.

In its opinion the court referred to *Illinois Central Railroad Company v. Cousins,* where an employee was engaged in wheeling a barrow of coal to heat the shop where other employees were at work repairing cars that had been, and were to be, used in interstate traffic, and said:

The state court held that the employee came within the act, on the ground that the work which he was doing was a part of the interstate commerce in which the carrier was engaged, and cited *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146. This court, however, repudiated that view, and reversed in an opinion per curiam on the authority of the Shanks case. The court cites the cases in which the rule in the Shanks case has been categorically restated, adding:

The applicable test thus firmly established is not to be shaken by the one or two decisions of this court where, inadvertently, the word "commerce" has been employed instead of the word "transportation."

Thus the court definitely settled the questions which were raised by the use of the two terms in stating the rule.

In 1932, in *Chicago and Eastern Illinois Railroad Company v. Industrial Commission of Illinois,* the court further restricted the test when it definitely overruled the earlier decisions in *Erie Railroad Company v. Collins*:

33 241 U. S. 641, 36 S. Ct. 446, 60 L. Ed. 1216 (1916).
34 284 U. S. 296, 52 S. Ct. 151, 76 L. Ed. 304 (1932).
35 253 U. S. 77, 40 S. Ct. 450, 64 L. Ed. 790 (1920).
and *Erie Railroad Company v. Szary.*\(^{36}\) In the last-mentioned case the employee, in attempting to oil an electric motor while it was running, was injured by having his hand caught in the gears. The motor furnished power for hoisting coal into a chute to be taken therefrom by engines principally employed in moving interstate freight. The railway company relied on the Collins case, where the employee operated a gasoline engine to pump water into a tank for use of locomotives in both kinds of commerce, and the Szary case, where the injured man at the time was applying heat to dry sand for use in locomotives used in both kinds of commerce. The court stated that the cases relied on by the railway company were out of harmony with the general current of the decisions of the court since the Shanks case, and added that *Chicago, Burlington and Quincy Railroad Company v. Harrington,*\(^{37}\) furnished the correct rule. Harrington was injured while engaged in removing coal from the storage tracks to the chutes from which were supplied locomotives of all classes, some engaged in interstate and others in intrastate movement, and the court held that there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes as to bring him within the act.

In *New York, New Haven and Hartford Railroad Company v. Bezue,*\(^{38}\) the injured man was engaged in transferring the main driving wheels of a locomotive from the lathe in the hoist shop of the railroad to a turntable preparatory to placing them under the locomotive which was to be in the shop twelve days for boiler wash and which at the time of the injury was inert and incapable of locomotion. The injury occurred on the ninth day. The state court held that the employee was engaged in a "plant service" and that the nature of the plant warranted the characterization of all his work of whatever nature as in interstate commerce. The court, holding

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\(^{36}\) 253 U. S. 86, 40 S. Ct. 454, 64 L. Ed. 794 (1920).


\(^{38}\) 284 U. S. 415, 52 S. Ct. 205, 76 L. Ed. 370 (1932).
that the test thus applied was broader than its decisions justify, said:
All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the act.

The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principle announced in Industrial Accident Commission v. Davis . . . and Minneapolis and St. Louis Railroad Company v. Winters . . . stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as New York Central Railroad Company v. Marcone . . . where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run.

Those who hailed the Pedersen case as the harbinger of a construction liberal in the extreme must observe in subsequent decisions a conscious effort to restrict the application of the act so far as the employee is concerned. However, the opposite tendency is noted with respect to safety appliances, a recent decision9 having the effect of requiring a gasoline tractor used in switching to have power brakes, and a hand car to have an automatic coupler.

Application of the Test

The selection of those employees who would be included in the first group described, namely, those engaged in interstate transportation, is not so difficult as the determination of those embraced within the second

group, that is, employees engaged in work so closely related to interstate transportation as to be practically a part of it.

All those employees who, as operatives, man trains moving or carrying interstate freight, employees who carry interstate freight, baggage or mail, who load it into cars or unload it therefrom, who switch it at terminals, or who handle interstate shipments even within the limits of the same state, are among the workers included in the first group. The hauling of empty cars and the movement of company material from one state to another have been held to constitute interstate transportation within the act. Furthermore, the protection of the Federal statute is thrown about these employees when they enter the premises of the employer for the purpose of beginning their day's work and continues until they leave the premises save where they choose an unsafe route instead of the safe way provided.

The second group embraces those engaged in work so closely related to interstate transportation as to be practically a part of it. More dependence is placed here on


47 Erie R. Co. v. Winfield, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057 (1917); Kryski v. Pennsylvania R. Co., 270 F. 758 (C. C. A. 3d, 1921). But where a switchtender, not on duty, was walking unnecessarily along right of way en route to place of work and quarter mile away, he was held not within act. Aldredge v. Baltimore and Ohio R. Co., 20 F. (2d) 655, cert. den. 275 U. S. 550, 48 S. Ct. 114, 72 L. Ed. 420 (1927).
the instrumentality—upon those things which have acquired a status as permanently used in interstate transportation, such as roadbed, track, tunnel, bridge, signal; instrumentalities whose character is derived from their assignment at a particular time to, or use in, interstate transportation, such as engines and cars, as well as those which are incidental or accessory thereto, such as stations, yards, repair shops, roundhouses, water tanks, coal chutes and the like. The cases lead one through the intricacies of railway operation and demonstrate that an occupational classification would be futile.

Participation in interstate transportation may be classed as direct, as in the case of train operatives and others already mentioned; mediate, as in the case of repair and maintenance of indispensable facilities; and remote, as the steps preparatory to the first two divisions. It seems more difficult to apply the test to the mediate and the remote, and therefore these particular classes will receive major treatment.

**Construction, Maintenance, and Repair**

Instrumentalities permanently used in interstate transportation will be considered first. The test announced by the Supreme Court requires work so closely related to interstate transportation as to be practically a part of it. It is submitted that the relation must be a practical one, or, as the Supreme Court has said, a real or substantial one. Transportation by railroad is not practically possible without construction of roadbed and rails.

Beginning with new construction over which interstate commerce has never passed, the cases uniformly hold that employees engaged therein are excluded from the provisions of the act. Thus, a laborer working in a tunnel under construction and designed for use in interstate transportation was held not to be within the act; nor a carpenter completing forms for concrete retaining

walls to support track elevation. As broad a statement of the application of the test to new construction as has been found in the cases reviewed is the expression of the Commission of Appeals of Texas, Section A, in Texas and Pacific Railway Company v. Kelly, which involved an injury to a workman while helping to install an interlocking system to replace manual switching on tracks over which the railway company was engaged daily in interstate commerce. The system had not been used and was not ready for use when the accident occurred. The court said:

If Kelly had been at work on the track, which was being used by trains in the transportation of interstate commerce, or if he had been at work upon a bridge likewise used in interstate transportation, or if he had been working upon the levers and parts of the device used by the railroad company in the operation of its tracks, he would come within the provisions of the Federal Employers' Liability Act. In other words, as we construe the opinions of the Supreme Court of the United States, it is held that the Federal Employers' Liability Act protects only those employed in interstate transportation. Those employed to work upon roadbeds, rails, ties, cars, engines, and other instrumentalities, which are intended for use in interstate transportation, but which have never been and are not in use therein, are not protected by that act. A distinction has been drawn between construction work and repair work, and it is held that an employee engaged in repairs on an appliance which is an integral part of interstate transportation is within the provisions of the act, but if the employee is employed at the time of his injury in the making of new appliances to be used in the future, he is not so engaged and will not be protected by the act.

Noteworthy, however, is the holding that even where the new construction has not been opened for the receipt and delivery of freight, the situation changes if interstate transportation is performed in connection therewith although not for the public. In Kelly v. Norfolk and West-

49 Dickinson v. Industrial Board, 280 Ill. 342, 117 N. E. 438 (1917).
ern Railway Company,\textsuperscript{51} the defendant was engaged in constructing tracks for a new yard. The state line between Virginia and West Virginia crossed one of these tracks a few feet east of its junction with the main line, and plaintiff had crossed the state line to the lead track with an engine and caboose and under orders was returning with some empty cars to the Virginia yard. While still in West Virginia he was injured. The court held that interstate color was given to his service by the interstate movement of the empty cars and not by the fact that they were moved as an incident to new construction work. Likewise, in New York, Chicago and St. Louis Railroad Company v. Slater\textsuperscript{52} an employee was injured during the loading of stringers after the completion of their use as supports for temporary tracks in a cut-off under construction to shorten a curve, the cut-off being incomplete and not yet used in interstate commerce. The court decided that the intent to transport the stringers from Ohio to Indiana, and their actual shipment, gave interstate character to the employment, and disregarded the incidents of issuance of waybill or bill of lading, as well as the non-use of the cut-off in interstate transportation.

Leaving new construction, we turn to the broad field of maintenance and repair of those instrumentalities which have been permanently dedicated, it might be said, to interstate transportation, such as roadbed, track, and the like. We find in an early case,\textsuperscript{53} which was decided while the Second Employers' Liability Cases were pending in the Supreme Court, that interstate commerce inherently abides in the track even though used for the double purpose of interstate and local traffic. In that case the employee's eye was injured while he was driving a spike into the ties. It has been held that the work of maintaining roadbeds and tracks in proper condition after they have become instrumentalities of interstate

\textsuperscript{51} 19 F. (2d) 808.
\textsuperscript{52} 23 F. (2d) 777, cert. den. 277 U. S. 605, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).
commerce is clearly within the act. Ballasting the main track of a railroad which carries freight and passengers between different states is undoubtedly work done in interstate commerce. Likewise, the work of repairing (painting) block signals is one that directly affects or facilitates the carriage of interstate commerce. In Anest v. Columbia and Puget Sound Railroad Company, the court said:

In the present case there could be no possible separation of decedent's inspection of appellant's track for the purpose of its intrastate commerce and of its interstate commerce. The two were obviously concomitant. His inspection was for the purpose of aiding and assisting the appellant in the operation of its trains, cars, and locomotives, and the carrying on of its business both of interstate and intrastate commerce.

A section laborer, assisting in the repair of the main track, who was injured when a pebble rebounded and struck his eye, was held to be within the provisions of the act. The same was true of a snow shoveler. In Lombardo v. Boston and Maine Railroad, a laborer shoveling dirt between ties under rails was held to be engaged in repairing the track and within the protection of the act. In a case in the Supreme Court decided May 19, 1919, an employee was injured while in charge of a car in the process of filling in earth to replace a railroad trestle used in interstate commerce. The court held that he was employed in keeping the interstate track, which was in daily use, clear and safe for interstate trains, thus avoiding delay to the commerce passing over it, and therefore was within the act. In Smith v.

55 San Pedro, Los Angeles and Salt Lake R. Co. v. Davide, 210 F. 870 (1914).
56 Brewer v. Missouri Pacific R. Co., 259 S. W. 825, (Mo. 1924), rehearing denied.
57 89 Wash. 609, 154 P. 1100 (1916).
58 New York Central R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045 (1917).
60 223 F. 427 (1915).
Payne, a helper, assisting another man to gauge the steam in a switch pipe connected with tracks used for both intrastate and interstate commerce, was held to be employed in the latter. The same is true of a roadmaster while engaged in the supervision of track repairs, and of a trackman employed in the repair of switches. But one injured during the digging of a ditch beside the track for two posts on which a spare rail was to rest until needed in repairing the track was held not to be engaged in work so closely allied to interstate transportation as to be a part thereof. Tested by the Harrington case, this conclusion was correct, for the work was nothing more than the putting of the rail in a convenient place from which it could be taken as required for use.

The Pedersen case definitely brought the work of repairing bridges within the protection of the act. Preparatory steps to repair a bridge, such as unloading timbers and cross-ties, were held to be a part of the task of repairing the bridge in Kansas City Southern Railway Company v. Martin. Likewise, painting, which protects a bridge from action of the elements, was held to be work related to interstate transportation in Louisville and Nashville Railroad Company v. Netherton, where the Pedersen case was cited.

Water is recognized as one of the arch enemies of successful railroading; so drainage of the roadbed is an essential part of its maintenance, and employees engaged in installing devices to carry off the water are held to be within the act.

64 Central R. Co. of New Jersey v. Colasurdo, 192 F. 901, writ of error dismissed 226 U. S. 617, 33 S. Ct. 111, 57 L. Ed. 383 (1912).
66 262 F. 241 (1920).
67 175 Ky. 159, 193 S. W. 1035 (1917).
An extremely liberal application of the rule is found in the case of *Chesapeake and Ohio Railway Company v. Russo,* where a water boy carrying water to laborers in a gang engaged in replacing rails in the main line was held to be contributing his part toward the end in view and his work so intimately connected with interstate commerce as to be a part thereof. This apparently follows the authority of *Philadelphia, Baltimore and Washington Railroad Company v. Smith,* where a cook in a camp car used by a gang of bridge carpenters employed to repair bridges and abutments upon the line of railway was held within the act. *Bennor v. Oregon-Washington Railroad and Navigation Company,* also on the authority of the Smith case, held that a "bull cook," an assistant who carried supplies and did roustabout work outside but had nothing to do inside with the cook for a repair gang engaged in maintenance of track, was employed in interstate commerce within the act. These cases involving injuries to cooks or laborers while in camp cars or bunk cars seem to be brought within the act on the theory that there were no local facilities for the quartering of the crews and that by the conditions of their employment they were necessarily on the railway premises. In *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Kane,* the workman was crossing the track on a personal errand before breakfast when he was killed. The court said he was within the act, his employment being definite and the nature and place of his service for the day clearly understood, although he had not yet lifted a pick or stuck a shovel into the ground and was not to engage in work for an hour and a half later.

Approving the general rule, the court in *Southern Pacific Company v. Industrial Commission* nevertheless

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71 175 Wash. 559, 27 P. (2d) 1082 (1933).
72 33 F. (2d) 866 (C. C. A. 9th, 1929), cert. den. 280 U. S. 588, 50 S. Ct. 37, 74 L. Ed. 637 (1929).
73 71 Utah 248, 264 P. 965 (1927), cert. den. 278 U. S. 605, 49 S. Ct. 11, 73 L. Ed. 533 (1928).
declined to extend the protection of the act to one injured while adjusting the sickle bar of a mower used to rid the right of way of noxious weeds on the ground that the mower was "an instrumentality in no sense used in commerce."

Cases which involve injuries to workers engaged in repairing rolling stock are difficult to classify as within or without the act. Unlike a railway track, "an engine, as such, is not permanently devoted to any kind of traffic," said the Supreme Court in the Winters case.\(^74\) In *Glidewell v. Quincy, Omaha and Kansas City Railroad Company*,\(^75\) the court said the place (whether in a blacksmith shop or standing on track) of doing the work was not the test, but the character of the work being done. "Duration of withdrawal from use" is a circumstance to be considered, and "it is this separation that gives character to the employment... as being in or not in commerce."\(^76\) In the case of *New York, New Haven and Hartford Railroad Company v. Bezue*,\(^77\) the Supreme Court said that "the length of the period" (in this case twelve days) "during which the locomotive was withdrawn from service and the extent of the repairs" stamped the engine as no longer an instrumentality of, or intimately connected with, interstate activity.

Necessarily, the time element is variable. In the Winters case the engine had been withdrawn three days from service, and before and after withdrawal hauled both interstate and intrastate commerce. In *Scoggins v. Union Pacific Railroad Company*,\(^78\) the car was in the course of repair for nearly two months, and the case was held not to come within the act; the court quoted from the Winters and Davis cases. An engine on the repair tracks for several months was held not to be in interstate transportation, although it was to be returned to such

\(^74\) Minneapolis and St. Louis R. Co. v. Winters, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358 (1917).
\(^75\) 208 Mo. App. 372, 236 S. W. 677, rehearing denied January 9, 1922.
\(^76\) Industrial Accident Commission v. Davis, 259 U. S. 182, 42 S. Ct. 489, 66 L. Ed. 888 (1922).
\(^77\) 284 U. S. 415, 52 S. Ct. 205, 76 L. Ed. 370 (1932).
\(^78\) 292 F. 162 (D. C., D. Minn., Fourth Div., 1923).
service when overhauling was completed. An empty car, carded as in "bad order," from which an interstate shipment had been unloaded the same day, was placed on the track to be returned to the owning road, a contemplated intrastate movement; and a car repairer working on this car was held not engaged in interstate transportation. An engine out of service thirteen days and in roundhouse was not considered to be in interstate transportation in James v. Chicago and North Western Railway Company. Likewise, a car in the yard awaiting further use, interstate or intrastate, is not in interstate commerce. Withdrawal for seventy-nine days was held to be excluded from the operation of the act in Chicago, Kalamazoo and Saginaw Railway Company v. Kindle-sparker. In Day v. Chicago and North Western Railway Company, the plaintiff was injured while he was working on an engine which had been sent to the shops for heavy repairs. Seven days after the engine entered the roundhouse and twenty-two days before the repairs were completed, the plaintiff was injured. The court distinguished between a locomotive pulling a train in interstate transportation which is repaired en route to enable it to complete the trip, and the engine here, which was not engaged in transportation of any kind, had no tractive power, and was unable to transport anything whatsoever.

A late case which might properly be included among the cases involving repairs to equipment is Sullivan v. New York, New Haven and Hartford Railroad Company, where a boiler—one of many used to drive turbines that operated generators that supplied the electricity for locomotives used by the railroad in interstate

81 115 Neb. 164, 211 N. W. 1003 (1927).
84 354 Ill. 469, 188 N. E. 540 (1933).
85 74 F. (2d) 725 (C. C. A. 2d, 1935).
and intrastate commerce—had been completely disconnected from the plant so far as power or operation was concerned for about four days and was entirely cold when the accident occurred. Enough boilers were on hand so that several could be repaired while others were in operation. The court commented upon the impossibility of reconciling the cases, saying that the test cannot be the destination of the boiler for interstate commerce or its future employment therein, but whether it was a necessary part of the equipment at the time of the accident or was then only a spare part completely withdrawn from use.

So far as the repair of rolling stock is concerned, it appears that the rule originally was that if repairs could be made without materially interrupting the interstate journey, they were within the statute, but that if the engine or car were withdrawn from indiscriminate use in both interstate and intrastate commerce, and use after repair was not definitely designated, they were excluded. The present rule seems to be that if the engine or car must be definitely withdrawn from all traffic while the repairs are in progress, so that it is no longer an instrumentality of, or intimately concerned with, interstate activity, the work is not within the protection of the act.

REMOTE PARTICIPATION

With respect to remote participation in interstate transportation, such as at stations, yards, water tanks, coal chutes, and the like, as well as the furnishing of supplies, the courts have held that a station agent on an interstate line lighting a fire in a depot stove; a station clerk turning off light at the close of the day’s work; a janitor in the general office of a railroad; or an assist-

89 Great Northern Ry. Co. v. King, 165 Wis. 159, 161 N. W. 371 (1917).
yet gardener employed to cultivate a yard and burn trash,\textsuperscript{90} are not within the protection of the act. Activities purely for the purpose of changing shop machinery are not given an interstate character by reason of the fact that the fixture is used to transmit power to the machinery used in the repair of cars assigned at various times to both interstate and intrastate transportation.\textsuperscript{91} The mere transfer of fuel or rails from one place to another so as to make them more convenient for use is not so close a relation to interstate transportation as to bring the employee within the act.\textsuperscript{92}

\textit{Van Dusen v. Department of Labor and Industries}\textsuperscript{93} is interesting because of the court's application of the test in the Shanks case to a non-railway employment in determining whether or not the worker was engaged in interstate transportation. Van Dusen was employed by the Northwest Radio Service Company, owning station KGA at Spokane. The radio station, operating under license from the Federal radio commission, was at all times connected by telephone lines with cities in other states for receiving and rebroadcasting programs originating there. It became necessary to install an ice machine to produce cold water to cool the radio tubes in the transmitting station to prevent serious impairment or suspension of transmission of programs. To install the ice machine it was necessary to move the switchboard, an integral part of the apparatus used in broadcasting. During the moving, and within an hour after the station had gone off the air for the night, Van Dusen was accidentally electrocuted. It was admitted that during broadcasting hours the station carried on an interstate business. The State Department of Labor and Industries rejected the widow's claim for pension under the Workmen's Compensation Act, and the Su-


\textsuperscript{91} Shanks v. Delaware, Lackawanna and Western R. R. Co., 239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436 (1916).

\textsuperscript{92} Chicago, Burlington and Quincy R. Co. v. Harrington, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941 (1916).

\textsuperscript{93} 158 Wash. 414, 290 P. 803 (1930).
supreme Court of Washington affirmed the order. By analogy to a number of decisions under the Federal Employers' Liability Act, which applies only to railroads, the court arrived at the conclusion that Van Dusen, working in a broadcasting station after it had signed off, was engaged in work so closely related to interstate commerce as to be a part of it, the theory apparently being that the instrumentality—the telephone exchange—had previously been used as an integral part of the radio station which was engaged in interstate commerce. It is submitted that the test in the Shanks case, which restricted "commerce" to "transportation," so far as the application of the Federal Employers' Liability Act is concerned, is inapposite to the facts of this case.

Educed from the decisions, the following questions suggest themselves in attempting to reduce to its simplest terms the rule which the Supreme Court has laid down for determining when an employee is engaged in interstate transportation within the act:

(1) What was his status with respect to interstate transportation at the time of the injury?

(2) Was he engaged at the time of his injury in active employment in interstate transportation?

(3) Was he engaged at the time of his injury in work

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95 Pause in active duties of making up interstate train to gather coal for warming shanty, held not inconsistent with duty to employer in Wyatt v. New York, Ontario and Western R. Co., 45 F. (2d) 705, (C. C. A. 2d, 1930), cert. den. 283 U. S. 829, 51 S. Ct. 345, 75 L. Ed. 1435 (1931). Car inspector going to aid of fellow-employee and assisting to clear wreckage from track used in interstate transportation, held within the act in Southern R. Co. v. Puckett, 244 U. S. 571, 37 S. Ct. 703, 61 L. Ed. 1321 (1917). Track laborer, substituting for signal lamplighter in switch yard, held within scope of employment in attempting to pick up loose piece of wire between tracks constituting source of danger in Doyle v. St. Louis Merchants' Bridge Terminal R. Co., 326 Mo. 425, 31 S. W. (2d) 1010 (1930), cert. den. 283 U. S. 820, 51 S. Ct. 345, 75 L. Ed. 1435 (1931).
necessarily precedent or consequent to interstate transporta-
tion.

(4) Was what he produced, used or intended to be used, directly or indirectly, in the transportation of
anything?

(5) If it is necessary to look to the instrumentality, what gave to it its interstate character? If it was not
permanently devoted to interstate transportation, was it assigned thereto at the time or had it been definitely with-
drawn therefrom?

(6) Was the instrumentality the medium of his employment in interstate transportation?

The act of transportation is the magnet which draws to itself the instrumentality and the worker. The instru-
mentality must be devoted permanently or assigned to interstate transportation at the time. The particular
work which the employee is doing in conjunction with the instrumentality must be in furtherance of the inter-
state transportation in which the carrier is engaged. Work purely incidental to the furnishing of the means is insufficient.

Interstate employment follows interstate transporta-
tion and begins when the workman, on a carrier’s premises, makes a forward move to serve in that traffic or employment, and ends only after he has completely
dissociated himself therefrom. The Federal Employers’ Liability Act does not define the term “employee.”
Therefore, it was used in its ordinary signification and

96 Employee who had prepared engine for trip, held still “on duty” and employed in interstate commerce, notwithstanding temporary absence from engine on personal errand. North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591 (1914).
98 A single interstate passenger (Ralston Purina Co. v. Bansau, 73 F. (2d) 430 (C. C. A. 7th, 1934), car or shipment will give the quality of interstate transportation to an entire train (Mappin v. Atchison, Topka and Santa Fe R. Co., 198 Cal. 733, 247 P. 911 (1926), cert. den. 273 U. S. 729, 47 S. Ct. 239, 71 L. Ed. 662 (1927)), or if there is an element of interstate commerce in traffic or employment, it determines the remedy (Philadelphia and Reading R. Co. v. Polk, 256 U. S. 332, 41 S. Ct. 518, 65 L. Ed. 958 (1921)).
includes a laborer when walking along a trestle to bunk cars furnished by the railroad after finishing his day's work.  

Efforts have been made to designate by steps or operations the closeness or the remoteness of the employee to interstate transportation but with no practical result. In Fenstermacher v. Chicago, Rock Island and Pacific Railway Company, \textsuperscript{101} the plaintiff was injured while loading telegraph poles on cars whence they were to be taken to repair a telegraph line used by the railroad in interstate commerce. The court said the work was removed from the actual work of repairing an interstate facility by at least three separate and distinct operations, and so was too remote to be so closely related to interstate commerce as to be practically a part of it. The court indicated that the line must be drawn somewhere, not undertaking to say where, and added:

If plaintiff was engaged in interstate commerce when he was injured, then the railroad employee who felled the tree which was made into the telegraph pole would be likewise engaged, if that particular tree had been set apart for such purpose. Likewise, the railroad employee who sharpened the axe, used by the employee who felled such tree, would come within the Federal Employers' Liability Act, and we would have a connection with interstate commerce about as close as that which "the priest all shaven and shorn" bore to the famous "house that Jack built."

The principle which the court in Rice v. Baltimore and Ohio Railroad Company\textsuperscript{102} derived from the authoritative decisions is that the act applies to a cause of action occurring to an employee (a) if then his general service is primarily and directly in the interest of interstate commerce, and it is seen that he was at the time engaged in a service necessarily precedent or consequent to or in the full execution of the primary object, or

\textsuperscript{100}Louisville and Nashville R. Co. v. Walker's Admr., 162 Ky. 209, 172 S. W. 517 (1915).
\textsuperscript{101}309 Mo. 475, 274 S. W. 718, cert. den. 269 U. S. 576, 46 S. Ct. 102, 70 L. Ed. 420 (1925).
\textsuperscript{102}42 F. (2d) 387 (C. C. A. 6th, 1930).
(b) that the injury was incurred during such a deflection from the direct line of execution thereof, that it should be regarded as but incidental or contingent thereto and reasonably necessary to its completion. To serve interstate commerce must be seen to have been, from the outset, a substantial purpose of the work in which the injured employee was then engaged.

Conclusion

It has been suggested that the problems presented by the test of engagement in interstate transportation point to the conclusion that it is an "unworkable concept" and that the repeal of the Federal act and the restoration of the field of regulation to the states is the one remedy.\(^{103}\) Agitation for amendment or repeal may bear fruit in the future. However, we are dealing with an existing condition and until some clearer test, some simpler concept, is formulated, the vexatious problem in each case must be confronted and solved. Thus, as stated by the court in *Flynn v. New York, Susquehanna and Western Railroad Company*,\(^ {104}\) with reference to the difficulty of formulating an exact, comprehensive, and exclusive rule by which to determine whether an act falls within or without the statute:

Upon reflection, it would seem almost impossible to formulate a rule applicable to the almost endless variety of circumstances and facts springing out of the intricacies of everyday modern life that will be of much practical use or aid. The application of the principle must be made to particular facts, as they arise; and by a process of exclusion and inclusion a rule may perhaps be formulated in time from the decision of such cases.

The test announced in the Shanks case, restated in numerous cases, must furnish the answer to the question whether an employee at the time of his injury is engaged in interstate transportation so as to claim the protection of the Federal act.

\(^{103}\) Lester P. Schoene and Frank Watson, "Workmen's Compensation on Interstate Railways," 47 Harv. L. Rev. 389.

\(^{104}\) 90 N. J. L. 450, 101 A. 1034 (1917), affirmed 91 N. J. L. 693, 103 A. 1052 (1917).