

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner v. WILLIAM J. HILES

CASE NO: No. 95-6

PLACE: Washington, D.C.

DATE: Monday, January 8, 1996

PAGES: 1-50

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
NORFOLK AND WESTERN :
RAILWAY COMPANY, :
Petitioner :
v. : No. 95-6
WILLIAM J. HILES :

- - - - -X
Washington, D.C.
Monday, January 8, 1996

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
the Petitioner.

LAWRENCE M. MANN, ESQ., Washington, D.C.; on behalf of the
Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ. On behalf of the Petitioner	3
LAWRENCE M. MANN, ESQ. On behalf of the Respondent	21

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 95-6, Norfolk and Western
5 Railway Company v. William J. Hiles.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case involves the proper interpretation of
12 section 2 of the Safety Appliance Act, which is quoted on
13 page 2 of the petitioner's brief, and which states that it
14 shall be unlawful for a railroad to use on its line --
15 excuse me -- any car not equipped with couplers coupling
16 automatically by impact, and which can be uncoupled
17 without the necessity of men going between the ends of the
18 cars.

19 In this case the respondent, a switchman at the
20 rail yard in St. Louis, Missouri, injured his back while
21 attempting to pull a drawbar into alignment that had
22 become misaligned almost certainly as a consequence of
23 having been disconnected from a prior car on a curve.

24 QUESTION: Mr. Phillips, was the drawbar
25 technology essentially the same at the time the statute

1 was enacted as it is today?

2 MR. PHILLIPS: Yes, Justice O'Connor. I don't
3 think there's much in the way of a significant advance
4 since 1893.

5 QUESTION: And so at the time that the statute
6 we're reviewing was adopted, it was necessary for the
7 drawbar to be physically adjusted at times between the
8 cars.

9 MR. PHILLIPS: Yes, Justice O'Connor, I believe
10 that's correct. As the D.C. Circuit said in the Lewis
11 case, that if you accept the notion that any misaligned
12 drawbar violates the Safety Appliance Act, then every
13 railroad has been in noncompliance with that act since
14 1898 when it went into effect, which means that every
15 railroad has been subject since 1898 to \$100 fines for
16 every such violation, which might have actually saved the
17 Federal Government its budget problems today, but clearly
18 would have done so on the back of the railroads in ways I
19 don't think Congress intended.

20 What we have here is an injury that falls far
21 afield from what Congress had in mind in 1893 when it
22 acted to protect railroad workers from the possibility of
23 being crushed between railroad cars as a consequence of
24 the old-fashioned link and coupling devices used.

25 QUESTION: Could you just refresh my memory? If

1 the employee doesn't recover in this suit, what recovery
2 does he have? Is there a workmen's compensation scheme?

3 MR. PHILLIPS: There's the Federal Employers'
4 Liability Act that would have been available to him had he
5 chosen to bring that action. That, of course --

6 QUESTION: Can he still bring that action?

7 MR. PHILLIPS: I would assume at this stage it's
8 too late, that the statute of limitations would have run.
9 It seems to me it was a conscious choice by the employee
10 in this case to bring this action exclusively under the
11 Safety Appliance Act and to do so to obtain the benefits
12 under State law, the --

13 QUESTION: Do you have to show some negligence
14 under FELA?

15 MR. PHILLIPS: He would have to show some
16 negligence under FELA, and respondent has steadfastly
17 avoided any effort to attempt to do that in this case.

18 QUESTION: So, if there's an on-the-job injury
19 with no negligence, is there ever a workmen's compensation
20 scheme?

21 MR. PHILLIPS: Not to my knowledge, no, Your
22 Honor. The required negligence -- it's the only scheme
23 that stands out in this particular way.

24 On the other hand, of course, unlike most
25 workers' compensation schemes, where there is a fairly

1 fixed cap on the recovery, there's no similar cap on the
2 recovery under FELA. As a consequence of that, employees
3 tend to get significant recoveries.

4 QUESTION: The Jones Act picks up on the same
5 thing. So, it's for seamen as well as railroad workers.

6 MR. PHILLIPS: The seamen have the same --
7 that's correct, Justice Ginsburg.

8 QUESTION: You mentioned the Lewis case and as
9 far as fines are concerned, you're certainly right, but
10 what do you make of this statement in Lewis that the
11 railroad's duty is, as far as the worker is concerned and
12 the worker's injury -- it's a duty not just to provide
13 proper equipment, but to guarantee its performance. That
14 seems to say the -- there can be no fine against the
15 railroad but there is a guarantee to the worker.

16 MR. PHILLIPS: I guess I would have two
17 responses to that, Justice Ginsburg. First, I think to
18 the extent that that suggests that there might be some
19 potential claim as a matter of negligence or even a claim
20 under the Safety Appliance Act where the only evidence is
21 a malfunction and no evidence put forward by the railroad
22 as to why the malfunction occurred, that is, to show that
23 -- simply a case of a misaligned drawbar or an unopened
24 knuckle -- sure, there could be recovery under those
25 circumstances, although I wouldn't expect that to happen

1 very often.

2 The alternative, though, is it's difficult to
3 square the broader understanding of that language with the
4 statutory scheme because it's reasonably clear to me that
5 in order to recover under -- through FELA for a Safety
6 Appliance Act violation, it has to be a Safety Appliance
7 Act violation. You cannot stretch the Safety Appliance
8 Act to cover situations that it wasn't designed to cover
9 simply because you end up ultimately obtaining your
10 recompense through FELA as a technical matter. It seems
11 to me you'd have to conclude that a misaligned drawbar is
12 a violation of section 2.

13 QUESTION: Are you saying politely that Judge
14 MacKinnon was incorrect to the extent that he said that
15 the -- that there is a guarantee of the performance?

16 MR. PHILLIPS: I think you can justify that
17 statement in the very limited sense in which this Court
18 has in the past recognized that if all the proof you have
19 is a malfunction and nothing else comes in, there could be
20 liability under those circumstances. To the extent that
21 that's what his statement means, I don't have any quarrel
22 with it.

23 To the extent he goes beyond that, you're right,
24 Justice Ginsburg. I was being polite in suggesting I
25 didn't agree with him.

1 QUESTION: Well, you say that if there's just a
2 malfunction and no evidence produced on the part of the
3 railroad, there could be liability. What would be the
4 theory or the explanation of liability there?

5 MR. PHILLIPS: Why would there be liability in
6 that situation?

7 QUESTION: Yes.

8 MR. PHILLIPS: Well, this Court's decisions
9 suggest that there are essentially two ways to demonstrate
10 a violation of the Safety Appliance Act: either there has
11 been a malfunction of the coupler or there has been a
12 defect in the coupler.

13 In the malfunctioning situation, what the Court
14 says is, we will presume, if it malfunctioned, that it had
15 something to do with an equipment failure.

16 But what the Court said quite plainly in
17 Affolder was that that presumes in the first instance that
18 the couplers were set to operate normally, and if the
19 couplers were not set, in that case by the way, opening of
20 the knuckle -- in our case I submit by way of aligning the
21 drawbar so that the knuckles would in fact connect -- then
22 it seems to me, as the Court said in Affolder, we would
23 have a good defense under that circumstance.

24 So, really the way the particular problem arises
25 simply is a technical kind of pleading problem. If there

1 had been in this case a failed coupling, I think it might
2 have been the case that we would have been required to
3 come forward to show that it was merely still a misaligned
4 drawbar problem, but in this case there was no
5 malfunction. There was no effort in coupling these
6 particular cars and, therefore, we were never even put to
7 the necessity of making that particular proof, Mr. Chief
8 Justice.

9 QUESTION: So, you say your case differs from
10 the hypothetical in that there was no malfunction here?

11 MR. PHILLIPS: That's correct, Mr. Chief
12 Justice. We have no malfunction and we have no defect.
13 And when you don't have either of those things, I would
14 have said that the Safety Appliance Act issue comes to a
15 close.

16 Respondents, however, because they can't satisfy
17 the traditional standards that this Court has adopted has
18 posed two much broader tests to be applied. One is, is
19 that anytime you have a coupling problem which requires an
20 employee to go between the ends of two cars, tracking the
21 end language of section 2 of the Safety Appliance Act,
22 that then any injuries that arise under those
23 circumstances ought to be compensable under section 2
24 through FELA.

25 And our answer to that is that that simply

1 defies the language of that statute. That -- this is not
2 a statute that imposes operational restrictions on how
3 railroads go about their business. What the language
4 about going between two cars does is fairly describe the
5 type of coupler that Congress meant to require in 1893.
6 And a little bit of history here goes a long way to giving
7 content to that particular phrase.

8 What we knew at the time was that in 1893
9 automatic couplers were fairly new to the scene, and
10 Congress did not want to mandate any particular type of
11 coupling and uncoupling mechanism. It simply wanted to
12 describe the type of a device that it wanted implemented
13 by 1898, and therefore what the -- as the Court again in
14 the D.C. Circuit said in the Lewis case, what we know is
15 that that independent requirement about going between cars
16 is not itself an independent prohibition under the act.

17 Part of the reason we know that it can't be
18 really a significant independent requirement under the act
19 is it doesn't even modify, by its own terms, the fact of
20 coupling.

21 Now, this Court has applied that language to the
22 coupling as a reasonable, I think, interpretation of
23 probably Congress' intent, but it seems quite unlikely
24 that Congress would have meant to make going between cars
25 the ultimate sort of sine qua non of a violation of the

1 Safety Appliance Act and not had that language actually
2 modify, by its own terms, that coupling process.

3 QUESTION: Can I ask you a technical question?
4 There isn't a drawing anywhere of what these things look
5 like I guess in the record, is there?

6 MR. PHILLIPS: In the record --

7 QUESTION: It would have been helpful because
8 I'm trying to figure it out and I might have gotten this
9 wrong. I guess what it is is a car like this.

10 MR. PHILLIPS: Right.

11 QUESTION: And then there's a thing that juts
12 out from the car.

13 MR. PHILLIPS: Drawbar.

14 QUESTION: And it has a knuckle on the end.

15 MR. PHILLIPS: Right.

16 QUESTION: And the thing that juts out is a
17 drawbar.

18 MR. PHILLIPS: Right.

19 QUESTION: And sometimes you have to have a
20 little give because it moves back and forth when they go
21 around curves. And sometimes when it gets over here, it
22 gets stuck over here.

23 MR. PHILLIPS: Right.

24 QUESTION: And then the person has to go between
25 the car and move it back here.

1 MR. PHILLIPS: Right, although --

2 QUESTION: Is that right?

3 MR. PHILLIPS: -- when he does that, obviously,
4 he doesn't have to be right between the cars. The cars
5 can be quite far apart.

6 QUESTION: Well, why didn't somebody think of
7 just putting a spring on it so the spring makes it come
8 back?

9 MR. PHILLIPS: I assume -- I mean, there have
10 been experiments made over the past 80, 90 years trying to
11 come up with a mechanism to make it spring back, and --

12 QUESTION: Actually my law clerk found one in
13 the Car Locomotive Cyclopedia for 1974. They have four
14 pictures, and it says, this is a device. It keeps a free
15 coupler centered in relation to the end. If the coupler
16 is swung wide when disengaged from another, the device
17 instantly returns it to center position.

18 MR. PHILLIPS: Right.

19 QUESTION: Is that what we're talking about?
20 They have four pictures of it.

21 MR. PHILLIPS: I assume that would be one of
22 the --

23 QUESTION: And he also found a place where -- he
24 was quite ingenious to find all this stuff, but he found a
25 place where they're doing research right now. It says 4

1 percent of the employee's lost time is associated with
2 uncoupling locomotives, and we're going to do a research
3 project.

4 They're -- but my point is that this material
5 I'm reading to you makes it sound as if the problem is a
6 design problem. It isn't just a maintenance problem.

7 MR. PHILLIPS: No. I --

8 QUESTION: And if it's a design problem and not
9 just a maintenance problem -- I'm sure Congress didn't
10 want to stop people from going in between cars to maintain
11 oil --

12 MR. PHILLIPS: Right.

13 QUESTION: -- rust-free paint, but they did have
14 in mind designing.

15 MR. PHILLIPS: Well, that goes to the second
16 broad theory that the respondents put forward, which is
17 that you really have a duty to come up with some system to
18 realign these drawbars.

19 QUESTION: Why not?

20 MR. PHILLIPS: The statute says --

21 QUESTION: I mean, why not? If 4 percent of
22 people's lost time is lost because of the -- I'm not
23 saying that I -- how I view this case.

24 MR. PHILLIPS: No, no.

25 QUESTION: I'm simply trying to figure out, is

1 it more like maintaining, you oil the thing, or is it more
2 like designing a better coupler? So, I look at this stuff
3 and say, well, 4 percent lost time, the Association of
4 Railroads says we're going to do research. This is a --
5 they have four drawings of springs. It sounds like design
6 and if it's design, isn't that the kind of problem
7 Congress had in mind?

8 MR. PHILLIPS: Well, I don't think it's the kind
9 of problem Congress had in mind because we know that
10 Congress dealt specifically with drawbars in the Safety
11 Appliance Act itself and in section 5 said, set up a
12 drawbar at a certain height. So, Congress knows the
13 difference between coupling mechanisms and the drawbar,
14 and Congress dealt with the drawbar.

15 Now, with respect to --

16 QUESTION: Well, how do we know that the drawbar
17 is not part of the coupling device?

18 MR. PHILLIPS: Well, we can -- we know that
19 Congress at least viewed them differently because section
20 2 talks about coupling couplers and section 5 talks about
21 drawbars. So, Congress at least had in mind the
22 possibility of the two being distinct, and as a
23 consequence of that, that seems to me a reasonable basis
24 for answering Justice Breyer's point.

25 QUESTION: No, but they had -- the old system

1 was a system where you had a thing sticking out of the car
2 called a drawbar.

3 MR. PHILLIPS: Right.

4 QUESTION: And it had a link at the end.

5 MR. PHILLIPS: Right.

6 QUESTION: And the link went inside another
7 drawbar, I take it, called a pocket, and then you dropped
8 a pin in.

9 MR. PHILLIPS: Right.

10 QUESTION: So, you'd think the coupling system
11 was that whole thing, wouldn't you? The thing that sticks
12 out, the link, the pin, and --

13 MR. PHILLIPS: I'm not trying to draw too fine a
14 distinction here. All I'm saying is that Congress clearly
15 had the two different things in mind. This is an
16 automatic coupling requirement, not an automatic
17 realignment of the drawbar requirement. And the fact that
18 Congress discussed specifically drawbars simply creates an
19 inference to me that Congress didn't go as far as what the
20 respondents have proposed as far as the obligations under
21 the Safety Appliance Act.

22 I think the more fundamental --

23 QUESTION: Well, excuse me. I thought your
24 fundamental response is simply even if that were so, this
25 is not what Congress meant by the necessity of men going

1 between the ends of cars.

2 MR. PHILLIPS: Right.

3 QUESTION: They're talking about going between
4 the ends of cars to effect the immediate coupling or
5 uncoupling.

6 MR. PHILLIPS: Right. My -- well, my -- it
7 seems to me the respondent has made two arguments. One is
8 based on that language, and I don't think that language
9 carries with it an independent substantive requirement.

10 Now, the respondents do make the alternative
11 argument that under any circumstances we should have some
12 kind of a duty to guarantee that drawbars can be realigned
13 regardless of what it takes, that we have a technological
14 responsibility that goes forward.

15 And all I was trying to say to Justice Breyer is
16 I don't think that's what this statute ever had in mind.
17 I don't see anything in the language of the statute that
18 would support it, and indeed, the absence of an
19 independent requirement of having to go between the cars
20 is the complete --

21 QUESTION: Argument. It becomes part of that
22 same argument.

23 MR. PHILLIPS: I may have parsed their argument
24 too finely for that purpose, but I do think the point
25 remains the same which is there is no duty on the

1 railroads to devise the kind of technological change that
2 Justice Breyer --

3 QUESTION: How many injuries were there last
4 year, if you know, approximately caused when people went
5 between cars to realign misaligned drawbars? Do we know
6 the answer to that question?

7 MR. PHILLIPS: The answer to that was -- is in
8 the footnote in our brief. As I recall, it depends on
9 which years you pick. One year there was one death and a
10 handful of injuries.

11 QUESTION: But is that -- I know that -- I do
12 recall I had some numbers on that, but I didn't know that
13 that was related to going between cars to cure the problem
14 of misaligned drawbars.

15 MR. PHILLIPS: I don't think anybody collects
16 the data on that close a point. I think what they do is
17 they collect data on coupling problems, and then whatever
18 coupling problems may -- presumably you could have an
19 injury if somebody is going in to lubricate the coupler so
20 that --

21 QUESTION: Yes.

22 QUESTION: The statute in any case requires the
23 necessity of going between the ends of the vehicles.
24 Right?

25 MR. PHILLIPS: Yes, Your Honor.

1 QUESTION: And someone might be injured going
2 between the ends of vehicles when it was not necessary if
3 the vehicles closed while the person is in there.

4 MR. PHILLIPS: Right.

5 QUESTION: But your point is, I take it, that
6 there's no necessity of going between the ends of vehicles
7 within the meaning of the statute --

8 MR. PHILLIPS: Within --

9 QUESTION: -- with this coupling system.

10 MR. PHILLIPS: That's correct, within the
11 meaning of this statute.

12 QUESTION: And this individual wasn't hurt by
13 reason of being between the two cars at all. He strained
14 his back as I gather, trying to straighten it out.

15 MR. PHILLIPS: That's right. If he had --

16 QUESTION: It could have happened if the car had
17 been up on a mount.

18 MR. PHILLIPS: Absolutely. If he had been asked
19 to bring a coupler in and put it on the end of the drawbar
20 and picked up the coupler and injured his back, he would
21 have exactly the same injury and exactly the same
22 situation, but there wouldn't be a serious argument that
23 that violated the Safety Appliance Act. Again, that's a
24 situation where the Federal Employers' Liability Act would
25 apply.

1 I do want to answer Justice Breyer's one concern
2 about this technology and whether it exists. The most
3 recent evidence I saw from the AAR was that on the devices
4 that have these kinds of springs, something in the
5 neighborhood of 30-some percent were the only -- were in
6 operation -- were actually working, even on -- where they
7 have those devices. For some reason -- and I don't
8 frankly know the technical explanation for it, but for
9 some reason these springs don't hold up very well and in
10 that sense probably pose at least as much of a risk of
11 having people go in there --

12 QUESTION: Is this in the record, Mr. Phillips?

13 MR. PHILLIPS: This is in the D.C. Circuit's
14 opinion in the Lewis case. There's a discussion of this
15 evidence. That's all. I just mentioned it for that
16 purpose.

17 QUESTION: The reason that I find it quite
18 relevant -- and I'm uncertain about how to proceed -- is
19 if in fact there are a lot of people who are hurt by this
20 and they have to go between the cars to realign the
21 drawbars and you could cure it at very little expense with
22 a rubber band or a spring, perhaps it does fall within the
23 statute which was worried about going between the bars and
24 being hurt for coupling.

25 MR. PHILLIPS: Well, I would go back --

1 QUESTION: If it's just like maintenance where
2 you oil it occasionally, then it wouldn't.

3 MR. PHILLIPS: Well, I would go back to Justice
4 Scalia's point because I think you cannot get to that
5 stage unless you conclude that there is an independent
6 prohibition against going between cars. And that I don't
7 think the purpose or the language of this statute will
8 sustain. And as a consequence of that, to the extent that
9 there is a problem that requires a resolution, whenever
10 they get back in order again, it should be dealt with
11 across the street and not by the Court here.

12 At the end of the day, what we have here is an
13 injury that is nowhere near the kinds of injuries that
14 Congress had in mind when it enacted the Safety Appliance
15 Act in 1893. This is an injury that is fully compensable
16 if there has been negligence by the railroad under the
17 Federal Employers' Liability Act.

18 In addition to that, of course, the railroad
19 would have the opportunity under those circumstances to
20 demonstrate contributory negligence and thereby reduce the
21 employee's recovery as a consequence of that contributory
22 negligence.

23 I think that is a balanced scheme and that this
24 Court ought not to unbalance that scheme by giving the
25 Safety Appliance Act an unduly broad interpretation. For

1 that reason --

2 QUESTION: Mr. Phillips, I think Judge MacKinnon
3 was writing as of -- what -- 1983, and he said that after
4 90 years that the automatic realigning devices, as
5 distinguished from automatic coupling devices, are still
6 in the experimental stage and had been installed on less
7 than 1 percent of the railroad cars.

8 MR. PHILLIPS: Right.

9 QUESTION: That was as of 1983 he was writing,
10 and what you're saying is that since that time there has
11 not been any significant change.

12 MR. PHILLIPS: As I understand it, there has not
13 been any significant technological advance that would
14 eliminate what problems existed in the past. That's my
15 understanding. Again, none of this happens to be in the
16 record, though.

17 If there are no other questions, I'd reserve the
18 balance of my time.

19 QUESTION: Very well, Mr. Phillips.

20 Mr. Mann, we'll hear from you.

21 ORAL ARGUMENT OF LAWRENCE M. MANN

22 ON BEHALF OF THE RESPONDENT

23 MR. MANN: Mr. Chief Justice, and may it please
24 the Court:

25 I have a photograph that may assist the Court.

1 This is the actual car that was involved in the accident.

2 QUESTION: Where in the record -- is that a
3 photograph of something that's in the record?

4 MR. MANN: That's an exhibit, Your Honor.

5 QUESTION: An exhibit.

6 MR. MANN: Yes.

7 And what I want to point out to the Court is
8 that the rail industry has dealt with only one aspect of
9 coupling and uncoupling. They have dealt with the
10 uncoupling process. They have provided a lever here that
11 you see which allows the coupler to uncouple without the
12 necessity of anyone going in between the cars.

13 What they haven't addressed is the coupling
14 procedure. They have not touched the coupling device to
15 prevent it from going back and realigning. And, Justice
16 Breyer, the passenger service in this country has that
17 type of device in effect. They use it and they use it
18 without major problems.

19 The freight industry --

20 QUESTION: Do we know that from the record?

21 MR. MANN: Mr. Chief Justice, I was involved in
22 the case at this --

23 QUESTION: Do we know that from the record what
24 you just --

25 MR. MANN: Not the record. It's in my brief.

1 QUESTION: I -- yes, I suspect you -- I suggest
2 you confine yourself to the record.

3 MR. MANN: The point is that this is a
4 performance standard statute. The Congress was not
5 concerned with how the industry attempted to prevent
6 employees from going in between the cars. They said to
7 the industry, take care of the problem in coupling and
8 uncoupling. Take care of that problem. Do not allow the
9 employees to go between the cars in either process.

10 QUESTION: Mr. Mann, I assume when that coupling
11 device is initially manufactured, somebody had to be there
12 to put it on. Right? And the car that that car would
13 first be coupled to was somewhere down maybe miles away,
14 but it was somewhere down the railroad tracks.

15 MR. MANN: Correct.

16 QUESTION: And one could say that the person who
17 installed that coupler was going between the two cars,
18 namely, between the car he manufactured and the car it
19 would ultimately be coupled to.

20 Now, do you think that's what the statute refers
21 to?

22 MR. MANN: No, sir.

23 QUESTION: Well, he was going between the cars.

24 MR. MANN: Only the --

25 QUESTION: Okay. So, we have to draw a line

1 somewhere. Right? It has to be --

2 MR. MANN: Only the process of coupling and
3 uncoupling. The maintenance testing and inspection of the
4 car -- there is no problem here.

5 QUESTION: All right.

6 Now, is the process of coupling or -- you say
7 the process does not begin with the installation of the
8 coupler.

9 MR. MANN: It does not.

10 QUESTION: Why does it begin with the setting of
11 the coupling mechanism so that they will engage properly?

12 MR. MANN: Because it will not engage unless
13 it's set properly.

14 QUESTION: It will not engage if it's not
15 installed either.

16 MR. MANN: But that is not covered under the
17 statute, Justice Scalia.

18 QUESTION: I agree but I don't see why setting
19 the arm is covered either. It seems to me what the
20 statute addresses is the immediate action of coupling and
21 uncoupling which is physically risky because in the old
22 days the employees faced the necessity, which is what the
23 statute refers to -- the necessity of going between the
24 cars while they were close together and in the process of
25 coupling.

1 MR. MANN: This --

2 QUESTION: That isn't necessary now in order to
3 set the arms.

4 MR. MANN: This Court has already ruled many
5 years ago in a case called Wagner there as no movement of
6 the car. You don't have to have movement of the car.

7 QUESTION: I'm talking about movement. I'm
8 talking about whether the act in question is an act that
9 is involved where the cars are necessarily in proximity
10 because they are in the act of coupling or uncoupling.

11 MR. MANN: It's not only the proximity, but in
12 the preparation of the coupling.

13 QUESTION: Oh, but you say that installing
14 the --

15 MR. MANN: That's not preparation of the
16 coupling, Justice Scalia.

17 QUESTION: It isn't?

18 MR. MANN: No.

19 QUESTION: You don't think putting it in in the
20 first place is preparation?

21 MR. MANN: No. It's not in the preparation of
22 coupling. No, sir. That could be in a shop somewhere.

23 QUESTION: Well --

24 MR. MANN: That's certainly not in the
25 preparation of coupling in my judgment.

1 QUESTION: I see. I see. So, installing it
2 wouldn't have been --

3 MR. MANN: No.

4 QUESTION: -- wouldn't have been covered.

5 MR. MANN: No.

6 QUESTION: But as soon as he installs it, he
7 moves the arm to the proper central position. Then he is
8 covered. That's --

9 MR. MANN: I disagree. No, sir. Not until the
10 cars are on the tracks --

11 QUESTION: Within some proximity.

12 MR. MANN: Some proximity.

13 QUESTION: I see. Okay. So, we're talking
14 about how much proximity?

15 MR. MANN: I don't think it matters --

16 QUESTION: How much proximity was there here?

17 MR. MANN: I think there was a car length or
18 maybe two, but it doesn't matter. The fact is if the
19 employee has to go in preparation of the coupling
20 procedure, it doesn't matter what time or how long that
21 time is in his work day. The purpose is to prevent that
22 employee from going in between the cars for coupling or
23 uncoupling so that if that car sits on the track, say,
24 even an hour, so long as it is in preparation of the
25 coupling procedure, I submit to you, Justice Scalia, it's

1 covered.

2 QUESTION: The language, it seems to me, at
3 issue here in the revised statute is couplers coupling
4 automatically by impact without the necessity of
5 individuals going between the ends of vehicles.

6 MR. MANN: It could not happen in this case. It
7 could not happen because this drawbar was skewed, and had
8 the crews attempted to push the cars together to collide
9 for coupling, it would have never happened.

10 QUESTION: What is your distance that you -- you
11 say two car lengths is not enough. What about 10 car
12 lengths?

13 MR. MANN: It doesn't matter as long as --

14 QUESTION: Half a mile? Half a mile?

15 MR. MANN: If it's in the same track and they're
16 going -- and the locomotive is ready to push that car and
17 it -- this was an operation. We had locomotive in the
18 track. They were ready to push the cars together. That's
19 why the employees were required to align it. They were
20 ready to do it.

21 QUESTION: And they don't have to be in the
22 process -- the immediate process of coupling.

23 MR. MANN: Well, they were. They were in the
24 preparation. They couldn't couple --

25 QUESTION: I mean, yes, manufacturing is

1 preparation in a sense too. You have to draw the line
2 somewhere.

3 MR. MANN: I agree.

4 QUESTION: And it seems to me under this statute
5 the reasonable line to draw it is when the cars about to
6 be humped together in order to effect the coupling or are
7 being pulled apart in order to disengage it.

8 MR. MANN: Well, I submit, Justice Scalia, the
9 immediate preparation of that car so that that could occur
10 would be encompassed there.

11 QUESTION: Well, Mr. Mann, I have trouble
12 knowing why we should interpret the statute -- the word
13 coupler -- as including the drawbar. I'm not sure it
14 does.

15 MR. MANN: Justice O'Connor --

16 QUESTION: They may well be different things.
17 They are dealt with differently in the statute. And one
18 could envision a coupler as not including the drawbar as
19 such.

20 MR. MANN: But the drawbar is all part and
21 parcel -- there's the draw head, which is the actual
22 coupling device, and then it is attached in one solid
23 piece of equipment. It's not separate in any way. It's
24 one solid piece of equipment -- this whole drawbar -- and
25 part of that is the head of the drawbar.

1 QUESTION: But it appears from the language used
2 in the different sections of the statute that Congress saw
3 these as different things.

4 MR. MANN: I -- they dealt with particular parts
5 of the whole drawbar, but they're not different. It's all
6 part and parcel of the same piece of equipment. It's not
7 -- you can't detach it. I mean, you could -- legally you
8 could take the whole part off, but you don't take one off
9 and leave the rest sitting there. I --

10 QUESTION: It seems like what they were after
11 was a system to replace the old method where somebody had
12 to go between the cars to put the pin in to couple the
13 cars.

14 MR. MANN: That's correct.

15 QUESTION: And that it was this joinder business
16 where they come together and the old pin used to have to
17 go that they were talking about --

18 MR. MANN: Correct.

19 QUESTION: -- not the drawbar that swings back
20 and forth of necessity to allow the train to turn.

21 MR. MANN: But that pin could never have been
22 placed in the train unless they were together.

23 QUESTION: Well, but it's sort of the -- you
24 know, the head bone is connected to the neck bone is
25 connected to the backbone, et cetera.

1 MR. MANN: Yes.

2 QUESTION: And at some point they're all one.

3 MR. MANN: I agree.

4 QUESTION: But I'm not sure that's the case
5 here.

6 MR. MANN: Well, I think it is important to go
7 back. What was Congress trying to prevent here? Injuries
8 and deaths. And how could they do it? The only way
9 they --

10 QUESTION: Well, but the most common thing was
11 this business of having to put in the pins. That's what
12 they were focusing on. They didn't want people to have to
13 go in there and physically drop in the pins.

14 MR. MANN: Correct. That's part of it.

15 QUESTION: But I -- it is not apparent to me
16 that they were concerned about the necessity of
17 occasionally moving the drawbar.

18 MR. MANN: Well, you did not have the same type
19 of technology at that time as you have today. Congress --
20 it is a performance standard, Justice O'Connor, and being
21 a performance standard, Congress didn't care how you do
22 it. Congress said to the industry, do it, protect the
23 employee in this procedure.

24 QUESTION: Could you have done it in 1893? In
25 other words, we've heard talk about what the technology

1 may or may not allow today. What do we know about the
2 technology in 1893? I gathered from Judge MacKinnon's
3 opinion that he was assuming the technology didn't exist
4 in 1893 so that in fact one -- on your theory of the
5 statute, the railroad could not have conformed in these
6 situations.

7 MR. MANN: But, Justice Souter, Judge MacKinnon
8 stated, misaligned drawbar or a closed coupler is
9 sufficient to establish liability under section 2.

10 QUESTION: Well, I'm talking about what he was
11 saying about the technology.

12 MR. MANN: The technology.

13 QUESTION: Did the technology exist in 1893 to
14 -- in effect, to conform to the standard of the statute as
15 you read it?

16 MR. MANN: Not at that time, but I think that
17 that --

18 QUESTION: Well, why would Congress have passed
19 a statute which assumed a technology that didn't exist?
20 If that's what it wanted to do, why wouldn't -- why
21 wouldn't it have been a lot simpler for Congress to say,
22 look, the railroads are absolutely liable without fault
23 whenever anybody gets hurt between two cars? If that's
24 what they wanted to accomplish --

25 MR. MANN: No.

1 QUESTION: -- why didn't they say that instead
2 of writing a statute which is couched in terms of what is
3 mechanically possible and at a time when it was not
4 mechanically possible to guarantee the kind of degree of
5 safety that you claim is inherent in the standard of
6 obligation?

7 MR. MANN: I think there are -- there may be two
8 answers to that. First of all, technology was just
9 emerging. Congress didn't know nor did it concern itself
10 with how this performance standard was to be performed.
11 What Congress was concerned with is protecting the worker
12 during that procedure, whatever that procedure is. And I
13 could envision, Justice Souter, of having a large rod
14 standing on the outside of the car and simply pushing it,
15 but the industry hasn't provided that.

16 QUESTION: Well, let me ask you another
17 question. It's a simple question and it goes to what I'm
18 seeing in that picture. Why doesn't the -- why isn't it
19 possible for that lever, which the picture shows, to align
20 the drawbar prior to coupling?

21 MR. MANN: Well, I'm not saying the technology
22 could not be devised.

23 QUESTION: It just looks as though that's what
24 it could do and maybe it isn't.

25 MR. MANN: Well, here it's attached. It doesn't

1 provide any movement. It's just an open and shut type of
2 lever here. But I --

3 QUESTION: What does it open and shut? The
4 knuckle?

5 QUESTION: It pushes the pin in.

6 MR. MANN: It opens this part here so that --

7 QUESTION: Oh, oh, I see. It doesn't move the
8 bar back and forth.

9 MR. MANN: No, it doesn't. It just opens.

10 QUESTION: I see.

11 MR. MANN: I'm not suggesting that they couldn't
12 devise it. It's not unlike the old Pinto cases where it
13 took \$10 to put a valve in. It's cost. It's just
14 economics. It's all it is.

15 QUESTION: It didn't take a century for somebody
16 to get on the Pinto. You're saying that this thing was in
17 violation of the law for a century. Was there any Federal
18 agency charged with enforcing this?

19 MR. MANN: Starting in 1970.

20 QUESTION: Before 1970, there was --

21 MR. MANN: With the Interstate Commerce
22 Commission.

23 QUESTION: Of happy memory.

24 (Laughter.)

25 QUESTION: For a century it had the authority to

1 enforce this thing and did nothing about it you're telling
2 us.

3 MR. MANN: Well, I don't know that. I'm not --

4 QUESTION: You don't know the contrary either.

5 MR. MANN: I -- that's not in the record
6 anywhere that there was no enforcement.

7 QUESTION: I know. That's exactly what I'm
8 pointing out. This thing has been going on for a century
9 and we have no indication not only of anybody recovering
10 previously because of this safety defect, but of any
11 Federal agency trying to enforce the safety requirement.

12 MR. MANN: The -- two things. One is the Court
13 has addressed injuries occurring in this type of
14 situation, not specifically the misalignment, but in
15 other --

16 QUESTION: Mr. Mann, apart from what the courts
17 have done, in response to Justice Scalia's question, isn't
18 the Lewis case highly relevant because that was an agency
19 regulation?

20 MR. MANN: Yes.

21 QUESTION: It was a regulation that said it's
22 okay to use this hook procedure.

23 MR. MANN: That's correct.

24 QUESTION: Now, do I understand your reasoning
25 with respect to the drawbar to be inconsistent with the

1 result that was reached in Lewis that it was not -- it was
2 okay to have this regulation that permitted the hook
3 procedure, even though it involved going between the cars
4 at least with part of one's body?

5 MR. MANN: The only part of one's body -- if you
6 recall, Justice Ginsburg, the hook came into play after
7 the coupler was opened part way. This is not totally
8 effective and efficient because it doesn't always open it
9 fully. So, in Lewis, there was an additional hook used
10 and the employee stood beside the car, of course had to
11 reach his arm inside, and pull it out. That's that piece
12 of equipment that was used in Lewis.

13 And the court -- I mean, I can't take issue with
14 the decision of the court, but the court further said in
15 that case that if there is a misaligned drawbar, then that
16 is covered as a violation under section 2 of the act. And
17 that's just what we have here.

18 QUESTION: Could you tell me a little bit about
19 your rule of causation and tell me what the rule of
20 causation is?

21 Suppose the employee sees the misaligned drawbar
22 and he walks quickly to correct it before he gets between
23 the cars and stumbles and hurts himself. Is there
24 liability?

25 MR. MANN: No. I don't think there's liability

1 because I think you have a super-intervening cause.

2 QUESTION: If he stumbles in between the cars,
3 is there liability?

4 MR. MANN: Until he -- I think there's a super-
5 intervening cause. Until -- there's -- well, first of
6 all --

7 QUESTION: Well, there's cause in fact. If it
8 hadn't been for the drawbar, he --

9 MR. MANN: Yes.

10 QUESTION: -- wouldn't have moved and wouldn't
11 have stumbled.

12 MR. MANN: The violation exists.

13 QUESTION: So, there must -- so, you must be
14 saying that there is some requirement of proximate
15 causation between the defective operation of the mechanism
16 and the injury.

17 MR. MANN: There --

18 QUESTION: You would agree with that.

19 MR. MANN: Yes.

20 And I further state that there already was the
21 violation, Justice Kennedy. The violation occurred
22 because there was the necessity of the employee to even
23 have to go in between. The violation already occurred.
24 Now, whether or not there's causation for recovery is a
25 different issue, of course, but as far as the violation of

1 section 2, it exists once there is a skewed drawbar.

2 QUESTION: One obvious reason --

3 QUESTION: But in --

4 QUESTION: Sorry.

5 QUESTION: One more quick.

6 In this case, as I understood it, your position
7 is that the -- whether or not the drawbar was stuck was
8 irrelevant, but it seems to me that -- am I wrong about
9 that?

10 MR. MANN: It's not irrelevant. The Court has
11 held in a number of cases that you do not have to
12 establish a defect in a car to prove violation of section
13 2. Affolder was one, a O'Donnell case, Carter case.
14 There are several cases, and the Court said that over and
15 over. And that's the gist of the railroad's argument
16 here, that you must show a defect before you can recover.

17 But if -- if -- the performance requirement is
18 not there, this statute says that's a violation because
19 it's up to the carrier to protect the employee.
20 Otherwise, you're going to continue to have employee
21 injuries and deaths.

22 QUESTION: And what exactly is the performance
23 requirement that you deduce from the statute?

24 MR. MANN: Mr. Chief Justice, I am saying that
25 the performance requirement is that in every case, not

1 just in -- when there's moving equipment, not just when
2 there's a defect, in every case where the couplers do not
3 couple automatically and cannot couple automatically
4 because of the way the equipment is designed, that there's
5 a violation.

6 QUESTION: Even if it's a --

7 MR. MANN: Yes.

8 QUESTION: Even if it's a misalignment and not
9 an actual failure of the coupler.

10 MR. MANN: That's correct. And the Court has
11 already ruled on that, that you do not have to show a
12 failure.

13 QUESTION: Yes, but I don't think they've
14 extended beyond failure of the couplers.

15 MR. MANN: This is a failure of the coupler.

16 QUESTION: In what respect?

17 MR. MANN: Because it can't couple
18 automatically.

19 QUESTION: But it wasn't designed to couple if
20 the thing is misaligned.

21 MR. MANN: But that's the whole point of our
22 case, Mr. Chief Justice. If the statute doesn't mean that
23 it must be aligned, of course, then we lose, but any --

24 QUESTION: Mr. Mann, aren't you leaving
25 something out when you say the employee doesn't have to

1 show any defect and you cited the Affolder case? But the
2 employer then, the railroad, can show there was no defect,
3 and that's a defense.

4 MR. MANN: The Court has held in several cases
5 that's not the fact. That is totally immaterial to the
6 case.

7 QUESTION: What case holds that the employer
8 comes in -- employee comes in and the employee then --
9 railroad then says there was no defect?

10 MR. MANN: I think O'Donnell case is clearly on
11 point. So is Carter. O'Donnell, they said it doesn't
12 matter that you expect too much of the coupler.
13 Specifically the Court stated that.

14 QUESTION: What is the case that says it is not
15 a defense that the appliance was not defective?

16 MR. MANN: I think those three cases would hold
17 that. I think a fair reading of O'Donnell would so state
18 that.

19 QUESTION: Can I ask you what was -- reference
20 Justice Kennedy's question, in this case wasn't the injury
21 he hurt his back?

22 MR. MANN: In pushing, he -- what he attempted
23 to do --

24 QUESTION: Yes.

25 MR. MANN: -- Justice Breyer, is push it back in

1 line.

2 QUESTION: But is that the kind of injury that
3 Congress was worried about in passing the statute? I
4 would have thought that people being crushed or something
5 or having their fingers stuck in the pins.

6 MR. MANN: That was certainly part of it.

7 QUESTION: Was it -- I mean, you can hurt your
8 back pushing anything in a railroad.

9 MR. MANN: But it's not -- anything is not
10 covered. This is the only thing that Congress was
11 concerned about, this procedure. It's so dangerous,
12 and --

13 QUESTION: Because of bad backs because of
14 pushing it, or because that you might get crushed?

15 MR. MANN: Well, either.

16 QUESTION: Either?

17 MR. MANN: You --

18 QUESTION: But aren't there a lot of heavy
19 things that you push in the railroad?

20 MR. MANN: Yes, but not everything is of course
21 a problem as --

22 QUESTION: Is there any indication that what
23 Congress was worried about was the fact that it was heavy
24 and you might hurt your back pushing it, any part of this
25 device?

1 MR. MANN: Well --

2 QUESTION: Any part of the previous device?

3 MR. MANN: I submit it was broader than that.
4 They wanted --

5 QUESTION: Was there anything that suggests it
6 was at least as broad as to catch that? I mean, is there
7 anything about bad backs and pushing things?

8 MR. MANN: Not bad backs per se.

9 QUESTION: Well, pushing. Pushing. You hurt
10 your muscle because you pushed.

11 MR. MANN: No, because Congress envisioned that
12 it wouldn't be necessary.

13 QUESTION: What I'm actually thinking too is one
14 reason why this might not have come up before before the
15 railroad commissions is no one has ever been hurt by this
16 in a way in which Congress was worried about. That is,
17 their footnote says one person is killed and 136 injured
18 in all coupling and decoupling accidents, of which pushing
19 drawbars or having anything to do with misaligned drawbars
20 must be a subset.

21 And so is there any information that anyone has
22 been hurt in the manner that Congress foresaw by crushing
23 or hands or something to do with it being a car other than
24 just being a heavy weight to push? Ever?

25 MR. MANN: The Federal Railroad Administration

1 in the accident/incident bulletins, Justice Breyer, is --
2 has a breakdown of those that were injured in moving
3 equipment, those that were injured in non-moving
4 equipment, those that were killed in both --

5 QUESTION: And what is the answer then as to how
6 many people were injured or killed in dealing with
7 misaligned drawbars?

8 MR. MANN: I can't -- I don't know.

9 QUESTION: We couldn't find it. We looked for
10 it. We couldn't find it.

11 MR. MANN: I don't know. But they do keep
12 statistical data and whether it's broken down that
13 specific, I can't answer.

14 QUESTION: So, then is the -- if I thought that
15 really what I'm trying to distinguish here is between what
16 I'd call routine maintenance of things that occasionally
17 cause trouble and serious design problems -- and a serious
18 design problem has to do with numbers and the kinds of
19 injuries Congress thought about -- then wouldn't I have to
20 decide this against you because the record isn't --
21 doesn't have that information and I can't get it enough?

22 MR. MANN: Well --

23 QUESTION: Or would I decide in your favor on
24 some presumption? I don't --

25 MR. MANN: Well, I -- if you determined that

1 this is not a design issue, then of course we would lose,
2 but in all due respect --

3 QUESTION: And how can we decide if it's a
4 design issue if we don't have numbers that tell us how
5 many people are hurt or killed compared with, let's say,
6 the difficulty of doing the redesign?

7 MR. MANN: Well, if a design is required,
8 Justice Breyer, why does it matter how many? If they
9 require --

10 QUESTION: Because in fact you wouldn't have to
11 spend the entire gross national product to save somebody
12 from having a bad finger because design is always a
13 question of what kind of problem is caused to people and
14 how difficult is it to solve the problem.

15 MR. MANN: Certainly Congress in 1893 didn't
16 know what the problem was going to be in 1996, but they
17 did know enough about that procedure to say make it safe
18 for the employee.

19 QUESTION: And safe is itself a word that
20 implies that failure to do it hurts somebody and it's
21 possible to redesign your way out of it. So, in that --

22 QUESTION: Mr. Mann, the safe that they're
23 concerned about is not back safety.

24 I don't see how you win if it's a design defect
25 either. For all we know, the ultimate design that comes

1 to solve the problem you're concerned with is a design
2 that enables this arm to be adjusted from inside the
3 railroad car with just as much physical effort as it takes
4 to do it from outside or from the side of the car so that
5 he doesn't have to go between the car, but he still has to
6 push just as hard. He would have hurt his back just the
7 same way.

8 MR. MANN: He would not have had a violation of
9 section 2. There may be some other violation but not of
10 section 2.

11 QUESTION: Mr. Mann, in O'Donnell the Court says
12 on page 389, we hold that the Safety Appliance Act
13 requires couplers which, after a secure coupling is
14 effected, will remain coupled until set free by some
15 purposeful act of control. It seems to me that's far
16 short of standing for what you say it stands for.

17 MR. MANN: But in --

18 QUESTION: It then goes on to say, negligence is
19 not required, which everybody concedes here.

20 MR. MANN: And it further, I think, Mr. Chief
21 Justice, states that the railroad cannot avoid liability
22 depending upon how difficult it will be for them to make a
23 coupler that works in all situations.

24 QUESTION: Yes. It says the act requires a
25 coupler, once it couples, stays coupled, but that really

1 doesn't cover your case.

2 MR. MANN: But the dicta does, not the specific
3 holding in the case, but the dicta certainly does because
4 it states that you should not be -- the railroad cannot
5 escape liability by showing too much was demanded of it at
6 338 U.S. 393-394.

7 QUESTION: But that's with respect to couplers.

8 MR. MANN: Yes.

9 QUESTION: Not drawbars.

10 MR. MANN: Well, if you're drawing the
11 distinction, I can't argue that point because I don't
12 think there's a distinction. They're part and parcel of
13 the same piece of equipment. I don't know how you can --

14 QUESTION: But it -- as I understand it, it's
15 misalignment of the drawbars, isn't it?

16 MR. MANN: The entire thing is misaligned. The
17 entire piece of equipment is misaligned. You can't -- one
18 part -- it's impossible to separate the two because here
19 is the draw head and here is the device it is attached to,
20 the whole drawbar, and I don't see how you can
21 distinguish --

22 QUESTION: Well, in Affolder, there was also
23 dicta in which the Court said, of course, the result
24 assumes the coupler was placed in a position to operate on
25 impact. The railroad would have a good defense that the

1 coupler had not been properly opened.

2 MR. MANN: Very logical of the Court because
3 they had developed this technology to allow it to open and
4 close without the necessity of the employee going between,
5 but they haven't addressed the other part of that statute,
6 and that is the coupling part. The uncoupling part they
7 did address.

8 QUESTION: Mr. Mann, I want to get back to
9 Palsgraf. You seem to assume that if there has been a
10 violation of the act, anything that occurs as -- with but
11 for causality by reason of that violation is recoverable.
12 Now, is that true?

13 MR. MANN: The Court has held --

14 QUESTION: Just simply because the act has been
15 violated even though the injury has nothing to do with the
16 act's violation.

17 MR. MANN: The Court has held that it's absolute
18 liability.

19 QUESTION: Suppose that it's misaligned, he has
20 to go between the cars, and he gets bit by a snake.

21 MR. MANN: Super-intervening cause. It's not
22 caused by the --

23 QUESTION: Well, why isn't his bad back a
24 supervening cause?

25 MR. MANN: Well, you're talking about recovery

1 for damages --

2 QUESTION: I mean, you say supervening cause,
3 but --

4 MR. MANN: -- liability --

5 QUESTION: Supervening causes are -- there is a
6 chain of factual causality here.

7 MR. MANN: Sure, but --

8 QUESTION: He pushed the bar. That's the
9 supervening cause.

10 MR. MANN: The violation has already occurred.
11 The violation is that this is not aligned properly.

12 QUESTION: Well, that's the same case in the
13 snake case.

14 MR. MANN: Well, it's similar because it is --
15 the violation already exists. The question of whether or
16 not there's recovery is a different aspect of liability.

17 QUESTION: Well, that's part of what we're
18 talking about I assume.

19 MR. MANN: But in this case, we don't have that
20 snake bite. We have the immediate issue of pushing the
21 drawbar which they have not used their technology to
22 correct.

23 QUESTION: But he might have had the push it
24 from inside the car even if there had been no safety
25 violation. They might have devised a new system in which

1 you push it from the inside instead of from the outside so
2 you don't have to go between the cars.

3 MR. MANN: I don't think there's a --

4 QUESTION: So, you can't say it was caused even
5 but for by --

6 MR. MANN: I don't think that's --

7 QUESTION: -- the safety violation.

8 MR. MANN: I don't think that's a violation of
9 the statute if he's inside the car.

10 QUESTION: Exactly. That's my point and he
11 would have hurt his back the same way.

12 MR. MANN: But if he's between the car, it's
13 certainly a violation of the statute.

14 QUESTION: So, anything that happens between the
15 cars is a --

16 MR. MANN: Not anything. Only in the coupling
17 and uncoupling procedure and in the preparation of that.
18 That's the only thing that's covered by the statute. You
19 have maintenance testing and inspection. None of that is
20 covered.

21 QUESTION: Well, the statute doesn't say in
22 preparation for coupling. It doesn't say that. I think
23 you're grafting something on that isn't in the statute.

24 MR. MANN: There's the Lewis case.

25 QUESTION: The Lewis case is a court of appeals.

1 MR. MANN: D.C. Circuit. Yes, that's correct.

2 QUESTION: It's not binding on us.

3 MR. MANN: And it doesn't specifically say that,
4 but when you look at Wagner case, for example, there was
5 no movement involved. That was a person who was preparing
6 -- let me explain, if I may.

7 QUESTION: Well, don't we have some concern,
8 when we're talking about imposition of a rule of per se
9 liability, to make sure that that's what the statute was
10 intended to cover?

11 MR. MANN: Yes.

12 QUESTION: I don't see why we should make a
13 stretch to pick up every conceivable kind of a result
14 here.

15 MR. MANN: I agree, Justice O'Connor, but in the
16 preparation for it -- I think it's certainly reasonable to
17 include preparation if there's a necessity of someone
18 going between the cars.

19 And I'll refer you back to the old Wagner case
20 of the Court. That case, the employee was literally
21 standing on this coupler --

22 QUESTION: Your time has expired, Mr. Mann.
23 Thank you.

24 Mr. Phillips, you have 11 minutes remaining.

25 MR. PHILLIPS: Mr. Chief Justice, unless there

1 are questions, I'm inclined to give you back my time.

2 CHIEF JUSTICE REHNQUIST: Very well.

3 The case is submitted.

4 (Whereupon, at 10:52 a.m., the case in the
5 above-entitled matter was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

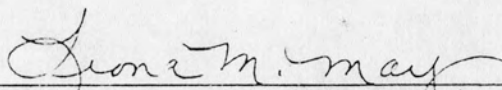
Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States, in the Matter of:

NORFOLK AND WESTERN RAILWAY COMPANY, Petitioner v. WILLIAM J. HILES

CASE NO.: 95-6

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY:



(REPORTER)