

## TRANSPORTATION

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*This article discusses yet another broad interpretation of when a rail car is “in use” in the context of the Safety Appliance Act. The manner in which a court interprets “in use” is critical as the interpretation triggers strict liability concerns.*

## The Case of the Haphazard Switcher: Missouri Appellate Court Renders Disturbing Interpretation of “In Use” Affirming an Injury-Prone Railroader’s SAA Verdict

### ABOUT THE AUTHOR



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## Introduction

A recent decision from the Court of Appeals in Missouri (Southern Division), *Mitchell v. BNSF Railway Company*, 577 S.W.3d 855 (Mo. Ct. App. S.D. 2019) broadened the standard of “in use” within the context of the Safety Appliance Act (“SAA”), causing concern throughout the rail industry. This article addresses the latest interpretation of the “in use” standard within the meaning of the SAA and will undoubtedly be a decision railroad defense lawyers will see repeatedly.

## Factual Background

Burlington Northern Santa Fe (“BNSF”)’s Springfield yard includes a center “bowl” of 30 short tracks numbered 101-130 south to north. Bounding this bowl are five long tracks to the north and four long tracks to the south, outside and beyond which lie other facilities, including repair shops. *Mitchell*, 577 S.W.3d at 856.

Jamie Mitchell (“Mitchell”) was injured two separate times while switching railcars at the Springfield yard. Mitchell’s first injury occurred in 2015 when the yardmaster wanted the last four cars in a train inspected before they were to be moved. He was instructed to cut the last four cars and leave them on the track. “As Mitchell prepared to make that cut in the darkness, a handrail he was holding on one car (“NATX”) broke and he fell, striking his back and head.” *Id.* at 857. Within an hour of the accident, car men inspected NATX and had it “bad ordered” for damaged handrails and ladder. *Id.* The “bad order” of the car labeled NATX with a mechanical defect.

After multiple surgeries and over a year of missed work, Mitchell returned to switching work at BNSF. In 2017, he once more injured himself yanking a stuck pin lifter as he was attempting to uncouple a defective car (“CHVX”) to have it moved to a spotting track to be repaired. *Id.*

Mitchell sued BNSF and his FELA allegations proceeded to jury trial. The trial court determined as a matter of law that both rail cars were considered “in use” for SAA purposes when Plaintiff was injured. *Id.* “In use” is a term of art as shorthand for the SAA’s formal statutory language that a carrier “may use or allow to be used on any of its railroad lines a vehicle only if it is equipped with...” 49 U.S.C. § 20302(a).

## Safety Appliance Act (“SAA”)

As background, the Safety Appliance Act serves essentially as a substantive amendment to the FELA. The SAA requires railroad companies to provide and maintain safety appliances on trains. The SAA does not have an exhaustive list of safety appliances; however, it references devices such as grab irons, handholds, power brakes, and automatic couplers. When a violation of the SAA results in an injury to an employee, the employer is strictly liable for the injury; the carrier is not excused by any showing of care, however assiduous. *Id.* at 858. Put differently, the employee’s contributory negligence is not a defense in the FELA case. 49 U.S.C. § 20302.

The SAA is construed routinely and liberally to cover a plethora of gadgets, in many contexts. However, the SAA applies only if the defective car was “in use” at the time of injury. *Id.*

at 858, citing *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 15, 58 S.Ct. 426 (1938). The problem is complicated further in situations, such as in *Mitchell*, when a rail car with a known defect is sent for repairs and an employee is injured during the car's transit. Was the car "in use" or was it not? That is the question. The case law interpreting "in use" is voluminous and subject to interpretation. Both practitioners and courts construct the terminology to fit the circumstances.

### Jury Verdict

In *Mitchell*, the jury found for the plaintiff awarding \$5,000,000 worth of damages for the 2015 injury while assessing Plaintiff 20% at fault. The jury also awarded \$80,000 in damages for the 2017 injury and assessed the Plaintiff 50% at fault. The court entered judgment against BNSF for \$5,080,000 without reduction for Plaintiff's comparative fault since the SAA, and, therefore, strict liability applied. *Id.* at 858.

BNSF asserted on appeal that the trial court's ruling of "in use" was erroneous arguing "NATX and SHVX were not in use because they had damage requiring repair, were in the rail yard awaiting repairs, and were under order not to be moved or returned to service until repairs were made." *Id.* at 859. The parties agreed appellate review was *de novo*.

### Analysis

The Missouri Court of Appeals disagreed with BNSF and affirmed the judgment. *Id.* at 856. The appellate court relied on a well-known (some would say "infamous") and ancient U.S. Supreme Court case not cited by either party but that is still used with frequency by today's

practitioners, *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916). In *Rigsby*, a switchman was engaged in taking 'bad order' cars to be repaired. The switchman rode on top of one of the bad ordered cars and fell because of a defect in one of the hand holds or grab irons that formed the rungs of the ladder. The Missouri appellate court noted that the bad ordered car in *Rigsby* had been out of service for perhaps a month, yet the Supreme Court summarily applied the SAA because:

[A]lthough §4 of the act of 1910 relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment.

*Id.* at 859, citing *Rigsby*, 241 U.S. 33, 46.

The statute cited above in *Rigsby* remains in effect but has been renumbered. It still preserves SAA civil liability in injury actions "arising from the movement of a vehicle with equipment that is defective, insecure, or not maintained in compliance with this chapter." 49 U.S.C. § 20303(c) (emphasis added).

In *Mitchell*, the distinguishing factor is the difference in time. *Mitchell*'s injury occurred not more than an hour before NATX was bad ordered, while in *Rigsby*, the car had been bad ordered for perhaps a month before the switchman was injured. In addressing the time issue, the Missouri Court of Appeals cited to two cases, *Brady*, 303 U.S. 10, 15, where a

carrier remained liable for injuries suffered by a railroad employee as a result of defective equipment in the course of movement, and *Southern Ry. Co. v. Bryan*, 375 F.2d 155 (5th Cir. 1967), where a railcar on an inoperative locomotive was being handled to be transported to the repair shop, that railcar was considered “in use” as contemplated by the SAA. *Mitchell*, 577 S.W.2d at 858, 859. Additionally, *Bryan* cited to *Rigsby* stating, “Where the hauling of a disabled or defective railroad vehicle is in progress or in immediate contemplation, the handling of it for that purpose is a part of its unitary journey from the point of discovery of disability to the repair shop.” *Mitchell*, 577 S.W.2d at 859, citing *Brady*, 241 U.S. at 36.

According to the Missouri court’s reasoning, it appears that no matter how long a rail car is considered bad ordered, it’s movement or immediate contemplation of movement to the repair shop undoubtedly considers it “in use” for purposes of the SAA. Again, the appellate court relied upon and reaffirmed jurisprudence where a rail car had been bad ordered for up to a month and was still considered in use when transported to be repaired.

### Conclusion/Concerns

Disabled railroad cars awaiting repairs in a rail yard at the time a railroad employee is injured can be “in use” within the meaning of the Safety Appliance Act, and thus the railroad company may be strictly liable under the Act for injuries sustained by its employee; although the railroad had ordered railroad cars not to be moved until serviced, it was sufficient for liability under the SAA that the employee's injuries occurred when movement of defective railroad car for repair work was immediately contemplated or in progress as part of the railroad car's unitary journey to the place of repair. 49 U.S.C.A. §§ 20302(a), 20303(c). *Mitchell*, 577 S.W.3d at 859-860. Therefore, railroads and practitioners alike should be aware of this potentially dangerous case and expect to see it in briefing submitted by plaintiffs’ lawyers.

The flurry of cases involving railroaders injured while a “bad ordered” car is being moved for repairs continues unabated, and practitioners can expect to see and hear the *Mitchell* opinion argued against the railroads they defend. Be prepared to craft creative counter-arguments well in advance.

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