

SUPREME COURT OF NORTH CAROLINA

Hinson v. . R. R., 172 N.C. 646

90 S.E. 772 (1916) · Decided December 6, 1916

OPINION

PER CURIAM.

CLARK, C. J., dissenting. From a judgment of nonsuit, plaintiff appealed. The only evidence taken was that offered by plaintiff. Taking that to be true, the court did not err in sustaining motion to nonsuit. Plaintiff was a hostler in the yards of Southern Railway Company, lessee of defendant, in Charlotte.

On the evening of 20 December, 1914, he started home across the yards and switching tracks of defendant. On his way he encountered a train of coal cars connected together, that had been run in one of the side-tracks that day. Plaintiff (647) looked up and down the train of cars and decided to cross the track underneath the cars, and started across underneath the drawhead connecting two of the cars.

While he was under the drawhead and putting his leg out across the rail to get out, an engine struck the train with sufficient force to move the train and drive a wheel over his leg. When the engine struck the train plaintiff states he was under the drawhead and had extended his leg across the track to get out. He could not have been seen from the engine or tender nor from the cars.

Plaintiff testifies that before he went under the train he heard the switch engine over in the junction yard, 175 yards away, and felt perfectly safe in so doing, as it was usually the business of the switch engine to move the cars on the set-off tracks. He further states that the path he was going was used by other employees, and that he had seen them, as well as a boss man, cross over the drawheads between cars when the path was blocked by trains.

Plaintiff admits that there were other safe ways for him to go home provided by the company and that he could easily have walked around either end of this train. He says; "The reason I did not talk around this strings of cars is because I did not think there was any danger." "If I had walked around I don't suppose I would be here today with a lost leg." Plaintiff further testified that he was engaged in preparing engines engaged in interstate commerce for use; that he had just finished preparing Engine No. 4619 to be taken on its run to Greenville, S.C., at 6 p. m., and he was hurt an hour later.

As it appears from the evidence of plaintiff that both he and his employer were engaged in interstate commerce, the case is governed by the Federal Employer's Liability Act, and the law as construed by the *Page 701 Federal courts, and not by the law as expounded by this Court. Ry. v.

Gray, Advance Opinions U.S. Sup Court, 22 May, 1916, page 558; Ry. v. Horton, 233 U.S. 492; Mondon v. Ry., 223 U.S. 1; Tel Co. v. Milling Co., 218 U.S. 406; Lloyd v. R. R., 166 N.C.

27. The facts show that plaintiff had been preparing engines for use in interstate commerce and had within the hour fitted out one to start on its run from Charlotte, N.C. to Greenville, S.C. The road of defendant extends from Charlotte to Atlanta and is under lease to the Southern Railway, a corporation doing business as a carrier in a dozen or more States.

Under such conditions, that plaintiff was a railway employee engaged in interstate commerce has been expressly decided by the Supreme Court of the United States in numerous cases. N.C. R. R., Co. v. Zachary, 232 U.S. 348; 58 Law Ed., 591.

The following are cases decided in the Federal and State courts. Round-house employee (an hostler), whose duty it is to clean (648) engines engaged in interstate commerce as well as to operate turntables. Cross v. Ry. Co., 177 S.W. 1127; Lloyd v. R. R., 166 N.C. 27. Employee carrying bolts used in repairing bridge. Pederson v. Ry., 229 U.S. 146. Employees engaged in repairing switches and side-tracks, Jones, v. R. R., 149 S.W.

951; Tuesdale v. R. R., 159 Ky. 718; Lombard v. R. R., 223 Fed., 427. This subject is elaborately discussed by Mr. Justice Myers, Supreme Court of Indiana, in Railway v. Howerton, 105 N.E. 1026. Plaintiff's evidence fails to disclose wherein the defendant failed to discharge any duty it owed him.

The habit of employees going under trains instead of around them is not sufficient to charge an engineer with notice that plaintiff was under the drawhead. Plaintiff was a workman of long experience and entirely familiar with the uncertain movements of engines and cars in the yards.

The defendant had a right to move cars and engines on the yards as the necessities of its business required, and the only duty under the circumstances that it owed plaintiff was to refrain, if possible, from injuring him in case his precarious condition had been discovered. There is no pretense that plaintiff's condition was discovered, and as he was under the train, it is manifest it could not have been discovered by any one on the engine or tender.

The defendant is not required to ring bells and blow whistles every time a car is shifted or a train moved on its switching yards, for the reason stated by Justice Brewer in Aerkfetz v. Humphreys, 145 U.S. 418: "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion.

The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution

*Page 702 against their approach.

The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars and enabled him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

Before the plaintiff went under the cars he examined the situation, weighed the chances, and deliberately decided to take the risk. He admits there were other and safe ways to his home, and that he could have easily gone around either end of the train, and candidly said that if he had done so he would not have lost his leg.

The ruling of the court (649) below is upheld by this Court in *Covington v. Furniture Co.*, 138 N.C. 374; *Dermid v. R. R.*, 148 N.C. 183; *Bryan v. LumberCo.*, 154 N.C. 485, and other cases. In the *Covington* case Mr. Justice Connor says the plaintiff should not have taken chances in the presence of a well known danger; "and if he did so, and was hurt, he cannot place upon the employer the blame or responsibility."

The same doctrine is declared by the Federal courts. *Cooper v. Headrick*, 159 Fed., 683, and cases cited. The case of *LeGwin v. R. R.*, 170 N.C. 359, cited in support of the contention of plaintiff, is not decisive of this case. There the railroad company purposely left open spaces between the cars for the employees of the lumber company to pass and repass. Plaintiff was not an employee of the railroad company, but of a lumber company on whose premises the railroad company had run a spur-track to load lumber from the mill.

The cars were not coupled together, but spaces were left between them so that the employees of the lumber company could pass to and fro on the latter's yards. Under such conditions LeGwin had a right to expect that the railroad company would not back its engines and cars violently against the separated and uncoupled cars and drive them together without giving proper signals and taking reasonable precautions for the safety of the employees of the lumber company.

As LeGwin was not an employee of the railroad company, his case was tried under the State law, and he was permitted to recover upon the ground above stated. This case comes under the Federal Law, which recognizes assumption of risk, and if there was ever a case in which plaintiff assumed the risk of his reckless conduct, it is this. Affirmed. *Page 703