

1963

James W. Church v. Denver and Rio Grande Railroad Co. : Appellant's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rawlings, Wallace, Roberts & Black; Richard C. Dibblee; Attorneys for Plaintiff and Appellant;

Recommended Citation

Petition for Rehearing, *Church v. Denver and Rio Grande Railroad Co.*, No. 9605 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/3988

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

FEB 18 1963

JAMES W. CHURCH,

Clerk, Supreme Court, Utah

Plaintiff and Appellant,

vs.

**THE DENVER & RIO GRANDE
RAILROAD COMPANY, A COR-
PORATION,**

Defendant and Respondent.

Case No.
9605

**APPELLANT'S PETITION FOR REHEAR-
ING AND BRIEF IN SUPPORT THEREOF**

RAWLINGS, WALLACE, ROBERTS & BLACK
Richard C. Dibblee
Attorneys for Plaintiff & Appellant

TABLE OF CONTENTS

	Page
PETITION FOR REHEARING	1
BRIEF IN SUPPORT OF PETITION FOR REHEARING	2
POINT I—This Court has deprived plaintiff of his constitutional and statutory right to a trial by jury.	2
POINT II—This court has misinterpreted the Fed- eral Boiler Inspection Act as applied to the facts of this case.	4
CONCLUSION	9

CASES CITED

Bolan v. Lehigh Valley Railway Co., 167 Fed. 2d 934	3, 7
Calabritto v. New York, N. H. & H. R. Co., 287 F.2d 394, 397, C.A.2d	8
Ehalt v. McCarthy, 104 Utah 110, 138 P.2d 639..5, 6, 9	
Fritts v. Toledo Terminal Railroad Co., 293 F.2d 361	7
Gowins vs. Pennsylvania RR. Co., 299 F. 2d 431....	7

	Page
Lilly v. Grand Trunk Western Railway Co., 317 U.S. 41, 63 S. Ct. 347, 92 L.Ed. 73 ..	4, 5, 6, 8
Rogers v. Missouri Pacific RR. Co., 352 U.S. 500, 77 S.Ct. 443	8
Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018 93 L. Ed. 1282	4, 6, 8
Waldrup v. Southern RR. Co., 98 S.W. 2d 614....	7

STATUTES CITED

Federal Boiler Inspection Act, 45 U.S.C.A., §23 et seq.	2 ,3, 4, 5, 6, 7, 8
Federal Employers' Liability Act, 45 U.S.C.A. §51, et seq.	4, 6
Federal Safety Appliance Act, 45 U.S.C.A., §2 et seq.	4

IN THE SUPREME COURT
of the
STATE OF UTAH

JAMES W. CHURCH,

Plaintiff and Appellant,

vs.

THE DENVER & RIO GRANDE
RAILROAD COMPANY, A COR-
PORATION,

Defendant and Respondent.

Case No.
9605

PETITION FOR REHEARING

COMES NOW JAMES W. CHURCH, Plain-
tiff and Appellant herein, and respectfully petitions this
Honorable Court for a rehearing in the above-entitled
case.

This petition is based on the following grounds:

POINT I

This court has deprived plaintiff of his constitu-
tional and statutory right to a trial by jury.

POINT II

This court has misinterpreted the Federal Boiler Inspection Act as applied to the facts of this case.

**RAWLINGS, WALLACE, ROBERTS
& BLACK**

RICHARD C. DIBBLEE
Attorneys for Plaintiff and Appellant

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THIS COURT HAS DEPRIVED PLAINTIFF OF HIS CONSTITUTIONAL AND STATUTORY RIGHT TO A TRIAL BY JURY.

Plaintiff instituted this action alleging a violation of the Federal Boiler Inspection Act.¹ The evidence was that a free-swinging metal door leading into the cab of an engine operated in such manner that plaintiff was exposed to an unnecessary peril. Plaintiff testified the door could have been made safer by the use of air vents that would cut down the air pressure and by the installation of door stops. The defendant presented evidence that the air vents were not feasible and the door stops would cause additional hazards.

This court has held that the foregoing evidence did

1. 45 U.S.C.A. § 23 et seq.

not present a jury question on the issue of safety of the door. Plaintiff respectfully submits that said decision is error. In this connectoin we cite the case of *Bolan v. Lehigh Valley Railway Co.*, 167 F.2d 934, a Federal Boiler Inspection case. In that case plaintiff's foot was injured as a result of the condition of a pilot step on the front end of an engnie, and the position of a steam-pipe located underneath the pilot step. The case discusses the contention of defendant concerning I.C.C. regulations; but with respect to the testimony by the employee as to the position of the steampipe and its being a contributing factor to the accident, the court stated:

“There was also evidence to support a conclusion that the condition of the step *and the position of the steampipe under it contributed to the accident.* True, plaintiff, while on the stand, stated that his foot had slipped because of a jerk, but he also stated that the accident was ‘due to fact that those bolt heads on top of the pilot step were there,’ and ‘That steam pipe had everything in the world to do with the accident.’ ”

Plaintiff respectfully submits that a jury could well find that a free-swinging door in a moving, swaying engine created an unsafety factor that constituted a violation of the Boiler Inspection Act. The *Bolan* case is simply indistinguishable from the case at bar.

This court has indicated that appellant did not cite controlling Boiler Inspection Act cases in the brief of appellant. The *Bolan* case is a Boiler In-

spection Act case as are *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282; and *Lilly v. Grand Trunk Western Railway Company*, 317 U.S. 41, 63 S.Ct. 347, 92 L.Ed. 73. These cases lay down the same liberal principles in Boiler Inspection Act cases as are applicable in Federal Employers' Liability Act and Federal Safety Appliance Act cases. And where there is "any evidence at all" to support a finding of a "not reasonably safe condition" on an engine, a jury question is presented.

The description by plaintiff of the manner in which the door operated and his opinion based on experience as to how the door could have been changed so as to eliminate the danger which caused his injury were facts and circumstances for the jury to weigh and appraise in determining whether defendant violated the Federal Boiler Inspection Act. To deprive plaintiff of the right to have a jury weigh these facts and circumstances is to take away from plaintiff "a goodly portion of the relief which Congress has afforded."

Plaintiff respectfully submits that this court's decision constitutes a denial of plaintiff's constitutional and statutory right to a jury trial and is contrary to and in conflict with the decisions herein cited.

POINT II

THIS COURT HAS MISINTERPRETED THE FEDERAL BOILER INSPECTION ACT

AS APPLIED TO THE FACTS OF THIS CASE.

The leading case interpreting the Federal Boiler Inspection Act is that of *Lilly v. Grand Trunk Western Railway Company*, supra. In that case the Supreme Court of the United States ruled that even though the engine was mechanically perfect, the jury was warranted in finding a violation of the Federal Boiler Inspection Act when snow and ice on the top of the tender made use of the engine unsafe. In reaching this decision the court used the following language:

“But there is no warrant in the language of the Act for construing it so narrowly, or for denying the commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment ‘in proper condition and safe to operate . . . without unnecessary peril to life or limb.’ Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb.”

The decision announced in the *Lilly* case was analyzed by the Utah Supreme Court in the case of *Ehalt v. McCarthy*, 104 Utah 110, 138 P.2d 639. In that case the Utah Supreme Court denied application of the Boiler Inspection Act where a boiler had exploded because a hostler and his helper, the plaintiff, had failed to keep the water level above the crown sheet. The *Ehalt* case is not in point here. The case went off on the ground of causation; that the cause of the explosion

was human failure rather than mechanical defect or foreign matter. Here we have a dangerous condition of the engine itself. This is not a human failure case. But the *Ehalt* case would never be supported by the United States Supreme Court today. It is simply at odds with the liberal philosophy announced by the *Lilly* case and the later United States Supreme Court cases.

In the case of *Urie v. Thompson*, supra, the sanders of an engine were improperly adjusted, which permitted silica dust to be in the cab of the engine, causing plaintiff to suffer a disease. In discussing the Act, the court stated as follows:

“But by its own terms the Boiler Inspection Act, like the Safety Appliance Act, does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibitions ‘unlawful.’ Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers’ Liability Act by imposing on interstate railroads ‘an absolute and continuing duty to provide safe equipment.’ ”
(*Lilly* case cited.)

The court then states:

“The congressional purpose underlying the Boiler Inspection Act is basically the same as that underlying the Safety Appliance Acts and the Federal Employers’ Liability Act. In requiring that the boiler and, not long after, that the entire locomotive be maintained ‘in proper condition and safe to operate,’ Congress by its own statement was attempting to insure that such equipment ‘be employed in . . . active service

... without unnecessary peril to life or limb.' . . . Others, like those of the Boiler Inspection Act, simply outline a general standard which may be more specifically articulated in rules enunciated by the carriers subject to the approval of the Interstate Commerce Commission."

In the case of *Bolan v. Lehigh Valley RR Co.*, supra, the position of a steampipe was held to be a violation of the Act because the same made the engine unsafe to operate. In *Fritts v. Toledo Terminal Railroad Co.*, 293 F.2d 361, the condition of the fireman's seat was sufficient to present to a jury the question of whether there was a violation of the Act. In the case of *Waldrup v. Southern RR. Co.*, 98 S.W. 2d 614, the condition of a door handle was held to be a violation of the Act.

In the case of *Gowins v. Pennsylvania RR. Co.*, 299 F.2d 431, a trial court was reversed for failure to submit to a jury the issue of whether the defendant company had violated the Boiler Inspection Act. Certiorari was denied by the United States Supreme Court. In this case the plaintiff was a switchman and assigned to a freight train. When the train arrived at a town, the plaintiff got off the locomotive to line a switch and walked to a point some 200 to 250 feet away from the engine. As plaintiff was getting on the engine, he slipped and fell. He testified that while traveling on the train to the town where he was injured, he used the walkways on both locomotives, and he noticed oil on them. Plaintiff also testified that he slipped and tripped

over a ground air hose. The trial court refused to instruct the jury on the violation of the Federal Boiler Inspection Act. In holding that the Act was applicable the court stated as follows:

“The Act has been liberally construed in the light of its prime purpose, the protection of employees, by requiring the use of safe equipment. Any employee engaged in interstate commerce who is injured by reason of a violation of the Act, has a cause of action under the Act. Section 23, Title 45 U.S.C.A; Lilly v. Grand Trunk Western R. Co., 317 U.S. 481, 63 S.Ct. 347, 87 L.Ed. 411; Urie v. Thompson, Trustee, 337 U.S. 163, 188-189, 69 S.Ct. 1018, 93 L.Ed. 1282. The Act covers not only defects in construction or mechanical operation, but gives protection against the presence of dangerous objects or foreign matter. Lilly v. Grand Trunk Western R. Co., supra; Calabritto v. New York, N. H. & H. R. Co., 287 F.2d 394, 397, C.A.2d.”

* * *

“We are of the opinion that the rulings in Lilly v. Grand Trunk Western R. Co., supra, 317 U.S. 481, 63 S.Ct. 347, and Rogers v. Missouri Pacific R. Co., supra, 352 U.S. 500, 77 S.Ct. 443, the District Judge was in error in withdrawing from the consideration of the jury appellant’s claim for damages under the Boiler Inspection Act. Calabritto v. New York, N.H. & H.R. Co., supra, 287 F.2d 394.”

The foregoing cases demonstrate that nice distinctions between different types and causes of unsafety are not indulged. The cases are decided on the large

principle enunciated by the Act itself of whether the engine can be operated without *unnecessary* peril to life or limb. Here the peril could have been found *unnecessary* in view of the evidence that door stops or proper ventilation would have prevented the danger which caused plaintiff's injury.

It is our position that the *Ehalt* case is not in point, is an unfortunate legal curiosity at best, and that the decision in the case at bar should be carefully reconsidered before it becomes a precedent in this State.

CONCLUSION

We respectfully request the court to reconsider the former decision and remand this case to the District Court for a jury trial.

Respectfully submitted,

RICHARD C. DIBBLEE

RAWLINGS, WALLACE, ROBERTS
& BLACK

Attorneys for Plaintiff and Appellant