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SENATE

{ REPORT
No. 97

R. CLYDE BENNETT

JANUARY 16 (calendar day, JANUARY 28), 1926.—Ordered to be printed

Mr. BAYARD, from the Committee on Claims, submitted the following

REPORT

[To accompany S. 1059]

The Committee on Claims, to whom was referred the bill (S. 1059) for the relief of R. Clyde Bennett, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

A similar bill passed the Senate in the Sixty-eighth Congress.

The facts are fully set forth in Senate Report No. 990, Sixty-eighth Congress, second session, which is appended hereto and made a part of this report.

[Senate Report No. 990, Sixty-eighth Congress, second session]

The Committee on Claims, to whom was referred the bill (S. 2441) for the relief of R. Clyde Bennett, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

In line 6, strike out the figures "\$15,000" and insert in lieu thereof "\$10,000."

The purpose of the bill is to reimburse R. Clyde Bennett in the sum of \$10,000 in full satisfaction of all his claims against the United States on account of permanent bodily injuries sustained by him as the result of his having been accidentally shot by a soldier who at the time of the accidental shooting was in the service of the United States, guarding Baltimore & Ohio Railroad property in the State of West Virginia.

The records show that the accident occurred on May 21, 1917, near Easton, W. Va., and that the soldier who did the shooting was a member of Company K, First Infantry, West Virginia National Guard, in Federal service. The soldier was immediately arrested, tried by general court-martial, and found guilty of criminal carelessness.

The facts are fully set forth in the following letter from the Secretary of War and in the proceedings of the court-martial, which are appended hereto, and made a part of this report:

WAR DEPARTMENT,
Washington, March 7, 1924.

Hon. ARTHUR CAPPER,
Chairman Committee on Claims,
United States Senate.

MY DEAR SENATOR CAPPER: I am in receipt of your letter of February 9, 1924, inclosing Senate bill No. 2441, for the relief of R. Clyde Bennett in the sum of \$15,000 on account of permanent bodily injuries sustained by him as the result of having been accidentally shot by a soldier, who at the time of the accidental

shooting was in the service of the United States guarding Baltimore & Ohio Railroad property in the State of West Virginia.

From the files in this department, it appears that this accident occurred on May 21, 1917, near Easton, W. Va., and that the soldier, Ross Peters, who did the shooting was a member of Company K, First Infantry, West Virginia National Guard, in Federal service. The soldier was immediately arrested, tried by general court-martial, and found guilty of criminal carelessness.

While it is not within my province to express an opinion as to whether the claim should be paid, I can say that the record of the general court-martial shows that the injury to Bennett was the result of the negligence of a soldier in the Federal service in accidentally discharging a loaded rifle, while on guard duty.

It is well settled that the United States as a matter of law is not liable for the wrongful or negligent acts of its agents where no breach of contract is involved, and therefore, the relief proposed would be an act of grace, the exercise of which is exclusively within the jurisdiction of Congress.

I am inclosing herewith a photostat copy of the complete record of the general court-martial which embraces all the pertinent records concerning this case which are in the possession of the War Department.

Sincerely yours,

JOHN W. WEEKS, *Secretary of War.*

United States v. Ross Peters, private Company K, First Regiment West Virginia Infantry National Guard

Proceedings of a general court-martial which convened at Fairmont, W. Va., pursuant to the following order:

HEADQUARTERS CENTRAL DEPARTMENT,
Chicago, Ill., May 15, 1917.

SPECIAL ORDERS }
No. 87 }

EXTRACT

1. A general court-martial is appointed to meet at Fairmont, W. Va., at the call of the president, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

Capt. George L. Weaver, First West Virginia Infantry; Capt. Joseph C. Berry, First West Virginia Infantry; Capt. David W. McVicker, First West Virginia Infantry; First Lieut. James L. Harvey, First West Virginia Infantry; First Lieut. Smith Ringer, First West Virginia Infantry; First Lieut. Franklin R. Pierce, First West Virginia Infantry; First Lieut. Carl J. Shettely, First West Virginia Infantry; Second Lieut. Ambrose Anderson, First West Virginia Infantry; Capt. Glenn F. Williams, First West Virginia Infantry, judge-advocate; Second Lieut. William V. Fairall, First West Virginia Infantry, assistant judge-advocate.

A greater number of officers can not be assembled without manifest injury to the service.

The employment of a stenographic reporter is authorized.

Such journeys as may be required by the members of the court, the judge-advocate and assistant judge advocate, in attending the sessions of the court and returning to their proper stations are necessary in the military service.

By command of Major General Barry.

H. O. S. HEISTAND,
Department Adjutant, Adjutant General.

FAIRMONT, W. VA., July 6, 1917.

The court met pursuant to the call of the president at 8 o'clock a. m.

Present: Capt. Joseph C. Berry, First West Virginia Infantry; Capt. David W. McVicker, First West Virginia Infantry; First Lieut. James L. Harvey, First West Virginia Infantry; First Lieut. Smith Ringer, First West Virginia Infantry;

First Lieut. Franklin R. Pierce, First West Virginia Infantry; First Lieut. Carl J. Shettely, First West Virginia Infantry; Capt. Glenn F. Williams, First West Virginia Infantry, judge advocate; Second Lieut. William V. Fairall, First West Virginia Infantry, assistant judge advocate.

Absent: Maj. George L. Wever, First West Virginia Infantry (detached service); First Lieut. Ambrose Anderson, First West Virginia Infantry (detached service).

The court proceeded to the trial of Pvt. Ross Peters, Company K, First Regiment West Virginia Infantry, National Guard, who, on appearing before the court, introduced Capt. George F. Whitmore as his counsel.

Lawrence Holbert was sworn as reporter.

The order appointing the court was read to the accused and he was asked if he objected to be tried by any member present named therein, to which he replied in the negative.

The members of the court, the judge advocate, and the assistant judge advocate were then sworn.

The accused was arraigned upon the following charges and specifications:

"Charge: Violation of the ninety-sixth article of war.

"Specification: In that Pvt. Ross Peters, Company K, First Regiment West Virginia Infantry National Guard, did at or near the east end of tunnel No. 21 on the line of the Baltimore & Ohio Railroad Co. near Eaton, W. Va., on or about the 21st day of May, 1917, through criminal carelessness discharge a service rifle while on duty as a sentinel, thereby seriously wounding one Clyde Bennett, a brakeman in the employ of the Baltimore & Ohio Railroad Co., the said Bennett then being on a train of the said company and being lawfully performing his duties as a brakeman for the said company.

"JAMES C. McMANAWAY,

"Captain, First Regiment, West Virginia Infantry National Guard."

To which the accused pleaded, to the specification, guilty; to the charge, guilty.

The paragraphs of the Manual for Court-Martial that set out the gist of each of the several offenses were read to the court by the judge advocate.

Lieut. T. W. HORNER, a witness for the prosecution, was sworn and testified as follows:

Direct examination by the JUDGE ADVOCATE:

Q. State to the court your name and age, Lieutenant.—A. T. W. Horner.

Q. What is your present occupation?—A. Lieutenant in the militia.

Q. You are first lieutenant, First Regiment West Virginia Infantry, are you not?—A. Yes.

Q. Do you know the defendant, Ross Peters?—A. Yes.

Q. Did he ever discharge his gun accidentally so as to wound any person, Lieutenant?—A. Yes.

Q. Whom did he injure?—A. He injured Bennett, a brakeman on the railroad.

Q. About when did this occur?—A. It occurred on the morning of the 21st of May.

Q. Tell what you know about the injury. Did you see the accident?—A. I didn't see the accident; no. I was told about it about two minutes after it happened; they discovered him on top of the train and took the train on through to Petroleum to get a doctor, and I went up to see Peters and placed him under arrest; when I came up the track he said he had done it now; he said he was in bad; and I put him under arrest; he said he had shot a brakeman.

Q. You say that he made this statement to you about two minutes after he had got the brakeman?—A. I heard about the accident about two minutes after, but it was about 10 minutes by the time I got to him.

Q. Had anyone else gotten there before you?—A. No; I was the first one there; a guard posted right near him.

Q. You were the first one there after he shot the brakeman?—A. Yes.

Q. Did he make any other explanation to you as to how this happened?—A. He made one to Captain Willie. I was standing listening.

Q. How soon was that after the event occurred?—A. It was about an hour or an hour and a half.

Q. What were your orders to sentinels on this post with regard to the manner in which they should carry their rifles while on post?—A. They are supposed to keep their pieces loaded and locked.

Q. Who gave those orders?—A. They were given by Sergeant Smith to a member of the guard.

Q. Yes; but who gave them to you?—A. Captain McManaway gave them to me.

Q. You were in command of this detachment at Eaton in which Pvt. Ross Peters shot a brakeman, at the time?—A. Yes, sir.

Q. You were the commanding officer of the detachment?—A. Yes.

Q. How many times had Private Peters fired his gun, if you know, from your examination?—A. I picked up but one shell.

Cross-examination by Captain WHITMORE:

Q. Lieutenant Horner, what were the instructions to the sentinels on this post with reference to getting out of the way of trains passing?—A. They were supposed to stand alongside the bank until the train was by; no definite instructions; they were to get out of the way of the train and as soon as the train was by to get back along the track and walk the track.

Q. There was a place for them to get to for them to be in safety?—A. Yes, sir; along the bank.

Q. To that extent they were permitted to leave their post?—A. Yes.

Q. Has Peters been in confinement since this accident occurred?—A. Yes.

Q. Where has he been confined?—A. He was in confinement at Parkersburg and then he was transferred to Eaton, and we didn't have him in confinement—we had him confined to the company street at Cairo; he was not allowed to leave camp.

Q. I see Private Peters enlisted in your company on the 31st day of March, 1917?—A. Yes.

Q. Has he been thoroughly instructed in the use of his rifle?—A. He had been instructed about loading and locking it; yes.

Q. Has he shown special aptitude? Is he what you would consider apt to learn?—A. I judge he was a man of average intelligence; the rest of them learn it; he has been told at least a dozen times, I should say.

By the JUDGE ADVOCATE. Are there any questions by any member of the court?

By a MEMBER OF THE COURT. Did you examine the rifle after you went up there, Lieutenant, to see whether or not it had been fired?

A. I did not; no. I picked up the shell lying alongside of where he was standing.

Q. You don't know whether there were any more shells in the rifle?—A. Should have been four more in it.

Q. You don't know whether there was or not?—A. No.

Q. You don't know whether the rifle had ever had been fired or not?—A. No. And further deponent saith not.

Sergt. SEYMOUR REYNOLDS, a witness for the prosecution, was sworn and testified as follows:

Questions by the prosecution:

Q. Are you Sergt. Seymour Reynolds, Company K, First Regiment West Virginia Infantry National Guard?—A. Yes, sir.

Q. Do you know the defendant Ross Peters?—A. Yes, sir.

Q. Was he under your command about May 21, 1917, of this year?—A. Yes, sir.

Q. Where were you stationed then?—A. Eaton, W. Va.

Q. You were sergeant there?—A. Yes, sir.

Q. On the night of May 21, 1917, or day, I don't know which, was Private Peters a member of your guard?—A. May 21?

Q. Yes.—A. Yes, sir.

Q. Where was he stationed?—A. At the east end of 21 tunnel, I believe, at Eaton, W. Va.

Q. Did anything occur that day while he was stationed on that post?—A. They told me he shot a brakeman on the Baltimore & Ohio.

Q. You didn't see the shooting?—A. No, sir.

Q. How soon did you see Private Peters after he did the shooting, if he did do the shooting?—A. I judge it would be in about half an hour or an hour after he came back over. I seen him at camp.

Q. You never saw him when he was on his post?—A. No, sir.

Q. Did you inspect his rifle to see that he had fired any shots?—A. No, sir.

Q. Did he make any statement of admission as to having shot anyone?—A. nothing to me.

The defense declines to cross-examine the witness.

And further deponent saith not.

There were no further questions by any member of the court.

B. H. MALCOMB, a witness for the prosecution, was sworn and testified as follows:

Questions by the prosecution:

Q. State your name and age to the court?—A. B. H. Malcomb; 21

Q. What is your present occupation?—A. I am a private in Company K?
 Q. First Regiment West Virginia Infantry?—A. Yes, sir.
 Q. Do you know Ross Peters, the defendant in this case?—A. Yes, sir.
 Q. Were you stationed with him on guard on May 21, 1917?—A. Yes, sir; but not on the same post.

Q. What post were you on?—A. There was a cave in the tunnel and I was stationed on the cave.

Q. How far from where he was stationed?—A. About 300 feet I would say.
 Q. Did you see Mr. Bennett shot?—A. No, sir; not exactly. I seen him just about the time he hit the box car, as he fell.

Q. You saw him fall?—A. Yes, sir; he just had hit the box car, and he threw out his hands.

Q. Tell what else you saw on that occasion with regards to Private Peters?—A. This freight train was pulling in at the far end of this tunnel and Peters walks to the watch box and sits down on the porch, and has his rifle laying on his lap; the train pulled through and about the time the caboose got "forninst" Peters, the brakeman got out of the box car and crossed the first box car and over on the next one, and some fellows working just above me, and they made a racket and I turned around to see what they were doing, and heard a gun fired, and I turned back around and seen this fellow throw out his hands; and I looked down at Peters; Peters still had his gun in his lap; and he jumped up and said "Oh my God, I have killed that poor man."

Q. How was Private Peters holding his rifle just before the accident, if you noticed?—A. He had his rifle laying down in his lap. I could not swear what he was doing with the rifle, because it was too far away. I could not just tel'.

Q. In which direction was the muzzle pointed?—A. East.

Q. Toward the railroad track?—A. Yes, sir.

Q. How was the gun pointed after you heard this shot?—A. About the same direction.

Q. Was it in the direction of Bennett?—A. Yes, sir.

Q. What did he appear to be doing with his rifle, if you know? What did it appear to you?—A. Looked to me like he might be cleaning around the trigger, or something, I would not say positive.

Cross-examination, questions by the defense:

Q. You were posted on the east end of this tunnel No. 21?—A. Yes, sir.

Q. Which direction was this freight train going?—A. Going east.

Q. It had come through the tunnel?—A. Yes, sir.

Q. And going on east?—A. Yes, sir.

Q. How far were you from Peters?—A. I would say about 300 feet.

Q. And Peters was between you and the train?—A. Well, you see I was up from the tunnel where I could look down on him.

Q. The train had passed out of the tunnel when you noticed him?—A. Yes, sir; about the time this railroader came out of the caboose, it was "forninst" Peters.

Q. How far, in your judgment, was the train from Peters when the shot was fired?—A. I would hardly know. Five or six hundred feet, I guess, probably.

Q. That would make it 900 feet or 300 yards from you?—A. Yes, sir.

Q. Where was this man standing when you saw him fall?—A. About middle ways of the second box car.

Q. On top of the box car?—A. Yes, sir.

Q. Is the track straight there?—A. Yes, sir.

Q. How far was Peters from the track?—A. About 12 or 15 feet, I guess; he stepped to one side, by a watch box.

Q. You were not looking at Peters when the rifle was discharged?—A. Not at the time, no; just as the fellow came off the first box car and started on the next one, I heard a racket and I turned around.

Q. You had been looking at Peters before this?—A. Yes, sir; the train was pulling through. I had a stationary post there.

By the JUDGE ADVOCATE. Are there any questions by any member of the court?

By the COURT. You say you heard Peters say he had shot this man?—A. Yes, sir.

Q. You were 300 feet away from him?—A. Yes, sir; he hallooed up and told me.

And further deponent saith not.

Dr. BEN O. ROBINSON, a witness for the prosecution, was sworn and testified as follows.

Questions by prosecution:

Q. State your name?—A. Ben O. Robinson; 37 years old.
 Q. What is your occupation?—A. Physician and surgeon.
 Q. Where are you located in practice?—A. Parkersburg, W. Va.
 Q. Did you treat one Clyde Bennett for a rifle wound about May 21, 1917?—

A. Yes, sir; I did.

Q. What was the nature of his injury, Doctor?—A. He had a hole through his body; entered the body on the right side, near the top of the shoulder blade, and extended through the apex of the lung, clavicle, collar bone and came out in his neck near the carotid artery, and went back into the face near the angle of the jaw, coming out just below the right eye.

Q. How long did you treat Mr. Bennett; about how long?—A. I have been doctoring him up until recently, since the morning of May 21.

Q. When was the last time you had occasion to examine him?—A. About a week ago.

Q. What was his condition then?—A. His right arm is paralyzed; his condition outside of that paralysis is pretty good,

Q. What in your opinion will be the result of this wound?—A. It will be permanent.

Q. You mean to say it will be a permanent paralysis of the arm?—A. Yes, sir; the bullet cut the brachial plexus nerves that supply the right arm.

By the JUDGE ADVOCATE. Any member of the court have any questions they wish to ask Doctor Robinson?

(No questions by the court.)

Sergt. SEYMOUR REYNOLDS, Company K, First West Virginia Infantry, was recalled by the prosecution and further testified as follows:

Questions by prosecution:

Q. You have been sworn to testify in this case?—A. Yes, sir.
 Q. You were sergeant of the guard the night Bennett got shot?—A. Yes, sir.

Q. Did you post the sentinels that day or were the corporals of the guard to do that?—A. I believe I was acting corporal that day.

Q. You inspected the members of each relief before they were put on post, did you?—A. Yes, sir.

Q. Did you inspect Private Peters?—A. I didn't inspect his rifle, no, sir; but I saw him load and lock his piece.

Q. To your knowledge, did he have orders to keep that piece locked while he was on post?—A. Yes, sir.

Q. Who gave those orders?—A. First Sergeant Smith gave them to me.

Q. And you gave them to him?—A. Yes, sir.

Cross-examination, questions by defense:

Q. Sergeant Reynolds, was there any circumstances under which those pieces should unlock?—A. Not unless the sentinel should unlock them himself.

Q. What was the use for a piece to be loaded if he was never going to unlock it? Were there any circumstances under which he might unlock the piece?—A. Unlock it if he had occasion to.

Q. Who was to be the judge of when that occasion should arise?—A. He was; the sentinel on post.

By the JUDGE ADVOCATE: Are there any questions by the court?

(No questions by the court.)

And further deponent saith not.

CLYDE BENNETT, a witness for the prosecution, was sworn and testified as follows:

Direct examination, questions by the prosecution:

Q. State your name and age to the court.—A. Robert Clyde Bennett; 31 years old the 31st day of last December.

Q. What was your occupation in the latter part of May, Mr. Bennett?—A. I was a brakeman, employed by the Baltimore & Ohio Railroad Co.

Q. Now, as to this accident that occurred at Eaton Tunnel, W. Va., you don't know much about it before you were hurt, do you?—A. Well, all I know about it, I realized I was shot in the back. I don't know who done it or how it happened.

Q. Describe as best you can what you were doing about that time, and what car you were on, and the extent of it, and that will be all, Mr. Bennett.—A. Eaton Station is a station stop for the package local, and we came out of the tunnel, and there were three brakemen of us went on the front end of the caboose, and the two men that were older in the service than I was stepped right by the side, and I went on top of the train to spot the car to unload, and when I got to the second car from the caboose I got shot.

Q. Do you know Private Peters? Had you known him before you were shot, or seen him at any time?—A. I would not know him now if I would see him.

Q. The defendant in this case, you wouldn't know him at all?—A. No, sir; I never seen him nor heard tell of him.

Q. You didn't see him before this accident at all?—A. No; I didn't see him; didn't see anybody.

Q. You don't remember of seeing him standing there?—A. No; I didn't see anybody.

Q. Didn't pay any attention to him at all?—A. None whatever.

Cross-examination, questions by defense:

Q. Just one question, Mr. Bennett: You say you don't know this boy?—A. No, sir.

Q. Then you can't imagine that he could have any personal animus against you?—A. I would not see that he could. I never heard of him before.

By the JUDGE ADVOCATE. Are there any questions by any member of the court:

(Nothing by the court.)

And further deponent saith not.

The prosecution rests.

STATEMENT OF THE DEFENDANT

On the 31st day of March I enlisted in Company K, First Regiment West Virginia Infantry. On May 21, 1917, I was posted on the east end of Eaton Tunnel, No. —, at 8 o'clock, and I suppose I was on there about one and a half hours, and I heard a freight train coming through the tunnel, and just about the time the fan pushes the smoke through, it is time to get off the railroad track for the train; so I climbed upon the watchman's porch, at the watch house, and laid my gun across my knees and took out my knife and began to cut the grease off of it; so this train was passing me then, and one of the brakemen—I would not say which one it was, whether that fellow that the rifle went off and hit or not—but one waved at me and I waved back, and turned my attention to the gun; and I supposed I moved the safety over, but I don't remember of moving the safety, but I suppose I did or it would not have went off, and I won't say sure I had my gun upside down or not, but I think it was, because when I investigated my gun I had it in my hands upside down, and the blood on the trigger guards—must have hit my nose—there was blood on my nose. As soon as the gun went off a fellow naturally would look the way the bullet went, and I seen the fellow fall; and I jumped up and hallooed to the other guard and says:

"Oh, my God, I have killed that poor brakeman!"

He said, "Yes; that's what you have." First Lieutenant Horner came up and put me under arrest.

The defense rests.

The court was closed for findings and the judge advocate and assistant judge advocate withdrew, and finds the accused:

Of the specification: Guilty.

Of the charge: Guilty.

The court was opened and the judge advocate stated in the presence of the accused and his counsel that he had no evidence of previous convictions to submit.

The defendant did not desire to make any further statement with regard to his record of previous service.

The court was closed for sentences, and the judge advocate and assistant judge advocate withdrew, and sentenced the accused to be confined at hard labor at such place as the reviewing authority may direct, for four months, and to forfeit two-thirds of his pay per month for a like period.

JOSEPH C. BERRY,

Captain, First Regiment West Virginia Infantry, President.

GLENN F. WILLIAMS,

Captain, First Regiment West Virginia Infantry, Judge Advocate.

HEADQUARTERS CENTRAL DEPARTMENT,
Chicago, Ill., July 20, 1917.

In the foregoing case of Pvt. Ross Peters, Company K, First West Virginia Infantry, the sentence is approved and will be duly executed at the station of his company.

T. H. BARRY,
Major General, Commanding.

and the *lungs* and *trachea* appear normal. The *liver* is enlarged, soft and tender, with the *bile* being yellowish green. The *kidneys* are normal.