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Workmen's Compensation - Federal Employers' Liability Act - Coverage Under 1939 Amendment

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WORKMEN'S COMPENSATION — FEDERAL EMPLOYERS' LIABILITY ACT — COVERAGE UNDER 1939 AMENDMENT — In 1956 the Supreme Court handed down two decisions interpreting the 1939 Amendment[1] to the Federal Employers' Liability Act[2] which substantially extended the act's coverage. The purpose of this short comment is to examine this extension and its impact on the perennial controversy between advocates of the FELA on the one hand and workmen's compensation on the other.

In *Reed v. Pennsylvania R. Co.*,[3] the plaintiff, an office clerk for the defendant railroad, whose duties included filing master tracings from which blueprints necessary to railroad repairs were made, was injured when a cracked window pane blew in on her. In defense to her action under the FELA, as amended in 1939, the defendant maintained that only transportation employees were covered by the act. The Court of Appeals for the Third Circuit affirmed the trial court's dismissal of the action.[4] On certiorari, *held,* reversed, four justices dissenting.[5] The 1939 amendment

1 53 Stat. 1404 (1939), 45 U.S.C. (1954) §51. "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce . . . shall be considered as entitled to the benefits of this Act. . . ."

2 35 Stat. 65 (1908), 45 U.S.C. (1954) §51. The act requires the plaintiff to prove negligence, but abolishes or modifies the railroad's common law defenses.

3 351 U.S. 502 (1956), noted, 36 BOST. UNIV. L. REV. 647 (1956).

4 Reed v. Pennsylvania R. Co., (3d Cir. 1955) 227 F. (2d) 810, noted in 1 VILLANOVA L. REV. 369 (1956).

5 351 U.S. 502 (1956). Frankfurter, J., speaking for the dissenters, argued (at 508) that Congress intended to cover only employees engaged in "the hazardous business of railroading."

did not limit FELA coverage to employees experiencing special hazards in the railroad industry. Since the tracings were indispensable to the defendant's business, the plaintiff furthered, and her duties had a close and substantial effect on, interstate transportation.

In a companion case, *Southern Pacific Co. v. Gileo*,[6] the Court held (two justices dissenting[7]) that an employee injured while constructing new railroad cars was covered by the act. It rejected the railroad's contention that the act did not apply because the new cars had not yet entered interstate commerce, and found that since a supply of new cars was necessary to the railroad's transportation needs, the employee's duties furthered and "directly or closely and substantially" affected interstate commerce within the meaning of the 1939 amendment.

I

The first Employers' Liability Act[8] passed in 1906 was declared unconstitutional since it covered all employees of interstate carriers, whether or not their duties related to interstate commerce.[9] The present act passed in 1908 originally covered only interstate railroad employees engaged in interstate commerce.[10] In *Shanks v. Delaware, L. & W. R. Co.*,[11] decided in 1916, the Court held that an employee was so engaged only if he was working in interstate transportation at the moment of his injury. This test did not prove definitive,[12] and led to a flood of litigation[13] and many nice distinctions. For example, an employee injured while repairing existing track was covered, while one constructing new track was not, since the new track was not yet in interstate commerce.[14]

6 351 U.S. 493 (1956).

7 More accurately, ". . . they disagree with the Court's theory in applying the Act of 1939 . . .," and the rationale of their dissent in the Reed case indicates that they would probably concur in the result. 351 U.S. 493 at 501 (1956).

8 34 Stat. 232 (1906).

9 The Employers' Liability Cases, 207 U.S. 463 (1908).

10 This act was held valid in the Second Employers' Liability Cases, 223 U.S. 1 (1912).

11 239 U.S. 556 at 558 (1916).

12 See Schoene and Watson, "Workmen's Compensation on Interstate Railways," 47 HARV. L. REV. 389 (1934); Carter, "Employment in Interstate Commerce under Federal Employers' Liability Act," 13 CHI.-KENT L. REV. 191 (1935).

13 See Frankfurter and Landis, "The Business of the Supreme Court at October Term, 1931," 46 HARV. L. REV. 226 at 240 (1932).

14 Compare Pedersen v. Delaware, L. & W. R. Co., 229 U.S. 146 (1913) with New York Central R. Co. v. White, 243 U.S. 188 (1917). See Matter of Baird v. New York Central R. Co., 299 N.Y. 213, 86 N.E. (2d) 567 (1949), and note 12 supra.

II

The 1939 amendment was passed to eliminate such restrictive distinctions by including within the act employees ". . . who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in interstate operations."[15] It has generally been construed liberally.[16] The "moment of injury" test is clearly gone,[17] and the *Gileo* case properly destroys the "new construction" distinction.[18] Significantly, the argument in neither case was pitched on a constitutional level,[19] and it is probable that all employees of interstate railroads could constitutionally be covered today.[20]

Despite certain language in subcommittee hearings implying the contrary,[21] it is doubtful that Congress intended to cover all,[22] and the Court indicates that coverage will be determined "through the process of case-by-case adjudication."[23] Yet the test the Court suggests, i.e., ". . . whether what he [the employee] does in any way furthers or substantially affects transportation,"[24] is sufficiently elastic to include all employees, and lower courts may have difficulty in determining who was meant to be excluded. As in the

15 S. Rep. 661, 76th Cong., 1st sess., p. 2 (1939).

16 See cases collected in 10 A.L.R. (2d) 1279 at 1286 (1950), and an excellent analysis of the pre-1947 cases in Delisi, "Scope of the Federal Employers' Liability Act—Recent Developments," 18 Miss. L. J. 206 (1947). But see Lawrence v. Rutland Railroad Co., 112 Vt. 523, 28 A. (2d) 488 (1942), cert. den. 317 U.S. 693 (1943), and Moser v. Union Pacific R. Co., 65 Idaho 479 at 489, 147 P. (2d) 336 (1944).

17 Southern Pac. Co. v. Gileo, 351 U.S. 493 at 498 (1956). Since 1939 only Illinois has kept the test, but in changed form. See Thomson v. Industrial Commission, 380 Ill. 386 at 393, 44 N.E. (2d) 19 (1942), cert. den. 318 U.S. 755 (1943). ". . . [T]he test must be whether the activity in which the employee is engaged at the time of the accident, directly or closely and substantially affects interstate commerce."

18 Only one case since 1939, Moser v. Union Pacific R. Co., note 16 supra, has been found holding that a new construction worker was not covered.

19 Reed v. Pennsylvania R. Co., 351 U.S. 502 at 505 (1956).

20 See Virginia Ry. v. Federation, 300 U.S. 515 at 557 (1937); Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

21 S. Hearings before a Subcommittee of the Committee on the Judiciary on S. 1708, 76th Cong., 1st sess., p. 58, where Senator Austin states, "I think I will move to substitute for those words ["or in any way"] the words that occur and recur in many cases of recent date as defining what kind of effect on interstate [commerce] is comprehended by the commerce clause of the Constitution. Those are the words 'directly, closely and substantially.'" While this language may indicate an intent to cover all employees, in context it more likely indicates only complete coverage of transportation employees, though not actually in interstate commerce at the moment of injury.

22 See S. Hearings before a Subcommittee of the Committee on Judiciary on S. 1708, 76th Cong., 1st sess., p. 29 (1939), where F. M. Rivinus, General Counsel, Norfolk & Western R. Co. states, "Argument may even be made that the present amendments mean to include all employees of interstate carriers by railroads. . . . If that is what these amendments mean they would be honest to say so. . . ." Congress did not so say.

23 Reed v. Pennsylvania R. Co., 351 U.S. 502 at 507 (1956).

24 Id. at 505.

Shanks case, the Court continued to require that the employee's duties further interstate transportation rather than interstate commerce. Yet it made this distinction meaningless by stating, "If 'any part' of petitioner's duties is in 'furtherance' of . . . interstate commerce, it also is in 'furtherance' of . . . interstate transportation."[25] "Transportation" as used in the Senate committee report probably indicates an intent to limit coverage to those injured around tracks, yards, depots, repair shops, etc., i.e., those places normally associated with the actual movement of goods where danger of injury is comparatively great.[26] At least three of the four cases cited by the Court in support of the *Reed* holding can be distinguished on that ground.[27] A witness before the subcommittee hearings supposed the amendment to be so limited,[28] but the Court held the language of the amendment to be broader than required to remedy the specific ills toward which it was directed.[29] Yet, as Justice Frankfurter observed, Congress would have no more reason for covering railroad office clerks than clerks in any other major industry dealing in interstate commerce.[30] The only other case found which dealt with office clerks suing under the FELA held that a typist in the railroad's claims department was not covered.[31] This dearth of authority probably indicates that the legal profession felt such clerical employees were not entitled to the act's benefits and advised against an action under the FELA, but may indicate that such office employees are seldom injured seriously enough to warrant suit.

25 Ibid.

26 See S. Rep. 661, 76th Cong., 1st sess., p. 3 (1939). *"Railroad men are frequently injured while moving or working upon cars or engines* which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. . . . The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the *movement of interstate traffic."* (Emphasis added.) The general import of such language does not suggest clerks in office buildings.

27 Ericksen v. Southern Pac. Co., 39 Cal. (2d) 374, 246 P. (2d) 642 (1952) (lumber inspector injured on loading dock); Straub v. Reading Co., (3d Cir. 1955) 220 F. (2d) 177 (assistant chief timekeeper injured in storeroom in terminal and characterized, at 183, as "a borderline case"); Lillie v. Thompson, 332 U.S. 459 (1947) (woman telegrapher assaulted at night in small frame building in isolated part of railroad yard. Coverage question not discussed). In Bowers v. Wabash R. Co., (Mo. App. 1952) 246 S.W. (2d) 535, a messenger boy killed en route from one railroad station to another was held covered so that the state compensation act did not apply.

28 S. Hearings before a Subcommittee of the Committee on the Judiciary on S. 1708, 76th Cong., 1st sess., p. 8, where T. J. McGrath, General Counsel, Brotherhood of Railroad Trainmen states, "Its application will be confined, of course, to the character of employees now covered by the present act."

29 Reed v. Pennsylvania R. Co., 351 U.S. 502 at 506 (1956).

30 Id. at 512.

31 Holl v. Southern Pac. Co., (S.D. Cal. 1947) 71 F. Supp. 21.

If the latter is true, the "mess" of litigation envisaged by Frankfurter as a result of the *Reed* decision may not occur.[32] In any case, on its particular facts, this decision may be in harmony with the spirit of the test enunciated in the *Reed* case.[33]

III

Justice Frankfurter has consistently advocated a federal workmen's compensation act for railroad employees[34] and has vigorously attacked the fault basis upon which the FELA rests as "archaic and unjust,"[35] "cruel and wasteful,"[36] and "antiquated and uncivilized."[37] Since the Court has held that the FELA pre-empts the field,[38] the expanded coverage of the principal cases will further cut down the scope of the state compensation acts and will presumably increase the number of injured railroad employees who will recover nothing because they cannot prove negligence. The assumption that negligence under the FELA is more difficult to prove than the elements of a workmen's compensation case may not be justified in the light of recent studies,[39] however, and at

[32] However, the uncertainty left by the Reed holding will almost require litigation of the coverage question in every suit brought by a clerk, whether under the FELA or a state compensation act. Coverage must be shown to exist under the federal act and, since the FELA pre-empts the field (see note 38 infra), FELA coverage must be shown not to exist when bringing an action under a state act.

[33] Both courts approached the problem in the same manner. The Supreme Court found that operations could not long continue without the repairs which required blueprints made from plaintiff's tracings. The district court found no impact on the movement of goods in either typing or failing to type claims. Query: Suppose the clerk had typed bills of lading, or had been the railroad president's secretary?

[34] See Frankfurter and Landis, "The Business of the Supreme Court at October Term, 1931," 46 HARV. L. REV. 226 at 249 (1932). See also Frankfurter's dissent in Ferguson v. Moore-McCormack Lines, 352 U.S. 521 at 539 (1957).

[35] Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 at 71 (1943).

[36] Wilkerson v. McCarthy, 336 U.S. 53 at 65 (1949).

[37] Urie v. Thompson, 337 U.S. 163 at 196 (1949).

[38] New York Central R. Co. v. Winfield, 244 U.S. 147 (1917). It has been argued that the added area of coverage of the 1939 amendment is concurrent with state compensation acts. Miller, "An Interpretation of the Act of 1939 (FELA) To Save Some Remedies for Compensation Claimants," 18 LAW AND CONTEM. PROB. 241 (1953). This construction seems doubtful and would retain all the coverage problems the 1939 amendment was designed to eliminate.

[39] RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY, 1938-40 (1947), Vol. II, table C-18, which indicates that of 87 permanent total disability cases studied which were dealt with under the FELA, in only one was there no compensation, and in only six was remuneration under $2,500. Table C-16 indicates that of 404 fatal injury cases studied which were handled under the FELA, the survivors in only 18, less than 4½%, received under $500. Further, the study was made before the 1939 amendment could have much impact, and when tort recoveries were considerably under what they would be today. One study [CONARD AND MEHR, COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS (1952)] summarized in Conard, "Is Workman's Compensation More Efficient than Employer's Liability," 38 A.B.A.J. 1011 (1952), concluded that of the total

least one railroad labor union[40] prefers the present tort recoveries to a federal workmen's compensation plan.[41] This is understandable in view of the background of low state compensation schedules,[42] the present tendency of the Supreme Court to leave the question of negligence to the jury,[43] and the generally accepted tendency of juries to find a railroad negligent. The railroads have urged that this amounts to liability without fault, without, however, the controlled awards present in workmen's compensation laws, and thus they have favored a federal compensation act.[44]

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amount spent in the compensation of injured workmen, a larger percentage winds up in the worker's pocket under FELA than under the Illinois Workmen's Compensation Act. See also Richter and Forer, "Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers," 36 CORN. L. Q. 203 (1951), and Forer and Richter, "An Analysis of the Federal Employers' Liability Act and Proposed Amendments Thereto," 28 TEMP. L. Q. 363 at 390, footnote 126 (1955), where the authors indicate that in their experience 96% of injured workmen recover as much or more under FELA as they would have under existing state compensation plans.

40 Brotherhood of Railroad Trainmen.

41 SOMERS AND SOMERS, WORKMEN'S COMPENSATION 320 (1954), observes that ". . . the attitude of the BRT now appears more representative of the real views of railway labor." See notes 42 and 43 infra. But see Miller, "The Quest for a Federal Workmen's Compensation Law for Railroad Employees," 18 LAW AND CONTEM. PROB. 188 (1953). A number of federal compensation acts have been proposed, see Appendix in Pollack, "Workmen's Compensation for Railroad Work Injuries and Diseases," 36 CORN. L. Q. 236 at 271 and 272 (1951), and one labor leader has suggested that only opposition by some segments of railway labor has prevented their passage. Harrison, "Railway Labor Favors Federal Accident Compensation Law," 24 AM. LAB. LEG. REV. 161 (1934).

42 SOMERS AND SOMERS, WORKMEN'S COMPENSATION 38 et seq. (1954); Katz and Wirpel, "Workmen's Compensation 1910-1952: Are Present Benefits Adequate," 4 LAB. L. J. 167 (1953); Cheit, "Adequacy of Workmen's Compensation," 1955 INS. L. J. 245.

43 See Alderman, "What the New Supreme Court Has Done to the Old Law of Negligence," 18 LAW AND CONTEM. PROB. 110 (1953). While purporting to follow the usual common law concept of negligence, 336 U.S. 53 at 61-62 (1949), the Court in recent years has almost always found that a directed verdict for a railroad was improper. See the excellent treatment in 69 HARV. L. REV. 1441 at 1447 (1956), and see, e.g., Webb v. Illinois Central R. Co., 352 U.S. 512 (1957).

44 See S. Hearings before a Subcommittee of the Committee on the Judiciary on S. 1708, 76th Cong., 1st sess., p. 24 (1939).