CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
v. ADAMS.

4-3048

Opinion delivered July 3, 1933.

1. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—PRESUMPTION.—In an action under the Federal Employers' Liability Act for an employee's death, a State statute imposing liability

on trainmen to keep a lookout and creating a presumption of negligence in certain cases, *held* inapplicable.

2. MASTER AND SERVANT—DISCOVERED PERIL—EVIDENCE.—Evidence *held* to sustain a finding that decedent employed in interstate commerce was negligently killed by a train after his peril was discovered.

3. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—In an action under the Federal Employers' Liability Act, only negligence of the employee which proximately contributed to the injury complained of is to be considered.

4. TRIAL—NECESSITY OF REQUEST FOR INSTRUCTION.—Where, in an action under the Federal Employers' Liability Act for negligent killing of an employee defendant requested no instruction to the jury to diminish the damages in proportion to decedent's negligence, no error was committed in failing to give such instruction.

Appeal from Perry Circuit Court; *Marvin Harris,* Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment for damages for the killing of its watchman at the cut on its railroad track near Ledwidge after his perilous position was discovered by the other employees.

The railroad runs through a narrow cut in the mountain about 300 feet west of the station at Ledwidge and on the south side of the track the wall of the cut is almost perpendicular and about 100 to 200 feet high and on the north side the wall is not so high, but both walls are virtually perpendicular. The wall of the cut on the south side extends a little further west than that on the north side. It was the duty of the watchman to patrol the track through the cut to see that it was clear of obstructions and to see that approaching trains were properly notified of any boulders or rocks that fell on the tracks.

On the morning of the occurrence, Johnson went on duty about 7 o'clock, and, while talking with the watchman at the east end of the cut, who was being relieved from duty, he heard a passenger train approaching. He started through the cut to meet the train, and near the west end of the cut he was struck by the train and instantly killed. He was employed in interstate commerce,

and the suit was brought under the Federal Employers' Liability Act.

The case was submitted to the jury on the sole question of whether the fireman of the approaching train saw the decedent's position of peril in time to avoid striking him by the use of ordinary care or failure to use such care.

Many witnesses testified about the width of the cut, or its narrowness rather, and that the clearance was insufficient for one to be in the cut when a train was passing without injury.

Appellant states in its brief:

"The testimony of plaintiff's witnesses was confined to an effort to show that there was not sufficient room in the cut for a man to walk through in safety while a train was passing, and that the fireman on a train approaching from the west could have seen a man in the cut several hundred feet before reaching the cut. It may be conceded that the testimony on these two points, if material, was sufficient to go to the jury."

A few minutes after 7 o'clock on the morning of April 1, 1932, the deceased, employed as a watchman, started west through the cut from a shanty at the east end thereof to take his position near the end of the trestle over Merrick Hollow. This position was on the south side of the track and beyond the west end of the south wall of the cut. His purpose was to signal the train through the cut. He never reached the place where he invariably stood to give the signal. After he was struck, he was found 88 feet from his accustomed place, and, if he was struck 29 feet back in the cut as appellee contends, he was 117 feet from his usual station.

The fireman testified that he saw the decedent walking astride the north rail of the track in the cut as soon as the train came in sight of the cut. This distance was variously estimated to be from 750 to 1,200 feet; that he continued to walk along the north rail of the track until he was within a few feet of the handcar set-off when he lifted his left foot over the rail and walked on the end of the ties until set-off was reached, and he then stepped

up on the set-off or jigger for the handcar, looking at the train all the time until it struck him. Witness said he immediately notified the engineer, who could not see the man on the track around the curve, to try to stop the train which he succeeded in doing in about a train length. That the engineer could not have stopped the train after he notified him in time to have prevented its striking the decedent.

The engineer testified that when the fireman began to make signals to him he did not understand the signal, it not being one in use, but he began to try to stop the train, although he did not do all he could have done to stop it, not having put the brake in emergency.

The train was estimated to be running at 4 to 5 miles per hour in the cut, the maximum speed permitted being 20 miles per hour; and there was some testimony tending to show that it could have been stopped within 150 feet at the maximum speed and in from 50 to 60 feet at the lower speed.

Wiley, a witness for the plaintiff, testified that Johnson came on at 7 o'clock, talked with him at the shack about 2 or 3 minutes as usual, and that the shack is at the east end of the cut on the north side of the track. They heard the train whistle west of the cut, and Johnson got up and started through the cut, the watchman being supposed to meet the eastbound trains on the west and the westbound trains on the east of the cut. This was an eastbound train. Witness said: "The train ran up and stopped at the door. I was in the shack, and some one of the trainmen said: 'We have killed that old watchman down there.' * * * I came out and went down there and looked at him. He was on the north side of the track back in the cut a ways—probably 15 feet. He was back in the cut 29 feet from the 'jigger'. He was back in the cut a distance of 15 feet from the end of the rock wall." Witness said the train was not running very fast—about 4 or 5 miles per hour.

The court instructed the jury, one instruction being complained of, and from the judgment on its verdict this appeal is prosecuted.

H. T. Harrison and *Thos. S. Buzbee,* for appellant.

W. R. Donham, for appellee.

Kirby, J., (after stating the facts). Only two questions are raised by the appeal, the sufficiency of the evidence to support the verdict, and whether the court erred in instructing the jury as to the measure of damages.

The suit being brought under the Federal Employers' Liability Act, there is no presumption of negligence, and no duty on the part of the trainmen to keep a lookout as provided for by the statutes of Arkansas, which do not apply. *C. M. & St. Paul Ry. Co.* v. *Coogan,* 271 U. S. 472; *St. L. & S. F. Ry. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102. In the latter case it was said that our statute, § 8562, Crawford & Moses' Digest, has been superseded in cases of this kind. The rule of the Federal courts on the burden of proof in cases of this character controlled by the Federal Employers' Liability Act is stated by the Supreme Court of the United States in *Patton* v. *Texas & Pacific Rd. Co.,* 179 U. S. 658, 21 S. Ct. 275. See also *Penn. R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391.

The testimony shows that appellant's fireman discovered the watchman in the cut a long way off, 750 feet or more, that he recognized him and was given the high sign by the watchman. That he continued to observe him without appearing to think he was in any position of danger or peril until shortly before he stepped outside the rails of the track on the other side about the time he reached the raised platform or jigger, a place fixed by the side of the track for storing the handcars, before giving the engineer the stop signal.

The engineer said he did not understand the signal to stop given by the fireman, that it was not in use as a signal, but could tell from his excitement that something was wrong, and he began to stop the train before he reached and struck the watchman, whom he could not see from his place in the cab.

The engineer evidently did not understand the significance of the signal, since he did not apply the brake in emergency as he could have done, which might have

resulted in stopping the train before the injury, although the fireman said it was not possible to stop the train after he gave the stop signal in time to avoid striking the watchman. The watchman stepping outside of the track and then on to the handcar platform might have caused the fireman not to appreciate the danger and the necessity for giving the signal sooner; and certainly the engineer could not have known about the condition as he could not see decedent on the track at all.

The train operatives, however, saw the decedent on the track long before there was any danger to him from the place occupied and necessarily were not negligent in not sooner giving the signal and attempting to stop at that time, since it was the duty of the watchman to go through the cut, as he was doing, to the other side, the west side, that he might flag the oncoming train as it came east through the cut. As soon as he perceived or concluded that the decedent was in a place of danger which he could not likely escape from, he gave the engineer the signal and an effort was made to stop the train in time to avoid the injury, although the fireman said he did not believe that the train could have been stopped after he called the engineer's attention to the danger and the necessity for its being stopped. The fireman said, however, the decedent had reached the platform and was apparently out of the place of danger, and he assumed that he could and would escape, when he concluded otherwise and gave the signal to stop. He said the decedent came to a stop after getting on to the platform, and it may be that he thought he was out of danger and that the fireman concluded that such was the case until he finally gave the signal to stop the train.

Since the body was found 29 feet from the jigger platform back down in the cut after being struck, and where the watchman was killed, the jury evidently did not believe the fireman's statement about his having reached the platform and standing thereon before the train reached him. In other words, they may have believed that the watchman was struck where he fell and before he had ever reached handcar platform, a place of

safety from which he might have escaped the danger; and that the fireman was negligent in not sooner notifying the engineer of his perilous position in order that the injury might have been averted. Under such circumstances we cannot say that there is not sufficient substantial testimony to support the verdict.

It is next insisted that the court erred in giving appellee's requested instruction No. 4 on the measure of damages, since the case was one brought under the Federal Employers' Liability Act, and that the court should have instructed the jury to diminish the damages in proportion to the negligence attributable to the decedent. The appellant requested no such instruction however and liability of the appellant to the payment of damages for the injury in question was asserted solely on the ground of failure to exercise ordinary care to prevent the injury after his peril was discovered. It seems that only such negligence as proximately contributes to the injury is to be considered, although the injury occurred in a State under the laws of which any negligence on the part of the person injured, even remotely contributing to the injury, is taken into account. The negligence to be considered in order to reduce recovery must be "causal." *Ill. Central R. Co.* v. *Porter,* 207 Fed. 311; *Seaboard Air Line Ry. Co.* v. *Tillman,* 237 U. S. 499, 35 S. Ct. 653; *K. C. S. Ry. Co.* v. *Sparks,* 144 Ark. 227, 222 S. W. 724; *St. L. S. W. Ry. Co.* v. *Simpson,* 184 Ark. 633, 43 S. W. (2d) 251. This last case it is true was reversed by the United States Supreme Court, (286 U. S. 346, 52 S. Ct. 520) but it was on the theory that the perilous position of the decedent was never discovered. See also *Gray* v. *So. Ry. Co.,* 167 N. C. 433, 83 S. E. 849; *Id.,* 241 U. S. 333, 36 S. Ct. 558; *Barnes* v. *Red River & G. Ry. Co.,* 14 La. App. 188, 128 So. 724; *Hamilton* v. *Chicago, B. & O. Ry. Co.,* 211 Iowa 924, 234 N. W. 810.

We do not regard our case of *M. P. Rd. Co.* v. *Skipper,* 174 Ark. 1083, 298 S. W. 849, as contradictory of these above cited authorities.

No error was committed in giving the instruction complained of, and on the whole case the record does not disclose any prejudicial error, and the judgment must be affirmed. It is so ordered.