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The Montgomery Ward Case
Pre-Trial History in the Making

by Randall B. Kester

Randall Kester, a partner in Cosgrave, Kester, Crowe, Gidley & Lagesen, is a director of the U.S. District Court of Oregon Historical Society.

In the early 1940s, pre-trial procedure under the "new" Federal Rules of Civil Procedure (adopted in 1937) was still in the experimental stages and both the courts and counsel were feeling their way gingerly into a new field. The case of *Montgomery Ward & Co. v. Northern Pacific Terminal Co., et al.*, 128 F. Supp. 475 (D. Or., 1953) and 128 F. Supp. 520 (D. Or., 1954), gave Chief Judge James Alger Fee an opportunity to explore the limits of the new procedure and set some kind of record for time spent in pre-trial conference and for length of a pre-trial order.

The case originated with a labor dispute between Ward and its employees that resulted in a strike and picket lines at Ward's Portland store and mail-order house. The labor dispute gave rise to the decision in *N.L.R.B. v. Montgomery Ward*, 133 F.2d 676, 146 A.L.R. 1045 (1943), which enforced an NLRB order holding that Ward had been guilty of unfair labor practices.

Ward's plant was normally served by a number of common carriers, both rail and truck. While the strike was in progress, the carriers were unable to serve the Ward plant because their unions refused to go through the picket lines of Ward's employees in the face of violence and threats of violence. As a result, Ward was unable to receive or ship its merchandise.

Because of the failure of the carriers to serve the plant, Ward

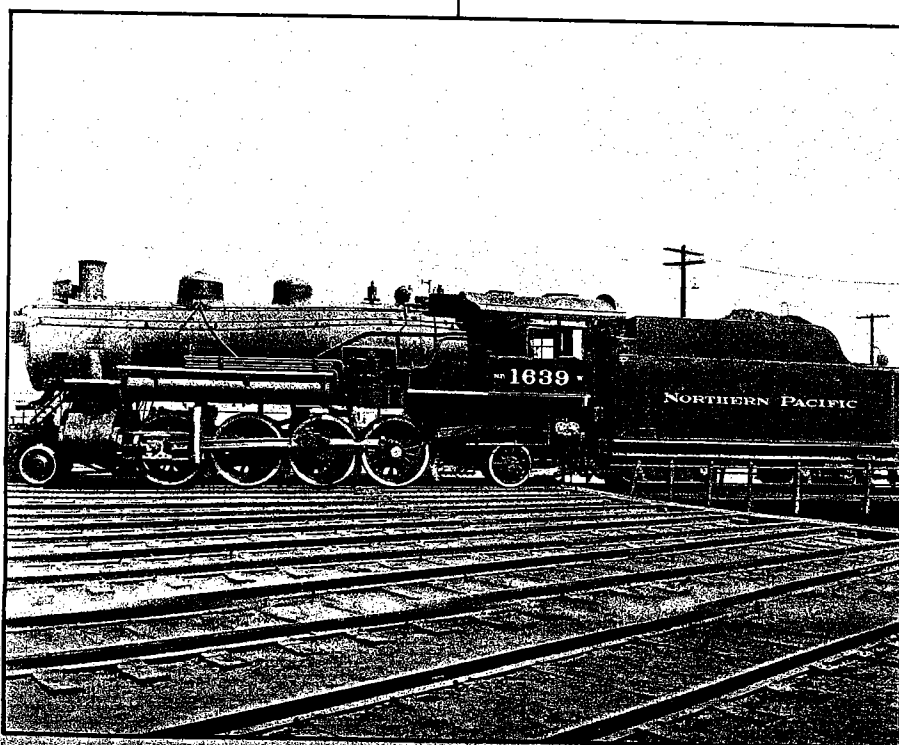
initiated action for damages against six railroads and numerous truck lines. While many legal theories were involved, the gist was breach of the common carrier obligation to serve the public. The lawsuit involved many parties, numerous shipments, and complex issues.

The case was filed in 1942 and came before Judge Fee for initial pre-trial conference in May 1944. During the several days of pre-trial conference, Judge Fee indicated that counsel would be expected to devote substantially full time to pre-trial proceedings until a pre-trial order was agreed upon. It was further decided that it would be desirable to stipulate as many facts

as possible in order to save trial time but would obviously be inconvenient to do the detailed work of agreeing upon facts in open court.

Counsel therefore suggested, and the court approved, a plan whereby the attorneys agreed to work on the order among themselves, but outside of court, and to report their progress to the court from time to time. This was done, and counsel worked continuously until June 1948, taking recesses during sessions of the Oregon Legislature (with respect to which counsel had extensive responsibilities). At that time, Judge Fee directed that thereafter, counsel engaged in such

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Oregon Historical Society photo

BRIEFS

Just a Reminder — the ceremony renaming the U. S. Courthouse in Portland for Gus J. Solomon takes place Friday, April 28, at 3:30 p.m., with a reception following.

Authors of the Court history have met with editor Carolyn Buan (also editor of *Oregon Benchmarks*) and Kirk Hall, who is coordinating the court history committee's work, to begin outlining the content of chapters.

Bill Trampusch, new director of the Oregon Historical Society, addressed the District Court Historical Society board at its January 18 meeting. Mr. Trampusch comes to OHS from Colonial Williamsburg, where he has been director of interpretive education. He and his family will move here in July.

The latest approach to recording oral histories is to capture them on videotape. This technique is being used by the state judicial society, which is recording the histories of retired judges, and by the Multnomah Bar Association's oral history committee. Our Society's board will be investigating this approach further.

The Ninth Judicial Circuit Historical Society is currently soliciting proposals for essays for the Fall 1990 special Bill of Rights issue of its journal, *Western Legal History*. For more information, contact Chet Orloff at (818) 405-7059. Proposals should be submitted to the Society at: P.O. Box 2558, Pasadena, CA 91102-2558.

Welcome New Members!

George H. Fraser (Lifetime Member)
John Paul Graff
Tom Benson
Kirk Hall
Bill Naito
Paul Connolly

Hess v. United States of America

The following article was submitted by former Society Director Cleveland C. Cory, retired partner of the law firm of Stoel, Rives, Boley, Jones & Grey.

On August 20, 1964 three employees of Robert C. Larson, doing business as Larson Construction Company, were drowned in the turbulent waters of the Columbia River when the tug and barge which they were on struck one of the downstream piers of Bonneville Dam. The tug and barge were drawn into, and swamped by, the waters of one of the spillways. The decedents had intended to take soundings in connection with Larson's performance of a contract for dam spillway deck repairs.

Three separate wrongful death actions were filed in the U. S. District Court for Oregon pursuant to the Federal Tort Claims Act. Liability of the United States was claimed under the Oregon Wrongful Death Statute (which then had a limit of \$20,000), as well as under the Oregon Employers Liability Act (ELA), which stated in part: "... all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb . . ."

Under the Oregon Wrongful Death Statute, contributory negligence and assumption of risk were complete defenses and damages were limited to \$20,000. On the other hand, if liability were established under the ELA, there would be no monetary limit; contributory negligence would only mitigate damages, and assumption of risk would not be a defense. If principles of general maritime law applied, contributory negligence and assumption of risk were in mitigation of damages.

The three actions were consolidated for trial before Judge Gus J. Solomon, who ruled in favor of the government on March 27, 1957

(1958 A.M.C. 660). The court held that the ELA was not applicable, first because the government was not responsible for the performance of the work then being done, and second because the application of the high standard of care required by the ELA would be unconstitutional as prejudicing the general uniform standard of reasonable care required by maritime law in personal injury and wrongful death cases. Judge Solomon also held that the government was not guilty of negligence in any respect and that the plaintiffs were not entitled to recover under the general Oregon Wrongful Death Statute.

After judgments of dismissal were entered, the parties agreed that disposition of an appeal in *Hess v. USA* would govern the other two cases. However, an appeal of Judge Solomon's dismissal of the *Hess* case to the United States Court of Appeals for the Ninth Circuit was unsuccessful. On August 20, 1958 that court held (1) that ELA was not a constitutionally permissible supplement to the general maritime law, and (2) the district court was correct in holding that the United States Corps of Engineers was not negligent in any respect (259 F. 2d 285).

On March 2, 1959 the United States Supreme Court granted a petition for a writ of certiorari "to consider a seemingly important question of federal law." (361 U. S. at 344.)

On January 20, 1960 the Supreme Court set aside the judgment of dismissal and remanded the case to the United States Court of Appeals for the Ninth Circuit. The Court's opinion was written by the late Mr. Justice Stewart, and Mr. Justice Clark concurred. The Chief Justice, Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan joined the Court's ruling "... but solely under compulsion of the court's ruling in *The Tungus v. Skovagaard*, (358 U. S. 588, 79 S. Ct. 503, 3 L. E. 2d 524). They believe that as long as the view of the law represented by that ruling

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Hess v. USA

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prevails in the Court, it should be applied even handedly . . ." These four justices (dissenters in The Tungus case) reserved their position as to whether that case should be overruled at a later date. Mr. Justice Harlan, joined by Mr. Justice Frankfurter and Mr. Justice Whitaker, filed a dissenting opinion.

The Tungus case had held that when admiralty adopts a state's right of action for wrongful death, it must enforce the right as an integrated whole.

Mr. Justice Stewart's opinion in the Hess case held that The Tungus case (decided on February 24, 1959) was controlling and that there was no constitutional impediment to applying the ELA maritime law to a death action in which the statute would otherwise by its terms apply. Thus the right of action for wrongful death created by the ELA might be invoked to recover for an Oregon maritime death without constitutional inhibition (361 U. S. at 321).

On remand to the United States Court of Appeals for the Ninth Circuit (282 F. 2d 633), the Court reviewed the record before Judge Solomon and concluded that the ELA was applicable with respect to the operation of the spillway gates by the United States. The court noted that Judge Solomon had not reached the questions as to whether the government had fulfilled the statutory duty of care prescribed by the ELA and, if it had not, what monetary damages were recoverable. The case was remanded to the district court for further proceedings.

Thereafter, Judge Solomon took further testimony as to the government's liability under the Oregon ELA. At the conclusion of further testimony, the court indicated that it was bothered by the question of causation.

Within a few days, and before Judge Solomon had made any formal decision, a senior attorney from the Admiralty Division of the Justice Department in San Francisco proposed an overall settlement of the

three cases for \$60,000, which was the limit of the government's liability under the Oregon Wrongful Death Statute. This offer was accepted by all parties and the three cases were dismissed.

Some ten years later the rationale of The Tungus and the Hess cases was repudiated by a unanimous Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 378 (1970). The opinion of the unanimous court was written by Mr. Justice Harlan, who had written the

dissenting opinion in the Hess case. The Court held that an action to recover for wrongful death occurring on navigable waters within a state is governed by principles of general maritime law. However, in the ten years between Hess and *Moragne*, attorneys in some Oregon maritime death cases were able to rely on the Oregon ELA to provide a recovery under its terms (see *Binney v. United States*, 329 F. Supp. 351 (D. Or., 1971), *aff'd* 460 F. 2d 263 (9th Cir. 1972)).

The Montgomery Ward Case

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work should remain in the city and in conference, observing working hours similar to those of the court until excused by the court.



Mail-order department of Montgomery Ward (Oregon Historical Society photo)

Under this regimen a pre-trial order was completed on June 4, 1951. It was signed and the trial began on the following day. The pre-trial order contained over 3,500 pages of agreed facts and schedules and over 100 additional pages dealing with the issues of fact and law raised by the parties (see 128 F. Supp. at 483, fn. 2). In addition, the parties filed briefs of several hundred pages. While the trial was originally estimated to take 18 months to two years, as a result of the extensive pre-trial proceedings, it was in fact accomplished in nine days (see 128 F. Supp. at 483).

At the trial's conclusion, Judge Fee rendered two decisions: one on liability and one on damages. With respect to liability, he held that the carriers violated their common law and statutory duties by failing to serve Ward during its strike (128 F. Supp. 475). With respect to damages, he held that the liability was individual and not joint (128 F.

Supp. 520), and awarded damages in separate amounts against 34 of the defendants. The case was not appealed, probably because the individual judgments against the various defendants were not large enough to warrant the very substantial expense of such an appeal. Some thought that Judge Fee planned it that way.

The immensity of the pre-trial effort is indicated by the following excerpt from Judge Fee's first opinion:

"When it is appreciated that the result was accomplished by examinations, tabulation and calculation of tariffs, connecting rates, history of shipments, plotting of mercantile and carrier operations, investigations into labor relations and the history of particular incidents, besides innumerable other factors, the magnitude of the task begins to take form. Many years of arduous work by the leading counsel for the carriers and the company in taking depositions, fixing statements of fact which all counsel could agree upon, and then making changes required to make them acceptable to opposing counsel required devotion

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The sports department of Montgomery Ward (Oregon Historical Society photo)

