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THE FEDERAL EMPLOYERS' LIABILITY ACT

By John L. Hall, of the Suffolk Bar.

Upon April 22d, 1908, there was enacted by Congress what has been known as the "Employers' Liability Act" and described under the title, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases." The first section of that Act is as follows:

"That every common carrier by railroad, while engaging in commerce between any of the several states or territories or between any of the states and territories or between the District of Columbia and any of the states or territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment."

By section 3 it is provided:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The only case in New England known to the writer which has arisen under the provisions of this Act and which has been submitted to a jury is that of *Mary A. Walsh, Admx.*, against the *New York, New Haven & Hartford R. R. Co.*, recently tried in the Federal court for the district of Massachusetts. The plain-

tiff's intestate was a car inspector and while beneath a car in the course of his employment received injuries resulting in his death, due to the alleged negligence of a fellow workman in permitting certain other cars to be brought in contact with the car under which the deceased was at work. While the facts are in dispute, the jury found for the plaintiff in a substantial amount. The presiding judge declined to pass upon the constitutionality of the Act, and his instructions to the jury were as follows:

"If you find, then, having found that the defendant company was a common carrier and engaged in interstate commerce, that the plaintiff's intestate was injured, and also while employed by such carrier engaged in such commerce, died as a result in whole or in part of negligence of the employees of the defendant, and if you find that the plaintiff met his burden of showing that, and if you find that the defendant has not met his burden of showing contributory negligence on the part of the plaintiff's intestate, or if you find that he has met the burden of showing that there was contributory negligence, then the negligence of the defendant company should be reduced by the negligence attributable to the plaintiff's intestate and if that reduction does not take away the entire amount of the verdict which you find proper for the plaintiff on account of the negligence of the defendant company's employees, then you will fix the question of damages under rules which I will give.

"The measure of damages is compensation for the pecuniary loss sustained by the widow and children of the plaintiff's intestate; the amount to be recovered is judged by his character, earning capacity, his habits and morals, and his cares and attentions and solicitude for his children. It is for you to pass upon this question—what was the life of the plaintiff's intestate worth to the widow and children under such fair and reasonable rules as can be given and in the consideration of reasonable men? How long would he live? What was he earning? What was the cost of living? What was he worth to the widow and children?"

The reference to the trial of this case is intended to illustrate concretely the practical working of the Act and to suggest to the mind of the lawyer the question of how the Act can promote the flow of commerce between the states.

The title of the Act relates to the liability of the carrier to its employees. It is, in fact, the regulation of the liability of the master to the servant. It primarily gives to the employee the rights against the employer which he has not hitherto possessed. It is supposedly based upon the law of torts. Recovery

may be had by reason of the negligence of any officer or agent of employee of a carrier engaged in interstate commerce. Recovery may be had also for any defect in the ways, works or machinery which is due to the negligence of the carrier. The ordinary risks which an employee takes of the negligence of a fellow employee may not now be relied upon by the carrier.

By the provisions of section 3 no lack of care on the part of the employee shall totally defeat his action, and by section 5 of the Act, the carrier cannot by any contract or rule exempt itself from any liability created under the Act. Its plain purport is to regulate the relations of the carrier in its position as employer with its employees. In effect, it determines the conditions of employment which shall obtain between the interstate carrier and its employees. It gives to the employees new rights; it takes away from the employers defenses which have existed under the common law. It is not based upon the principle that there shall be a remedy for a wrong committed; it is not justified on the ground of the existence of great dangers in the employment regulated, because its provisions apply not only to those who are actually engaged in train service, but to employees whose duties are purely clerical and who have no connection with the movement or operation of trains. It is in its essence an act of taxation.

The enactment of such a regulation can only arise from the power of Congress to regulate commerce among the several states. What, then, is the test for determining whether an Act of Congress is a regulation of commerce within the broad meaning of the Constitution?

In *Hopkins v. United States*,¹ the language of the court is as follows:

"To treat as condemned by the Act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the Act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the Act."

In *Addyston P. & S. Co. v. United States*,² the court said:

"Under this grant of power to Congress that body in our judgment may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a con-

¹ 171 U. S., 592.

² 175 U. S., 228.

tract will be when carried out to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce."

And in the same decision this language is used:

"And that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially and not merely indirectly record incidentally and collaterally regulate to a greater or less degree commerce among the states."

And upon page 234:

"Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the Act of Congress."

In *Adair v. United States*,³ it is said:

"Manifestly, any rule prescribed for the conduct of interstate commerce in order to be within the competency of Congress under its power to regulate commerce among the states must have some real or substantial relation to or connection with the commerce regulated."

From this language it is plain that the purpose of the Constitution was to secure a free and unobstructed flow of commerce between the states comprising the Confederation. Does this Act of Congress meet the tests required by the decisions of the Supreme Court? Do its provisions naturally and directly and logically tend to promote or facilitate commerce between the states? Is it "to make easier or safer or speedier to transport freight or carry passengers from one state to another"?

The argument that is advanced by those who seek to uphold the constitutionality of the measure is based upon the fact that inasmuch as Congress has power to regulate interstate commerce, it may well regulate all the instrumentalities connected with or concerned in interstate commerce.

"An examination of them (decisions) will show that the regulation of interstate commerce extends to the regulation of the persons engaged in it. The engine, the train, the cars which move commerce may be regulated by Congress. Why cannot Congress regulate the relation between the interstate carrier and its interstate servants? No commerce can move without labor. How

³ 208 U. S., 178.

can Congress regulate commerce if it cannot impose rules of liability upon those engaged in it?"

Argument of the Assistant Attorney-General of the United States in *Hoxie v. N. Y., N. H. & H. R. R. Co.*⁴

Mr. Justice Moody, in *Howard v. Illinois Central R. R.*,⁵ says:

"If Congress in the exercise of its plenary power over interstate and foreign transportation deems that the safety of that transportation would be increased by enacting that those employed in it shall have a different remedy for injuries sustained by its negligent conduct than that furnished by the laws of the states, this court cannot without overstepping the boundary which separates the judicial from the legislative field declare the enactment void."

Again on page 526:

"How poor and meagre the power would be if, whenever it was exercised, the legislator must pause to consider whether the action proposed regulated commerce or merely regulated the conduct of persons engaged in commerce."

Again on page 529:

"They (decisions) cannot be regarded lightly and if we follow them they lead us to the conclusion that the national power to regulate commerce is broad enough to regulate employment, duties, obligations, liabilities and conduct of all persons engaged in commerce with respect to all which is comprehended in that commerce. . . . If the statute which is now before us is beyond the constitutional power of Congress, surely the Safety Appliance Act is also void, for there can be no distinction in principle between them."

In other words, the arguments advanced proceed upon the theory that Congress has power to regulate all those engaged in interstate commerce rather than upon the theory that the Act must be one which directly and naturally regulates interstate commerce. That argument is unsound. An Act passed by Congress forbidding employees engaged in interstate commerce to assign their wages might well be a regulation of those engaged in interstate commerce, yet such an Act could not be construed as a regulation of interstate commerce itself. An Act of Congress might require carriers engaged in interstate commerce to employ only those who belonged to a labor organization, yet such an Act would not be a

⁴ 73 Atl. Rep., 754.

⁵ 207 U. S., 463.

regulation of interstate commerce. Congress has already passed an Act, making it criminal for an interstate carrier to discharge an employee because of his membership in a labor organization. Such an Act was a regulation of those engaged in interstate commerce, yet it was not a regulation of interstate commerce itself, as construed by the Supreme Court in the case of *Adair v. United States*.⁶

If such a doctrine as advanced by those supporting the constitutionality of this measure was the law, there is no reason why Congress might not so legislate in regard to the liabilities of shippers engaged in interstate commerce toward their employees.

The answer to Mr. Justice Moody's question to justify the passage of the Safety Appliance Act is found in the opinion of Mr. Justice Harlan in the *Adair* case:

"That Act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, but the Act upon its face showed that its object was to promote the safety of employees and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employees and travelers. It was held that there was a substantial connection between the object sought to be attained by the Act and the means provided to accomplish that object."

No such purport presents itself upon the face of the Act in question. It does not declare in any respect that it regulates interstate commerce. It is an "Act to regulate the liability of carriers to employees." Because it is a regulation of master and servant, it does not follow that it is beyond the authority of Congress. It must be such a regulation that it directly and naturally and logically promotes or facilitates interstate commerce. It is that imperative condition which must obtain before the Supreme Court can declare that the Act is within the provisions of the Constitution. Does the Act naturally and directly make the transportation of freight or passengers easier from one state to another? Does it naturally and directly make such transportation safer? Did the legal relations between employer and employee, as they existed prior to the passage of the Act, tend to obstruct or prevent the free flow of commerce between the states? Did they affect in any way the safe and speedy transportation of

⁶ 208 U. S., 161.

freight or passengers from one state to another? It is difficult to see that this Act does in any degree increase the amount of commerce between the states or that the non-existence of the Act would tend to decrease the amount of commerce between the states. It is difficult to see that trains carrying freight or passengers will be moved with greater speed or with greater safety.

If it was the intention of Congress to pass an Act for the purpose of securing the safety of passengers and property in interstate transportation, would not there have been some declaration of such purpose by Congress itself? If safety of transportation had been in the minds of Congress, would there have been a provision permitting an employee engaged in the movement of trains to recover for injuries to which his own carelessness contributed? Surely such a right of recovery is not an incentive to the safe and careful handling of trains.

The safe and rapid carriage of passengers and freight is accomplished only by the exercise of a high degree of care by the officers and men so engaged. Accidents are bound to occur; they are incident to the operation of a railroad. Some arise from causes which are really unforeseen and cannot be guarded against. Some arise from a single act of carelessness—a momentary absence of attention. An engineer fails to notice his signal, a brakeman fails to cover the rear of his train, a switch is misplaced, a signal is not given, a mistake in orders, and the consequences to human life and property are disastrous. No Act can be said to promote the exercise of that high degree of care which is required of railroad employees which permits compensation for the failure to exercise such care.

It is only by an indirect and unsatisfactory method of reasoning that it can be said that safety in transportation is promoted by increasing the amount of damages which a railroad company must pay for the acts of carelessness of its men in their relations to each other. Indeed, under present conditions railroad employees are in a great measure a self-governing body, their compensation, their obligations, the performance of their duties in no small degree rest with themselves. It is important that they themselves should feel that upon them rests the responsibility of working with men whose conduct shall be as free as possible from negligence. Safety will not be promoted by lessening their sense of responsibility in this respect.

It has been said that Congress has attempted to use the power of regulating commerce "as a pretext for legislation really intended for some other purpose"; that the measure is really for the purpose of satisfying the labor vote of the country; that its real aim is not to regulate commerce, but to distribute the burden of injuries resulting from the operation of railroads.

Certain members of the House Judiciary Committee of the Sixtieth Congress reported as follows upon this bill:

"We are unable to see how interstate commerce can be impeded, obstructed or hindered or facilitated, promoted or aided either directly or indirectly in the slightest degree in either case because the doctrine of fellow servants does or does not apply as a matter of liability between the employer and the employee engaged in interstate commerce."

The answer of Mr. Paine, the majority leader, was this:

"When the former bill was before the House, I said to the gentlemen around me that I feared it was unconstitutional, but it meets the approbation of the counsel for the locomotive engineers and therefore I voted for it. I say to-day that I fear this bill may receive the same decision from the Supreme Court of the United States when it gets there, but I shall vote to-day as I voted a year and a half ago, in favor of passing an employers' liability act."

But whatever was the *intention* of Congress in the passage of this Act, we are concerned only with the question: does the Act itself regulate interstate commerce within the broad meaning of the Constitution? No matter what motive may have caused Congress to pass the Act, that test must be satisfied. Giving to words their accepted meaning, the forces of nature operating in their ordinary way, it is impossible to find that the proposed legislation will directly, naturally or logically promote or facilitate commerce between the states. It is an Act "not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens and only indirectly and remotely affecting the operations of commerce."⁷

We are constrained to accept the language of the court in its opinion in the recent case of *Hoxie v. N. Y., N. H. & H. R. R. Co.*,⁸ denying the constitutionality of this Act:

"Except so far as the Act is a regulation of commerce between the states, its enactment was beyond the power of Congress;

⁷ *Sherlock v. Alling*, 93 U. S., 104.

⁸ 73 Atl. Rep., 754 (Conn.).

that it remotely affects such commerce is not sufficient if that result is only to be secured by invading the settled limits of the sovereignty of the states with respect to their own internal police."

However much we may welcome legislation which shall lessen the burdens of the working classes, whether it be by employers' liability acts or by workmen's compensation acts, it will be with regret if that end is to be accomplished by a strained and unnatural construction of the powers of Congress under our existing Constitution. There has been no attempt to discuss the other and important features of this Act, but rather to confine the scope to a single aspect. The final decision of the Supreme Court of the United States upon this question, as well as upon the other questions that are involved in the construction of this statute will be of the utmost importance in determining what powers under the Constitution have been granted to Congress to regulate interstate commerce.

John L. Hall.