In the

Supreme Court of the United States

EUGENE C. KELLEY,

PETITIONER,

V.

SOUTHERN PACIFIC COMPANY,

RESPONDENT.

No. 73-1270

Washington, D. C.
October 22, 1974

Pages 1 thru 53

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Petitioner,

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SOUTHERN PACIFIC COMPANY,

Respondent.

Washington, D. C.,

Tuesday, October 22, 1974.

The above-entitled matter came on for argument at 1:49 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

R. J. ENGEL, ESQ., Engel & Warner, 55 Stevenson Street, San Francisco, California 94105; on behalf of the Petitioner.

JOHN J. CORRIGAN, ESQ., One Market Street, San Francisco, California 94105; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1270, Kelley against Southern Pacific.

Mr. Engel, you may proceed whenever you're ready.

ORAL ARGUMENT OF R. J. ENGEL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ENGEL: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court:

Ostensibly the issue that is appearing before Your Honors is whether this Court should set new guidelines for determining employee status under the FELA, or the Federal Employers Liability Act.

Southern Pacific Company was successful in maintaining in the Ninth Circuit that the District Court had applied a new legal theory in creating employee status under the FELA.

This new legal theory purportedly comes from the Fourth Circuit in a case called Smith vs. Norfolk.

Petitioner not only disagrees with Southern Pacific's contention as to what the theory, or legal theory is that is set forth in Smith, but, further, petitioner believes that there is a threshold issue here that has not been briefed nor argued, either by the Ninth Circuit or by Southern Pacific Company.

Contrary to Southern Pacific Company's analysis, both the trial court, the District Court, and both parties

recognize that a factual question was being submitted and that the Court was going to render a factual conclusion as opposed to a legal conclusion.

Because the Ninth Circuit did not consider this issue and did not consider whether or not the trial court or District Court was in fact rendering a factual conclusion, the Ninth Circuit simply ignored the issues with regard to the limitations on its appellate review power in an appellate court or a circuit court reviewing a factual determination by the District Court.

I suggest that what's at the heart of this matter is that the Ninth Circuit desires to have this Court postulate a new theory, a new theory with regard to it determining employee status. And to accomplish this, what the Ninth Circuit did is it selected a single fact or finding by the District Court and it singled out a single authority that was relied on by the trial court or the Ninth Circuit, and it ignored all the other findings and it ignored all the other authorities that were relied on by the District Court.

Now, the reason I suggest that this Court is before -- or that this case is before this Court is that the Ninth Circuit failed to recognize the factual consideration rendered by the District Court, and that the Ninth Circuit's appropriate appellate review power was to deal with it as a factual conclusion and uphold the District Court's decision.

The Tenth Circuit, in a very similar type of case, Missouri-Kansas vs. Hearson, harmonized and set forth both the Smith decision and the Ninth Circuit decisions as authority for a single proposition. The Tenth Circuit had no problem at all recognizing that Smith vs. Norfolk did not set forth a new legal theory.

And I suggest to this Court that the analysis that the Tenth Circuit made in the Missouri-Kansas vs. Hearson decision is a correct analysis of the Smith decision and is the same analysis that the District Court made in the case at bar.

The result of the Ninth Circuit decision in this matter is that it is the only appellate decision which has overturned a District Court's factual conclusion as to what constitutes an employee under the FELA. There are decisions both ways in the District Courts, where District Courts have rendered conclusions that a person was not an employee and there are decisions where the District Court has concluded that a person employed by an independent contractor was an employee.

And the Ninth Circuit review is the only decision where those type of preliminary factual conclusions were made by a District Court, has been overturned.

QUESTION: Mr. Engel, --

MR. ENGEL: Yes?

QUESTION: -- I'm puzzled by the sentence at the

bottom of page 11 of your Petition -- page 11.

MR. ENGEL: Yes.

QUESTION: You state that "the Court of Appeals, by ruling directly to the contrary, without supporting authority, intentionally created a conflict in Court of Appeals decisions."

Are you suggesting that CA-9 did not decide this case in good faith, in the exercise of its judicial discretion, merely for the purpose of creating a conflict?

MR. ENGEL: No, Your Honor, that would not be my intent in making that decision. I recognize that that is a rather strong statement and certainly could be interpreted in the manner that Your Honor is suggesting.

I think the Court was trying, in all good faith, to render a very appropriate decision, but I think that what the Court did come up with was an obvious conflict in the circuits, when, in fact, the issue that was presented to the Ninth Circuit was whether a factual determination had been made by the District Court.

So that when I say they intentionally made a conflict, what I'm suggesting is that they were aware that they were creating a conflict and that that did not cause them -- it did not cause them to follow the Fourth Circuit is what it amounted to.

QUESTION: They explicitly disagreed with the

Fourth Circuit then?

MR. ENGEL: Yes.

QUESTION: That's what you mean, not consciously and deliberately.

MR. ENGEL: Well, actually what I'm saying is that they misinterpreted the Fourth Circuit.

QUESTION: Unh-hunh.

MR. ENGEL: They thought they were creating a conflict. The Fourth Circuit decision in Smith vs. Norfolk, as the Tenth Circuit has recognized, is not a new legal theory. It is consistent with all the other circuits.

QUESTION: Your theory is that the question in each case is a factual question: Is the plaintiff an employee of the railroad? And that --

MR. ENGEL: Yes. And all the Circuits agree with that.

QUESTION: -- it's not a -- and that there's not a conflict in law.

MR. ENGEL: No, Your Honor. And I think that the reasoning that the Tenth Circuit made in that regard, in citing the cases in the Ninth Circuit as well as the Fourth Circuit, harmonizes all the Circuits into one consistent viewpoint, and that is that we have a factual determination to be made by the trial court along the guidelines of the Restatement, Section 220, and that the District Court in this matter, that is

precisely what it attempted to do.

QUESTION: Well, if that's the case, is this an appropriate case for us to grant plenary review in, if there really isn't the kind of conflict that I got the impression there was from your petition?

MR. ENGEL: Well, the Ninth Circuit decision, as it stands now, creates a conflict, because they misinterpreted or misread, in my judgment, the Fourth Circuit opinion.

In other words, they have placed a legal interpretation on the Fourth Circuit's opinion, and they are saying in the Ninth Circuit that we are ruling to the contrary. So there is a conflict.

But I'm suggesting that when you go under the surface of it and examine the Fourth Circuit decision, it is not in conflict with any of the other circuits, and the only decision now that is in conflict with the other circuits is the Ninth Circuit decision in the case at bar. Because it is the only appellate decision that has overturned a District Court's factual conclusion on employee status.

QUESTION: Mr. Engel, I take it you are supporting, then, the findings and conclusions that Judge Zirpoli made?

MR. ENGEL: Yes, Your Honor.

QUESTION: And what about this language in his conclusions that "The work being performed by Mr. Kelley involved a nondelegable duty of the Southern Pacific"? Are

you supporting that also?

MR. ENGEL: Yes, Your Honor. That finding, what it provides, or how I read it, is that the Court was concluding that it was the nature of the work that the plaintiff was performing that brought him within the coverage of the FELA, that the plaintiff was doing a nondelegable duty, or was performing work in the services of the railroad, which is the definition that the Restatement uses for determining what -- who an employee belongs to at the time of a particular act.

And the trial court here, the District Court, was concluding that the plaintiff was fulfilling work of Southern Pacific Company, and it was because of that that the plaintiff was entitled to the coverage of the Federal Employers Liability Act.

QUESTION: You don't think that that is the pivot of the Ninth Circuit's disagreement and disaffection with the District Court's --

MR. ENGEL: What the Ninth Circuit --

QUESTION: Perhaps you drew these, did you?

MR. ENGEL: No, Your Honor. I drew -- I proposed some, the Court changed a number of them. Most of mine were broken down more singularly, and it combined its findings and made it a shorter set of findings.

What the Ninth Circuit did, it did not comment on that finding, Your Honor. The Ninth Circuit picked out the

fourth conclusion of fact, or finding of fact by the District Court, where the Court concluded that Pacific Motor Trucking Company was an agent of Southern Pacific Company. But the Ninth Circuit ignored the finding No. 9, which concluded, as a factual basis, that the type of work that the plaintiff was doing brought him within the FELA.

In other words, the Ninth Circuit concluded and said: The District Court found that Pacific Motor Trucking Company was an agent of Southern Pacific Company and therefore there was FELA coverage.

That is not what the findings show. The finding with regard to the agency for the trucking company is in No. 4, but the finding that the Court used to support the FELA coverage is No. 9, where it says the plaintiff was fulfilling a nondelegable duty of the defendant Southern Pacific Company, which brought the plaintiff within the traditional agency relationship, and in such a relationship to the defendant Southern Pacific Company.

QUESTION: Well, the Ninth Circuit certainly referred to the nondelegable language.

MR. ENGEL: Yes.

QUESTION: Mr. Engel, --

MR. ENGEL: Yes?

QUESTION: -- I have not checked these other cases you mentioned, do you happen to recall how many of them

involve jury verdicts, with respect to the status of the employee?

Here you had no jury, you had a District Judge who made certain findings, some of which perhaps are arguably at least mixed findings of law and fact.

But my question is, in the cases on which you rely, were they jury verdicts or decisions by District Judges?

MR. ENGEL: Well, they are a combination, Your Honor. Some of them are motions for summary judgment that went up on appeal, which of course were decided by a court or a judge, and some of them are jury conclusions at the time of trial.

I don't know another case dealing either with FELA law or I couldn't find another case, period, where you had a situation where the parties agreed to waive a jury as to the limited issue, and submitted that factual question to the court for determination, as we did here.

We were then going to proceed with the questions of negligence and damages to a jury. But it was well understood at the time of trial that this limited issue was, we were waiving a jury as to that one limited factual question and that factual question was going to be decided by the court.

QUESTION: May I ask, while I've interrupted you, whether it is permissible under California law, or under the Federal Act, for an injured employee to receive both Workmen's

Compensation benefits and FELA benefits?

MR. ENGEL: Yes, Your Honor, there are -- in fact, I should have cited it to the Court. There is a decision where that issue was raised in an FELA situation, and, while I'm not that confident about the court nor the ruling, my recollection was that the court concluded -- I think it was a Circuit Court -- that because somebody had applied for Workmen's Compensation benefits that that was not a factor in determining whether or not he was entitled to FELA coverage.

QUESTION: Would he be entitled to retain both benefits?

MR. ENGEL: Well, while this is not within the purview of this appeal, I would anticipate that in the event this Court rules in favor of petitioner, that what will happen is Southern Pacific will then stop the Workmen's Compensation benefits, and we will litigate that issue, as to whether or not that's appropriate or not.

QUESTION: I thought the Workmen's Compensation came from Pacific.

MR. ENGEL: Well, --

QUESTION: Granted it's a wholly owned sub, but it's -

MR. ENGEL: I'm sorry, I use them interchangeably. It is -- I'm suggesting that Pacific Motor Trucking Company will stop the Workmen's Compensation benefits, and we will then litigate that issue.

QUESTION: But there's no right to subrogation.

MR. ENGEL: There is not in this case, no, Your Honor.

QUESTION: But would there be a right of -- what -- of credit to any, against any coverage --

MR. ENGEL: Well, I think it's going to be complex, Your Honor. Because that is a State right, under State statute, and the rights under the FELA are not State-oriented but federal-oriented.

QUESTION: Well, I'm merely asking whether there would be a double recovery here, and I take it this is what Justice Powell is concerned about.

MR. ENGEL: Well, Your Honor, of course I'd like to say to you, because I know double recoveries are not something that are desired by any court, that no, they won't happen. But, to be perfectly candid with Your Honor, I anticipate that when Pacific Motor Trucking Company stops the payments, that I will go to the law books and see what I can do for Mr. Kelley to see if he's not entitled to both.

But I can't tell Your Honor what I would anticipate the result of that would be.

QUESTION: Do you -- would you agree that the District Court was, in its mixed finding about the nondelegable duty, holding that a railroad cannot, under any circumstances, engage an independent contractor totally unrelated to it, unlike Pacific, totally unrelated and thereby avoid FELA responsibil-

ities? Is that the impact of his holding?

MR. ENGEL: Well, the impact that I find in that finding is that he was characterizing the work that was being done by Mr. Kelley as being "performing in the services of the railroad".

I don't think that his finding goes so far as to say that any time an individual is performing a certain type of work that they are necessarily an "employee" within the FELA.

In other words, each case would still have to be determined on the facts, and I don't think there is anything in the Smith case nor in the District Court's decision here where that you could anticipate that every time an individual, who fell from a tri-level railroad car, would necessarily be entitled to FELA coverage. It would be determined factually in that given case at that given time.

QUESTION: Well, you say "every person". Limit that to "a person" who is unloading the car, --

MR. ENGEL: Yes.

QUESTION: -- hasn't the District Judge said that unloading is a function of the common carrier, the railroad, and can't be passed on to anybody else?

MR. ENGEL: No, I don't think so, Your Honor. I think that in this particular case he found that to be true. There are some particular facts in this given case, which, in

my opinion, caused him to come to that conclusion. There was difference of opinion in the briefs with regard, for example, to whether this work was within the tariff of the railroad.

The work of unloading the tri-level railroad car doesn't necessarily have to be within the tariff of the railroad. It was in this particular case.

QUESTION: I thought in the fact-finding it was, wasn't it?

MR. ENGEL: Yes, oh, yes. In this case --

QUESTION: Finding IV says it.

MR. ENGEL: I'm saying in this case that is true, but it doesn't necessarily have to be, and the next person who is working on a tri-level railroad car and falls off, in that instance the railroad may not have within its tariff the unloading of the automobiles. That would be a significant fact that would be different.

So that there are differences in fact in each case. And I think what the District Did here is that in this particular case he concluded that Southern Pacific Company in this particular case had a nondelegable duty.

QUESTION: I notice that the Court of Appeals didn't cite Sinkler. Does it have any relevance here?

MR. ENGEL: Well, Sinkler was a case involving determination of the defendant class as opposed to the plaintiff class. I think it has application in that both in Sinkler,

where they were determining the defendant class -- in other words, who are the employers that can be sued.

QUESTION: Well, you had an independent employer there, as you do here.

MR. ENGEL: Yes.

QUESTION: There it was the belt railroad.

MR. ENGEL: Yes.

QUESTION: And it was performing what we characterize as an operational activity of the respondent railroad, which was sued.

In light of Finding IV, why isn't that this situation?

MR. ENGEL: Well, because Sinkler dealt with determining the defendant. In other words, it was the -- was the defendant an employer who could be sued?

In our instance we're talking about: Is the injured party an employee that can sue an employer, an identified employer?

But they are very similar in that both cases, both the Baker and --

QUESTION: Oh, I see. There we held -- that's right. There the award was to an employee of this plaintiff, of this defendant railroad, by reason of the negligence of the belt railroad.

MR. ENGEL: That's right.

QUESTION: I see. In this instance what we have is

the negligence of his employer.

MR. ENGEL: Correct.

QUESTION: Right. That is, it's directed --

MR. ENGEL: We're going back the other way.

QUESTION: Yes.

MR. ENGEL: But there is a similarity in that both cases turn on what was the nature of the work that the party involved was doing at the time. That determines --

QUESTION: Well, whether it was part of the operational activities of the respondent railroad.

MR. ENGEL: Yes.

QUESTION: And I would suppose that Finding IV here doesn't seem to have been challenged in the Court of Appeals, saying that what was done here was in the regular course of its business, that is of the Southern Pacific, pursuant to its contractual responsibilities to the shippers and its tariff responsibilities.

MR. ENGEL: Correct.

QUESTION: So that, in any event, the operation was within the operational activities of the Southern Pacific.

MR. ENGEL: It was so found.

QUESTION: That seems to be what that finding --

MR. ENGEL: Yes, Your Honor.

QUESTION: In other words, having been paid for it, for the unloading operation, Southern Pacific would not be

heard by the District Judge to say that it wasn't part of their employment?

MR. ENGEL: That's correct. And there was some dispute about it at the time of trial and in the briefs, as to whether or not that tariff was -- actually covered the unloading operation, and Your Honors will note that we have attached a copy to our brief of the interrogatory, where we had taken the deposition of one of the SP superiors, who said that he thought it was an alternative tariff situation that some shippers could and some shippers would not be charged that tariff. But, in fact, when an interrogatory was submitted to Southern Pacific Company, they specified that that employee was inaccurate and that all railroad tri-level automobile carriers at that time, the tariff included the unloading operation.

QUESTION: What page is that on in your -- I take it it's in the Appendix?

MR. ENGEL: In the Appendix, yes, Your Honor.

That's pages Roman numeral twelve through fifteen, the question, it begins at twelve and the answer is on fifteen. Roman numeral fifteen, at the end.

QUESTION: Well now, unless I don't read my Roman numerals correct, I haven't got that many pages in your Appendix, at least to your brief.

MR. ENGEL: Oh, I'm sorry, Your Honor. I'm speaking

of the petition.

QUESTION: Oh.

MR. ENGEL: I don't believe it's attached to the brief, Your Honor. I do have it attached to the petition.

QUESTION: Yes.

MR. ENGEL: In the absence of any further questions --

QUESTION: May I just ask, Mr. Engel, suppose this employer had not been wholly owned by Southern Pacific?

MR. ENGEL: I don't think that would make any difference.

QUESTION: It wouldn't make any difference?

MR. ENGEL: No.

QUESTION: So it all has to turn on the fact that this employer was performing an essential operational activity of the railroad?

MR. ENGEL: Well, this particular individual. In other words, rather than the employer -- in other words, just because Pacific Motor Trucking --

QUESTION: Right. Right. He was doing the unloading.

MR. ENGEL: Right. He was doing a particular act and that particular act, because of the nature of that act, was actually performing the services of Southern Pacific Company, and consequently he's entitled to FELA coverage.

QUESTION: So I take it, if there were an engine that broke down, instead of one of the Southern Pacific's mechanics

repairing it, Southern Pacific hired a plumbing company and a plumber employed by that company came and repaired the boiler of the locomotive and was injured in the process, you would say he could recover against Southern Pacific?

MR. ENGEL: I would say he could, but not necessarily. In other words, I don't think any of these cases turn on one particular fact.

QUESTION: Well, a fact-finding could have been made --

MR. ENGEL: Yes.

QUESTION: -- that he was, for that purpose, an employee of the railroad.

MR. ENGEL: Correct. But the respondents here want --

QUESTION: What cases have we had that approach that in this Court, any?

MR. ENGEL: Well, there's one that's very similar to that, where Westinghouse sold an engine to a railroad, and tha --

QUESTION: Which one is that?

MR. ENGEL: Well, --

QUESTION: I thought I knew these cases.

QUESTION: Well, the Court of Appeals thought it was wholly -- your approach would be wholly inconsistent with cases in this Court.

MR. ENGEL: The Ninth Circuit did.

QUESTION: Yes.

MR. ENGEL: Yes. I recognize that, Your Honor. I disagree profusely with the Ninth Circuit's conclusion.

QUESTION: And you have another Court of Appeals pretty much on your side.

MR. ENGEL: Yes.

QUESTION: The Fourth Circuit.

MR. ENGEL: And the Ninth Circuit is saying the Fourth Circuit created a new theory, and we're saying that that's not accurate; and the evidence of that is the Tenth Circuit harmonized both Districts and didn't have any problem.

QUESTION: Well, you certainly are relying on more than one factor, as I think you just suggested here.

MR. ENGEL: Yes.

QUESTION: Including, among other things, the longevity on the job of Mr. Kelley.

MR. ENGEL: The job, correct.

QUESTION: Of doing this kind of thing over a long period.

MR. ENGEL: He was also injured while he was just getting the automobiles prepared to unload. He wasn't -- they hadn't even started actually driving the automobiles off the railroad car. The process where he was injured was going along and unhooking the chains underneath, so that --

and each of these facts can be important. And I think it would, under the Baker decision, the test is the District Court at that particular time weighing all these facts, what conclusion they come up with.

QUESTION: Well, I take it you are relying specifically on Baker, are you not?

MR. ENGEL: Yes.

Your Honor, the citation that I referred to was Bryne -- that's B-r-y-n-e -- vs. Pennsylvania Railroad Company.

QUESTION: Yes.

QUESTION: Have you got the cit of that right in front of you?

MR. ENGEL: Yes. It's 262 Fed 2d 906.

QUESTION: Not in this Court?

MR. ENGEL: No, it was -- certiorari was denied here, but it's a Circuit opinion.

And I've asked that a few minutes could be saved for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Corrigan.

ORAL ARGUMENT OF JOHN J. CORRIGAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CORRIGAN: Mr. Chief Justice, and may it please the Court:

As I perceive the issue in this case, it is: Shall the FELA law be extended to include persons other than employees of railroads?

All of the cases cited by all of the parties, save and except one, make a finding of employment by a railroad, whether it's through a borrowed servant doctrine, a joint servant doctrine, an alter-ego doctrine, or some doctrine, they all make a finding of employment.

Counsel says that the Tenth Circuit harmonizes the Ninth Circuit and the Fourth Circuit. The Tenth Circuit case he has in mind is Hearson vs. the K-T Railroad. It's cited in the briefs, and it's 422 Fed 2nd.

The Court finds in Hearson that Hearson was an employee of the K-T.

In other words, the K-T sold its car-cleaning facilities to try to avoid the consequences of the act. But they kept control over Mr. Hearson. And the Court says it doesn't matter whether he sweeps from the right or the left, the point is the railroad still maintained the necessary control, and because they did that Mr. Hearson continued to be an employee.

Now, he also relies, and he just cited a Circuit Court case, Bryne vs. Pennsylvania Railroad, there you had a Westinghouse engineer whose job it was to service sophisticated locomotives after they were sold to the company, the railroad company. And he came on the railroad property and he worked on these locomotives, and he came under the control of the railroad. And that case held he was a joint employee. There was a conventional common law employment relationship that developed which was not developed in this case --

QUESTION: You mean under the control in the sense that --

MR. CORRIGAN: Yes, sir.

QUESTION: -- that everything he did was directed and supervised and --

MR. CORRIGAN: He worked there --

QUESTION: -- and planned out and laid out for him by the railroad?

MR. CORRIGAN: That was the finding, sir. A conventional finding of employment which is not in this case, and the case that's relied upon, and it's from the Fourth Circuit, is unique and it's different in that it is the only case that does not find employment.

Now, I --

QUESTION: Give us the Tenth Circuit citation, is it Hearson, with an H?

MR. CORRIGAN: It's Hearson, H-e-a-r-s-o-n, vs. Missouri-Kansas --

QUESTION: Well, I don't find it in the briefs, in the Table of Authorities cited.

MR. CORRIGAN: It's in counsel's brief, I believe, in one of his briefs.

QUESTION: But not in your brief?

MR. CORRIGAN: No.

QUESTION: No, I don't find it in --

MR. CORRIGAN: It's 422 Fed 2d 1037.

QUESTION: 1037.

MR. CORRIGAN: 422 Fed 2d 1037.

QUESTION: Missouri-Texas Railway v. Hearson.

MR. CORRIGAN: It's Texas Railway v. Hearson --

QUESTION: Cited at page 29 of petitioner's brief.

MR. CORRIGAN: Yes, it's M-K-T vs. Hearson.

QUESTION: Missouri-Texas.

QUESTION: Oh, I see it, Missouri, unh-hunh.

MR. CORRIGAN: I'm very sorry.

QUESTION: I have it.

MR. CORRIGAN: I'd like to point out one thing --

QUESTION: Mr. Corrigan, are you saying that there are no elements of control in here as to Mr. Kelley's --

MR. CORRIGAN: Right. I'd like to point out --

QUESTION: I thought there were some aspects of

evidence that he was subject to direction of SP employees. Is my impression incorrect?

MR. CORRIGAN: If we may, we'll go to the findings. Counsel says this is a case where the appellate court sought to change the findings, to re-evaluate them, to interpret them. They didn't.

The opinion of the Ninth Circuit begins and ends with the findings of the District Court.

The District Court found that Mr. Kelley was an employee, he was in the employment of the PMT. He was paid --

QUESTION: Well, what about Finding VIII, Mr. Corrigan?

MR. CORRIGAN: That finding is --

QUESTION: It's on page 29. "The responsibility for immediate supervision"and so forth "was that of Southern Pacific, even though the exercise thereof was executed by employees of Pacific".

MR. CORRIGAN: Yes, he was in the exercise of -- control was that of the Pacific Motor Trucking Company --

QUESTION: Well, I'm sorry, as I read it at least, it says "The responsibility for immediate supervision and control of the unloading operations" was Southern Pacific's, "even though the exercise thereof" -- meaning of the supervision and control -- "was executed by employees of Pacific."

MR. CORRIGAN: Yes, the responsibility, sir, but it

doesn't say the control was in the Southern Pacific, sir; it does not say the right of control was in the Southern Pacific --

QUESTION: Well, why doesn't it? That's what I don't understand. That the responsibility was there, doesn't that also mean the right was there?

MR. CORRIGAN: No. Could I explain why?

QUESTION: I wish you would.

MR. CORRIGAN: All right, sir.

The railroads in the Twentieth Century have become a very sophisticated operation. We have, for example, computers that help run the transportation system. We have sophisticated telephone systems. We don't have the where-withal or the knowledge to run these computers, but we have the responsibility to see that they run so the railroad can continue running.

Does that make all the IBM employees who come in and fix those computers railroad employees for the purposes of the FELA? Does that make all the telephone company employees employees for the purpose of the FELA?

These are employees of another company. And counsel acknowledged that it wouldn't make any difference whether we're talking about a subsidiary company or some other company.

There are many things in a railroad enterprise that have to be done by others.

QUESTION: Well, to take your hypothetical, I suppose it's possible that Judge Zirpoli would have found that those -- would not have found that those are nondelegable duties, and he would not have found, as he did here on page 29, that the "responsibility for immediate supervision and control" of the maintenance of the electronic computer system was.

MR. CORRIGAN: We had a responsibility and control, Mr. Chief Justice, to see that a job got done. That was to see that railroad cars became unloaded under the tariff.

But there's a difference, it seems to me, between the responsibility to see that a result gets -- becomes fact, and having control or the right of control. You can hire an independent contractor, and that doesn't give you the right of control. We don't have control -- the right of controlling those IBM employees when they come and fix our computers.

I'd like to touch on --

QUESTION: Well, there is something in your favor, that the District Judge carefully avoided, in so many words, finding that this gentleman was an employee of the Southern Pacific.

MR. CORRIGAN: The best thing in this case is the finding of the District Judge for the Southern Pacific Company. He rejected the proposed findings of the petitioner, because the petitioner requested a finding that the Southern Pacific was an employer. The District Judge knew he could not make that

finding because the evidence wouldn't support it.

He therefore found that employment was in the Southern Pacific Company. The scope of coverage of an FELA case --

QUESTION: Wait a minute. He found what?

QUESTION: You misspoke yourself.

MR. CORRIGAN: He therefore found -- I misspoke myself. I'm very sorry.

QUESTION: Freudian slip.

[Laughter.]

MR. CORRIGAN: He therefore found that he was an employee of the Pacific Motor Trucking Company.

I want to touch on a concept that this Court has developed in the FELA field, and it has to do with nondelegable, the word "nondelegable".

The concept of nondelegable relates to nondelegable duties. There are not cases of this Court that --

QUESTION: Well, may I just suggest --

MR. CORRIGAN: Yes.

QUESTION: -- I think we went all through this in Sinkler, didn't we? And we shut up the operational activities concept as something peculiar to the FELA. Didn't we?

MR. CORRIGAN: Yes. There are two concepts, though, that I want to get --

QUESTION: Well, I'm not sure "delegable" and

"nondelegable" are really appropriate in that context.

MR. CORRIGAN: There are two concepts, though, that I think it's important, my duty to make clear:

One deals with nondelegable. Nondelegable refers to duty. It is not a concept developed by this Court which creates employment. Once you have employment and work for a railroad and are an employee of the railroad, as all the cases have held you have to be to come under the Act, then the railroad has a nondelegable duty to furnish you a safe place to work.

And the fact that you send your railroad employee out on another railroad or out to a shipper's premises, and he gets hurt in an unsafe condition there, you can't say, as a railroad, Well, we don't owe you because you got hurt there. No, you have a nondelegable duty. And that's the concept in which nondelegable came up. And the District Court became confused with it.

Now, as to operational activity. That concept is very much confused by the Smith decision in the Fourth Circuit.

Operational activity is a concept which protects employees who are in fact employed by railroads. In Houston, Texas, the Missouri Pacific contracted out its switching business, and they had an employee in a railroad car, and the switching company who was doing their operational work for them ran the car into the Missouri Pacific car, in which a Missouri

Pacific admitted employee was standing, and hurt him.

And this Court said this is really an extension of an agency principle. You can't let someone else do your operational work and then deprive your own employees of the right of recovery,because they are your employees.

QUESTION: That was because of the special history, the FELA, the purpose for it.

MR. CORRIGAN: Yes. I think this raises another very interesting point, and it's this: If you analyze the Act very carefully, you see that there are three classes involved. There's a plaintiff class -- and the only plaintiffs that come under that Act and can recover are employees of common carriers by railroad. Not employees of agents of common carriers by railroad.

This Court, in 1950 and again in 1959, said this term "employee" and "employed" is not used in any special sense. It's just a conventional, what the convention meaning of the word "employee" is. And if to be an employee you have to be in someone's employment, you don't get to be an employee of a railroad by being employed by an agent of the railroad.

This Court made that very clear in the Baker case in 1959.

QUESTION: Well, it requires that the railroad itself direct and supervise and detail and plan, and every-

thing else, the activities of the employee of --

MR. CORRIGAN: Which they did not do in this case.

QUESTION: Well, that's -- unless fact-finding VIII is to the contrary.

MR. CORRIGAN: The other thing, the other class is the class of carriers, employers under the Act.

The class of employers are common carriers by railroad, and if you don't work for a railroad -- to put it as simply as I can, Your Honors, -- you don't come under the Act.

This Court held that six years ago in the Edwards case. You have to work for a railroad or you don't come under the Act.

QUESTION: Mr. Corrigan, could I ask you what I guess is just a purely mechanical question. In the Appendix there appear to be two sets of findings of fact and conclusions of law.

MR. CORRIGAN: I can explain that.

QUESTION: One is at 28 and 29 and the other is 161. Is one the ones prepared by you and the other prepared by your adversary?

MR. CORRIGAN: The findings in the low-numbered pages --

QUESTION: Pages 28 and 29.

MR. CORRIGAN: -- are the findings as signed by the

Court. The ones at the end of the book are the findings as proposed by the petitioner and as rejected by the Court. The petitioner asked to have the Court find that his client worked for a railroad. Petitioner's attorney asked that, and the Court said, No, I can't find that. He doesn't work for a railroad.

QUESTION: What, then, the findings at 161 of the Appendix weren't ever signed by the Court?

MR. CORRIGAN: No, sir, they are proposed findings.

QUESTION: I note II, and that is, "Defendant, Southern Pacific, by and through agreement with Pacific had the right to exercise control over the details of the work being performed by the plaintiff at the time of the accident in question."

MR. CORRIGAN: That was a proposed finding.

QUESTION: Yes. That's what I say, that's one that was rejected. Unless it's embodied in fact-finding VIII which was signed.

MR. CORRIGAN: Yes, sir.

I -- yes?

QUESTION: In Sinkler, where the railroad's employee was hurt in the process of switching operations carried on by the belt railroad --

MR. CORRIGAN: Yes, sir.

QUESTION: -- an independent contractor. Now, I

take it you would say that if both an employee of the railroad and an employee of the belt railway had been hurt in the same accident, in the Sinkler case, that one would have been under the FELA and the other one would not?

MR. CORRIGAN: Well, you picked a very unusual fact situation there. They both would have, because the belt railroad is also a common carrier by railroad, and its employee --

QUESTION: Well, I know, but it would have been -- the FELA -- the railroad would have been liable, one railroad would have been liable, you'd say --

MR. CORRIGAN: Well, both railroads --

QUESTION: Which one -- could one --

MR. CORRIGAN: Well, here's what would happen. If that railroad was negligent and if it hurt one of its employees, it would be liable under FELA --

QUESTION: Well, I understand that. I understand that.

MR. CORRIGAN: Right. Now, the --

QUESTION: How about the other railroad?

MR. CORRIGAN: -- other railroad would be responsible because it gave up an operational activity to the belt railroad, and because it gave up an operational activity to the belt railroad it cannot escape the consequences of the act to its own employees, Mr. Justice --

QUESTION: Well, how about to the belt railroad's

employee?

That's the question, that I asked you.

MR. CORRIGAN: Well, Missouri Pacific, under those facts, would not be liable to the belt railroad's employees who were injured, because the belt railroad's employees were not under their control, they were not their employees, the negligence was the act of the belt railroad and not the Missouri Pacific. So the Missouri Pacific would only be liable to its own employees.

QUESTION: Even though, for purposes of the Act, a fellow employee doctrine reached the belt railway, in Sinkler?

MR. CORRIGAN: I'm sorry, sir?

QUESTION: Well, the belt railway, for some purposes, was held identical with the other railroad.

MR. CORRIGAN: Only for purposes -- only the -- and I was about to get to that, and I think I could explain it this way, Mr. Justice.

QUESTION: Well, that was an interpretation of the word "agent" in the special section.

MR. CORRIGAN: That's the next thing I want to come to that's very important. I tried to describe three classes that come under this Act: the employee class, the employer class, and now I'd like to talk about the third class, which I think relates to your question, Mr. Justice White.

The third class of people or organizations referred

to in the Act are the people or organizations for whom the railroads are responsible: officers, agents and employees of railroads.

Now, note: the word "agent" is used with reference to those people for whom a railroad is liable, for whose conduct they're liable. The word "agent" is no way used with reference to the employee class. It's used in one part of the statute but not in the other.

There's good reason for that. We've quoted the legislative history here quite extensively. It was relied on by this Court and quoted extensively by this Court six years ago in Edwards vs. Pacific Fruit Express, and it was relied on specifically by the Circuit Court for the Ninth Circuit.

The legislative history is very clear that Congress did not want teamsters or truck companies under the Act.

So I think that partially explains why the concept of agency doesn't relate to the plaintiff class.

QUESTION: Mr. Corrigan, the plaintiff in this case was a member of the truckers' union, wasn't he?

MR. CORRIGAN: Yes, sir, the Teamsters Union.

QUESTION: Teamsters, right. And was Pacific Motor Trucking Company regulated as a trucking company by the Interstate Commerce Commission?

MR. CORRIGAN: Yes, sir.

QUESTION: And by the California Commission?

MR. CORRIGAN: Yes, sir.

It's a motor carrier operating in interstate commerce.

QUESTION: Yes.

MR. CORRIGAN: In nine western States.

There has been --

QUESTION: Are you paying compensation --

MR. CORRIGAN: Pacific Motor Trucking Company. They are paying for the pension and the medical and everything.

QUESTION: Is there a prospect of double recovery?

MR. CORRIGAN: What's that, sir?

QUESTION: If there were a reversal here, would there be the prospect of a double recovery?

MR. CORRIGAN: Well, I'm sure that Pacific Motor Trucking Company -- you've asked the question for which I can't find any legal authority one way or another.

QUESTION: Your friend said he hoped so, and he was going to try to bring that about.

MR. CORRIGAN: And I'm sure the Pacific Motor Trucking Company would work, Your Honor, on the opposite -- for the opposite results.

You know, there's something else about this case that's very important, and it's this. Because railroads have been around a long time, people think in terms that they should be able to do everything for themselves, because at one

time they did. They had their own carpenters a hundred years ago, their own plumbers, their own sheet metal workers, and everything. But you don't live in that kind of a world any more.

The work that was being done by Mr. Kelley in this case was not railroad work, it was teamsters' work. the record in this case, specifically the testimony of Mr. Cawkins, shows the following to be true, and I think this is very important.

This trucking company was organized and formed in the early 1930's, and about 1937 they built highway trailers, the truck company, the PMT, to carry automobiles along the roadway in trailers, the driveaway type thing. And the PMT employees, like Kelley, in 1937 loaded and unloaded those trailers.

About 1950, the railroads started what was known as piggy-back service. That piggy-back service was flat cars on which they would put vans, trucks. And a little later, one of the kinds of vans or trucks they put on the railroad cars were these highway trailers that carried automobiles, the actual truck-trailer with the automobiles on it was tied on the railroad car, and it was a form of piggy-backing.

The same teamster employees who were performing that work since '37 performed it in the loading and unloading on the railroad cars; the loading and unloading.

Then in the early Sixties, the railroads, the railroads of this country, designed what's known as bi-level and tri-level cars and they did away with putting the truck, the autos on the trucks on the cars, they just put the cars on the train, on the railroad cars -- the automobiles on the railroad cars.

But the significant thing is this: the same employees, the same teamsters, like Kelley, who had been there eight years doing this work, continued to do the work. It was never done by railroaders. And why should anyone suppose it should be done by railroaders?

There's a lot of work that comes under a railroad cap that is not railroad. There are a lot of peripheral industries that work with a railroad, and their activities are carried under a tariff.

There are cases in our brief on that.

But they are not railroading. This Court said, six years ago, the last case decided on the question of coverage under the Act, was Edwards vs. Pacific Fruit Express. This Court said there are a lot of things that look like railroading but they are not railroading.

In the Edwards case, that company owned railroad switch engines, had tracks, moved boxcars, owned cars, did switching, but they weren't a common carrier by rail. Not being a common carrier by rail, their employees couldn't

come under the Act.

QUESTION: Mr. Corrigan, if you prevail here, I suppose you think that the Ninth Circuit opinion does not open the way to a railroad's avoiding FELA liability by contracting out various things, such as maintenance and the like?

MR. CORRIGAN: No. I'd like to address myself to that question, sir.

In the first place, we have to look at it in the context that contracting out to avoid the Act would be bad, if you were avoiding it with reference to your obligations to your own employees.

QUESTION: -- [inaudible]

MR. CORRIGAN: Yes, sir.

Which Kelley was not in this case. We always have to start there. Kelley was not an employee of the railroad.

Now, contracting out, sir, can be prevented if it's evil, if the --

QUESTION: Be in contravention to section 5. Is that what you're talking about when you say "evil"?

MR. CORRIGAN: Yes. If it's wrong -- I'm not sure that it would be in contravention of section 5, contracting out.

QUESTION: Well, of the Act, of some part of the Act then?

MR. CORRIGAN: Yes. If it is, and I don't agree that it is, but let's assume for the purpose of argument -- well,

no, I can't agree that contracting out is prohibited by the Act.

What's prohibited by the Act is taking a release from an employee, then he signs up for employment: "I promise not to sue you". That's what section 5 is all about.

But section 5 doesn't deal with contracting out. You see, contracting out can be handled by other laws and institutions, not by an improper interpretation contrary to legislative intent of the FELA.

The FELA said, the Congress said, and this Court said Congress said it, six years ago, that the FELA only applies to employees of railroads.

Now, with that in mind, this Court shouldn't strain to worry about contracting out and in the process improperly interpret the FELA. For this reason: contracting out will be prevented by the Railway Labor Act and by the United Transportation Union. If a railroad decided it would be a good idea, to contract out all the work of our locomotive engineers, the union could file a section 6 notice, and there would be a nationwide strike sooner or later, and they couldn't do it.

So I think it's so highly theoretical, and to worry about theoretical thing like that and interpret the Act where it shouldn't go, where this Court says it shouldn't go, six years ago, would be wrong.

Another thing I want to point out to you about contracting out, why it wouldn't work:

The railroad operations, take a train leaving from San Francisco to Salt Lake City, is a very integrated type of operation. The engineer has to rely on the conductor for his signals, who has to rely on the brakeman, who has to rely on the dispatcher, who has to rely on someone else. If you contracted out the work of the conductors or the brakemen or the engineer, those people would still be controlled by the railroad, because they would be so integrated, and this Court wouldn't have any trouble finding, if the contracting out came to pass -- which it won't -- this Court wouldn't have any difficulty finding the railroads still maintaining control, the conductor still telling the engineer when to move, the train dispatcher still telling them when they can leave the station, the train master is still running the show:

There will still be requisite control and supervision over these employees who have been contracted out.

So the railroad may think it's contracting out, but this Court would hold that the control is still there. The control that is not in the Kelley case.

QUESTION: Well, I don't know, Mr. Engel, are there any -- or Mr. Corrigan, whether there are any Pullman cars left any more, but a Pullman car is typically a railroad function, is it not?

MR. CORRIGAN: Well, this Court said no, and --

QUESTION: Well, they didn't say it wasn't a railroad function, they just --

MR. CORRIGAN: -- in Robinson.

What they said, what this Court said in Robinson vs. Baltimore & Ohio, in 1915, that there are many things that happen on a railroad that are not really railroading in the sense that Congress intended in the Federal Employers Liability Act.

QUESTION: Well, Mr. Corrigan, let me change my question. It's a typical common carrier function, isn't it?

MR. CORRIGAN: It's a common carrier function for a railroad to pull a Pullman car if there are still Pullman cars, yes, sir.

QUESTION: Yes. And the car looks from the outside much like all the other cars.

MR. CORRIGAN: Yes, sir.

QUESTION: But the Court held that the Pullman car employees were not -- if I recall correctly -- were not employees of the railroad.

MR. CORRIGAN: Yes, sir. And didn't come under the Act.

QUESTION: And, more important, did not come under the Act.

MR. CORRIGAN: Yes, sir.

QUESTION: It would have been entirely appropriate, would it not, for Congress to have put Pullman car employees under the Act, since they're pulled by the same engine?

MR. CORRIGAN: That's -- yes, sir, whatever Congress would have wanted to, but Congress didn't want to and this Court said they didn't want to, in the Robinson case. We have extensive legislative history, Your Honor, in our brief, and this Court quotes extensive legislative history in the opinion in the Edwards case, which I keep coming back to, by Justice Black.

This Court relied on it, and this Court said that there was a great deal of legislation dealing with railroads in the decade of the Thirties, wherein, Congress, if it wanted to, could have included other people. But Congress specifically excluded other people, and they specifically excluded teamsters.

Then when we got around to the '39 amendment of the FELA, Congress was asked to include trucking companies and teamsters, and Congress said no. And the Ninth Circuit is cognizant of that, and they make the reference to the report in their opinion.

But I urge upon you that not only the Ninth Circuit is aware of it, but this Court was aware of it, and this Court relied heavily on it in the Edwards case.

I want to allude to another thing that's important. There is no particular kind of railroad activity that is magic,

if you're doing a certain kind of work you must be a railroader.

When this Court interpreted the '39 amendment in a case called Reed vs. Pennsylvania Railroad, this is what it said: The railroad was all upset because Mrs. Reed was a clerk, and the window blew in in her office and cut her on the face. And they said, Well, you're not a railroader, you don't have soot in your face and cinders in your hair and calluses on your hands, you're a clerk; you can't have recovery under this Act.

And this Court said, what counts is, in order to come under the Act, not what you do, you can be a clerk and come under this Act. And since that opinion, every clerk has come under this Act.

What counts is that you have to be in the employment of a railroad which -- and doing work which closely or substantially affects interstate commerce.

Mr. Kelley was not in the employment of a railroad. It was specifically so held by the trial court.

I think that, for whatever reasons, there is a direct conflict, and there's no way around it, between the Fourth Circuit and the Ninth Circuit. And the legislative history was interpreted by this Court, and the decisions in Robinson of this Court, and Baker of this Court, clearly indicate that the Fourth Circuit is in error in that one case. There's only one case, it's Smith vs. Norfolk & Western, in

which they said, You find that Mr. Smith is not an employee of a railroad, but it doesn't matter to us, he's the employee of an agent of the railroad.

And the Ninth Circuit recognized, as this Supreme Court has recognized on so many occasions, that isn't enough. You have to be an employee.

QUESTION: Is there anything in the Edwards case, which I see you have reason to be familiar with, that indicated that the Pacific Fruit Express was owned by either one or a combination of railroads?

MR. CORRIGAN: It was owned fifty percent by the Southern Pacific Transportation Company and fifty percent by the Union Pacific Railroad Company.

But, again, --

QUESTION: You argued it, didn't you?

MR. CORRIGAN: Yes, sir.

QUESTION: That's where you won?

MR. CORRIGAN: Yes, I like that case, Judge -- Your Honor, I'm sorry.

QUESTION: We apparently lost the dissenting opinions in that case -- I don't find them.

MR. CORRIGAN: There are none, it was unanimous.

[Laughter.]

MR. CORRIGAN: There's one other thing. The trial judge in this case was not asked to decide questions of law

only, this was a bifurcated trial. He was the fact-finder.

Thank you very much for your time and the privilege of being here.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Corrigan.

Mr. Engel, you have a few minutes left.

REBUTTAL ARGUMENT OF R. J. ENGEL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ENGEL: Briefly, Your Honors.

The conclusion of law that I proposed to the trial court was a conclusion of law which the Court can find at page 163 of the index [sic], where I stated that Mr. Kelley was a, quote "employee", end quote, of the defendant Southern Pacific.

The trial court did not reject a fact-finding of employment, and what the trial court did is it rejected my use of the term "employee" in quotes.

QUESTION: Well, he did reject your proposed Finding II, didn't he?

MR. ENGEL: Well, there were some that he did reject, Your Honor, yes.

QUESTION: Well, I mean that's the one, it seems to me, that has some relevance here. That's the one that seems -- if it's covered at all, it would be covered in fact-finding VIII that he did sign.

MR. ENGEL: Yes, I think he did encompass my fact-

finding II in his fact-finding VIII. There were several of them that were combined up. And one of them, of his, specifically says they had the responsibility and control. I think it's rather clear that he found, as a matter of fact, that they had the control.

And the --

QUESTION: That isn't quite as strong an argument as it would be if he had not been presented with an explicit finding about employment and rejected it, or at least failed to adopt it.

MR. ENGEL: Well, Your Honor, he rejected my use of putting "employee" in quotes, as a conclusion of law.

QUESTION: He could have just taken the quotation marks out of it, if he wanted to find that your man was an employee.

MR. ENGEL: And what he did, though, Your Honor, is that he changed the language of my conclusion of law and added a fact that I -- a conclusion of fact that I had not proposed, and that was his proposed -- or his Finding IX, which specifically -- and I had not offered that.

It says: "The work being performed by the plaintiff" -- and this is the finding that brings the plaintiff within the relationship to Southern Pacific Company because of the nature of the work he was doing.

QUESTION: But he never said that he was an employee.

MR. ENGEL: No, Your Honor, and because --

QUESTION: He rejected that.

MR. ENGEL: He rejected my conclusion of law, where the term "employee" was used, yes.

QUESTION: And that's the word that's used in the statute?

MR. ENGEL: Yes. But in Baker --

QUESTION: And he rejected that.

MR. ENGEL: But in Baker vs. Texas, which is the test, and this -- what is being argued here is that Southern Pacific Company wants this Court now to go back and rephrase or reword or change Baker vs. Texas, wherein this Court, at that time, and what has been the rule for many years now, that you make a factual determination as to whether the person is an employee, as that term is used within the FELA.

It is not that you make a factual determination that the person in fact is an employee, it's a matter of creating a class of individuals on an individual case basis, as to whether an individual fits within the coverage of the FELA.

And what we are doing here is what the Ninth Circuit did not do, and that was to recognize that it's a factual conclusion and a factual determination for the District Court to make, and what is happening is what is happening here.

Each case now would be re-argued and re-argued, because there is no rule coming from this Court as to a guideline whereby the District Courts can use. This Court has set down that guideline in Baker, and it says it's a factual determination for each judge to do in each individual case.

And that's the rule that they're challenging. They want this to have -- be a matter of law, to take away from the District Courts the ability to make a factual determination.

QUESTION: Well, but, Mr. Engel, the conclusion of law you proposed at 163 was that the plaintiff was an employee of the defendant.

MR. ENGEL: In quotes, yes.

QUESTION: The conclusion that Judge Zirpoli reached, the conclusion of law on page 30 of the Appendix, is really quite a different reasoning process, isn't it? Than yours, relying on Baker vs. Texas and Pacific.

MR. ENGEL: Well, I don't think so, Your Honor, because Baker vs. Texas said it's a factual determination depending on what the work that was being performed at the time of a given injury, and what the Court has done in its factual conclusion here is characterized the kind of work that was being done that supported the Court's conclusion that he was entitled to coverage.

QUESTION: But he was unwilling to say that your man

was an employee of Southern Pacific. Judge Zirpoli was.

MR. ENGEL: That's correct. He chose to characterize it by the nature of work as opposed to a label as to whether he's an employee or agent or borrowed servant, or whatever, he characterized it by the nature of work that Mr. Kelley was doing. And because of the nature of work that he was doing, he was entitled to FELA coverage, and that has been the standard test this Court has promulgated since Baker and long before, back in 1927, with regard to the doctrine of borrowed servant. It was the nature of work the individual was doing.

What Southern Pacific wants to do is to eliminate the whole concept --

QUESTION: But didn't he go through that process and conclude, like the Act requires, that this man was an employee of Southern Pacific?

MR. ENGEL: Well, why he chose to characterize it by the nature of work --

QUESTION: Rather than reject your finding.

MR. ENGEL: Wehl, Your Honor, I don't know. All I know is that he chose to characterize it by the nature of work.

QUESTION: Well, I suppose, since he entered an award in favor of your man, that there's implicit in it a finding that he was an employee.

MR. ENGEL: Well, he's -- certainly we have to assume

that the judge is cognizant of what the statute reads, and he cited the statute in his conclusions of law.

QUESTION: Well, he did make an award, didn't he?

MR. ENGEL: Yes.

QUESTION: Right.

QUESTION: A dollar award.

MR. ENGEL: Yes.

QUESTION: And the difference is, in the Smith case, the Court of Appeals explicitly said that the plaintiff there was not an employee, and then they went ahead and said, nonetheless, he's covered by the Act.

MR. ENGEL: No, that's how Southern Pacific characterizes it --

QUESTION: Well, I just read the opinion myself, and I would think that would be helpful to you.

QUESTION: I would think so, too.

MR. ENGEL: What I'm saying is that what Smith said and what the District Court here said is that depending on the type of work that the person was doing, as in Smith, that he does fall within the FELA; and Smith recognized that --

QUESTION: Well, to fall within the FELA, everybody agrees that you have to be an, quote, "employee", unquote, of the railroad.

MR. ENGEL: Yes. And there is no -- the history of having employees of independent contractors covered by the

FELA is not a new concept, and that's what they wish to abolish.

QUESTION: Is it of any significance at all, or relevance, that Kelley has never recognized himself as an employee of the railroad?

MR. ENGEL: Well, the Restatement sets down some thirteen factors, any one of which can be controlling and no one of which is controlling; and one of them is that what the parties understand the relationship, whether he thinks -- regarding who he thinks he is employed by or who they think is their employee. But that is only one factor that this Court has previously said should be used by the court as a guideline.

And I think it's of particular interest, if you will, in my brief I show how the District Court went down and made its findings to almost correlate precisely with the Restatement test, which is the test that they wish to abolish.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:50 o'clock, p.m., the case in the above-entitled matter was submitted.]

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