

specified in the schedule in subdivision (c), and that if actual duration of the temporary total disability does not exceed such healing time then the applicable period specified in such schedule shall not be increased.

It is clear, when the related parts of § 8 are considered together, that Congress intended to distinguish between temporary total disability (b), permanent partial disability due to the total loss of the use of a member (c) (1), and permanent partial disability due to the partial loss of such use (c) (18) (19), and that its purpose was to require payments on account of the loss of earning capacity resulting from each. The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the Act, means that the full rate shall be allowed for the duration of the healing time and that the proportionate rate shall apply to the balance of the established compensation period.

The decree will be modified so as to allow the full rate of \$24.04 for only 32 weeks and proportionate compensation of 40 per cent. for 282 weeks.

Modified and affirmed as modified.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. v. BEZUE.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 263. Argued January 7, 1932.—Decided January 25, 1932.

1. A case is not within the Federal Employers' Liability Act unless the employee at the time of his injury was engaged in interstate transportation or in work so closely related thereto as to be practically a part of it. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556; *Chicago & E. I. R. Co. v. Industrial Comm.*, ante, p. 296. P. 420.
2. Whether repair work on a locomotive comes within this definition must be determined, not by reference to the kind of plant in which it was done, nor by the kind of labor usually performed by the

employee, but by whether the locomotive at the time of the accident was in service in interstate transportation, or had been taken out of it. P. 420.

3. The fact that the facilities of the yards where the employee was at work at the time of the injury were used largely for servicing and repairing locomotives engaged in interstate commerce, and that he was engaged in a "plant service," is not sufficient to bring him within the Act. Pp. 419, 420.
4. A practice of the railroad company to send its locomotives to another shop for so-called out-of-service repairs and to use the shop in which the injury occurred for monthly boiler washings and incidental repairs can not overcome facts showing that the locomotive in question was out of service at the time of the injury. Pp. 420, 421.
5. The employee, when injured, was engaged in a terminal plant, moving a pair of main driving wheels from a shop where they had been repaired to a roundhouse where they were to be replaced under a locomotive. The locomotive was one used for interstate transportation, which for nine days had been undergoing repairs in connection with a boiler wash and was inert and partly dismantled. *Held* not within the Act.
256 N. Y. 427, reversed.

CERTIORARI, *post*, p. 604, to review a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals, which affirmed a judgment of the Appellate Division, in an action in damages for personal injuries under the Federal Employers' Liability Act.

Mr. Edward R. Brumley, with whom *Mr. John M. Gibbons* was on the brief, for petitioner.

Mr. Thomas J. O'Neill, with whom *Mr. Charles D. Lewis* was on the brief, for respondent.

Respondent at the time of his injury was an essential employee in an interstate transportation service plant, and then and at all times was engaged in servicing and maintaining interstate locomotives. Therefore his work was an essential part of interstate transportation. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556; *Chicago &*

N. W. Ry. Co. v. Bolle, 284 U. S. 74; *New York Cent. R. Co. v. Marcone*, 281 U. S. 345; *Illonardo v. Erie R. Co.*, 103 N. J. L. 4; *Salvo v. New York Cent. R. Co.*, 216 App. Div. 592; *Erie R. Co. v. Collins*, 253 U. S. 77; *St. Louis R. Co. v. Seale*, 229 U. S. 156; *Erie R. Co. v. Winfield*, 244 U. S. 170; *Knowles v. New York, N. H. & H. R. Co.*, 223 N. Y. 513.

At the time of his injury he was working on an interstate transportation instrumentality not withdrawn from service, and therefore the Federal Act applies. *Lusk v. Bandy*, 76 Okla. 108; *Industrial Comm. v. Davis*, 259 U. S. 188; *Oglesby v. St. Louis, S. F. R. Co.*, 318 Mo. 79; 277 U. S. 587; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353; *Davis v. Akins*, 109 Kan. 474; certiorari denied, 257 U. S. 658.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondent was injured while in the employ of petitioner, an interstate carrier. He brought suit under the Federal Employers' Liability Act in the Supreme Court of New York and recovered a judgment which was affirmed by the Appellate Division and the Court of Appeals.¹ Petitioner urges that at the time of respondent's injury his work was not in interstate commerce within the intentment of the statute.

At Maybrook, New York, the westerly terminus of a branch of the railroad, petitioner maintains a roundhouse, a machine shop, a carpenter shop, and a so-called hoist building containing four tracks with two pits, a hoist of large capacity for raising engines, a lathe for repairing driving wheels, apparatus for electric welding, tool room, and electrical shop. These facilities are used largely for

¹ 232 N. Y. App. Div. 840, 248 N. Y. S. 926; 256 N. Y. 427, 176 N. E. 828.

servicing and repairing locomotives engaged in interstate transportation. The respondent had been employed at this terminal for about a year, at first as an engine wiper; later, and at the time of the accident, as a member of a general unskilled labor gang. His principal work was the operation of an electric truck with which he transported materials from one portion of the plant to another. By means of this truck, and sometimes without it, he was accustomed to assist in various minor repairs to locomotives brought into the terminal, such as lifting driving rods, pumps, journal boxes, draw bars, assisting in greasing, or greasing, engines, and other work of a similar nature. On the morning of September 2, 1929, he was not using the truck, but pursuant to an order of the foreman of the gang joined other workmen in removing a pair of main driving wheels from a lathe in the hoist building and rolling them along the tracks in the yard to an engine pit where they were to be installed in a locomotive which had arrived at the terminal August 23, and had been set aside for the customary boiler-wash given all engines every thirty days. Preparatory to the boiler-wash an inspection was made and orders were issued for certain work, which included the removal of the main driving wheels and shifting them to the hoist shop so that the journal might be turned, the transfer of several parts to the machine shop, the separation of the jacket from the fire-box, the replacement of some four hundred seventeen leaking bolts, the renewal of bushings, and other items requiring skilled labor. The fire was dumped, the main driving wheels and other portions needing attention were removed, and the engine was left inert and incapable of locomotion.

The boiler-wash and repairs consumed twelve days. On the ninth day, the turning of the journal on the main drivers having been completed, the respondent, on orders of his foreman, joined others of the unskilled labor gang

in removing the main driving wheels from the lathe in the hoist shop, placing them upon a track, and pushing them by hand to the turntable, which was then connected with another track onto which the men pushed the wheels preparatory to moving them to a pit in the roundhouse where they could be placed under the locomotive. During this work respondent was injured, as has been found, by the negligence of the foreman in removing a block from under the wheels.

The state court held that the terminal facilities in which respondent worked constitute a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce; that the fact that some work is there done on locomotives engaged in intrastate commerce does not deprive the establishment of its character as an essential instrumentality of interstate commerce; that the respondent was engaged in a "plant service," and worked indiscriminately upon engines engaged in interstate and intrastate commerce. The conclusion was that the nature and purpose of the plant warranted characterization of all respondent's work, of whatever nature, as in interstate commerce.

The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177; *Illinois Central R. Co. v. Cousins*, 241 U. S. 641; *New York Central R. Co. v. White*, 243 U. S. 188, 192; *Industrial Accident Comm. v.*

Davis, 259 U. S. 182, 187; *Chicago & N. W. Ry. Co. v. Bolle*, ante, p. 74.

The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 558; *Chicago & E. I. R. Co. v. Industrial Comm.*, ante, p. 296. Under the circumstances of this case, whether respondent is within the Act must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principle announced in *Industrial Accident Comm. v. Davis*, supra, and *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as *New York Cent. R. Co. v. Marcone*, 281 U. S. 345, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run.

Respondent endeavors to support the claim that here the instrumentality had not been taken out of interstate commerce, by reference to the practice of petitioner, which is that work, sometimes greater and often less in amount than in this case, is done at Maybrook in connection with the monthly boiler-wash; whereas after a locomotive has run thirty-five thousand miles, or eighteen months, it is marked for out-of-service repairs and is sent to petitioner's general repair shop at Readville, Massachusetts. The argument is that the railroad company thus recognizes that such work as is done at Maybrook in conjunction with boiler-washing is incidental and does not take the engine out of service.

We do not think this custom warrants a disregard of the proved facts, and the adoption of an artificial classification of the locomotive as one in service at the time of respondent's injury. The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

BLACKMER *v.* UNITED STATES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 200 and 201. Argued January 5, 6, 1932.—Decided February 15, 1932.

1. A citizen of the United States residing in a foreign country continues to owe allegiance to the United States and is bound by its laws made applicable to his situation. P. 436.
2. The power to require the return of absent citizens in the public interest is inherent in sovereignty; and what in England was the sovereign prerogative in this respect, pertains, under our constitutional system, to the national authority, exercisable by Congress, to prescribe the duties of the citizens of the United States. P. 437.
3. One of the duties of such absent citizens to the United States is that of attending its courts to give testimony when properly summoned; and Congress may provide for the performance of this duty and prescribe penalties for disobedience. P. 438.
4. Questions of authority in such cases are not questions of international law, but of municipal law. P. 437.
5. The Act of July 3, 1926, provides that when the testimony of a citizen of the United States residing in a foreign country is needed by the Government in a criminal case, the court in which the case is pending may issue a subpoena to be served upon him personally by an American consul with a tender of money to cover his necessary expenses of travel to and from, and attendance upon, the court; that if he refuse or neglect to appear as directed by the subpoena, the same court, upon proof of service and default, may issue its order directing him to appear before it at a designated time to show cause why he should not be adjudged guilty of con-