

1961

# The Denver and Rio Grande Western Railroad Co. v. State Tax Commission of Utah : Petition for Rehearing

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah**

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THE DENVER AND RIO GRANDE  
WESTERN RAILROAD  
COMPANY, a Corporation,

*Petitioner,*

— vs. —

THE STATE TAX COMMISSION  
OF UTAH,

*Respondent.*

**FILED**

FEB 16 1901

Case No. 9312 Utah  
Clerk of the Court

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**PETITION FOR REHEARING  
AND BRIEF IN SUPPORT THEREOF**

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# In the Supreme Court of the State of Utah

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— vs. —

THE STATE TAX COMMISSION  
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*Respondent.*

Case  
No. 9312

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## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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Comes now, The Denver and Rio Grande Western Railroad Company, herein referred to as “Rio Grande,” Petitioner, and respectfully petitions this Honorable Court for a rehearing and re-argument in the above entitled case. This petition is based upon the following grounds:

### POINT I.

THE COURT OVERLOOKED THE ESSENTIAL  
FACT THAT THE PURCHASE OF MATERIALS  
BY PETITIONER IS INDEPENDENT OF AND

PRECEDES THE PERFORMANCE OF SERVICES RENDERED IN REPAIR OF FOREIGN LINE CARS.

POINT II.

THE COURT OVERLOOKED THE ESSENTIAL FACT THAT AT THE TIME OF INITIAL PURCHASE USE TAX WAS PAID TO THE STATE OF UTAH ON THE MATERIALS THEREAFTER USED IN THE REPAIR OF FOREIGN LINE CARS.

POINT III.

THE COURT ERRED IN ITS CONCLUSION THAT THE SAME TAXABLE EVENT OCCURS IN THIS STATE IN CONNECTION WITH THE REPAIR SERVICES RENDERED AS WITH THE MATERIALS FURNISHED.

POINT IV.

THE COURT OVERLOOKED THE ESSENTIAL FACT THAT SERVICES PERFORMED IN THE REPAIR OF FOREIGN LINE CARS WHILE SUCH CARS ARE IN ROUTE IN THE MOVEMENT OF COMMERCE IS A PART OF THE PROCESS OF THAT COMMERCE.

POINT V.

THE COURT OVERLOOKED THE CONTROLLING PRINCIPLE OF LAW WHICH PERMITS THE TAXATION OF TRANSACTIONS OCCURRING PRIOR TO THE COMMENCEMENT OF OR AFTER THE COMPLETION OF COMMERCE BUT WHICH PRECLUDES TAXATION UPON THE PROCESS OF COMMERCE ITSELF.

WHEREFORE, Petitioner prays that the judgment and opinion of the Court be re-examined and a re-argument permitted of the above entitled case.

A brief in support of this petition is filed herewith.

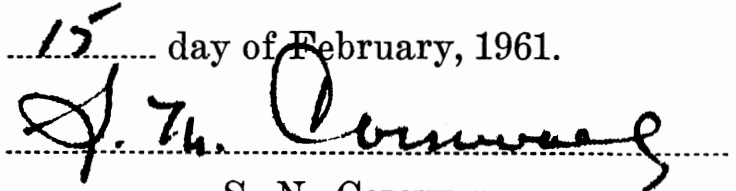
S. N. CORNWALL,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

*Attorneys for Petitioner*

S. N. CORNWALL, hereby certifies that he is one of the attorneys for Petitioner, and that in his opinion there is good cause to believe that the judgment objected to is erroneous, and that the case ought to be re-examined and re-argued as prayed for in said petition.

DATED this 15 day of February, 1961.

A handwritten signature in dark ink, appearing to read "S. N. Cornwall", is written over a horizontal dotted line.

S. N. CORNWALL

# BRIEF IN SUPPORT OF PETITION FOR REHEARING

## POINT I.

THE COURT OVERLOOKED THE ESSENTIAL FACT THAT THE PURCHASE OF MATERIALS BY PETITIONER IS INDEPENDENT OF AND PRECEDES THE PERFORMANCE OF SERVICES RENDERED IN REPAIR OF FOREIGN LINE CARS.

In its opinion the Court stated in part that:

“... It does not claim that our statute is invalid because the tax is technically on services and not on a sale of property and such a contention would be without merit if made. Thus it is not apparent why the materials furnished in making the repairs should be taxable but the services rendered in making such repairs would not be taxable.”

The foregoing statement overlooks essential facts. Rio Grande in connection with its railroad operations necessarily makes substantial purchases of materials. These materials are used for (a) the repair of its own cars and locomotives, (b) the repair of cars of other roads which is the responsibility of Rio Grande, and (c) the repair of foreign line cars, which is the responsibility of such foreign lines. The statute involved here concerns only repairs under the third category. Rio Grande cannot know in advance where or how the materials which it purchases may be used. Its operations require that it have on hand a storehouse supply of such materials. Consequently, Rio Grande has paid and must pay to the State of Utah at the time of initial purchase, sales or use tax on all the materials purchased by it regardless of the use



which may thereafter be made of such materials. The materials involved here were purchased outside the State and use tax as required by law was paid to the State of Utah by Rio Grande in connection with the initial purchase. It is therefore manifest that the initial purchase by Rio Grande of materials is wholly independent of the subsequent use of any such materials in repairs which may be made upon foreign line cars. These facts were set forth in the brief of petitioner and presented to the Court in oral argument.

Because the materials which are used in the repair of foreign line cars are purchased independent of and in advance of any such use the initial purchase of such materials is taxable within the principles of the cases heretofore decided by this Court and the Supreme Court of the United States. The services rendered in the repair of foreign line cars and the use of materials theretofore purchased in making such repairs are not related to the initial purchase of materials. The foregoing statement overlooks this essential feature in this case.

## POINT II.

**THE COURT OVERLOOKED THE ESSENTIAL FACT THAT AT THE TIME OF INITIAL PURCHASE USE TAX WAS PAID TO THE STATE OF UTAH ON THE MATERIALS THEREAFTER USED IN THE REPAIR OF FOREIGN LINE CARS.**

At the time Rio Grande purchases its storehouse materials it pays applicable sales or use taxes to the State of Utah. It cannot do otherwise for it has no means of know-

ing where or when such materials may be used in its operations. Petitioner has conceded liability for tax upon the initial purchase. What petitioner does not concede is the contention that materials on which tax has once been paid should again be subject to tax if used at a later date in making repair on a foreign line car while in the movement of commerce. The opinion of the Court in affirming the decision of the Commission overlooks the fact that tax on the materials was paid at the time of initial purchase and appears to hold that it may again be imposed upon materials thereafter used in repair of foreign line cars. This we believe is erroneous.

### POINT III.

**THE COURT ERRED IN ITS CONCLUSION THAT THE SAME TAXABLE EVENT OCCURS IN THIS STATE IN CONNECTION WITH THE REPAIR SERVICES RENDERED AS WITH THE MATERIALS FURNISHED.**

From the statement quoted above the Court, in its opinion, concludes that:

“... The same taxable event occurs in this state in connection with the repair services rendered as with the materials furnished.”

From the consideration of the above Points I and II, it is seen that (i) Rio Grande necessarily purchases its materials in advance of repair and without any knowledge or means of knowing as to what part of such materials may at a subsequent date be used in the repair of foreign line cars, and (ii) Rio Grande, at the time of the purchase

of such materials, pays applicable sales or use tax to the State of Utah. The taxable event with respect to such materials therefore occurs when such materials are first purchased, not weeks or months later when some part of such materials is used in the repair of a foreign line car. The foregoing conclusion that the same taxable event occurs in this State in connection with repair services rendered as with materials furnished is therefore erroneous.

#### POINT IV.

**THE COURT OVERLOOKED THE ESSENTIAL FACT THAT SERVICES PERFORMED IN THE REPAIR OF FOREIGN LINE CARS WHILE SUCH CARS ARE IN ROUTE IN THE MOVEMENT OF COMMERCE IS A PART OF THE PROCESS OF THAT COMMERCE.**

Petitioner respectfully urges that the Court overlooked the fact that the only cars which are involved in the repairs here under consideration are cars which belong to other railroads. These cars could only come into the possession of Rio Grande because of their movement in commerce. The repairs are in effect made in route. They are necessary in order to continue the journey of the cars along their way in a movement which has been commenced prior to reaching Rio Grande rails and which will necessarily not terminate until the car is returned to the owner road. The repairs being so made are necessarily repairs in the process of commerce. This commerce may temporarily be stopped, but commerce hardly ever flows in an unbroken movement. There are necessarily stops for many purposes while trains are in opera-

tion. They are stopped for inspection, for fueling, for changing of crews, for passing of other traffic, and for switching in yards. The repairs in question here are essentially no different from other temporary stoppages in the movement of such commerce.

### POINT V.

**THE COURT OVERLOOKED THE CONTROLLING PRINCIPLE OF LAW WHICH PERMITS THE TAXATION OF TRANSACTIONS OCCURRING PRIOR TO THE COMMENCEMENT OF OR AFTER THE COMPLETION OF COMMERCE BUT WHICH PRECLUDES TAXATION UPON THE PROCESS OF COMMERCE ITSELF.**

The line of demarcation which separates transactions which may be taxed from those which may not be taxed is the line which is drawn at the threshold of the process of commerce itself. We have observed that transactions which are completed prior to the commencement of commerce or after commerce ceases have been held to be subject to taxation. On the other hand, activities which are part of the commerce itself may not be subject to tax. This line of demarcation has been pointed out by the Supreme Court of the United States, the final arbiter of this entire problem, and is illustrated in the recent case of *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), wherein the Supreme Court distinguished the cases which permitted taxation from those which precluded taxation and drew the line of demarcation as stated above in language appearing at page 433 of the U. S. Report as follows:

“Though all of these cases were closely related to transportation in commerce both in time and

movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

“Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co. v. Arizona* *el rel. Sullivan*, 325 U. S. 761, 767, 65 S. Ct. 1515, 1519, 89 L. Ed. 1915. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Comany*. ‘What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.’ *Freeman v. Hewit*, *supra*, 329 U. S. 249, 256, 67 S. Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. . . .”

Once it is recognized that repairs of foreign line cars are necessarily made as a part of the movement of commerce, a taxation upon the process of rendering such repair casts an unlawful burden upon such commerce. Such burden is prohibited even though it adds no more to the costs of commerce than a permissible use or a sales tax.

Under the application of that principle, the tax here imposed is unlawful.

Union Pacific Railroad Company, The Ogden Union Railway and Depot Company and Southern Pacific Company, pursuant to authorization of this Court, join in this brief as *amici curiae*.

We respectfully submit that a rehearing of this cause should be granted to the end that the errors herein set forth may be corrected.

Respectfully submitted,

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