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THE SUPREME COURT AND THE FEDERAL EMPLOYERS' LIABILITY ACT, 1960-1961 TERM*

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FOR THE FIFTH SUCCESSIVE YEAR, it is my pleasant task to review with you the actions of the United States Supreme Court in the term just ended in cases arising under the Federal Employers' Liability Act.[1] At first blush the term just ended was not an encouraging one for railroad employees. Since the well-known *Rogers* case[2] in 1957 the Supreme Court has been reviewing on the merits, always at the instance of the employee who was unsuccessful in the court below, an average of about five FELA cases per year. Last term it reviewed only two cases on the merits. One of those two cases was especially notable because in it, the Court for the first time in a quarter of a century set aside, on the ground of insufficiency of the evidence, a judgment for plaintiff which had been affirmed by the courts below. A close look at the cases, both the two reviewed on the merits and the fourteen which the Court refused to review, is required to see if the era introduced by the *Rogers* case has really come to an end.

The history-making case was that of Mary Henagan, whose judgment against the New Haven was reversed by the Supreme Court, though the courts below had held the evidence sufficient to raise a jury issue.[3] Certiorari was granted during the preceding term of the Court, and I discussed the case, as it stood then, with you when last I spoke on this subject.[4] Mary Henagan was thrown against the counter of the grill car in which she was a waitress when the engineer made an emergency application of the brakes, in an

* The substance of this article was presented as an address at the 1961 annual convention of the National Association of Claimant's Compensation Attorneys in Boston, Mass.

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1 DeParcq, *The Supreme Court and the Federal Employers Liability Act, 1956-1957 Term*, 36 Texas L. Rev. 145 (1957), 31 Rocky Mt. L. Rev. 22 (1958) (*1957-1958 Term*), 44 Minn. L. Rev. 707 (1960) (*1958-1959 Term*), 14 Okla. L. Rev. 159 (1961) (*1959-1960 Term*).

2 *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957). See DeParcq, *The Supreme Court and the Federal Employers Liability Act, 1959-1960 Term*, 14 Okla. L. Rev. 159, 160 n.6 (1961).

3 *New York, N.H. & H.R. Co. v. Henagan*, 364 U.S. 441 (1960), *reversing* 272 F.2d 153 (1st Cir. 1959).

4 *Supra* note 2, at 167-169.

unsuccessful attempt to avoid hitting a woman who had stepped onto the tracks of the Providence station in a successful attempt to commit suicide. Mrs. Henagan acquired a paranoid psychosis, believing herself to be responsible for the woman's death and fearing that she would be tried for murder. She made a rather thin claim of negligence, asserting that if the engineer had used due care he might have seen the woman on the tracks sooner and avoided running over her. The trial judge, Judge Charles Wyzanski, refused to set the verdict aside, though he said that the jury had reached "a preposterous conclusion" as to causation and that "there was no evidence whatsoever of negligence on the part of the engineer."[5] The First Circuit affirmed, although it indulged in what I referred to in last year's speech as Supreme Court Baiting[6] by announcing such startling propositions as that plaintiffs no longer have the burden of persuasion as to negligence in FELA cases, and that "the faintest scintilla of evidence" is enough to make a jury issue.[7]

The Supreme Court took the bait. It granted the railroad's petition for certiorari last term,[8] and this term reversed in a per curiam opinion in which, after a brief review of the facts, the Court simply stated:

> We have examined the trial record and hold that the proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the respondent's injury.[9]

Justices Black and Douglas were the only dissenters. They thought the evidence of negligence was sufficient, and asserted also that if the case were to be reversed it should be for a new trial rather than for judgment for the defendant.[10] Thus they adhered to the view, which they have been urging without success for a good many years, that the Constitution prohibits directed verdicts in federal courts.[11]

5 272 F.2d 155, 156 (1st Cir. 1959).
6 *Supra* note 2, at 168-169.
7 *Supra* note 5, at 158.
8 362 U.S. 967 (1960).
9 *Supra* note 3, at 442.
10 *Id.* at 442-443.
11 See *Galloway v. United States*, 319 U.S. 372, 396 (1943) (*Dissenting Opinion*).

Probably it is wrong to make too much of this case. The evidence of the eyewitnesses was that the woman did not step onto the track until the engine was within forty feet, and there was testimony that under the conditions, the minimum distance in which the train might have been stopped was eighty feet.[12] Like the *Herdman* case[13] in 1957 and the *Inman* case[14] in 1959, the *Henagan* case perhaps shows no more than that some accidents do happen without negligence by the railroad, and that the charge that the Supreme Court has made an insurer of the carriers is demonstrably false. It is interesting, though, that in this case the Supreme Court took the plaintiff's judgment away though it had been approved by the lower courts, even if they may have had their tongue in cheek in approving it. In *Herdman* and *Inman*, the Supreme Court merely affirmed the action of lower courts in holding that defendant was entitled to judgment as a matter of law. So far as I can find, the last instance, until *Henagan*, of the Supreme Court reversing, on sufficiency of evidence grounds, a plaintiff's verdict which had been affirmed below, was a 1936 case in which the plaintiff's lawyer was a young Minnesota attorney named Harold E. Stassen.[15] Thus, *Henagan* is surely a landmark but it is probably not a lighthouse, pointing any new direction of the courts below.

The other case decided on the merits last term was Eugene Maynard's attempt to collect damages for injuries he suffered, as to which his employer claimed he had given a release.[16] Admittedly he had given a release, and there was no question of fraud, duress or undue influence. The North Carolina Supreme Court affirmed a nonsuit because of the release,[17] but the United States Supreme Court held that there was sufficient evidence to raise a jury issue as to whether he had received consideration for it. It also held that the validity of a release, challenged for want of consideration in an FELA case, is a federal question, and it is not to be decided in the light of state standards. The check which the railroad gave Maynard at the time he signed the release was for the exact amount he would have been paid had he not missed work because of his in-

12 *Supra* note 5, at 157.
13 *Herdman v. Pennsylvania R.R.*, 352 U.S. 518 (1957).
14 *Inman v. Baltimore & O.R.R. Co.*, 361 U.S. 138 (1959).
15 *Chicago G.W. R. v. Rambo*, 298 U.S. 99 (1936).
16 *Maynard v. Durham & Southern Ry.*, 365 U.S. 160 (1961).
17 251 N.C. 783, 112 S.E.2d 249 (1960).

jury. He claimed that the check was not consideration for the release, but merely his pay check, rightfully owing. There was other evidence that the railroad owed him no back wages, that it was neither required to nor in the habit of paying men for lost time. Six members of the Court, speaking through Justice Douglas, said:

> It is not for the judges to resolve the conflict and to conclude that one side or the other was right. The issue of fact that it presented is one on which fair-minded jurors might honestly differ.[18]

Justices Whittaker and Harlan dissented. They agreed that a release is invalid if the only consideration given is wages to which the employee had an absolute right, but they could find no evidence to support his claim that he had any right to wages for the time he did not work. Justice Frankfurter filed a statement setting forth his familiar position that to review cases turning on assessment of the trial testimony is "an obvious misuse of our discretionary jurisdiction" and that the writ should be dismissed as improvidently granted.[19] Justice Frankfurter fails to explain why he voted on the merits in the *Henagan* case, which some persons might have thought to have turned on an assessment of trial testimony.

In one case this term the Court followed the course which Justice Frankfurter has so frequently urged, and did dismiss the writ of certiorari which it had earlier granted.[20] The Florida East Coast Railway suspected that Bert Smith, one of its flagmen, was physically unable to perform his duties. They undertook to verify this suspicion by requiring him to walk one mile along the track, as a "field test." He fell in the course of this and was injured. It is not clear whether the intermediate Florida appellate court took his judgment away because it thought his only remedy for being required to take such a field test was under the Railway Labor Act, or whether it deemed the evidence insufficient to show that the railroad was negligent in requiring the field test. The question presented in the petition for certiorari was equally ambiguous. After hearing argument on the case a bare majority of the Court joined

18 *Supra* note 16, at 163.
19 *Id.* at 164.
20 *Smith v. Butler, cert. granted,* 364 U.S. 869 (1960).

in a brief per curiam opinion which asserted that the petition had raised solely a question regarding the bearing of the Railway Labor Act, and that after argument it became clear that the decisions in the Florida courts did not turn on that issue. Accordingly, the writ of certiorari was dismissed.[21] Justice Brennan, Chief Justice Warren, Justice Black and Justice Douglas dissented. They did not agree that the petition had raised solely a question about the Railway Labor Act and said it had tendered the familiar issue of whether a reviewing court had properly taken away an FELA verdict on sufficiency of the evidence grounds.

The case is a baffling one. The majority concludes that the Florida decisions did not turn on the Railway Labor Act. The dissenters agree. Thus, the Court is apparently unanimous in reading the proceedings below as going to the sufficiency of the evidence. We know that many members of the Court do not think it should review sufficiency of evidence cases, but every member of the Court except Justice Frankfurter has explicitly stated that when four members of the Court vote to grant certiorari on a sufficiency of the evidence case, the Court is obliged to decide the case on the merits. Here four members of the Court thought that was the issue on which they had granted certiorari, yet the Court dismisses the writ. Seemingly, what the majority holds is that it will vote, albeit reluctantly, where review has been granted explicitly on sufficiency grounds, but that if a majority think the petition was granted on a different ground, and later find that ground untenable, they are free to dismiss the writ even though four Justices find in the petition a sufficiency issue. Certainly, such a view introduces a rather weird and fortuitous technicality into the certiorari practice, but at least it is a situation not likely to recur often. Counsel can escape such a trap by formulating with clarity the Questions Presented in the petition for certiorari.

In addition to the cases I have described thus far in which the Court heard oral argument, it disposed of a number of cases without argument by denial of certiorari. Railroads petitioned for certiorari in five cases; all five petitions were denied. Two of the cases raised questions as to the measure of damages. The Court refused to review a splendid decision from the Second Circuit holding that

21 366 U.S. 161 (1961).

the jury is not to take income taxes into account in computing damages,[22] and a fine Third Circuit decision permitting recovery for impairment of future earning power where the plaintiff was still employed by the railroad, at a higher salary than before the injury, but was so disabled that he would have difficulty getting any other job.[23] The Court denied certiorari also in two quite routine cases where the conclusion of the courts below that the railroad was liable for plaintiff's injuries or death seems required on the plainest principles.[24]

The last, and most interesting of the cases in which a carrier petitioned unsuccessfully for review was from a decision of the Second Circuit that sand seen on the platform of a switch engine prior to the accident was sufficient to support a jury finding that the railroad, through its employees, either knew or should have known that a dangerously slippery condition existed.[25] As a straight FELA claim, this would have been straightforward enough. As Judge Charles E. Clark wrote for the Second Circuit:

> The sustained efforts of the Supreme Court majority to preserve the integrity of the jury system, over vigorous dissent that the time taken with these cases is not well spent, show that this verdict is not to be upset.[26]

But the case was also submitted to the jury on a theory that the presence of temporary foreign matter, such as sand, was a violation of the Boiler Inspection Act. The Second Circuit agreed with this, though several of the judges concurred quite reluctantly, but felt that the rule of the well-known *Lilly* case,[27] which the author briefed and argued, required the result, even though in the case before them there was no violation of an ICC rule, as there had been in *Lilly*.

22 *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960).

23 *Wiles v. New York, C. & St. L. R.*, 283 F.2d 328 (3d Cir. 1960), *cert. denied*, 364 U.S. 900 (1960).

24 *Missouri Pac. R. v. Mendoza*, 337 S.W.2d 622 (Tex. Civ. App. 1960), *cert. denied*, 365 U.S. 818 (1961); *Boston & M. R.R. v. Hall*, 284 F.2d 474 (1st Cir. 1960), *cert. denied*, 365 U.S. 817 (1961).

25 *Calabritto v. New York, N.H. & H. R.R.*, 287 F.2d 394 (2d Cir. 1961), *cert. denied*, 366 U.S. 928 (1961).

26 *Id.* 287 F.2d 394, at 395.

27 *Lilly v. Grand Trunk Western R.*, 317 U.S. 481 (1943).

Employees petitioned for certiorari in eleven cases. Two petitions were granted. One was the *Maynard* case,[28] involving the adequacy of consideration for a release, where, as I have said, the Court held for the employee. The other case in which review was granted has not yet been heard by the Court.[29] It involves a holding by a West Virginia court that the railroad was entitled to a directed verdict because of misrepresentations by the employee more than six years before the accident as to his health and physical condition, even though these misrepresentations had no causal connection with the accident.

In the nine cases which I regard as denials of review, I include the *Smith* case,[30] which I discussed earlier, involving the "field test," where the Court first granted certiorari and later dismissed the writ. Some of the others raised only routine questions. Thus in one case a plaintiff, who had received a $50,000 verdict, sought a new trial on the ground that the instructions, as he interpreted them, were erroneous. The Illinois Supreme Court, which has not been hostile to FELA plaintiffs, said: "We cannot perceive how any such interpretation could be drawn."[31] I know well how plaintiff's counsel can find error in a record when the verdict has been disappointingly small, but the interpretation plaintiff sought to put on the verdict was certainly a forced one. It is not surprising that certiorari was denied.

Nor am I surprised that the Court refused to review decisions holding railroads not liable where the plaintiff was assaulted by an intoxicated fellow employee not acting within the scope of his employment,[32] or where the plaintiff fell at lunch when his fellow employee jerked his stool from under him as he was sitting down,[33] or where the employee, while off duty, left his hotel and came back to the yard on his own business, and was injured in the process.[34] I am a little suspicious of the last of these cases, as I am of any FELA case where the only authorities relied on are lower court

28 *Supra* note 16.

29 *Still v. Norfolk & W. R. Co., cert. granted,* 365 U.S. 877 (1961).

30 *Supra* note 21.

31 *Pinkstaff v. Pennsylvania R. Co.,* 20 Ill. 2d 193, 170 N.E.2d 139, 143 (1960), *cert. denied,* 365 U.S. 878 (1961).

32 *Moreno v. New York Cent. R. Co.,* 366 U.S. 928 (1961).

33 *Rogers v. Norfolk & W. R. Co., cert. denied,* 365 U.S. 879 (1961).

34 *Wallace v. St. Louis-San Francisco Ry. Co.,* 239 Miss. 237, 120 So. 2d 131 (1960), *cert. denied,* 364 U.S. 862 (1960).

decisions twenty or thirty years old, but in general these seem run-of-the-mill cases, quite different from the kind of case which the Court in recent years has been reviewing.

I am less sure about the other four cases where an employee's petition for certiorari was denied. In one an employee of the Lenoir Car Works sued the Southern Railroad, claiming he had contracted silicosis. The Southern owned all the stock of Lenoir, but the trial judge, sitting without a jury, found no evidence that it dictated the management of Lenoir or that Lenoir was a mere adjunct of Southern, so as to make the Southern the employer of the plaintiff within the Act. The Sixth Circuit affirmed, and the Supreme Court refused to review.[35] It really seems a little hard to conceive of a railroad not dictating the management of its wholly-owned subsidiary. But there is an important difference between a trial court, sitting without a jury, finding a fact in a particular way, and the same court directing a verdict in a jury case. I would not think that a directed verdict could have stood up had this case been tried to a jury. And even though it was a non-jury case, Justice Douglas dissented from the denial of certiorari.[36]

In another case there was conflicting medical evidence at the trial as to whether plaintiff had recovered from his injuries. Plaintiff's counsel suggested in his closing argument that plaintiff might be fired after the trial. The railroad's lawyer objected strongly, and said that the jury was entitled to assume there would be no change in plaintiff's status, and the court instructed the jury not to consider any possibility that the plaintiff might be fired by the rairoad as a result of the lawsuit. A few weeks after the trial the railroad, without further medical examination, discharged the plaintiff on the basis of the testimony at the trial of his own experts. Plaintiff sought a new trial under Rule 60(b) but this was denied. The trial court, and the Third Circuit, held that events after the trial are not newly-discovered evidence, and that there was no proof that the argument of the railroad's lawyer amounted to fraud or misrepresentation. The Supreme Court, Justice Black dissenting, refused certiorari.[37] One may well assume that the railroad lawyer was

[35] *Garrett v. Southern Ry. Co.*, 278 F.2d 424 (6th Cir. 1960), *cert. denied*, 364 U.S. 833 (1960).

[36] *Ibid.*

[37] *Brown v. Pennsylvania R. Co.*, 282 F.2d 522 (3d Cir. 1960), *cert. denied*, 365 U.S. 818 (1961).

entirely sincere in his belief that plaintiff would not be discharged, but can his client be permitted to act in a manner contrary to the assurance its counsel had given the jury and the court? The issue here goes not to such neat legal categories as fraud or misrepresentation, but involves the integrity of the judicial process itself.

The Ninth Circuit, in another case which the Supreme Court refused to review, held that grease on the grab iron of a car is not a violation of the Safety Appliance Act.[38] It distinguished the *Lilly* case,[39] where foreign matter on a locomotive was held to be a violation, on the ground that a locomotive is under the control of a single railroad, while a car is used on many different lines, is in the custody of consignees, and the railroad should not be under an absolute duty as to it. Perhaps so, but the reluctance of the Ninth Circuit to give a broad reading to the Act, and to the *Lilly* case, contrasts sharply with the more liberal attitude of the Second Circuit, in the case involving the sand on the footwalk which I mentioned a few moments ago.

Finally there is a case from Ohio involving an engineer who slipped and fell while descending the ladder from the cab to call for instructions. The train had been stopped, and while it was stopped one of the crew detected a defective brake beam. The engineer was going to the wayside telephone to ask instructions about this. There was no claim that anything was wrong with the cab ladders, nor that carrier negligence played a part in the result. Plaintiff claimed, rather, that the defective brake beam was a violation of the Safety Appliance Act. A verdict was directed against plaintiff. This was affirmed by the Ohio Supreme Court. That court went out of its way to critize the recent FELA decisions of the Supreme Court, and to argue that a plaintiff who has voluntarily chosen a state court, in order to enjoy supposed procedural advantages of that court, should have to live with the state notions of what constitutes sufficient evidence of negligence. The relevance of all this in a Safety Appliance Act case is not obvious. Finally the court held that the defective brake beam could not be said to be the, or even a, proximate cause of the engineer's fall.[40] I had hoped

[38] *Collins v. Southern Pac. Co.*, 286 F.2d 813 (9th Cir. 1961), *cert. denied*, 366 U.S. 923 (1961).

[39] *Supra* note 27.

[40] *Reed v. Pennsylvania R. Co.*, 171 Ohio St. 433, 171 N.E.2d 718 (1961), *cert. denied*, 366 U.S. 936 (1961).

that the decision four years ago in the *Rogers* case[41] would put an end to talk of "proximate cause," but the habits of state courts are hard to break.

At the outset I told you that, at first blush, this was not an encouraging term for railroad employees, but that a close look at the cases would be required to see if the *Rogers* era was really over. We have made that close look. What conclusions can we draw?

The *Henagan* case[42] was an unusual one, but it is hard to think too much has been lost by setting aside a plaintiff's verdict in a case where the evidence of negligence was so thin that such staunch supporters of the jury system, and of a liberal interpretation for the Act, as Chief Justice Warren, Justice Brennan and Justice Clark could find no jury issue. Indeed the case may serve a worthwhile purpose in demonstrating again the falsity of the claims that the Court has converted FELA into an absolute liability statute.

It is disappointing that the Court granted so few of the petitions for certiorari by unsuccessful plaintiffs. In some of those cases, as I have indicated, the decisions below seem to me erroneous. But there is an encouraging conclusion to be drawn from reading the cases, as I have, which the Supreme Court has refused to review. They reveal a sympathetic and conscientious attempt to apply the Act in the spirit of *Rogers* and its progeny. The last case I discussed, the Ohio case about the defective brake beam and proximate cause, is the only one of all these cases in which the lower court displayed the hostile attitude toward FELA claims, and toward Supreme Court decisions construing the Act, which was once so common. It is noteworthy too, that there was not a single case this year in which an employee petitioned for certiorari from a decision in which his evidence of negligence was held to be insufficient.

All the evidence is not yet in, and I may be guilty of the indefatigable optimism which is the hallmark of our profession. Yet I cannot help but think that the meaning of this term is not that the *Rogers* era has ended, but that the lesson of *Rogers* has been

41 *Supra* note 2.
42 *Supra* note 3.

learned by the lower courts. The Supreme Court made it clear that the jury was to decide fact issues, and trial judges and appellate courts were not to substitute their judgment on the facts, so long as reasonable men might differ about them. The ancient curse words, "speculation and conjecture," were no longer to be a talismanic symbol upon invocation of which the jury verdict would vanish into smoke. Finally, and most important of all, the Court, despite heavy attack from its critics, granted review and reversed in every case in which the lower courts remained intransigent in the former approach. Finally, the lower courts have heeded this lesson, and have stopped intruding on the proper concern of the jury. If the Supreme Court were granting few petitions for certiorari now because it had yielded to the savage onslaughts of the Harvard Law School, this would be a matter of grave concern. But if the Supreme Court is granting few petitions now because there are few cases in which the lower courts depart from the proper standards, we have no cause for complaint. Let us hope that future years prove that that is the meaning of the 1960-1961 term.