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FELA--1939 Amendment--Repair Shop Workers

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crimination in the principal case, the Ohio Supreme Court cited a Georgia case¹⁹ in which it was held that there had been no denial of equal protection. However, the claim of unconstitutionality in the Georgia case was grounded on the fact that accounts receivable were taxed at a higher ad valorem rate than certain other types of intangibles. No allegation of discrimination as between foreign and domestic corporations was made.

The decision in the principal case indicates that the mere possibility of reciprocity between states does not satisfy the equal protection requirement. The United States Supreme Court will determine whether, without reference to possible future actions by other states, the attacked legislation discriminates against non-residents.²⁰ On the basis of this test there was clearly a denial of equal protection in the principal case.

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¹⁹ Parke, Davis & Co. v. City of Atlanta, 200 Ga. 296, 36 S.E.2d 773 (1946).

²⁰ Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 Sup. Ct. 228 (1920).

FELA—1939 AMENDMENT—REPAIR SHOP WORKERS

Claimants worked in defendant's locomotive repair shop. During repairs, locomotives which had been in interstate transportation customarily remained in the shop, immobilized and unassigned to future service, for periods of from fifteen to sixty days. Some of the claimants worked directly on locomotives. However, one operated a forging machine, making small locomotive parts; and another maintained the shop's electrical equipment. The former was injured while changing dies on his forging machine; and the latter while working on a switch box. On appeal from an order of the Appellate Division¹ sustaining the action of the Workmen's Compensation Board allowing the claims, the Court of Appeals reversed, and dismissed the claims.² The court was of the opinion that all the claimants came within the provisions of the Federal Employers' Liability Act as amended in 1939³ and therefore were not entitled to compensation under New York law.

Prior to 1939, the FELA provided:

Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable

¹ Baird v. New York Central R.R., 86 N.Y.S.2d 54 (App. Div. 3d Dep't 1948).

² Baird v. New York Central R.R., 86 N.E.2d 567 (N. Y. Ct. App. 1949).

³ 35 STAT. 65 (1908), 45 U.S.C. § 51 (1934), as amended, 53 STAT. 1404 (1939), 45 U.S.C. § 51 (1946).

in damages to any person suffering injury while he is employed by such carrier in such commerce⁴

*Shanks v. Delaware, L. & W. R. R.*⁵ enunciated the strict test of applicability of the pre-1939 FELA: Was the employe 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 the *Shanks* case, an employe whose usual job was repairing locomotive parts was injured while moving an overhead counter-shaft through which power was communicated to machinery in the repair shop, and was held to be outside the application of the Act. Subsequent cases applying the *Shanks* test, held outside the scope of the Act a millwright hurt while sawing timber to be used in repairing a caboose which had been in interstate commerce that same day;⁶ and a repair shop worker injured while rethreading bolts used in interstate engines.⁷ Repair shop workers working directly on locomotives which had been withdrawn from service were generally held not to be employed in interstate commerce within the meaning of the Act unless the period for which the engine was withdrawn was very short.⁸

⁴ 35 STAT. 65 (1908), 45 U.S.C. § 51 (1934).

⁵ 239 U. S. 556, 558, 36 Sup. Ct. 188, 189 (1916).

⁶ *Fish v. Rutland R.R.*, 189 App. Div. 352, 178 N.Y. Supp. 439 (3d Dep't 1919).

⁷ *Detroit & T.S.L.R.R. v. Seigel*, 153 N.E. 870 (Ohio Ct. App. 1926); *accord*, *Watson v. Louisville & N.R.R.*, 242 Ky. 14, 45 S.W.2d 499 (1932) (workman injured while lifting jack preparatory to raising loaded coal car in order to repair it, the coal to be used in both interstate and intrastate engines); *Phillips v. Baltimore & O.R.R.*, 287 Pa. 390, 135 Atl. 102 (1926) (employe injured while remodeling bins used to store spare repair parts used in interstate machinery). In 1932 the Supreme Court held that an employe oiling a motor used for hoisting into a chute coal to be taken from there and used by interstate locomotives, was not engaged in interstate commerce within the *Shanks* test. *Chicago & E.I.R.R. v. Industrial Commission of Illinois*, 284 U. S. 296, 52 Sup. Ct. 151 (1932). This case overruled *Erie R.R. v. Collins*, 253 U. S. 77, 40 Sup. Ct. 450 (1920), and *Erie R.R. v. Szary*, 253 U. S. 86, 40 Sup. Ct. 454 (1920). In *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, 57 Sup. Ct. 592 (1937), it was held that employes employed in similar work were engaged in interstate commerce for purposes of collective bargaining under the Railway Labor Act.

⁸ *Industrial Accident Commission of California v. Davis*, 259 U. S. 182, 42 Sup. Ct. 489 (1922); *Klar v. Erie R.R.*, 118 Ohio St. 612, 162 N.E. 793 (1928); *Koons v. Philadelphia & R. Ry.*, 271 Pa. 468, 114 Atl. 262 (1921). In *Oglesby v. St. Louis-San Francisco Ry.*, 318 Mo. 79, 1 S.W.2d 172 (1927), an employe hurt while repairing an engine which was used exclusively in interstate commerce was held to be within the Act despite the fact that the engine had been out of service ten days. *But cf.* *Minneapolis & St. L.R.R. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170 (1917) (worker not within Act when nothing to show that engine was permanently devoted to interstate commerce or assigned to it in

In 1939, the Act was amended by the addition of the words:

Any employee of a carrier, any part of whose duties . . . shall be the furtherance of interstate . . . commerce or shall, in any way directly or closely and substantially, affect such commerce . . . shall . . . be considered as being employed by such carrier in such commerce⁹

This amendment has been so construed as to include as employed in interstate commerce employees who ordinarily were employed in interstate commerce but who at the time of the injury were employed in intrastate operations.¹⁰ Thus, a repair shop worker who repaired and rebuilt freight cars, most of which were used in interstate commerce, was not required to prove that the car he was working on when injured was in interstate commerce or set apart for such commerce in order to recover under the FELA.¹¹

The courts in most cases have construed the amendment as eliminating the strict test of the *Shanks* case and as greatly broadening the coverage of the Act.¹² For example, an employe installing a ventilator through the roof of a machine shop in which iron parts were forged for use in repairing interstate boxcars has been held to be within the Act.¹³ Some courts have expressed the belief that by virtue of the amendment nearly all railroad employes now are included within the FELA.¹⁴

advance at time of injury, although engine was withdrawn from service for only three days). If the engine was immobilized to a sufficient degree, recovery was usually denied even though the length of time the engine was withdrawn from service was very short. *Day v. Chicago & N.W. Ry.*, 354 Ill. 469, 188 N.E. 540 (1930); *Zmuda v. Delaware, L. & W.R.R.*, 234 App. Div. 827, 278 N. Y. Supp. 138 (3d Dep't 1935); *White v. Lehigh V.R.R.*, 251 App. Div. 507, 297 N. Y. Supp. 933 (3d Dep't 1937); *McGowan v. New York Central R.R.*, 265 App. Div. 272, 39 N.Y.S.2d 533 (3d Dep't 1942), *aff'd*, 290 N. Y. 289, 50 N.E.2d 295 (1943).

⁹ 53 STAT. 1404 (1939), 45 U.S.C. § 51 (1946).

¹⁰ E.g., *Maxie v. Gulf, M. & O. R.R.*, 356 Mo. 633, 202 S.W.2d 904 (1947); *Scarborough v. Pennsylvania R.R.*, 154 Pa. Super. 129, 35 A.2d 603 (1944). *Contra*: *Thomson v. Industrial Comm'n*, 380 Ill. 386, 44 N.E.2d 19 (1942).

¹¹ *Maxie v. Gulf, M. & O. R.R.*, *supra* note 10.

¹² E.g., *Harris v. Missouri P.R.R.*, 158 Kan. 679, 149 P.2d 342 (1944); *Wills v. Terminal Railroad Ass'n*, 205 S.W.2d 942 (Mo. Ct. App. 1947); *Wheeler v. Missouri-Kansas-Texas R.R.*, 205 S.W.2d 906 (Mo. Ct. App. 1947); *Schmidt v. New York Central R.R.*, 12 Ohio Supp. (51 N.E.2d) 112 (C. P. 1943); *Trucco v. Erie R.R.*, 353 Pa. 320, 45 A.2d 20 (1946); *Scarborough v. Pennsylvania R.R.*, 154 Pa. Super. 129, 35 A.2d 603 (1944).

¹³ *Wills v. Terminal Railroad Ass'n*, 205 S.W.2d 942 (Mo. Ct. App. 1947).

¹⁴ *Harris v. Missouri P.R.R.*, 158 Kan. 679, 149 P.2d 342 (1944); *Scarborough v. Pennsylvania R.R.*, 154 Pa. Super. 129, 35 A.2d 603 (1944). *But see* *Thomson v. Industrial Comm'n*, 380 Ill. 386, 44 N.E.2d 19 (1942).

It may be questioned whether Congress intended so vast an extension of the Act's applicability. The report made by the Senate committee at the time the amendment was under consideration¹⁵ stated the intent of the amendment to be to bring within the application of the Act workers who ordinarily were engaged in interstate commerce but who at the time of injury were engaged in an intrastate activity. The report did not manifest an intent to include within the scope of the Act workers whose usual duties would not have been considered before the amendment as being in interstate commerce. However, the wording of the amendment appears to support the view adopted by the courts in most cases that the coverage of the Act has been expanded to include many of these. The court in the principal case has adopted this view.

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¹⁵ SEN. REP. NO. 661, 76th Cong., 1st Sess. 2, 3 (1939).