1914

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS; *Oct. 21, 22. *Nov. 30.

AND

ARTHUR GODFREY PICKERING (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Railways—Operation—Transfer of cars—Interswitching—Negligent coupling — Duty of train crew — Scope of employment — Employer's liability—Jury—Findings of fact—Evidence.

A train crew of the defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars in the yard. In order to do so it was necessary to shunt several cars placed in front of the car to be transferred and the train crew switched these cars to certain tracks on which there was then standing a train of the other railway company, headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the judge had charged them, and they returned a general verdict in favour of the plaintiff.

Held, affirming the judgment appealed from (24 Man. R. 544), that in so proceeding to couple the cars they had switched on to the standing train the defendants' train crew were still acting within the scope of their employment in the defendants' business and, as they performed the work in a negligent manner, the defend-

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

ants were liable in damages for the injuries caused to the plaintiff.

Per Duff J.—The question, whether the acts of negligence of the company's servants were done in course of their employment was a question of fact for the jury in respect of which there was evidence to support their finding in favour of the plaintiff.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment entered by Mr. Justice Galt, at the trial, upon the verdict of the jury in favour of the plaintiff with costs.

In the circumstances stated in the head-note, the jury returned a general verdict and assessed damages in favour of the plaintiff for $11,000, upon which judgment was entered by the trial judge, and this judgment was affirmed by the judgment appealed from. The questions raised on the appeal are stated in the judgments now reported.

J. B. Coyne for the appellants.

W. H. Trueman for the respondent.

DAVIES J.—I understood Mr. Coyne in his reply practically to concede that the coupling of the cars taken by the appellant company's train to Bird's Hill, where the train of the Canadian Northern Railway was standing, was the main question in this appeal.

His contention, however, was that such coupling was something beyond the scope of the employment of those in charge of the Grand Trunk Pacific train and that, therefore, the company was not liable even for the negligence of its employees in respect to it.

I confess I have not reached my conclusion adverse

(1) 24 Man. R. 544.

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

Davies J.

to this contention without a good deal of doubt. The coupling of the cars was certainly not done under the yardmaster's orders. It was probably done as a matter of convenience and railway practice and under an arrangement made at the time by the employees of both trains. The evidence justifies this conclusion. The jury had evidence before them on which their findings could be sustained. They had a right to accept Thompson's evidence, if they so determined, even if it was in conflict with that of Foster, Gavin and Carroll, as contended.

I am, therefore, not able to find that such negligent coupling as was proved in this case was beyond the scope of the employment of the conductor and engineer of the Grand Trunk Pacific train.

That negligence consisted in the want of notice of the intended coupling to the Canadian Northern Railway train under which the plaintiff was at the time working and in the excessive impact.

I, therefore, concur in the dismissal of the company's appeal.

IDINGTON J.—The respondent was at work under his engine which, with a train of eighteen or more cars, was standing on a branch of the Canadian Northern Railway at a station in Manitoba when those in charge of one of appellant's engines ran some three cars into said branch to connect them with said train. This was done without warning and with such violence that it moved the whole train and injured the respondent who recovered a verdict and judgment against appellant therefor.

Appellant contends it cannot be held liable for the

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

Idington J.

acts of the men occasioning such injury. It appealed to the Court of Appeal for Manitoba and the appeal was dismissed, Mr. Justice Richards dissenting.

The appellant admits sending its men with the engine and a caboose and other cars to leave the latter in the yard of the Canadian Northern and to bring out a car which was loaded with freight to be taken over appellant's line. The car to be brought out was found attached to three other cars in a siding in said yard. Those had to be shunted about to accomplish this purpose.

It seems to me clear that men on such an errand could not of their own volition have undertaken to shunt these cars about in any way seeming best to themselves without consulting those in charge in said yard.

Primâ facie it would be the yardmaster who could and perhaps should direct what is to be done. It is said he requested the appellant's men to move the cars in question to a point on the main line and an engine would be along to pick up the three other cars, and they proceeded accordingly to get the car they were after by the several movements needed to accomplish it and had when done these other remaining cars standing on the main line when some one suggested they connect them with the train I have referred to on the branch line and they did so accordingly without any notice to the men in charge thereof and thus injured respondent.

It is urged that in doing so they were acting beyond the scope of their duty and without authority and hence appellant is not liable for their negligence.

It is quite clear that to have left the cars on the main line at the time when the express train was ex-

pected, and that other engine expected to take charge of them was not there to do so, would have been unjustifiable and possibly disastrous.

They did what seems to have been needed for the convenience of the Canadian Northern people and themselves in order that the business in hand should be most readily and rapidly discharged and they be enabled to get off with despatch out of the yard and end their errand.

I am not disposed to follow in all its mazes the other shunting it is suggested they might have done and the possibility of their running over some other man than the one they did, and still less the mass of contradictions between the witnesses and variations of story on the part of some, for I am quite sure they acted in the course of their master's business and used the judgment which impliedly they had a right to use under the circumstances, but happened to be negligent therein for which the master must suffer.

No master ever gave his men authority to act negligently, and every man who does gets beyond the scope of his authority in a sense, but the unfortunate master has to bear that burden as far as others are concerned.

If the case called for it I think a good deal might be said in regard to what section 317 of the "Railway Act" requires of each railway company and impliedly of those entrusted by any railway company with any part of the duty thereby imposed.

Again the several movements forward and backward would have had to be taken no matter into what siding they involved entering, and this evidence bearing upon the relation of sidings in question is of such conflicting character as to reduce the question to one

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

Idington J.

for the jury, who may merely have found that appellant's men were reduced to exercising their judgment to extricate themselves from their difficulties and properly chose this siding or branch as result, and acting thereon acted negligently.

In any way one can look at it — and counsel, fertile in resources, has induced me to look at it in a good many ways — it all comes back to the responsibility of the master for his servant in executing his master's business, and in that regard appellant must fail.

The appeal should be dismissed with costs.

DUFF J.—I concur in dismissing this appeal. The only point requiring notice arises out of the contention of the appellant company that the acts of negligence charged are not acts for which they are legally responsible. The substance of the question is whether there was or was not evidence to support a finding by the jury that in fact those acts were done by the employee of the company in course of their employment as the servants of the company. It does not seem to me that there is much to be gained by discussing in detail the exact effect of the evidence. After carefully considering it I have come to the conclusion that Mr. Coyne's contention must be rejected.

ANGLIN J.—The defendants appeal against the judgment of the Court of Appeal for Manitoba upholding the verdict of a jury finding them liable to the plaintiff for damages for personal injuries to the extent of $11,000. Three main grounds of appeal were urged in this court: 1st, that the trial judge wrongfully refused to put questions to the jury; 2nd, that the evidence established contributory negligence on

the part of the plaintiff; and 3rd, that the act of the defendants' servants which caused the plaintiff's injuries was not within the scope of their employment.

Having regard to the fact that counsel for the defendants asked that certain questions should be put to the jury only after the learned judge had completed his charge, to the scope and character of the questions suggested, and to the presentation in the charge to the jury of the issues on which they had to pass, I think it was within the discretion of the learned trial judge to decline to put these questions. Moreover, I cannot see that any miscarriage of justice resulted from his failure to require the jury to answer specific questions.

In support of his contention that contributory negligence was established counsel for the defendants relied on the breach by the plaintiff of Rule 26 of the Canadian Northern Railway Company, in whose employment he was. That rule reads as follows:—

> Rule 26. A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car or train indicates that workmen are under or about it; when thus protected, it must not be coupled to or moved, and other cars must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workman.
>
> Workmen will display the blue signals and the same workmen are alone authorized to remove them.

Assuming that this rule imposed a duty on the plaintiff — something which might very easily be more clearly expressed — a perusal of the portion of the charge dealing with the issue of contributory negligence makes it clear that the jury was not asked to find the plaintiff negligent on the ground that he failed to observe Rule 26. No objection was taken to the charge on this ground, and the learned judge was

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

Anglin J.

not asked to direct the attention of the jury to the rule. Neither is there any reference to it in the judgments delivered in the Court of Appeal. Other grounds of contributory negligence dealt with in the trial judge's charge were not relied upon at bar in this court. I think the defendants are not entitled to have the judgment against them disturbed on this ground.

Mr. Coyne's main contention was that in taking three Canadian Northern Railway fruit-cars to the Bird's Hill line the employees were either acting as servants of the Canadian Northern Railway Co. or as volunteers and not in the course of their employment by the defendants. He also maintained that, if they had been acting within the scope of their duties as employees of the defendants in bringing the cars to the Bird's Hill line, they ceased to so act and were mere volunteers in proceeding to couple them to the Canadian Northern Railway train which was standing there. I think there was evidence to warrant the jury in concluding that, having regard to all the circumstances, the most practical, if not the only practical way of dealing with the three Canadian Northern cars, which was open to the Grand Trunk Pacific crew, in order to secure the Grand Trunk Pacific meat-car which they had been sent to get, was to take all four cars up to the Bird's Hill line as they did. On Foster's evidence I think it was also open to the jury to find that the Grand Trunk Pacific crew had been requested by him to deliver the three Canadian Northern cars to Thompson for the Canadian Northern Railway Company; there was also evidence to support an inference that it would have been dangerous and improper to have left the three Canadian Northern cars standing on the Bird's Hill line without placing them in

charge of Canadian Northern officials, and that the coupling of these cars to the Canadian Northern train standing there was a reasonable, if indeed it was not the best, means available to the Grand Trunk Pacific crew to relieve themselves and their employers, the defendants, of all further responsibility in connection with those cars. The jury may well have found that Thompson requested that the three fruit-cars should be coupled to the Canadian Northern train by the Grand Trunk Pacific crew as the most convenient means of making delivery of the cars to him as Foster had instructed. I think it was open to the jury to have drawn all these inferences and it must be assumed that they did in fact draw such of them as are necessary to sustain the general verdict which they rendered for the plaintiff. While the testimony on this branch of the case is certainly not as complete or as satisfactory as could be desired, on the whole I am of opinion that it cannot be held that there was no evidence on which a jury could find that what was done by the Grand Trunk Pacific crew was in the course of their employment.

No substantial attack was made by counsel for the appellants on the finding that in the coupling of the three fruit-cars with the Canadian Northern train the defendants' servants acted negligently, and upon the evidence, at all events in so far as undue force in making the coupling was charged, such an attack could not very well have been made.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This is the case of a railway accident. The plaintiff, respondent, who is a fireman in

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

Brodeur J.

the employ of the Canadian Northern Railway Company, was doing some necessary work under his engine when a Grand Trunk Pacific train came into collision with it. The plaintiff got injured and he sues the Grand Trunk Pacific Railway Company.

A verdict of negligence was rendered by the jury and the judgment was confirmed by the Court of Appeal. We are asked to reverse that decision.

A meat-car had to be switched from a transfer-yard of the Canadian Northern Railway Company to the Grand Trunk Pacific line and a Grand Trunk Pacific engine went into that yard to get that car. But in order to reach that car the Grand Trunk Pacific people had to shunt some three cars that were in front of that meat-car. They were asked by the superintendent of the yard to remove those three cars on a certain line. Those cars could just as well be switched in the yard proper or on that line. It was just as convenient for the Grand Trunk Pacific crew to make the shunting at either of those places.

In bringing those three cars on the branch line they collided with the plaintiff's train. The impact was done carelessly.

The appellants seek to avoid the liability in stating that the Grand Trunk Pacific crew were not in their course of employment.

When they were in the yard of the Canadian Northern Railway Company the Grand Trunk Pacific crew had to follow the instructions, as to their movements, of the yardmaster. They could perhaps have refused to follow the instructions that were given to them if they found them unreasonable; but, in this case, no suggestion is made that they were unreasonable.

1914

GRAND TRUNK PACIFIC RWAY. CO. v. PICKERING.

Brodeur J.

It is even stated that the removal of those cars on the branch line was a saving of time and work for the Grand Trunk Pacific crew.

Then those servants were bound to act without negligence, and if by their negligent act they caused injury they render their master liable.

The verdict is a reasonable verdict in the circumstances and the judgment *a quo* should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *H. H. Hansard.*

Solicitors for the respondent: *Bonnar, Trueman & Hollands.*