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Master and Servant--Recovery for Silicosis under Boiler Inspection Act and Federal Employers' Liability Act

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The petition for certiorari in the principal case urged the question of whether the content of petitioner's speech was composed of "fighting words" not protected by the Constitution, without mentioning the erroneous instruction by the trial court nor argument addressed to it. This would appear a manifest limitation of the scope of review accorded under the text of the Supreme Court Rules. Rule 38, subd. 2, 306 U. S. 716 (1939), reads in part as follows: "The petition for certiorari shall contain . . . the questions presented; and the reasons relied on for allowance of the writ. Only the questions specifically brought forward by the petition . . . will be considered." In *Flourney v. Wiener,* 321 U. S. 253, 259 (1944), it was said that, on application for certiorari to a state court, the Supreme Court would not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the state court, a proposition as authority for which the court cited *National Licorice Co. v. N. L. R. B.,* 309 U. S. 350 (1940) and *General Talking Pictures Co. v. Western Electric Co.,* 304 U. S. 175 (1938); *cf. Morehead v. New York* ex rel. *Tipaldo,* 298 U. S. 587 (1936) (by implication). But, in the principal case, the error was not only not assigned; it was not even presented to or passed upon by the state court.

Whatever its merits, the case adds nothing to constitutional law. *Cf.* 1 MERCER L. REV. 114 (1949); 9 LAW. GUILD REV. 70 (1949). Mr. Justice Douglas' majority opinion, the dissent of Mr. Justice Jackson and the opinions of the judges in the state appellate courts expressed no disagreement regarding the substantive rights and limitations with respect to freedom of speech. The significance of the case, it is submitted, is the extent to which the Court has disregarded its rules of procedure as well as meanings attributed to them by language in prior decisions, in protecting this basic freedom.

W. E. C.

MASTER AND SERVANT—RECOVERY FOR SILICOSIS UNDER BOILER INSPECTION ACT AND FEDERAL EMPLOYERS' LIABILITY ACT.—*P,* fireman on *D* railroad, allegedly contracted silicosis as a result of inhalation of silica dust emanating from defective sanders on *D*'s locomotives. *P* charged violations of the Boiler Inspection Act, 36 STAT. 913 (1911), as amended, 43 STAT. 659 (1924), 45

U. S. C. §23 (1946), which imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof in proper condition, safe to operate without unnecessary peril to life or limb. The Missouri Supreme Court held the Boiler Inspection Act, and more specifically Interstate Commerce Commission Rule 120, 49 CODE FED. REGS. §91.120 (1938), which requires proper sanding apparatus to be maintained in safe and suitable condition for service, to be inapplicable since the Act and ruling were aimed at promoting safety from accidental injury, as distinguished from injury due to gradual inhalation of harmful dusts. *Urie v. Thompson,* 357 Mo. 738, 210 S. W.2d 98 (1948). Held, on certiorari, the Boiler Inspection Act covers silicosis; judgment reversed and case remanded with instruction to reinstate the judgment on the verdict. *Urie v. Thompson,* 337 U. S. 163 (1949) (5-4 decision).

There is a definite differentiation generally, in the adjudicated cases, between an accidental injury and an occupational disease such as silicosis. *American Mutual Liability Ins. Co. v. Agricola Furnace Co.,* 236 Ala. 535, 183 So. 677 (1938); *Phillips Petroleum Co. v. Renegar,* 167 Okla. 496, 30 P.2d 922, 924 (1934); *Thompson* v. *Industrial Comm'n,* 82 Utah 247, 23 P.2d 930 (1933). It is conceded that the appalling number of accidental injuries preceding the enactment of the Boiler Inspection Act prompted its passage, see 2 ROBERTS, FEDERAL LIABILITIES OF CARRIERS §501 (2d ed. 1929). That Interstate Commerce Commission Rule 120, *supra,* requiring locomotives to be equipped with proper sanding apparatus was designed to insure an adequate auxiliary braking system rather than to protect employees against silicosis is not disputed in the principal case. The Court considered liability imposed by the Boiler Inspection Act of broader character and adopted the rule used in connection with Safety Appliance Acts. 27 STAT. 531 (1893), as amended 36 STAT. 298 (1910), 45 U. S. C. §1 *et seq.* (1946). A carrier's liability springs not from the employee's position or the work he may be doing when injured, but it arises whenever the failure to obey these safety appliance laws is the proximate cause of injury to the employee when engaged in the discharge of duty. *Louisville & N. R. R. v. Layton,* 243 U. S. 617 (1917). The Safety Appliance Acts have been liberally construed allowing recovery for every injury the proximate cause of which was a violation of the Acts. *Swinson v. Chicago, St. Paul, M. O. Ry.,* 294 U. S. 529 (1935).

Although the principal case is the first testing the applicability of the Boiler Inspection Act to silicosis, the Court is not wholly without precedent in the related field of employee health protection. State regulations requiring automatic fire doors and cab curtains to protect the health of employees were invalidated, the Court stating that the Boiler Inspection Act supersedes regulations endeavoring to prevent sickness and disease due to excessive and unnecessary exposure. See *Napier v. Atlantic Coast Line,* 272 U. S. 605, 611 (1926). Indeed the requirement for closing "unnecessary or excessive openings in locomotive cabs" imposed by Interstate Commerce Commission Rule 116 (g), 49 CODE FED. REGS. §91.116 (g) (1938), after the *Napier case* was designed to protect employee health from inclement weather. *Wisconsin R. R. Comm'n v. Aberdeen & R. R. R.,* 142 I. C. C. 199 (1928). In upholding Interstate Commerce Commission Rule 157, 49 CODE FED. REGS. §§ 91-157 (1938), requiring power operated reverse gears on locomotives, it was held in *United States v. Baltimore & Ohio R. R.,* 293 U. S. 454 (1935), that it might conceivably be found necessary to promote safety, even if it did so only incidentally by preventing health impairment through excessive exertion or fatigue. The power delegated the commission was considered to be a general one.

The Boiler Inspection Act is substantively, if not in form an amendment to the Federal Employers' Liability Act, 35 STAT. 66 (1939), as amended, 53 STAT. 1404 (1939), 45 U.S.§54 (1946) & supplements the latter by imposing "an absolute liability and continuing duty" on carriers to provide safe equipment. *Lilly v. Grant T. W. R. R.,* 317 U. S. 481 (143); *Southern R. R. v. Lunsford,* 297 U. S. 398 (1936); *Baltimore & O. R. R. v. Groeger,* 266 U. S. 521 (1925). An employee injured by reason of a violation of the Boiler Inspection Act may bring his action under the Federal Employers' Liability Act, charging violation of the former. *Moore v. Chesapeake & O. Ry.,* 291 U. S. 205 (1934); *Great N. Ry. v. Donaldson,* 246 U. S. 121 (1918). The Court, in the instant case, recognized this as an alternative basis for its decision, and it would seem the sounder ground for the result reached.

The principal case also involves the first ruling by the Court that the Federal Employers' Liability Act covers silicosis, although state and federal decisions have authorized recovery under the act for injuries not involving accidents or violence. *Shelton v.*

Thompson, 148 F.2d 1 (7th Cir. 1945); 157 F.2d 709 (7th Cir. 1946) (carbon monoxide poisoning); *Baltimore & O. R. R. v. Branson,* 242 U. S. 623 (1917) (paint poisoning). In *Sadowski v. Long Island R. R.,* 292 N. Y. 448, 55 N. E.2d 497 (1944), recovery for silicosis was sustained under the Federal Employers' Liability Act. The dissent in the principal case has no quarrel with the question of liability under this act.

Under the circumstances, it would seem a justifiable inference that the Boiler Inspection Act was enacted for the purpose of facilitating employee recovery in connection with the Federal Employers' Liability Act, rather than restricting such recovery or making it impossible.

W. M. T.

STATES—PUBLIC CONTRACTS—DISQUALIFICATION OF OFFICERS AS APPLYING TO FUNDS RECEIVED FROM FEDERAL GOVERNMENT.—*H,* a member of the Board of Education of Roane County, in the general merchandise business, sold supplies and groceries to schools for use in administering the National School Lunch Act. 60 STAT. 230 (1946), 42 U. S. C. §1751 (1948). In a proceeding to remove board members, *H* was charged with violating W. VA. CODE c. 61, art. 10, §15 (Michie, 1943), which prohibits any member of any county or district board from being pecuniarily interested in the proceeds of any contract or service with the board, whereby as such member, he may have any voice, influence or control. Other board members were charged with having knowingly approved the violation by *H.* The lower court dismissed the proceeding. *Held,* reversed. The state statute, regulatory in nature, applies to funds furnished the State Department of Education under the federal statute. *Hunt v. Allen,* 53 S. E.2d 509 (W. Va. 1948).

The National School Lunch Act calls for government grant-in-aid to states for hot lunch programs. The defendants contended that, since payments were made to *H* entirely with funds appropriated by Congress and deposited to the credit of the board, W. VA. CODE c. 61, art. 10, §15 (Michie, 1943), did not apply, urging that it does not cover federal money going through their hands pursuant to a federal statute but is confined to money belonging to the state. Indicating that the problem was of first impression in this jurisdiction and that diligent search had failed to reveal a