The transcript is incomplete in other particulars, but in view of the defect above referred to it would be useless at this time to go into the matter further.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2581.

WORKMEN'S COMPENSATION ACT—WHERE RAILROAD COMPANY ENTERS INTO ARRANGEMENT WITH CORPORATION FOR HANDLING FREIGHT ON PLATFORMS OF FREIGHT TERMINAL IN OHIO —WHETHER OR NOT EMPLOYES ARE SUBJECT TO PROVISIONS OF OHIO WORKMEN'S COMPENSATION ACT.

A railroad company enters into an arrangement with a corporation for the handling of freight on the platforms of a freight terminal in Ohio; on the assumption that the relation between the railroad company and the terminal company is that of independent contract.

HELD:

That the employes of the terminal operating company are subject to the Ohio workmen's compensation act.

Whether the relation is that of independent contract and whether the purpose of the arrangement is to evade the federal employers' liability act are questions not determined, in the absence of additional facts.

COLUMBUS, OHIO, November 16, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission recently submitted to this department copy of a communication received from the Terminal Operating Corporation, enclosing a copy of extract from an agreement between that corporation and the New York Central Railroad Company, and requested the opinion of this department upon the question submitted in the Terminal Operating Corporation's letter, which may be stated as follows:

> To what extent, if any, does the Ohio workmen's compensation act apply to the Terminal Operating Corporation and its employes?

The letter states that on a certain date in the near future the Terminal Operating Corporation expects to take over the operation of a certain freight terminal belonging to the New York Central Railroad Company in the city of Cleveland, and to handle, under the contract (extracts from which are enclosed with the letter) "all inbound, outbound and transfer freight. This will cover all interstate and intrastate shipments." The letter also states that:

> "Our force will be entirely confined to the freight platform operation, and will have nothing whatever to do with cars while in motion."

The extracts from the agreement are as follows:

> "1. The contractor will take over and operate to the satisfaction

of the railroad, by the means, facilities and labor hereinafter mentioned, the freight handling department of said Orange Avenue Terminal, and will perform any and all functions and services incident to such business which are customarily performed by the employes listed in 'Schedule A' hereto attached, all incoming and outgoing freight to be handled through said terminal currently and with dispatch.

2. The contractor will pay the wages of all employes of the classes set forth in said 'Schedule A,' whose services are taken over by it, and the cost of supervising said work; and on the first and fifteenth days of each month will render to the railroad a statement showing the tonnage of freight handled by it for the preceding two weeks' period, as evidenced by tonnage receipts received from the railroad as hereinafter provided, and divided between revenue freight and company material freight; together with the cost to it of handling such business, and the amount due to it from the railroad therefor.

3. The railroad will furnish to the contractor without charge all tractors, trailers, trucks, hoists, elevators, and other freight handling equipment installed, or to be installed in its said Orange Avenue Terminal station, to be used solely in carrying out the terms of this contract; and will maintain the same in good order and serviceable condition, recharging batteries and replacing such equipment as may be or become unfit for efficient operation; provided that the contractor will compensate the railroad for any injury or damage sustained to said equipment through the fault or neglect of the contractor or its employes using the same; or at the contractor's option may replace equipment so damaged, reasonable wear and tear resulting from its use in said business excepted.

4. The railroad will release and turn over to the contractor for its exclusive management and direction, as far as the railroad is able to do, the classes of employes now a part of the railroad's operating force for the handling of freight in and about said Orange Avenue Terminal, as shown on said 'Schedule A,' made a part hereof. And if the same be required by the contractor for the most efficient and economical performance of the work of handling such freight, said 'Schedule A' may be revised from time to time by the addition of other similar classes of employes, or the elimination of classes therefrom.

7. The railroad will bear any expense arising from the bonding of such employes of the contractor as the railroad may designate; and will furnish transportation over its lines for officials of the contractor when necessarily engaged in supervising the work under this contract.

8. The railroad assumes liability for the following: Losses from breakage, theft, and all over, short and damaged freight, except in cases of the neglect or fault of the contractor or its employes, losses due to flood, fire, strike, and from any causes due to an act of God.

9. All loss or damage to persons or property sustained while the contractor or its employes are on or about the premises or tracks of the railroad and arising, growing out of or connected with the performance of the work herein provided for, except as may be due to the sole negligence of the railroad, its agents or employes, shall be borne by the contractor, and the contractor will indemnify and save the railroad harmless therefrom."

It should be stated at the outset that the extracts which have been sub-

mitted hardly afford a fair basis for an opinion upon the question submitted. The whole contract should be before this department. That is to say, the conclusion to be reached might be influenced by provisions as to method of compensation, or other provisions which are not shown in the extracts from the agreement. Inasmuch, however, as the Terminal Operating Corporation desires an immediate opinion, such conclusions will be reached as can be predicated upon the partial evidence before this department, without prejudice to the modification of the conclusions in the event that additional facts are hereafter submitted.

Thus, it will be assumed that the relation between the New York Central Railroad Company and the Terminal Operating Corporation is that of independent contract. This is the view most favorable to the Terminal Operating Corporation, if that corporation desires to subject itself and its employes without further action to the workmen's compensation law of this state; for if the relation between the parties to the contract is that of principal and agent, or if the parties are joint adventurers, then, for reasons that will hereafter appear, the status of the employment contracts between the Operating Corporation and its employes is substantially the same under the workmen's compensation act of this state as if there had been no arrangement of this sort whatever.

It must be admitted that this assumption is not an easy one to make, but for present convenience the question may be discussed on that hypothesis.

One of the questions which arises in the course of the investigation of the general question concerns the interpretation of section 1465-98 of the General Code, which provides as follows:

> "The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been *or may be* established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid."

The question with which we must deal grows out of the fact that the congress of the United States has not established a rule of liability or method of compensation for all employers and their employes engaged in interstate and foreign commerce. The Federal Employers' Liability Act, so-called, is limited, as will be hereinafter pointed out, to common carriers of interstate commerce *by railroad* and their employes. Carriers of such commerce other than those by railroad are not within the terms of that act. The question which arises then is as to the meaning of the words "or may be established by the congress of the United States" as used in section 1465-98. Is the word "may" used in the sense of potentiality, as designating the power of congress; or in the sense of futurity, with the word "hereafter" understood, i. e., in the

sense of "shall" used as a part of a future verb rather than as an expression of command?

The courts of the different states have reached diverse conclusions upon this question. Thus, it has been held in West Virginia that the word "may," in a section almost if not quite exactly like section 1465-98 of the Ohio workmen's compensation act, is used in the first of these two senses. So that an employe of an interstate gas pipe line company engaged in promoting the interstate transportation of the gas is one of those to whom such a section relates, and is therefore in respect of his employment not subject to the West Virginia workmen's compensation law, in the absence of a voluntary election by him and his employers, and then only to the extent to which his connection with intrastate work may and shall be clearly separable and distinguishable from interstate commerce.

> See Suttle vs. Hope Natural Gas Co. (W. Va.) 97 S. E., 429;
> Miller vs. United Fuel Gas Co., 106 S. E. 419.

The same conclusion seems to have been reached by the supreme court of Washington in *State* vs. *Postal Telegraph Cable Co.,* 172 Pac., 902.

The decisions in both these jurisdictions, strangely enough, do not argue the point but assume that the connotation of potentiality is the natural signification of the word "may." On the contrary, New York, in Jensen vs. Southern Pacific Co., 215 N. Y., 514 (reversed on other grounds 244 U. S. 205), in a carefully considered opinion so far as this point is concerned, reached the opposite conclusion. As Miller, J., says at page 522:

> "The legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the congress of the United States. But it is said that congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule "may be established," etc.
>
> Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words 'may be' should be construed in the sense of 'shall be'."

To which forceful reasoning may be added the thought that the whole verb "has been or may be established" indicates rather clearly opposing ideas of time. If the idea of potentiality had been in the mind of the legislature the words "has been or" would have been superfluous. The reasoning of the New York court therefore appeals to this department as correct and preferable to that apparently, though without any discussion, employed in the cases which may be said to represent the numerical weight of authority. In so far as this question may be rendered doubtful by the disagreement among the cases in other states, this department would of itself therefore resolve the doubt in favor of the New York view. Fortunately, however, the commission seems to have considered this very question in the case of *Voshall* vs. *Kelley Island Lime & Transport Co.*, Bulletin of the Industrial Commission, Vol. IV, No. 5, p. 46; 1 Department Rep., 888. To be sure, the commission's determination in that case turned out to be erroneous because the employment in question was maritime and came within the principle of *Southern Pacific Co.* vs. *Jensen,* 244 U. S. 205, and the subsequent cases on that point; but enough was said in the opinion of the commission in the case cited to show the commission's view on the question of statutory construction now under consider-

ation. That view is adopted by this department as being founded upon the better reasoning, and it is therefore concluded that section 1465-98 G. C. is intended to apply at any given time only to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has actually been established by legislation of the congress of the United States. So that if at any time it appears that there are employers and their employes who are engaged in intrastate and also in interstate and foreign commerce, but for whom a rule of liability or method of compensation has not been at the time established by the congress of the United States, this section does not apply.

At this point, however, note must be taken of another provision which tends to confuse the issues and render the conclusion just stated of less apparent service than it otherwise would be in arriving at the ultimate conclusion on the question. The reference is to paragraph 3 of section 1465-61 G. C., defining the terms "employe," "workman" and "operative" as used in the section, in part, as follows:

> "3. Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer."

In the event that the Operating Corporation be regarded as an independent contractor, and in the further event that such Operating Corporation should fail to pay the premium into the state insurance fund, or to make the other election permitted by the act and referred to in the paragraph above quoted, this paragraph apparently attempts to impose the status of employer upon the railroad company. At first blush this might seem to raise in a new form the question previously discussed as to the meaning of section 1465-98. Without disposing completely of this question at this time, it may be said that unless the relation between the Railroad Company and the Terminal Operating Corporation is such as that the statutes of the United States furnish a rule of liability or method of compensation for the employes of the latter, section 1465-98 does not apply, and the fact that section 1465-61 may purport under certain circumstances to impose liability upon the Railroad Company cannot change this conclusion.

Of course, it is not to be doubted that freight handling at a terminal is commerce, and may be interstate or not, according to the contemplated journey of the freight.

> See: McNeill vs. Southern Ry. Co., 202 U. S. 543;
> C. C. C. & St. L. R. R. vs. Dettlebach, 239 U. S. 588;
> Southern Ry. Co. vs. Prescott, 240 U. S. 632;
> O'Brien vs. Pennsylvania Ry. Co., 176 N. Y. Supp. 360.

In this case the question is removed from the sphere of doubt by the express statement that among the freight to be handled by the Terminal Corporation is transfer freight.

Still proceeding then on the theory that the Terminal Operating Corporation, under the contract from which excerpts have been quoted, would sustain toward the Railroad Company the relation of independent contractor, we have to inquire whether the Federal act establishes a rule of liability for the employes working under this company and their employer. The following provisions of that act (35 Statutes at Large, 65) are quoted:

> "Section 1. Every common carrier *by railroad* while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, ports, docks, or other equipment."
>
> "Section 3. * * * The fact that the employe may have been guilty of contributory negligence shall not bar recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe * * *."
>
> "Section 4. Such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."
>
> "Section 5. *Any contract, * * * or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void.*"

The first question to be considered may be put as follows:

> Still assuming the relation between the contracting parties to be that of independent contract, does the Federal act apply?

It seems that a negative answer should be given to this question, unless the contract is one inhibited by section 5 of the Federal act. That is to say, if the proposed contract between the New York Central Railroad Company and the Terminal Operating Corporation is to be regarded as a contract or device, the purpose or intent of which is to enable the New York Central Railroad Company to exempt itself from the liability created by the Federal act, then to that extent—i. e., to the extent of the effect which it otherwise might have upon liability under the Federal act—the contract is void, and the Railroad Company remains liable to the employes of the Terminal Operating Corporation for any injury which may be attributed to the negligence of the railroad. Possibly, also, the effect of this section is to make the Terminal Operating Corporation itself an agent of the railroad for the purpose of attributing the consequences of its negligence to the railroad itself. This view is taken by the supreme court of Washington in *State* vs. *Construction Company,* 91 Wash., 181. In that case the state brought suit against the construction company to recover premiums payable into the state insurance fund on account of the employes of the construction company engaged in repairing a bridge on the line of an interstate railroad. The following quotation from the opinion of the court will show the court's reasoning:

> "It is next conceded that the Bates & Rogers Construction Company were independent contractors. It is probably true that that

company was an independent contractor. But that fact is unimportant, because section 5 of the Federal employers' liability act provides: (Here follows a quotation from section 5, supra).

* * * We are satisfied that there was no intent on the part of either the railway company or the Bates & Rogers Construction Company, by the contract which they entered into, to evade that act. The contract was one of employment by the railway company of the Bates & Rogers Construction Company to do a particular work upon the repair of this bridge. The Bates & Rogers Construction Company, and all of its employes, were employes of the railway company, within the meaning of the Federal Employers' Liability Act; and the fact that the Bates & Rogers Construction Company was an independent contractor would not affect the nature of the employment."

The court accordingly held that the state act did not apply.

This decision would be squarely in point and would dispose of the whole question, were it not for the fact that its authority is somewhat weakened by the subsequent case of *Luby* vs. *Industrial Insurance Commission of Washington,* 191 Pac., 855. That case did not overrule *State* vs. *Construction Company, supra,* but it is true that in the opinion in the later case some doubt was cast upon the correctness of the earlier opinion, as the following quotation will show:

"The trial court rested his decision on the authority of the case of State vs. Bates & Rogers Construction Co., 91 Wash., 181, and the learned counsel representing the plaintiff concedes in his brief that if the court is to adhere to the principle of that case it is conclusive against the plaintiff's right of recovery, devoting an argument to a showing that the case was incorrectly determined. But the trial court in its decision does not notice the very radical change in the statute made by the legislature subsequent to the decision of the case cited and prior to the transaction out of which the present controversy arises. This change we think presents the vital question in the case, and requires an affirmance of the judgment, regardless of any conclusion that may be reached on the question of the soundness or unsoundness of the cited case."

The court then goes on to quote an amendatory section adopted by the legislature of Washington in 1917, which is wholly unlike anything which appears in the Ohio workmen's compensation law and the effect of which, as construed by the court, was to withdraw from the application of the act all employments in which the employe is engaged upon work for an interstate railroad, regardless of the manner in which such work was done or the immediate control to which the person performing such work might be subject. As the court says:

"It makes no distinction with regard to the manner in which the railroad company performs the work; that is, whether it performs the work directly by employes hired and paid by it, or whether it performs the work through an independent contractor, who undertakes the work for a stated consideration with the understanding and agreement that he is to employ and pay for the necessary laborers—in either event the employes are without the provisions of the act. In other words, it is the character of the work that excludes, not the method by which the work may be performed."

The authority of the first Washington case is further weakened by certain decisions of the supreme court of the United States.

In *Chicago, Rock Island & Pacific Ry. Co.* vs. *Bond,* 240 U. S. 449, the railroad company had entered into a contract with one Turner, whereby Turner agreed to furnish all the labor required and necessary to handle all the coal required by the company at Enid, Oklahoma, and to place the same in coal-chute pockets of the company; to break all coal to the size of 4-inch cubes or less before delivery; and to perform other loading and unloading acts for the company. The company was to pay for the services in certain designated numbers of cents per ton, cord or yard, as the case might be. The contractor agreed to maintain a sufficient supply of coal in the coal chutes; he expressly assumed all liability for death or injuries of persons in his employ, whether caused by the negligence of the company, its agents or employes, and covenanted to save the company harmless on account thereof, etc. It was expressly

> "agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

There was also another contract between the company and Turner, whereby he was required to cooper all cars which the round-house foreman directed him to prepare to fit the cars to hold grain in transit, the foreman to be the sole judge whether the preparation was in accordance with the contract. Turner, the contractor, was killed through the alleged negligence of the company, while performing work under the first, or coal, contract. The following language appears in the opinion, per Mr. Justice McKenna, and shows the decision of the court:

> "There was, it is true, * * * a certain direction to be given by the company, * * *. But the manner of the work was under his (Turner's) control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. * * * The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employes. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employe and a remedy against his incompetency or neglect.
>
> * * * It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results. And the covenants were suitable for the purpose, only consistent with it, not consistent with a temporary employment. This is manifest from the provision for payment, from the careful assignment of liabilities, and the explicit provision that Turner 'shall be deemed and held as the original contractor, and the railroad company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.'
>
> * * * *
>
> We do not think that the contract can be regarded as an evasion of section 5 of the employers' liability act * * *.
>
> Turner was something more than a mere shoveler of coal under a

superior's command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be judged by its results. * * *

Thus, being of opinion that Turner was not an employe of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

This case, then, limits the application of section 5 of the Federal Employers' Liability Act, and holds that it does not apply to a case where the relation between the railroad and the contractor is really independent, even though such relation may have the effect of withdrawing from the application of the Federal Employers' Liability Act persons who otherwise would be employes of the railroad.

See also: *Robinson* vs. *Baltimore & Ohio Railroad Co.*, 237 U. S. 82, (case of Pullman conductor subject to the direct control of the Pullman Company only, and entering into a contract with that company by which he releases all railway companies over whose lines the cars of the company may be operated from all claims for liability; such contract held to be valid in spite of section 5 of the Federal Employers' Liability act).

These cases certainly throw grave doubts upon the correctness of the decision in *State* vs. *Bates & Rogers Construction Company, supra.*

If indeed then we are justified in assuming that the relation between the Railroad Company and the Terminal Operating Corporation is that of independent contractors, the conclusion seems inescapable that the Federal Employers' Liability Act furnishes no rule of liability for the employes of the Terminal Operating Corporation and their employer; so that the state workmen's compensation act as a whole applies, and the case is not within the exceptions of section 1465-98 thereof.

In the second place, however, it might be argued that inasmuch as the receipt, delivery and transfer of freight at a freight station is ordinarily part of the functions of a railroad, congress must have intended its act to apply to all persons engaged in that business and to include them within the scope of the descriptive term "every common carrier by railroad." The question now raised, put in another way, is this:

> Where a railroad company, by contractual arrangement with another corporation, turns over one of its ordinary functions, namely, the receipt, transfer and delivery of freight, to such other corporation, is not such other corporation considered as a separate entity, itself a "common carrier by railroad" within the meaning of the Federal Employers' Liability Act?

No authority has been found on this point in the brief time which has been afforded to this department for the investigation of the question. Some of the cases previously cited show that the mere fact that the thing which the railroad company secures to be done by independent contract is a thing which the railroad company might do by its own employes is immaterial. For example, a railroad company might put its own employes at work repairing its cars, coaling its engines, repairing its tracks, serving as porters, etc. Many railroads do these very things. But such possibility and such practice on the part of some railroads do not make a company or person engaged in the business of repairing equipment for a railroad, or operating sleeping cars on a railroad, or operating a coal chute for a railroad, etc., a "common carrier by

railroad." All the cases suggested, however, are distinguishable in that the activities covered by the independent contracts in question were not those of a common carrier, whereas the activities of the Terminal Operating Corporation partake at least in part of that character. For example, the function of transferring freight from one car to another is a common carrier's function; probably the function of placing freight on board cars is that of a common carrier, whether that of unloading it from cars is or not. Yet, though these services may partake of the character of a common carrier's services, the question remains as to whether the person or company engaged in them is a "common carrier *by railroad.*"

The nearest cases are those of steamships operating in connection with railroads. That of *Thornton* vs. *Grand Trunk-Milwaukee Car Ferry Co.*, (Mich.), 166 N. W., 833, apparently holds (without analysis or discussion, and upon authority of a case not in point [Carey vs. Grand Trunk Western Ry. Co., 166 N. W. 492]) that an employe of such a car ferry company is subject to the Federal act and therefore not within the state workmen's compensation act. The point was not even argued in the case, reliance being upon the maritime character of the employment. Subsequently this opinion was modified (168 N. W., 410) and the decision was placed upon the correct ground indicated by the supreme court of the United States in the *Jensen case, supra.*

Kennedy vs. *Coon* (N. J.), 106 Atl., 210, is a case of the same kind.

In *Valley Steamship Co.* vs. *Wattawa,* 244 U. S., 202, the supreme court of the United States dismissed as "entirely without merit" a claim that the state workmen's compensation law could not apply to an employe of a steamship, on the ground that such application would burden interstate commerce, and avoided a discussion of the question of admiralty and maritime jurisdiction by the statement that the point was not presented to the trial court. It does not appear, however, that the steamship on which the injury occurred was operated in connection with a railroad.

Deciding the question now under consideration upon principle, it is the opinion of this department that the Terminal Operating Corporation, in spite of its close connection with the railroad, is not a "common carrier by railroad" within the meaning of the Federal act; so that, proceeding still upon the assumption that the relation between it and the New York Central Railroad Company is that of independent contract, the conclusion is reached that the state workmen's compensation act applies in the normal way to the relation between it and its subordinate employes.

The foregoing discussion, then, disposes of all points involved in the question save that respecting whether or not the relation between the Railroad Company and the Operating Corporation is really that of independent contract. At the outset it was assumed that such was the case. This opinion might therefore stop at this point, being limited, however, to that assumption. It is here reiterated that the question, however, cannot be satisfactorily disposed of until the whole contract is before this department. The following intimations to the contrary are found in the extracts which have been furnished:

In paragraph 1 appears the promise of the contractor to

> "perform any and all functions and services incident to such business which are customarily performed by the employes listed in 'Schedule A'."

If this be taken to mean that the relation between the Terminal Corporation and the railroad is the same as that formerly subsisting between

the railroad and its employes who are to be "taken over" by the Terminal Corporation, then it would be difficult to sustain the position that the Operating Company is really an independent contractor. The case would then be clearly brought within the principle of rather numerous decisions of the commission, and within the implication at least of the decision of the supreme court of the United States in the *Turner case, supra.*

See commission rulings in

McAllister vs. National Fire Proofing Co., Vol. 1, No. 7, Bull. Ind. Com., 107;

Robinson vs. The Newark Reflector Co., Vol. 1, No. 7, Bull. Ind. Com., 167.

The test is that of control. Two questions may be put:

(1) Does the Railroad Company retain control over the manner in which the Terminal Corporation is to operate the Orange Avenue terminal, or does the contract as a whole contemplate that the Terminal Corporation will be held responsible only for results?

(2) Does the Railroad Company retain any control over the conduct of the employes who are to be "taken over" by the Terminal Corporation?

The fourth paragraph of the agreement refers to the "exclusive management and direction" of the contractor; and the ninth paragraph recites that the contractor assumes liability in certain cases—a provision somewhat similar to that commented upon by Mr. Justice McKenna in the *Turner case, supra.* These provisions of the contract rather point in the direction of the relation of independent contract; but the ultimate question which has to be decided can, as previously intimated, only be resolved when all the facts are before this department.

It may be said that the consequence of holding that the relation between the two companies is not that of independent contract is to make section 1465-98 General Code apply to the case; for in that event, whether regarded as a device in violation of section 5 of the Federal Employers' Liability Act or not, the contract would create such relation between the subordinate employes and the Railroad Company as to make the Federal Employers' Liability Act applicable. In that event the following conclusions would ensue:

(1) The state workmen's compensation law could in no event apply to or cover the risk of injuries or deaths occurring in connection with interstate commerce.

(2) The state act could not be made applicable at all unless the interstate and intrastate work of each employe could be clearly separated and distinguished one from the other.

(3) To the extent that the intrastate work of each employe could be separated and distinguished from his interstate work, the risk of injury or death occurring in the course of such intrastate work could be covered only by voluntary arrangement, approved by the industrial commission and evidenced by written acceptances signed by the employer (the Terminal Operating Corporation) and each of its employes, and filed with and approved by the commission.

This point is not further elaborated because of the incompleteness of the facts upon which the opinion is requested.

Respectfully,

JOHN G. PRICE,

Attorney-General.