Are Runaway Boxcars Still a "Train"? And Other Interesting Questions

BY FRANK GIBBARD

Before workers' compensation laws were adopted in Colorado, injured workers faced significant hurdles to recovery for their injuries through tort actions brought in the Colorado courts. One obstacle was the "fellow servant rule," which barred recovery where the injury or death could be attributed to a coworker's negligence. By the turn of the 20th century, the Colorado legislature had significantly limited, then abolished, the rule. The reasons for this abolition are discussed in a 1912 decision from the Colorado Court of Appeals involving a tragic railroad accident. That decision also addressed the curious issue of whether cars and a caboose, when detached from their locomotive and poised to roll away, are still a "train" within the meaning of a tort statute, and, if so, who has "charge and control" of the "train."

The Accident

Below the abandoned hillside mining town of Gilman, Colorado, lies an old Denver and Rio Grande sidetrack known as Belden Siding. On the morning of May 2, 1901, a group of workmen was clearing track on the siding after mud and a rockslide had covered the track.[1] One of the workmen was Vito Vitello, who worked as a section man.

High cliffs stood on one side of their worksite, towering 1,500 feet above the tracks. The Eagle River ran on the other side of the site. In between the cliffs and the river, three parallel tracks filled the narrow valley. These tracks curved sharply as they wound their way through the valley. After the spring thaw, rocks frequently rolled downhill onto the tracks from the cliffs above.

About a mile and a half west of, and uphill from, the worksite at Belden Siding was Red

Cliff station. Around 9:30 on the morning of May 2, as the men were working to clear the track below, a freight train arrived at the station, traveling east from Minturn. This train consisted of a locomotive, four cars, and a caboose. One of the four cars was loaded with scrap iron, including broken and unused railroad parts.

The conductor and two forward brakemen detached the locomotive and drove it forward into the station. There, they used it to move other cars. In the meantime, they left the four cars and caboose sitting on the track. The conductor left the cars in the hands of Samuel Dugan, an experienced rear brakeman. It was Dugan's job to bleed the air brakes and then set hand brakes to prevent the train from rolling down the mountainside toward Belden Siding. For whatever reason, however, he failed to do his duty that day.

After the engine was detached, Dugan stayed with the cars for a while, and then inexplicably left them. The air brakes held the train for about 15 to 25 minutes, until the air escaped from the brakes.[2] With no hand brakes set to hold the train, the cars began to roll downhill.

As they rolled, the cars picked up speed. Down in the valley, the foreman of the work crew spotted the runaway cars when they were still 800 to 900 feet away. He yelled to the workmen to move toward the edge of the river on the inside of the curve. Some of the men followed his advice, but others, including Vitello, moved in the opposite direction, toward the cliff face.

The cars soon reached the curve, moving at a high rate of speed. About 200 to 300 feet uphill from the workmen, the train hit the curve in the tracks. Two of the cars did not make the curve and derailed. The other two cars and the caboose kept going. They rounded the curve and soon were only about 100 feet from the men. At that point, the two cars jumped the track. They headed along the ground, running outside of the curve. Then they ran along the ground until they came to a halt.

One of the derailed cars had left scrap metal scattered all over the ground. As the trackmen approached the wreck, they found Vitello lying dead between two of the tracks. The top of his head had been fractured. The cause of the fracture was unclear. Was he hit by a piece of metal from the scrap car? Or could he have been (coincidentally) struck by a rock that fell from the cliff face?

Vitello's widow sued the railroad in Arapahoe County District Court. The case was submitted to a jury. After the jury had been deliberating for 24 hours, the foreman sent a note to the court stating that the jurors stood 11 to 1 in favor of Ms. Vitello.[3] The court admonished the jury at length on their duty to reach a verdict. The last holdout juror then folded. The jury awarded Ms. Vitello $5,000.

Alleged Jury Tampering

The trial had been hotly contested. At one point, the railroad had grown so suspicious about events during the trial that it had allegedly hired a Pinkerton detective to watch the jury.[4] Accusations of jury tampering later surfaced.

According to articles in the *Rocky Mountain News*, the railroad's accusations centered on a member of the Vitello jury venire named John Q. Naylor.[5] Naylor had not been chosen for the Vitello jury, but he purportedly inserted himself into the case anyway by approaching several jurors on behalf of Ms. Vitello during trial recesses.[6] Naylor reportedly went so far as to ask one of the jurors to "do what he could" for Ms. Vitello's counsel.[7]

The plaintiff's side had similar complaints. It alleged that a railroad man named James Watkins, who had been a witness at trial, also had spoken with jurors.[8]

After learning of these accusations, trial judge S.L. Carpenter investigated the issue. He asked the railroad's attorney to supplement his pending motion for a new trial by addressing the alleged jury tampering. As part of his investigation, the judge summoned the previously discharged jurors and several witnesses back to his courtroom. Watkins failed to appear, but the jurors all swore there had been no attempt to tamper with them. The court also asked reporter John I. Tierney, who had broken the story in the *News*, to disclose his source for the accusations, but Tierney refused.[9] Tierney claimed, however, that his information had come from two different jurors. The court took the motion for a new trial under advisement and eventually denied it.

First Appeal (1905)

The railroad appealed to the Colorado Supreme Court. After the case was fully briefed, Ms. Vitello filed a supplemental brief in which she challenged the adequacy of the record to rule on the railroad's issues. The Court rejected her challenges and proceeded to the merits.

Ms. Vitello had brought her action under the 1893 Employer's Liability Act.[10] The Act provided:

> Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time . . . . by reason of the negligence of any person in the service of the employer who has the charge of control of any . . . train upon a railroad, the employee, or in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have [a] right of compensation and remedy against the employer . . . .

The district court instructed the jury that the railroad could only be liable under this statute if the conductor, who had "charge and control" of the cars, had been negligent.[11]

Given the narrow definition of "charge and control" in the district court's instruction, the railroad had an obvious defense. It argued that the train's conductor was not negligent and the accident was entirely the fault of the brakeman. The Supreme Court surveyed the evidence and concluded that "the testimony shows conclusively that, if there was any negligence, it was that of the brakeman, and not of the conductor."[12] The conductor had discharged his duty by leaving the train in the hands of a competent and experienced brakeman. For this reason, the jury's verdict was against the weight of the evidence and had to be reversed.

The Court was careful to explain that it was not saying that the railroad could not be liable for the negligence of its brakeman, or even that the brakeman had not been "in charge of the train" while the conductor was performing other duties.[13] But because the case was tried on the theory that *the conductor* had to be negligent for the plaintiff to recover—and the evidence conclusively showed that the conductor was not negligent—the jury's verdict was against the weight of the evidence.

The Court also found error in the district court's failure to bar expert witnesses from testifying about who was responsible for securing the train on the grade. This line of expert testimony was objectionable, for two reasons. First, the experts were being asked to give an opinion on the ultimate issue in the case, which only the jury could decide. Second, the question was not a proper matter for expert testimony.

Because it was remanding for a new trial, the Court provided its opinion on two other matters in the case. First, given a factual dispute about the cause of Vitello's death (debris from the train versus a falling rock) the trial court should not have instructed the jury that the manner of his death was "undisputable."[14] Second, a trial court should be "extremely cautious" in advising a deadlocked jury, as the court had here, to avoid coercing any of the jurors.[15]

Retrial and Second Appeal (1912)

The jury in the second trial also found in favor of Ms. Vitello. The railroad appealed once again, this time to the Colorado Court of Appeals.

On appeal, the railroad first argued that the complaint had been deficient in failing to identify which of its employees had been negligent. Although this issue concerned the sufficiency of the complaint and could likely have been raised in the first appeal, the court of appeals did not find the issue waived. But it concluded that the complaint sufficiently alleged negligence, so the trial court had not erred in denying the railroad's motion to make the complaint more specific. The court of appeals also determined there was sufficient evidence to support the jury's verdict that the train crash, and not falling rocks, had caused Vitello's death.

The court then arrived at a main issue in the case: whether the negligence of Vitello's fellow servant, the brakeman Dugan, precluded him from recovering damages for his injuries. The court of appeals determined that Colorado precedent did not resolve the issue and that decisions in other courts were divided on the subject, "covering substantially the same state of facts as here" but "exactly opposite in both reasoning and conclusion."[16]

The court of appeals noted that the Colorado legislature had already limited the fellow-servant rule in 1877 and 1893 and had abolished it altogether in 1901. But questions had been raised about the procedures used to pass the 1901 legislation, and that legislation had been challenged in both state and federal litigation, which remained pending. Even so, the legislature had again abolished the fellow servant rule in a 1911 enactment. But that was after Mr. Vitello died. To further complicate matters, there was also a problem in applying the 1901 legislation retroactively to Vitello's death. The 1901 legislation had been passed *after* the accident occurred, later in the year. So, the court of appeals concluded it could not simply rely on the legislative enactments. It would have to decide for itself, instead, whether the fellow servant rule applied under the circumstances.

The court noted the distinction between Vitello's job as a section man and Dugan's as a brakeman. The two jobs were in separate departments of the railroad. Vitello worked in the track department, under the roadmaster, and Dugan worked in the operating department, under the trainmaster.[17] Under these circumstances, the rationale behind the fellow servant rule did not apply, because the two employees reported to entirely different supervisors, did entirely separate jobs, and could not encourage each other to be careful in their work. The court of appeals further explained that specialization had made the rule obsolete:

> Industrial advancement has been such since the origin of that rule that the reasons for it . . . seem now to be farfetched and unsound, when applied to the relation of master and servant in the great industries of the present day. Then the reaping hook and cradle were the only harvesting implements as the first of them had been for centuries before. Now powerful machines drawn by

> horse and steam power, and manufactured in great establishments, employing vast numbers of operators in different and special departments perform such service.[18]

The court noted the effect of specialization in the railroad industry:

> [N]ow, by great railroads stretching hundreds of miles in extent and employing men in many departments of construction, maintenance, and operation, with huge engines propelled by steam or electric power, which . . . employ[] great numbers of men in various and separate departments, and where the operators may never be in contact or even in sight of each other.[19]

The court had found no Colorado case "where the common master has been held exempt from liability for injury to one servant by the neglect of another, where it does not appear that the servants were co-operating in the particular work in which they were engaged, or were in a general way associated in such duties."[20]

The court of appeals therefore rejected the railroad's fellow servant rule argument. It then went on to address other interesting issues in the case. The 1893 Act made the railroad liable to employees whose injuries were caused by "the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive engine or train upon a railroad."[21] The court determined it had two questions to resolve under this statute: (1) were the runaway cars a "train"? and (2) did Dugan have "charge or control" over them? It answered both questions in the affirmative.

Citing cases from several jurisdictions, the court of appeals determined that a train is still a "train," even when detached from its locomotive. It noted a Massachusetts decision that concluded that under its statute, a train "generally signifies cars in motion," and although they are typically set in motion by a locomotive attached to the cars, that is not always the case.[22] Thus, even detached cars were still a "train."

The court also relied on cases from other jurisdictions discussing "charge and control" to help it conclude that Dugan's responsibilities as brakeman gave him "charge and control" over the runaway cars, at least during the key time when his negligence occurred:

> Certainly, if Dugan had set the hand brakes, he could have prevented the movement of the cars. Therefore, by the performance of his duty, he could have controlled their movement, which resulted in the injury. If it was his duty to control, and if in the exercise of that duty he had the power to control, then he was in control. The negligence in the failure to prevent the moving of the cars is certainly as important as would have been the negligent movement of the cars.[23]

The court of appeals further reasoned that Dugan had "charge and control" of the train, even if the conductor also had responsibility for the train. It quoted a case reasoning that the words "'charge' and 'control' . . . are apt words . . . to describe the duties of a conductor of a train, an engineer of a locomotive, or a signal man in his box. There is no inconsistency in one person having the general charge and another the physical control over any of the equipment mentioned, and either or both being negligent."[24]

The court of appeals therefore affirmed the district court's judgment in favor of Ms. Vitello.

Conclusion

The town of Gilman, above Belden Siding, became a superfund cleanup site in 1984 due to toxic mining activities, and is now a ghost town.[25] Around the time of Vitello's accident, the Denver and Rio Grande Railroad merged with the Rio Grande Western, eventually becoming known as the Denver and Rio Grande Western Railroad (DRGWR). Through a further series of mergers, most of what is left of the DRGWR is now operated by Union Pacific. CL

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NOTES

1. The facts are taken from *Denver & Rio Grande RR v. Vitello (Vitello I)*, 81 P. 766 (Colo. 1905), and *Denver & Rio Grande RR v. Vitello (Vitello II)*, 121 P. 112 (Colo.App. 1912).
2. *See Vitello II*, 121 P. at 113.
3. *See Vitello I*, 81 P. at 767–68.
4. "Hint at Bribery," *Rocky Mountain News*, p. 16, col. 1 (May 11, 1902).
5. John Q. Naylor had already earned a footnote in Denver history for his role in a bribery case following the W. W. Anderson affair. W. W. "Plug Hat" Anderson, an attorney, was thrice tried but never convicted for the non-fatal shooting of H. H. Tammen and F. G. Bonfils, editors of *The Denver Post*. It was said Anderson shot the editors because they had criticized him about what they viewed as his exploitation of his client, convicted murderer and alleged cannibal Alferd Packer. Tammen was later convicted of jury tampering connected with one of the Anderson trials. *See generally* Gibbard, "'Alferd' Packer & the Bonfils/Tammen Shooting," 42 *Colo. Law.* 9 (Sept. 2013). A key witness to alleged juror bribery in the Anderson case was George Adams, a juror. At the bribery trial, Naylor presented impeachment testimony against Adams, purportedly showing Adams had lied about his fitness for jury service in the Anderson case and his lack of bias. Naylor claimed, but Adams vehemently denied, that Adams had told Naylor on the day of the Tammen/Bonfils shooting that he wished Anderson had succeeded in killing the two men. *See* "Hint at Bribery," *supra* note 4.
6. *See* "Hint at Bribery," *supra* note 4.
7. *See* "Not Influenced: Jurors in Vitello Case Deny That Naylor Tampered With Them," *Rocky Mountain News*, p. 5, col. 5 (June 24, 1902).
8. *See id.*
9. *See id.*
10. Colo. Laws 1893, p. 129, ch. 77.
11. *Vitello I*, 81 P. at 767.
12. *Id.* at 768.
13. *Id.* at 769–70.
14. *Id.* at 770.
15. *Id.*
16. *Vitello II*, 121 P. at 115.
17. *See id.*
18. *Id.*
19. *Id.*
20. *Id.* at 116.
21. *Id.* at 118 (internal quotation marks omitted).
22. *Id.* (internal quotation marks omitted).
23. *Id.* at 119.
24. *Id.* at 119–20 (internal quotation marks omitted).
25. *See* https://en.wikipedia.org/wiki/Gilman,_Colorado.