

Q Do you know whether or not he saw you? A No, sir.

Q What time was that? A Probably two or three minutes after seven o'clock.

Q Just before the accident? A Yes, sir, just before the accident.

Q What was Jackson doing when you waived your hand at him? A I suppose he was leaning towards the lever.

Q Did you see what he was doing? A Was not doing apparently anything at the time.

Q Did you see in what direction he was looking? A Towards me.

Q Looked at you? A Yes, sir.

Q At that time do you remember whether or not there was a Sixth avenue train coming down? A There had been a Sixth avenue train pass me while I was probably in the neighborhood of 54th street.

Q Do you know whether any other train passed prior to the accident? A Merely the preceding Ninth avenue train that I got off from at 59th street.

Q The one preceding the Sixth avenue? A Yes, sir, the Ninth avenue preceded the Sixth.

Q The next train, could you see the next train that was stopping? A The Ninth avenue?

Q The one that had the accident? A No, I did not see that. My back was towards it.

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Q So you saw Jackson after the last train had gone by the tower, prior to the accident? A Yes, about that time.

Q And waived your hand at him? A Yes, sir.

Q You were on the structure? A Yes, sir.

Q You are what is known as the relief? A To the tower man?

Q Yes. A Yes.

Q You take his place if he has to go away? A Go to the toilet, yes.

Q When he wants to go to the toilet? A Yes.

CROSS EXAMINATION BY MR. NAYLOR:

Q Your duty is that of -- is called dispatcher? A Yes, sir.

Q What are the duties that you attend to there; what is it that you do? A Well, I keep track of the interval, Ninth and Sixth avenue trains, and if they are any larger than they should be I notify the terminal point, and they cover that interval on the return trip, and then if anything should happen to a train, break down within a radius of a mile, either one way or the other, I goto it and get them moving as quickly as I possibly can.

Q You are stationed in the little office in front of the tower? A Yes, sir.

Q How far away? A Probably within ten feet.

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Q Now, on the morning in question you were due to report at this place at any time prior to the arrival of the first down express? A Yes, sir.

Q And that was your time for reporting each day? A Yes, sir.

Q Did you always get off the train in coming down at 59th street? A Very much, yes.

Q Did you always? A Up to that time no; I probably rode to 50th street.

Q Sometimes you went around into 53rd? A I have that.

Q So you might come from any direction? A Yes, sir.

Q You have come down on the trains, when they have been Sixth avenue trains, and slowed up and got off in front of your station house? A Yes.

Q And it was not an every day occasion for you to come down from 59th street? A No, sir.

Q How fast was this train that was coming down, this Ninth avenue train, running, when it went on the point of the switches? A I did not see the train.

Q It passed you, you were on the structure?

A The preceding train, the Sixth avenue, passed me on the structure.

Q Passed you up at 54th street.

Q Did the Ninth avenue pass you somewhere? A No, sir.

Q Your walk along the edge of the track was not over

four feet beyond the west side of the track, was it? A I got off ---

Q Answer me. Was it not within four feet of the west side of that track? A Where I was?

Q Where your walk was? A Yes.

Q Did not the Ninth avenue train pass you between 54th street and these switches? A No, sir.

Q Where were you when the Ninth avenue train passed?
A Immediately in front of the office.

Q At what rate was the train going when it passed you and you were in front of the office? A In fact the train did not pass me at all.

Q How fast was the train going when you were at that point? A That I cannot say. It was merely supposition on my part how fast she was going according to the accident.

Q Didn't you see the train at all? A No.

Q You came down upon this structure, and here was the train coming down and you did not see it? A This disabled train do you speak of?

Q The disabled train? A No, sir, I did not.

Q And you were within four feet of it? A Within four feet of it.

Q You say on your examination --- have you never stated that you are not sure whether you waved to Jackson in the

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tower? A I cannot say.

Q Is it not a fact that there is some doubt in your mind as to whether you waved to Jackson that morning? A No, sir.

Q You are very positive of it now? A Yes, sir.

Q You were then how far away from the tower? A Probably sixty to eighty feet.

Q And was there not noise on the street below and trains passing on the structure at the time? A May have been.

Q Could you hear Jackson say anything? A No, sir.

Q Now, then, at that time, seven minutes or five minutes past seven o'clock, who was around on this platform besides Jackson in the tower, and you coming down on the west walk of the track? Who else was there near there? A The yard man, he was I should judge about 51st street.

Q He was down below 53rd south? A Yes, sir.

Q Does he know anything about operating the tower switches, the levers in the tower? A I do not believe that he did.

Q Don't you know as matter of fact that he did not? A He did not.

Q He did not, did he? A No.

Q How about the otherman, Yoeman, where was he?

A He was at 55th street.

Q Did he know anything about the switches? A No, sir.

Q He was two blocks away? A Yes, sir.

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Q You were the only man around there that knew anything about the switches? A That is all, yes.

Q When had the last night relief gone, the night guard man?
A Six o'clock.

Q How many people were there with Jackson between six and the time you arrived in the morning? A One.

Q Who? A The night yard man.

Q What was his name? A Shotte.

Q What time did Shotte leave? A Six o'clock in the morning.

Q Between six and seven o'clock is it not a fact that Jackson was absolutely alone in this tower? A Yes, sir.

Q Nobody around at all? A Except the yardman.

Q The yardman left at six o'clock? A There is the relief, he reports there at six o'clock, the day man.

Q What was his name? A Eberts.

Q Eberts is the man who went down to 51st street? A He was there at that time but after seven o'clock.

Q Did he know anything about the operation of these levers?
A No, sir.

Q I ask you again, was there any person with Jackson between six that morning and the time of the accident, actually on the ground who knew anything about the operation of the levers? A No, sir.

The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and takes a recess until five minutes after two.

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AFTER RECESS.

J O H N E. B I E B E R, resumes the stand.

RE-DIRECT EXAMINATION BY MR. TRAIN:

Q I observe by looking at the Coroner's minutes that you testified then that the defendant gave you the customary salute on that morning. Now do you remember making such a statement in the Coroner's Court?

Objected to. Objection sustained.

Q Do you recollect being asked in the Coroner's Court whether or not the defendant gave you the customary salute?

A I don't remember, no, sir.

Q Do you remember answering to the question that he did give you the customary salute? A I do not.

Q Do you remember this question: "Did he on that morning -- referring to the morning of the accident -- greet you? A I think he did, yes. Q Do you remember, A Well, I won't swear but I feel positive that he did. Q What I want to find out is if he was looking up town? A When I was at this point sixty feet from the tower, the customary salute I got from Jackson. Q I want to know what he did on that occasion? A Saluted. Q Did he salute you? A Yes." Do you recollect giving those answers in the coroner's court? A If I made that statement it is undoubtedly correct.

BY THE COURT:

Q The question is whether you have any recollection?

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BY THE TRAIN:

Q Have you any present recollection? A No, sir.

Q Is your memory less good now than it was then? A I guess not.

Q Do you now recollect whether or not he did salute you in anyway? A I do not.

Q Do those questions recall to your mind your state of mind on that point in the Coroner's Court? A Yes .

Q Did you recollect then that Jackson saluted you?
A I cannot say -- I don't recollect.

Q Do you say you did not so testify in the coroner's court? A Oh, no.

Q You think your memory is as good now as it was then?
A Yes.

Q Can you explain an apparent contradiction in your testimony on that point?

MR. NAYLOR: I object to that form of question.

I do not believe it is altogether a contradiction. He says that he does not recollect.

BY MR. TRAIN:

Q You have no doubt but what you did testify as I read from the minutes? A No doubt at all.

Q What I want to know is why, if you were positive that he did salute you, when you testified in the Coroner's Court, how it is that you are almost equally positive that he

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did not now? A It is sometime since then.

Q You lay it to the lapse of time between? A Yes, I do.

Q What is your best recollection at the present time as to whether he saluted you or returned your salute?

A I think he did.

RE-CROSS EXAMINATION:

Q You are not positive about that? A No, I am not positive.

Q You did not intend to have the jury carry the idea that you are stating positively that he returned any salute to you? A That my salute was recognized, I do not, not at this moment.

Q By that you mean you are in the habit of going down in the morning quite frequently, and it is a customary thing for you to wave your hand to him? A Yes.

Q You may have omitted it this morning and not remembered, is that the idea? A I may have, yes.

Q You have no distinct recollection as to that occurrence that morning?

MR. TRAIN: He did not say he had no distinct recollection of his own salute, it was about Jackson's supposed reply.

THE WITNESS: My own salute, yes, but Jackson's

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reply I don't remember.

BY MR. NAYLOR:

Q You saw Jackson right after the accident? A A few minutes after the accident.

Q You stayed right there on the structure? A Yes.

Q Did you see Kelly, the motorman? A No.

Q Ever see him since? A No, sir.

Q Did you look for him on the train? A No, sir.

Q Did you look for him on the platform? A No, sir.

Q Nowheres on the structure? A No, sir.

Q Your duty as so-called dispatcher at this point is to report delinquencies of the different employees?

A Yes, sir.

Q Did you ever report Jackson for any delinquency?

A No, sir.

Q Did you ever find him away from his post? A No, sir.

Q Do you know whether he was away from his post this morning? A No, sir.

Q You know how to operate those levers there? A Yes, sir.

Q With the cautionary signal No. 1 set at yellow and the home signal, 2, at green, and the pot signal yellow, a combination of three of that kind, what would you expect a Ninth avenue motorman to do?

Objected to. Sustained. Exception.

Q What would be the duty of a Ninth avenue motorman?

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Objected to.

BY MR. NAYLOR:

Q What is the rule regulating the duty of a Ninth avenue motorman finding a combination of those three signals, yellow at 1, green at 2, and yellow at the pot signal?

MR. TRAIN: I object unless the rules are put in evidence, they are the best evidence.

THE COURT: If the witness knows.

MR. TRAIN: You are allowing by secondary evidence what you would not permit me to prove by primary evidence.

THE COURT: The question of secondary evidence has never been raised here touching the rules.

BY THE COURT:

Q Do you know what the rule is? A That particular route that counsel speaks of?

Q Yes. A Yes.

MR. TRAIN: May I examine the witness?

THE COURT: I have just asked if he knew it and he answered yes.

MR. TRAIN: I would like to ask the witness whether his knowledge is not based upon the book of rules supplied by the company.

THE COURT: You may answer.

THE WITNESS: Yes.

MR. TRAIN: Then I think the rules book ought to be

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put in evidence.

BY MR. NAYLOR:

Q Wholly or in part? A In part.

MR. TRAIN: I object to the statement of any rule unless the book is offered.

(The former question is repeated as follows:)

Q What is the rule regulating the duty of the Ninth avenue motorman finding a combination of those three signals, yellow at one, green at two, and yellow at the pot signal?

A Stop.

Q What is the duty of a Ninth avenue motorman at that point, coming down and finding signals imperfectly set for his route? A Stop.

Q Is there any difference in the effect of such a combination and a single red light at home? A The home signal being red is stop.

Q He would also stop when there was a combination of the three signals?

MR. TRAIN: I object to the form of the question.

Objection sustained.

THE COURT: Put your question.

BY MR. NAYLOR:

Q Should he stop? A Yes.

Q You are a superior officer to the tower man?

A Yes, sir.

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Q You have worked on that tower and in that vicinity with Mr. Jackson for a number of years? A Yes.

Q You have known people who know him? A Yes.

Q Do you know his reputation for attention to duty and as a faithful employee? A Yes, sir, it is good.

Q What would be the duty of a Ninth avenue motorman coming down with Sixth avenue markers on his train, and finding the three lights in question set in combination of yellow at 1, green at 2, and yellow at the point of the switches? A Stop.

Q Have you known motormen to come down with the wrong signals on their train?

Objected to. Objection sustained. Exception.

Q Have you seen Sixth avenue markers on Ninth avenue trains coming down on that track?

Objected to. Sustained. Exception.

Q Do you know any rule of the company which requires a man to set a switch or a signal when he is stricken with sickness or anything of that sort?

MR. TRAIN: I object --- I withdraw my objection.

MR. NAYLOR: I withdraw my question.

BY MR. NAYLOR:

Q Has it ever been in your experience that one of the connecting rods operating the switches and signals has become disconnected or broken?

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Objected to. Sustained. Exception.

Q What would be the duty of a Ninth avenue man coming down, finding ---

MR. NAYLOR: I withdraw that question.

BY MR. NAYLOR:

Q What time did the first express go down? A 7:15.

Q You were ten minutes ahead of time? A Yes, sir.

Q You were expected to be there just in time for that train? A Ten or fifteen minutes preceding the first express.

BY MR. TRAIN:

Q When are you due at your post or were you due on that day at your post? A Anywhere from 7 to 7:5 in the morning, or seven ten.

Q Is there not a fixed time when you are due there? A No-- get there before the first express south bound and that is due there at seven fifteen.

Q Then you are not due there until seven fourteen, are you? A Not exactly, after seeing that everything is all right --

Q Louder? A Well, say seven ten at the latest.

Q There is not any defined time? A No, sir, betwixt seven and seven ten.

Q In your response to a question put to you by Mr. Naylor, before lunch, you gave general assent to a question which contained the statement that you were within four feet

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of the Ninth avenue train, and I want to inquire whether you were at any time to your knowledge within four feet of the Ninth avenue train? A No, sir.

Q How near the Ninth avenue train were you, so far as you know, at any time? A Well, there was a distance of probably thirty feet from the switch points to where I stood.

Q You have told the jury that if a Ninth avenue motorman coming down on the local tracks saw a yellow light at the cautionary point, and a green light at the home signal, and then a yellow pot light at Sixth avenue, it would be his duty to stop his train? A Yes, sir.

Q And I assume that the same rule holds good on the Sixth avenue elevated that holds good on all railroads that anything out of the ordinary is to be deemed an order to stop the train? A Yes, sir.

Q If he noticed anything, no matter what it is, that is apparently inaccurate, incorrect, the wrong thing displayed, out of the ordinary, that is a signal to stop? A Yes, sir.

Q It is in itself an emergency signal? A Yes, sir.

Q And there is no question but what a Sixth avenue route for a Ninth avenue train is an emergency signal?
A Yes, sir.

Q Just as a white light displayed at any point would be a signal to stop? A Yes, sir.

Q Let us turn for a moment from the duty of a motorman to

the duty of Jackson. What was the duty of Jackson as a tower man at this point immediately after the Sixth avenue train passed the tower? A To set the switch in a normal position for south bound Ninth avenue.

Q Before setting it in the normal position what was his duty to do? A Throw the switch.

Q Did he have to change the home signal to red? A The home signal to red.

Q And then clear the track for the Ninth avenue train, and make it a straight-away track? A Yes, sir.

Q And then what next? A Then throw the signal -- that is throw the switch and leave it that way.

Q Leave the Ninth avenue track clear? A Yes, sir.

Q And then what was his next duty? A To wait for the next approaching train and observe which road it was.

Q If it was a Ninth avenue train? A Leave the switch as it is and clear the signal.

Q Clear the home signal to green? A Yes, sir.

Q If it was a Sixth avenue train? A He would hold that train there until he set the switch for the Sixth avenue route and then clear the signal.

BY MR. NAYLOR:

Q In case a Sixth avenue train should follow a Sixth avenue train, does that apply? A Yes, sir.

Q What was the duty of a motorman in connection with an

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emergency such as was presented here?

MR. TRAIN: I object. That has been answered.
It was a signal to stop.

MR. NAYLOR: If it is conceded, that is all I want.

MR. TRAIN: There is nothing conceded; that is the
testimony.

THE PEOPLE REST.

MR. NAYLOR: I move that the District Attorney
be directed to elect which count he will go to the jury.

THE COURT: What have you to say?

MR. TRAIN: The District Attorney does not want to
elect unless he has to.

THE COURT: Can you tell me any difference between
the counts?

MR. TRAIN: No, I cannot. Perhaps Mr. Naylor will
throw some light upon it. We rely upon the count which
charges the defendant with neglecting to do a specific
duty.

MR. NAYLOR: The first count is general, and the
second count states a specific state of facts.

THE COURT: I will deny your motion at this time
with leave to renew.

MR. NAYLOR: I move your Honor to dismiss the

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indictment upon the ground that the essential elements of the crime as set forth in the indictment has not been proven.

Denied. Exception.

THE COURT: I acted on your motion a moment ago, Mr. Naylor to direct an election, because the distinction between the counts was not clearly in my mind. I find upon inspection a distinction, and I therefore withdraw the first count of the indictment from the consideration of the jury, and it may go to the jury under the second count of the indictment.

Mr. Naylor opens the case in behalf of the defense.

THE DEFENDANT'S CASE.

CORNELIUS A. JACKSON, the defendant,
called as a witness in his own behalf, being duly sworn
and examined, testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are the defendant in the action, - you are the defendant? A Yes, sir.

Q How old are you? A Forty-three.

Q Where were you born? A Warden Dyke, New Jersey.

Q How far is that beyond Patterson? A About six or seven miles -- about six miles west of Patterson.

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Q On a farm? A Yes, sir.

Q And some ten years ago you came to New York City?

A Yes, sir.

Q And went into the employ of the elevated railroad?

A Yes, sir.

Q Your first employment there was in what capacity?

A A coupler.

Q In what yard? A 135th street.

Q What were your duties as a coupler?

Objected to. Sustained. Exception.

MR. NAYLOR: I want to show his life history,
and show how he grew up in this service.

THE COURT: It is unimportant. I sustain the
objection.

BY MR. NAYLOR:

Q Were you promoted from coupler to another position?

A Yes, sir.

Q What was the next position? A As a flagman.

Q At what point? A 53rd street and Ninth avenue.

Q About what time was that, about what year? A About --

Q How many years after you had been in the railroad
service? A About two years.

Q Did you learn anything about the operation of the sig-
nals at that time? A No, sir.

Q Did you later learn the signals? A Yes.

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Q And to operate the levers -- about how many years after you became flagman did you learn to operate the tower?

A Probably about a year and a half -- probably a little longer.

Q What were your duties as flagman?

Objected to.

Question withdrawn.

Q How long were you flagman? A I should judge about in the neighborhood of eight years.

Q During that time were you assigned in any way to duties in the tower? A Yes, sir.

Q And what were your duties in connection with tower work? A Operating the trains, - taking the place of other men that was absent.

Q As a relief? A Yes, sir.

Q But at what time were you finally assigned permanently to the tower? A The time the strike took place.

Q Do you recall the date of that -- was it March, 1905? A It was around the 7th of the month, I think.

Q The accident took place in September, 1905? A Yes, sir.

Q I show you People's Exhibit 5, signal bulletin No. 1; did you ever get any other printed rules besides that? A Yes, sir; one more book.

Q I show you this book; is that the book you received?

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A Yes, sir, one like this I received.

BY THE COURT:

Q You had better examine the book? A Yes, this is the one I received, there is my name.

BY MR. NAYLOR:

Q Is that the identical book? A Yes, sir.

THE COURT: He says that is the book he received.

MR. NAYLOR: I offer it in evidence.

BY MR. TRAIN :

Q Fix the date, - what was the date you received this book?

BY MR. NAYLOR:

Q About when did you receive that? A I received that when the motive power was changed from steam to electricity.

Q Do you recall what year that was? A No, I cannot.

BY THE COURT:

Q Was it prior to your service in the switch tower?

A No, after,-- before I entered the switch tower.

BY MR. NAYLOR:

Q While you were still a flagman? A Yes, sir.

MR. TRAIN: May I ask whether there is anything in this book relative to your duties as a tower man?

THE WITNESS: No, sir.

MR. TRAIN: I object to it.

BY MR. NAYLOR:

Q In connection with your duty as a towerman are you not

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instructed with reference to the duty of a motorman and trainman, is not that part of the instructions given you? A Yes, sir, as I was flagman I was instructed to that effect.

MR. NAYLOR: I offer this book in evidence.

Objected to. Objection sustained, because it is not relevant to the issue.

Q Is it not a fact that you are instructed and as a tower man are given the rules which apply to motormen and trainmen?

Objected to as immaterial.

Q As part of your duty as tower man?

Objected to. Sustained. Exception.

MR. NAYLOR: If your Honor please, in connection with the offer of these rules I desire to call your attention to the necessity of proof to show there was a reasonable ground for expecting the motorman on this train to perform the duty that had been prescribed for him by these rules, in which the tower man had been educated and taught to rely upon when performing his duty.

THE COURT: I have permitted the defendant to answer the question that this book was given to him, because of the People's contention that another book was given to him. Now he says this is the only book other than the one in evidence, which is offered by you, which was handed to him. That is a contradiction to that extent of the People's contention, but the contents of this book

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it appears from the statements made in court, does not relate to his duties as a tower switchman, and therefore I exclude it as not relevant to this issue.

MR. NAYLOR: If it is shown by his testimony that he is instructed in the duties, the general duties of the trainmen and the motormen, as a part of his equipment in his capacity as tower man ---

THE COURT: No, I adhere to my ruling.

MR. NAYLOR: I except.

The book is marked for identification Defendant's Exhibit A.

BY MR. NAYLOR:

Q Did the witness Lutz give you any book of instructions at the time that he claims he was giving you or showing you how to work the levers in the tower?

MR. TRAIN: Lutz did not say he did. There is no contention he gave him any book.

THE COURT: He may answer it. I think he said no.

THE WITNESS: No, sir.

BY MR. NAYLOR:

Q Did he read to you from any book? A No, sir.

Q Just what instructions did Lutz give you if any at that time? A To operate the lever.

Q Show you what levers and what switches? A Yes, sir.

Q And signals? A And signals.

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Q Is that all? A And to look out for the trains, the signals on the trains as they were coming down.

Q Did you ever leave your post of duty while you were at that ---

Objected to.

THE COURT: He may say yes or no to that, because that includes the time in question.

BY MR. NAYLOR:

Q Did you ever desert your duty?

Objected to unless it is specified at this time.

He cannot prove prior dereliction.

THE COURT: The greater includes the less. He may answer if he ever did.

MR. NAYLOR: I will withdraw the question and re-frame it.

BY MR. NAYLOR:

Q Excepting the 11th of September, 1905, did you ever at any time desert your post of duty?

Objected to. Sustained. Exception.

Q On the 11th day of September, 1905, tell the jury in your own words, just what took place in connection with this train?

MR. TRAIN: I object. A general question of that sort enables a witness to say anything he may see fit to state.

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THE COURT: If it is not relevant, move to strike out the answer. He may answer.

BY MR. NAYLOR:

Q What time did you report to duty?

THE COURT: Then the prior question is withdrawn.

A Twelve o'clock at midnight.

Q That would be the early morning of Monday, September 11? A Yes, sir.

Q Your tour of duty ran until what time? A Eight o'clock in the morning.

Q Had you been attending to your duty all that night? Had you been at work all the time? A Yes, sir.

Q From twelve o'clock at night until --- A Yes, sir.

Q Had you had any physical ailment during that night? A Yes, sir.

Q What was it? A Sickness.

Q What kind of sickness? A Cramps, pains.

Q Had there been a relief or a yard man on the structure with you until six o'clock that morning? A Yes, sir.

Q What became of him at six o'clock? A He went home.

Q From six o'clock until seven o'clock, was there any person on the structure within two blocks of the tower, besides yourself? A No, sir.

Q Was there any relief at hand, any man to call whom you saw at the time, or near the time of the accident? A No, sir.

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Q The accident took place at seven five, as I understand it? A Yes.

Q Along about that time did you notice the Sixth Avenue train coming down on the west track, did you notice a Sixth Avenue train coming down? A Yes.

Q Where was that train when you noticed it? A At 57th Street.

Q Then what was your condition of body, - what shape were you in? A In very bad shape.

Q Tell the jury what it was, stomach ache? A I had cramps and was physically broken down. I could not stand the pressure any longer, and I cleared the signals for this Sixth Avenue train and I went downstairs. While I was downstairs this Sixth Avenue train passed by, and I looked through a window and saw the next preceding train, which was a Ninth Avenue train, and I ran upstairs as quick as I possibly could, and when I got upstairs this Ninth Avenue train was on the switch points and there was nothing could be done.

Q You had had a movement of the bowels? A Yes.

Q You had been sitting upon the closet? A Yes.

Q Did you stop to button up your trousers when you came up? A No, sir.

Q Did you come upstairs with your hand upon them?
A Yes, sir.

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Q Had you stopped to use any paper? A No, sir.

Q Had you hurried back as soon as you could? A As soon as I could possibly get up there.

Q Had you felt before you went down that you might faint if you did not go?

Objected to as leading.

Sustained.

Q What was your condition when you started down?

THE COURT: He has described that.

MR. NAYLOR: I want to make it clear to this jury.

THE COURT: Say it again, then.

A They were very bad --- I was in such pain and torture that I could not stand it any longer.

Q Did you see Mr. Bieber or anybody else at the time?

A No, sir, not at that time.

Q With the trains passing and the noises, could you make them hear if you called? A No, sir.

Q When you set the Sixth Avenue signal, or signal for the Sixth Avenue train, could you see the Ninth Avenue train coming? A No, sir, I could not.

Q Was there any open or blind switch ahead, into which any succeeding train after the Sixth Avenue train might run?

Objected to. Sustained. Exception.

Q The Sixth Avenue train went around all safe? A Yes, sir.

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Q The Sixth Avenue train went around all safe?

A Yes, sir.

Q And any succeeding train had the same opportunity, did it not?

MR. TRAIN: I object as self evident.

Objection sustained. Exception.

Q There was a clear track ahead for any train that came?

A Yes, sir.

Q There were no cars standing upon either of the routes, Sixth Avenue or Ninth Avenue? A No, sir.

Q Was this accident entirely unexpected by you? A Yes, sir.

Q Had you contemplated that by fixing these signals for the Sixth Avenue train that you were jeopardizing any other train? A No, sir.

Q Did you contemplate that the Ninth Avenue train would run past a Sixth Avenue switch set against it?

Objected to. Sustained. Exception.

MR. NAYLOR: The question is intent.

MR. TRAIN: He is not charged with any intent.

If he intended to do it he would be charged with murder.

MR. NAYLOR: I note an exception. The indictment charges us here with willfully, feloniously and carelessly.

Objection sustained.

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Exception.

BY MR. NAYLOR:

Q Did it occur to you in the slightest that the setting of these signals could possibly lead to any accident?

A No.

Q Have you seen Ninth Avenue trains coming down bearing Sixth Avenue markers?

Objected to. Sustained. Exception.

MR. TRAIN: I object to it unless that is the contention here. If so I withdraw my objection.

THE COURT: Do you contend that this train bore wrong markers?

MR. NAYLOR: No.

THE COURT: Then I sustain the objection.

Exception.

BY MR. NAYLOR:

Q How far did you have to go to reach the toilet?

A About, I should judge, about twenty feet.

Q How far is the lower floor from the floor where the levers are? A About ten or twelve.

Q Then you had to go across the floor in the lower room?

A Yes, sir.

Q How long were you gone? A I should judge about a minute and a half, not longer than that.

Q You had never been reported for any dereliction of

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duty?

Objected to. Sustained. Exception.

Q Have you ever omitted to set a signal, where you should have set a signal, during such time as you have been in full possession of your bodily faculties?

THE COURT: You may inquire as to what he did on this day. You may show what happened at the time this accident occurred.

BY MR. NAYLOR:

Q On this particular day, September 11, 1905, did you set your switches in all cases according to your understanding of the rules, so that trains passed in safety? A Yes, sir.

Q Would you have set a switch for the Ninth Avenue train had you been physically able to do so? A Yes, sir.

Q Were you able to do so? A No, sir, I was not.

Q There is a junction of this road at 53rd Street and Sixth Avenue? A Yes, sir.

Q Is there any person at that point who knows anything about the operation of the levers in your tower? A No, sir.

Q Is there any person on the west side at that hour in the morning who knew how to operate the tower at 53rd Street and Ninth Avenue? A Only Mr. Bieber and the relief man, unless the regular men were sent for.

Q They had to be sent through at Harlem? A Yes, sir.

Q And Mr. Bieber and the regular men were not there?
A No, sir.

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Q By the regular man you mean the regular inspector?

A By the regular man I mean Mr. Lutz --- he is the regular man --- my relief on that morning.

Q He was your relief at that time? A Yes, sir.

Q He went on when you left? A Yes, sir.

Q He went on at eight o'clock in the morning and you went off at eight o'clock? A Yes, sir.

Q He was not there at the time of this accident?

A No, sir.

CROSS EXAMINATION BY MR. TRAIN:

Q Assuming that you had not been under a physical necessity to leave your post, what was your understanding on the morning of September 11th, 1905, as to what your duties were in relation to setting switches and signals after the passing of the Sixth Avenue trains? A The home signal was supposed to be turned red.

Q What was the next thing? A And to straighten up your Sixth Avenue route for a Ninth Avenue route and leave them that way until the proceeding train came down, until you saw what it was.

Q Until the following train came down? A Yes.

Q And then if it was a Ninth Avenue train to clear the signals to green? A Yes, sir, to clear the signal to green.

Q In other words, what the gentlemen testified to this

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morning in regard to that is your understanding of it?

A Yes, sir.

MR. NAYLOR: I object to the form of the question.

Objection sustained.

Q That is what you say you would have done could you have done so? A Yes, sir.

Objected to upon the same ground. Objection sustained.

MR. TRAIN: I refer to his own answer now.

THE COURT: Precisely, but it was objected to and I sustained the objection. The trouble with the question is that the record does not clearly show what the question is --- it relates back.

MR. TRAIN: I see.

BY MR. TRAIN:

Q As I understand it, by your last answer, you meant the jury to understand that had you been physically able to do so, after the Sixth Avenue train had passed, you would have changed the yellow signal to red, cleared the track for the Ninth Avenue train, and then waited to see what train was coming?

A Yes, sir.

Q And if it were a Ninth Avenue train then to have given it the green signal? A Yes, sir.

Q Or if a Sixth Avenue train, change the track back to Sixth Avenue route, and then to clear the signal? A Yes, sir.

Q What was the nature of this illness of yours, was it

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chronic or something that occurred merely on that morning?

A No, it was something that occurred that night --- cold.

Q When did it begin? A Around two or half past two in the morning.

Q Up to that time you felt entirely well? A Up to that present time, yes.

Q Up until two or half past two you had felt all right?
A Yes, sir.

Q What was the first manifestation of this illness?
A Cramps and pains.

Q And a desire to use the toilet? A Yes, sir.

Q Did you at once make use of the toilet? A Yes.

Q And secured some one to take your place while you were at the toilet? A Yes, sir.

Q How many times did you use the toilet up to six o'clock?
A Probably three or four times.

Q On each of those occasions who took your place?
A The night yard man.

Q In each instance? A Yes.

Q Now, was this pain, and faintness, and so forth, which you have described something that progressed in seriousness as time went on? A Yes, sir.

Q Got worse and worse? A Worse all the time.

Q Did it start in pretty bad? A Yes.

Q Hit you very suddenly? A Very sudden.

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Q Do you attribute it to any particular thing -- did you ever find out what it was that caused this acute indigestion-- something you had eaten --- A Something I had eaten.

Q But you never found out what it was? A No.

Q How long did it last? A It lasted all that next day.

Q When was it worst, when was it at its height?

A Around say from six o'clock, half past six in the morning up until about twelve or one o'clock, during the day.

Q Now, between five and six o'clock were you suffering badly from these cramps? A Yes.

Q Feeling faint? A Yes, sir.

Q Have any other symptoms of disorder except faintness and cramps? A That is all, and going to the toilet.

Q You felt verybadly? A Yes, sir.

Q And I think you used some expressions in giving your testimony to Mr. Naylor, the gist of which was that you were in an exceedingly bad state? A Yes, sir.

Q Pretty well knocked out? A Yes, sir.

Q What means of communication are there between your tower and the other stations on the elevated road? A By a telephone.

Q You were connected directly with the 59th Street station? A Yes, sir.

Q And with the 53rd Street station? A Yes, sir.

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Q And you had had these symptoms prior to the leaving of the man who went off at six o'clock? A Yes, sir.

Q Now, during the hour between six and seven did you feel any necessity for going to the toilet? A Yes.

Q Did you know when to expect your relief, I mean the man that was to come on about seven o'clock or shortly after? A No.

Q You knew he came on about that time? A I knew he came on about seven o'clock.

Q When was the last time you went to the toilet before the time you went at five minutes past seven? A At about five or ten minutes after six.

Q While your relief was still there? A Yes.

Q Did you say anything to him about thinking that you were in pretty bad shape to run the tower? A He knew I was in bad shape.

Q Did you say anything to him about it? A No, only that I merely wanted to go to the toilet.

Q Just wanted to go to the toilet? A Yes.

Q You say you saw a Sixth Avenue train coming shortly after seven o'clock? A Yes.

Q And that it was opposite about what street? A 57th Street.

Q It was a clear morning and you could see the signals all right? A Yes, sir.

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Q How fast does a train come down from 57th Street to 53rd Street, what is the running time, the average running time?

A I should judge from 57th to 53rd would take them about--not quite half a minute.

Q Does it take seven or eight seconds a block? A Probably about that; maybe not as much.

Q Less if anything? A Yes, sir.

Q Of course you did not know how closely following that Sixth Avenue train another train might be? A No, sir.

Q Or what, if any train, was following it, and what train that would be, whether Sixth or Ninth Avenue? A No, sir.

Q At that hour of the morning do trains alternate as a rule --- what would you naturally expect at that hour to find following a Sixth Avenue train, another Sixth or a Ninth Avenue? A Sometimes a Sixth and sometimes a Ninth.

Q One as likely as the other? A Yes.

Q So that you knew there was an even chance that the train which you saw would be followed by a Ninth Avenue train? A No.

Q I thought you said it was about as likely that the next train would be a Ninth as a Sixth --- do you understand my question? A I don't just understand.

Q My question is simply this, you saw a Sixth Avenue train coming? A Yes, sir.

Q Did you have any way of knowing what the next train

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would be, or how closely behind the Sixth Avenue train it would be? A No, sir.

Q It was just as likely to be a Ninth Avenue train as to be a Sixth Avenue train? A Yes.

Q If you had been able to restrain yourself during the length of time that it would take the Sixth Avenue train to come from 57th Street to the tower, you would have been able to tell, would you not, what the next train was going to be? Assuming that it was following shortly behind the first?

A Not unless --- no, sir.

Q At what distance can you tell what the train is --- how far up the track can you determine whether it is a Sixth or a Ninth Avenue train? A Just according to the weather.

Q On this morning what kind of a day was it? A Kind of hazy in the morning, at that hour.

Q How far up the track could you see? A About 57th or 58th Street.

Q Couldn't you see to 59th Street? A You could, but could not distinguish signals on the train at 59th Street.

Q How near could you determine the signals? A Well, at 57th.

Q That is as close as you could tell the signals? A Yes, sir.

Q If you had waited for that train to pass and then set up your red signal, as I understand you to admit that it

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was your duty to have done, unless excused by this call of nature, you could then have told what the next train was going to be, if it had been at 57th Street? A Yes, sir.

Q But you say that your condition was such that it was impossible for you to wait until that Sixth Avenue train had come down to your switch and you had put a danger signal behind it, before you had to go to the toilet? A Yes.

Q Didn't you know that if you didn't wait, or resort to some other expedient, there might be a Ninth Avenue train following right behind that Sixth Avenue train, which might get into trouble? A No, sir.

Q In other words, you had to relieve yourself instantly? A Yes, sir.

Q Now, of course you wanted to do that just as quick as you could and get back to your post? A yes, sir.

Q You knew it was a somewhat hazardous thing for you to do to leave your post? A Yes, sir.

Q Did you instantly, the minute you saw that Sixth Avenue train at 57th Street, jump down to the toilet? A Yes, sir.

Q How long do you suppose it took you to go into the toilet? A I couldn't say just how long.

Q How long does it take to get from the tower down in the toilet? A About eight or ten seconds, probably.

Q Well, it took you eight or ten seconds? A Probably

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it would.

Q Call it ten seconds. You say as soon as you got into the toilet you looked through the window up the track and saw the Ninth Avenue train? A No, I did not.

Q Then I misunderstood you. What is your testimony?
A I said when I got downstairs in the toilet I looked up the track to see if there was a Ninth Avenue train coming, and I saw a Ninth Avenue train after.

Q Afterwards? A The Ninth Avenue train was not in sight when I first looked, and as I was looking through this window I saw the Ninth Avenue train coming in sight.

Q You say it took the Sixth Avenue train which you saw at 57th Street, in the neighborhood of half a minute to come down to the switch, and it took you eight or ten seconds to come down in the toilet, so you must have been on the closet prior to the time that the Sixth Avenue train came down?

A Yes, sir.

Q And passed the tower? A Yes, sir.

Q You had a leaway on your own estimates somewhere in the neighborhood of twenty seconds? A I could not say just how many seconds.

Q You say the running time of the train is about thirty seconds, and it takes you about ten seconds to go down in the toilet; now, the Sixth Avenue train did not go by the tower at the same moment you reached the toilet? A No, sir.

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Q It passed afterwards? A After I was down.

Q You could not have seen up the track unless this train was by the tower, could you? A Yes, sir.

Q You could have seen even though the Sixth Avenue train had not reached the tower, you, nevertheless, by looking through the window of the toilet could have seen another train behind it? A Not at the present time, no, sir, until they get down the hill ways --- not from the window.

Q The Sixth Avenue train has to be very near the tower, before you can see up the track and determine what nature of train is coming behind it? A Yes, sir.

Q When you looked out the window where was the Sixth Avenue train? A Just going around the curve.

Q In other words, it had passed the tower? A Yes, sir.

Q So you did not see the Ninth Avenue as soon as you might have seen it? A No, sir, not if I had been upstairs.

Q Not as soon as you might have seen it in the toilet, because you say you could have seen the Ninth Avenue train even before the Sixth Avenue train got to the tower --- I am not trying to confuse you at all, but I am trying to find out exactly what the situation was. Am I right in assuming that you have testified that you could have looked through the toilet window and seen a train following the Sixth Avenue train, even though the Sixth Avenue train had not yet reached the tower? A After the Ninth Avenue train, or whichever train

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it was following this Sixth Avenue, gets down the structure a ways, down around probably ---

Q I think you are confused as to the point of the question; did the Sixth Avenue train in any way impede your view of the track before it reached the tower from the toilet?

A Yes, sir, it does.

Q Could you see at all what train was following the Sixth Avenue train before the Sixth Avenue train had reached the tower? A No, sir.

Q So you could not tell what train was following until that Sixth Avenue train had gotten by the tower and passed the home signal? A No, sir.

Q Then, the Sixth Avenue train had passed the tower, or was passing the tower before you did see the Ninth Avenue train through the window of the toilet? A Yes, sir.

Q That is right --- all right --- and you had had in the toilet the difference in the time between the running time of the Sixth Avenue train from 57th Street and your own running time from the tower down to the toilet? A Yes.

Q And then you looked out and saw the Ninth Avenue train-- now, where was the Ninth Avenue train? A The Ninth Avenue train when I looked out was about 55th Street.

Q You could have seen the Ninth Avenue train at 57th street, had you looked out the window? A Yes.

Q You say the minute you saw it at 55th street, that

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was two blocks off? A Yes, sir.

Q (Continued) You ran upstairs and it was too late to throw the red signal in front of the train? A Yes, sir. He was on the bar.

Q You absolutely deny ever having received a book of rules similar to this which has been marked for identification? A Yes, sir.

Q Never received anything of the sort? A No, never did.

Q Irrespective of whether you did or not, are you familiar with the rule which reads, "When day and night switchmen are employed, they must not leave their post until properly relieved or by permission of the dispatcher"?

Objected to. Overruled. Exception.

Q Are you familiar with that rule? A No, sir.

Q Don't you know that is a rule of the company?

MR. NAYLOR: He said not.

BY THE COURT:

Q Do you know whether it is or not? A No, sir, I do not.

BY MR. TRAIN:

Q What do you understand the rule of the company to be relative to leaving one's post while on duty?

Objected to.

THE COURT: He may answer that.

Exception.

A As a rule to get somebody in your place if there is one to be gotten.

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Q And if there is not one, what is the rule of the company? A I suppose to die.

Q That is just what I want to find out. You state there is a rule according to your understanding that a man must not leave his post? A Yes, sir.

Q That is practically what I read to you, "When day and night switchmen are employed they must not leave their post until properly relieved or by permission of the dispatcher" --- that is substantially your understanding of the rule, is it not? A I am sure I do not know. I do not know the rules at all because I have not got no book to learn them.

Q If you have telephoned up to 59th Street you could have secured relief at any time? A No, sir.

Q Why not? A Because there was nobody there to relieve me.

Q You could have had the train held until you went down and used the toilet? A Yes, sir, provided the train had not left.

Q When you saw that train at 57th Street you could have thrown a red light in front of it, or red disc at the home signal, and then held it up a few seconds and gone down and relieved yourself and come back and everything would have been all right, would it not? A After you distinguish what the train is you always clear for them.

Q Couldn't you have stopped that train by putting a red

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signal out at home, after you saw it at 57th Street? A I could have, yes.

RE-DIRECT EXAMINATION BY MR. NAYLOR:

Q When you say you could have stopped the train, you mean you could have set signals to stop the train? A Yes, sir.

Q But that would not have stopped the train? A No, sir.

Objected to.

Q When you are asked whether you could have thrown the signal red, you did leave a condition of defective signals which you knew under the rules motormen would obey?

Objected to. Sustained. Exception.

Q Didn't you know as a matter of fact when a Ninth Avenue man came down and found yellow, green and yellow set, one, two and three, that he ought to stop?

MR. TRAIN: I except. That is not proper re-direct examination, and I ask that counsel be instructed not to pursue it. We have had all that. Objection sustained.

Exception.

Q Didn't you know that a Ninth Avenue train run by a motorman who was attending to his duties could not get into trouble approaching the signal set as they were at the time of the accident, yellow, green and yellow?

Objection sustained. Exception.

MR. NAYLOR: If your Honor please, in that case the

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District Attorney has opened up this question. He asked the witness whether or not he did not know when he left this situation in the switches that he was endangering a Ninth Avenue train, and I am trying to follow up and get in the door he opened for me.

THE COURT: I will let him answer then. I will reverse myself. Possibly it is proper.

Q (Repeated) A Yes.

BY MR. NAYLOR:

Q You knew you were leaving a condition of signals that did not have any probable disaster in them, did you not?

A Yes.

Q There is a decline or hill from 57th down to 53rd, is there not?

THE COURT: That has been proven -- that is, there is testimony to that effect, and no dispute about it.

MR. NAYLOR: I guess that is so.

BY MR. NAYLOR:

Q You were endeavoring to stand this suffering down to such time as Mr. Bieber would arrive?

MR. TRAIN: I object as not re-direct examination.
Objection sustained.

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ENOS V. DUTCHER, called as a witness in behalf of the defendant, being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are connected with the operating department of the elevated railroad, are you not? A Yes, sir.

Q And have been for a number of years? A Yes.

Q In the capacity of instructor of motormen? A Yes, sir.

Q You knew Paul Kelly? A Yes, sir.

Q The motorman on this derailed train? A I did.

Q You gave him instructions as to operating his train?

Objected to. Sustained. Exception.

Q Did you deliver to him a book of rules, and get his receipt for it?

Objected to. Sustained. Exception.

Q Did you instruct the motorman Kelly that when he approached a line of signals at 53rd Street, No. 1 yellow, green at home and yellow at pot signal that he should stop?

Objected to. Sustained. Exception.

Q Did you ever give Jackson any instructions?

A No, sir.

Q You are acquainted with the rules in the operation of the elevated railroad? A Partially, yes.

Q You instruct all the men who are motormen, running trains over the road? A That is my duty.

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Q What would be the duty of a motorman on the Ninth Avenue road coming down to the corner of 53rd Street and Ninth Avenue and finding the switches set against him, yellow No. 1, green No. 2, and yellow at the point of switches?

Objected to. Objection overruled.

A Duty to stop.

Q What ways are there of stopping a train from the standpoint of the tower man?

Objected to. Sustained. Exception.

Q Red is the signal to stop?

THE COURT: I think you have got that. The general manager has testified and there is no dispute about it.

BY MR. NAYLOR:

Q Is there any other method than by means of setting up a red signal or a defective signal by which to stop a train?

Objected to as incompetent, irrelevant and immaterial.

Sustained. Exception.

Q We have in evidence here "Signal Bulletin No. 1", imperfect signal, signal improperly displayed or the absence of a signal at a point where a signal is known to be located is an indication of danger and must be acted upon accordingly -- would a yellow light at No. 1, a green light at home, and a yellow at the pot switch, 53rd Street and Ninth Avenue, be an imperfect signal under the meaning of this

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term for a Ninth Avenue train? A Yes, sir, for a Ninth Avenue train.

Q That would mean then a situation of danger? A Yes, sir.

Q It would mean to the motorman stop? A Yes, sir.

Q Under the rules at what rate of speed should a train pass signal No. 1, a Ninth Avenue train coming south?

MR. TRAIN: I object unless the rules are put in evidence.

Objection sustained. Exception.

Q Do you know there is a rule relating to the rate of speed of a train passing No. 1 cautionary signal?

Objected to. Sustained. Exception.

Q At what rate of speed is a motorman on the Ninth Avenue line instructed by you he may run past signal No. 1?

Objected to. Sustained. Exception.

Q What is a safe rate of speed at which a train may go around the curve from Ninth Avenue into 53rd Street?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Exception.

Q At what rate of speed do the rules and regulations of the company direct a motorman on a Ninth Avenue train, approaching 53rd Street and Ninth Avenue junction, to run?

MR. TRAIN: I object as not the best evidence.

MR. NAYLOR: Now your Honor, I am asking this question to bring to the attention of the jury the one question

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that is involved here and that is the rate of speed at which this train was operated. It has not been proved by the People anything about the rate of speed and I am endeavoring to make such proof as will show to this jury the rules, the practice, the custom, with reference to the operation of this road as provided for the officers charged with the duty of operating it safely.

MR. TRAIN: I have no objection to his proving it properly. Here are the rules. Let him put them in evidence. Why is he afraid to have the rules come in evidence.

MR. NAYLOR: Going around the curve here is not the essence of the matter, it is the rate of speed at which they go around.

MR. TRAIN: There is an objection to the specific question which calls for a ruling, and I object to it upon the ground that the witness is not the best evidence.

THE COURT: Some time ago I sustained the District Attorney's objection to a question as to what speed would safely pass the curve at 53rd Street and Ninth Avenue, and I have just stated to the District Attorney that I have doubts about my ruling and shall therefore reverse my ruling and permit an answer to that question.

MR. TRAIN: Will you have the question put?

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THE COURT: Surely. I was only indicating to a counsel, so that he could repeat that question. You may ask that question again and I will allow it.

BY MR. NAYLOR:

Q At what rate of speed would it be safe for a train to make to take the 53rd Street curve?

MR. TRAIN: I object because it is immaterial.

The Ninth Avenue train was not supposed to take the 53rd Street curve.

BY THE COURT:

Q What rate of speed is it safe for a train to pass around the curve at 53rd Street and Ninth Avenue into 53rd Street from Ninth Avenue? A The rules of the company are nine miles per hour.

Q What rate is a safe one, if you know? A No, I could not answer that.

BY MR. NAYLOR:

Q Is there a rule of the company which defines the rate of speed as they approach the switches to go into 53rd Street?

MR. TRAIN: I object as vague and indefinite.

Sustained. Exception.

Q Is there a rule which determines the rate of speed which a train shall be run by the motorman past No. 1 cautionary signal? A The rules of the company are that

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motorman shall have ---

THE COURT: Say yes or no.

BY MR. NAYLOR:

Q Is there a rule? A As to the rate of speed by No. 1 signal?

BY MR. NAYLOR:

Q Yes. A No, sir.

Q At what rate do they as matter of practice and custom run their trains past No. 1?

Objected to. Objection sustained. Exception.

Q Is there any rule as to speed in approaching a switch for the curve?

Objected to as immaterial.

Sustained. Exception.

Q Is there any rule which defines the rate of speed at which a train shall run on a local track? A Defining the rate of speed?

Q Yes. A Not to exceed thirty miles an hour.

Q In approaching a switch is there any rule?

MR. TRAIN: That has been objected to and the objection sustained.

THE COURT: I sustain the objection.

Exception.

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