No. 20-807

IN THE
Supreme Court of the United States

BRADLEY LEDURE,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

NELSON G. WOLFF
Counsel of Record
JEROME J. SCHLICHTER
SCHLICHTER BOGARD & DENTON LLP
100 South Fourth Street, Suite 1200
Saint Louis MO 63102
(314) 621-6115
nwolff@uselaws.com

Counsel for Petitioner

April 23, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

The Seventh Circuit affirmed summary judgment against petitioner on FELA claims for violation of federal railroad safety laws because it determined the oily locomotive on which he fell was not "in use" although it was temporarily stopped during interstate transportation. The decision conflicts with this Court's precedent broadly finding on-rail vehicles in use even when not part of a fully assembled train ready to depart a yard, consistent with express Congressional intent to afford injured workers a remedy against employers who fail to provide safe equipment. And, lower courts remain confused and have established conflicting legal standards. These undeniable conflicts are not a factual disagreement, rather, they reflect a dispute about the appropriate legal standard. This Court's precedent and the standards of other circuits mandate a finding that UP5683 was in use because the work being done was incidental to railroad transportation, not maintenance or repair. Because this issue affects long-established, important fundamental rights of thousands of injured railroad workers and clear guidance is needed, review should be granted.

ARGUMENT

I. RESPONDENT FAILS TO REFUTE THAT THE SEVENTH CIRCUIT'S REFUSAL TO ENFORCE IMPORTANT FEDERAL SAFETY LAWS AS WRITTEN IS WRONG, CONFLICTS WITH THIS COURT'S PRECEDENT, AND ENTRENCHES A CIRCUIT SPLIT, WARRANTING REVIEW.

1. Petitioner demonstrated that the Seventh Circuit's legal standard for "in use" conflicts with this Court's precedent. *Brady v. Terminal R.R. Assoc.*, 303 U.S. 10 (1949). Respondent's contention (at 17) that the "holding in *Brady* in no way controls the outcome" here is wrong for the reasons stated in the petition. Moreover, respondent failed to address similar holdings of this Court in *Delk*, *Rigsby*, and *Schendel*. Pet. at 10. The railcars in those cases were found to be in use although they were on non-main line track, not at a place of repair, for extended periods, motionless, and were to be prepared for eventual transportation. Accordingly, the Court characterized their status as "incidental" to eventual transportation. Collectively, this precedent stands for the fundamental principle that on-rail equipment is in use if it is being utilized in connection with transportation instead of repair. Respondent cites no precedent from this Court which in any way supports the Seventh Circuit's legal standard exempting railcars/locomotives merely because work incidental to transportation remains to be done, particularly when stopped in the midst of interstate transit.

Respondent does identify one case not cited in the petition, but that too is consistent with precedent. In *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904), the

Court acknowledged its obligation to liberally interpret Congressional enactments to promote safe railroad equipment and reduce injuries. *Id.* at 15-18. It rejected the railroad's argument that the railcar was not in use merely because it was not actually moving or being put into a train for such transport. *Id.* at 22. Instead, the Court held the car remained in use "when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so [is] within the law." *Id.*

Respondent acknowledges the Seventh Circuit did *not* consider whether the status of UP5683 was incidental to its eventual return to transportation. Instead, its test focused on how much work needed "to be done before this locomotive was ready for its next trip in interstate commerce.'" Resp.18. The lower courts here were fully cognizant UP5683 had been used the day before to power the same train from Chicago and was to resume interstate transportation within one hour after a couple of cars were switched from the train. Doc. 87 at 4-5. Yet, constrained by previous Seventh Circuit cases, the lower courts here focused on *active* use instead of broader *incidental* use. This restrictive legal threshold is inconsistent with the statutory text, which imposes no limits on the types of use, and effectively excused respondent's safety violations. In *Brady*, additional work consisting of a car inspection before transport resumed did not excuse the safety violation. Likewise, time delays in this Court's other cases far exceeded the one hour before UP5683 resumed its interstate journey. Had the Seventh Circuit followed this Court's precedent, including *Brady*, it would have found UP5683 to be in use. Only storage in a repair facility would change that.

Significantly absent from respondent's brief and the decision below is any acknowledgement that courts must construe federal railroad safety laws liberally, "in light of [their] primary purpose, the protection of employees and others by requiring the use of safe equipment." *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 485-86. Not only does the Seventh Circuit's "active use" standard conflict with plain, broad statutory text, it is also inconsistent with the statute's remedial purpose. This Court's and other circuits' rule that on-rail vehicles, including locomotives, remain in use unless being repaired furthers the statutory purpose. The lower court's narrow construction of use clearly contravenes express Congressional intent.

Petitioner's quarrel with the Seventh Circuit's holding is not "factbound", as respondent asserts. Resp.18. Rather, it is the restrictive *legal* standard that exempts railroads from liability anytime a train stops temporarily to change crews and switch cars. That, as both petitioner and *amici* previously explained, would eviscerate valuable protection of train crews that Congress and the FRA intended to provide, including providing locomotives that have been inspected and cleaned of oily passageways.

Respondent properly concedes that caselaw interpreting the Safety Appliance Act applies to the Locomotive Inspection Act. Both statutes prohibit a railroad from *using on its line* any locomotive or railcar unless it is in a safe and proper condition. 49 U.S.C. §§20302, 20701. Thus, a locomotive or railcar which is in a place of repair has not been considered by this Court to be in use on the railroad's line. Two differences between these statutes noted by respondent are immaterial. The different functions of railcars and locomotives does not undermine their

more significant commonality: use in transportation on railroad lines and need for periodic inspection, maintenance and repair at facilities located off railroad lines to ensure safety for transportation crew use. Respondent cites no authority suggesting that detaching a locomotive from its train to await reconnection for later transport transforms its character of being used in transportation. Even an empty railcar remains in use when transported as part of a train, just like a locomotive after it is powered off to save fuel during part of its journey remains in use because the danger posed by defective components to an employee is the same and, thus, subject to the safety standards. *Johnson*, 196 U.S. at 22. *Great Northern Railway Co. v. Otos*, cited by respondent, is inapposite because the SAA's additional language cited by respondent was not dispositive—that rail car, temporarily delayed while other cars were being switched, likely would have been in use without that language. 239 U.S. 349, 351-52 (1915), (citing *Delk v. St. Louis & San Francisco R. Co.*, 220 U.S. 680 (1911)).

Here, the Seventh Circuit ignored the Court's precedents broadly finding that rail vehicles remain in use until they are removed from rail lines to a place of repair. Instead, the Seventh Circuit relied on its own incorrect and restrictive legal standard.

2. Petitioner demonstrated the existence of a circuit split. Remarkably, respondent denies (at 20) the existence of *any* conflict in the circuit courts, despite both lower courts here declaring exactly that. Pet.App. 3, 14 (describing "various tests" as "all over the place"). Despite this Court's precedents, the lower courts have struggled to identify a uniform standard for determining when use begins and ends. The Seventh Circuit's decision exacerbates the circuit conflict and demonstrates the acute need for this

Court's guidance. Respondent's attempts to minimize the conflict are unavailing.

To be sure, the Seventh Circuit held that UP5683 was not in use because it was "stationary, on a sidetrack and part of a train needing to be assembled before its use in interstate commerce," (Pet.App. 4), even though it had been used to power the same train from Chicago to Salem and its transportation had not come to an end. Many other circuits impose no such requirements and find on-rail vehicles to be in use based on similar facts. Pet.13-18.

For example, respondent addresses two cases from the Fourth Circuit in a strained attempt to show some consistency with the Seventh Circuit. The *Deans* court specifically rejected a focus on how much work (an airbrake test) still needed to be done, finding such a distinction "too facile". Instead, it focused on where the train was located (railyard tracks, not in storage or a repair location) and the activity of the injured worker (transportation crew, not repair-maintenance crew) in finding the car was in use. 152 F.3d 326, 329-30 (4th Cir. 1998). *Deans* rejected the conflicting, bright line test adopted in *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991). It is true, as respondent notes (at 21), that the Fourth Circuit in *Phillips* found a *train* was not in use. 190 F.3d 285, 290 (1999). But, tellingly, respondent wholly ignores that circuit's decision in *Angell v. Chesapeake & O. Ry. Co.*, where a locomotive was found in use although it was not moving, was not yet part of a fully assembled train, and the employee was injured "in preparation for moving it to a nearby track to pull a train a few hours later." 618 F.2d 260, 262 (4th Cir. 1980). *Angell* specifically rejected the Tenth Circuit's restrictive legal standard in *Estes* limiting in use to injuries sustained when the locomotive was *moving*.

The Seventh Circuit clearly applied different legal standards than these other circuits, highlighting the existence of an entrenched circuit conflict.

Respondent simply cannot square the Seventh Circuit standard with those used by other circuits. Pet.23-25. As respondent implicitly concedes (at 22-24), those decisions declined to find dispositive any distinction between *preparation* for movement and actual movement. See, e.g., *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 840, 842 (1st Cir. 1998) (locomotive found in use although train not fully assembled and work needed to be done, including review of inspection card inside idling locomotive in the railyard, before it was to be operated on rail line); *Holfester v. Long Island R. Co.*, 360 F.2d 369, 370-71 (2d Cir. 1966) (railcar remained in use even after removed from its train and temporarily placed on a yard assembly track when employee injured while inspecting it). Importantly, respondent does not dispute that had petitioner brought suit in other circuits, UP5683 also would have been found to be in use.

Instead, respondent (at 22) broadly characterizes all circuit court tests as considering a "totality of factual circumstances." Indeed, it is wholly unremarkable that courts consider the facts of each case and petitioner takes no issue with that. What respondent ignores is petitioner's challenge to conflicting *legal* tests adopted by those courts, some of which find dispositive whether a train is in motion or completely assembled. Other circuit courts have acted consistently with this Court's longstanding precedent and the LIA's clear legislative intent to broadly construe "use" to include motionless rail vehicles that were not part of fully assembled trains, with work to be done before departure. The common thread

running throughout these decisions is that a rail vehicle remains in use *unless* it is moved from the rail line to a place of maintenance or repair, or the injured party was responsible for performing maintenance.

It is not the Seventh Circuit's mere application of law to particular facts which is challenged here (although that too was incorrect). Rather, the question presented to this Court is simply whether the Seventh Circuit's test distinguishing "preparation for" from "active" use conflicts with Supreme Court precedent and with the decisions of other circuits which have included many types of preparation, such as the activities petitioner was performing (walking on passageways from locomotive to locomotive to enter the cab) that are incidental to the transport on railroad lines. Quite clearly, the multifarious in use tests formulated by the various Circuits cannot all be correct, as a rail vehicle which is in use under some tests has been deemed *not* in use under others.

This case raises an issue of national importance for railroad safety across the country and respondent raises no genuine vehicle problems that would materially hinder review. Respondent argues, unpersuasively, that this issue is not sufficiently important to merit this Court's review because cases concerning in use arise infrequently, but it cites no statistics in support. Cf. Amici Br. of Labor Unions 4-7. Respondent's cavalier characterization of the subject (at 27) as "obscure" and "not[] pressing" ignores the statistical data presented by petitioner's *amici* of widespread safety standard violations by domestic railroads and injuries to workers while a locomotive is stationary. The dozens, if not hundreds, of lower court opinions cited by the parties and commentators (Resp. 25) highlight the importance of this issue, which would certainly benefit from this

Court's first consideration in the fourscore years since *Brady*.

Respondent also argues this issue "only" affects whether an injury case is governed by a negligence or negligence per se standard. But, this ignores the significance of the legal remedy at stake in such cases: eliminating the need to prove the oft disputed element of notice and eliminating comparative fault as a defense. 45 U.S.C. §§53, 54a.

Finally, respondent urges the Court to dodge review because one new Justice sat on the panel below. Yet, a single recusal is not uncommon and does not materially hinder this Court's review.[1] This case presents an ideal vehicle to resolve the circuit split and provide clear guidance in cases which often involve significant injuries. Given FELA's overarching purpose to establish a uniform standard liberally affording a compensation remedy, this Court should grant review.

---

[1] In one recent term, justices recused themselves 180 times, the "vast majority" of which were due to justices' "previous work," and there were nearly 90 recusals at the merits stage between the 2005 and 2015 terms, yet decisions issued nonetheless. See Debra Cassens Weiss, *Supreme Court justices recused themselves 180 times in most recent term,* ABA Journal (July 12, 2016), https://www.abajournal.com/news/article/supreme_court_justices_recused_themselves_180_times_in_most_recent_term; Samuel Morse, *When Justices Recuse, and When They Refuse,* Empirical SCOTUS (Feb. 23, 2017), https://empiricalscotus.wordpress.com/2017/02/23/when-justices-recuse/.

II. RESPONDENT FAILS TO REFUTE THAT THE SEVENTH CIRCUIT DECISION WAS WRONG AND CONFLICTS WITH THIS COURT'S PRECEDENT AND HOLDINGS OF OTHER CIRCUITS ESTABLISHING THAT FORESEEABILITY IS A JURY ISSUE.

1. Petitioner established that review of this point is required to correct a decision that the Seventh Circuit got wrong, just as it did 54 years ago when this Court accepted certiorari to reverse a similarly incorrect decision in *Webb v. Illinois Central R. Co.*, 352 U.S. 512 (1957). Respondent's failure to discuss *Webb* at all is deafening. Its reference to *Holbrook*, a decision on which this Court's review was not sought, reenforces the point that the Seventh Circuit got it wrong and will continue to get it wrong until corrected by this Court again. Worse, if not reversed, other courts may follow this wayward course to perpetuate the demise of a firmly entrenched FELA substantive right to jury determinations on contested negligence issues which are clearly supported by circumstantial evidence and reasonable inferences. Respondent also failed to address the Seventh Circuit's comment in another case noting that reasonable foreseeability of harm "remains somewhat elusive and abstract," *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir. 1998). The common thread in these Seventh Circuit decisions is its refusal to allow "the jury to weigh evidence and to decide whether or not the inspections satisfied [the railroad's] duty to provide the [employee] with a safe place to work [notwithstanding t]hat there were other possible sources of the hazard." *Webb*, 352 U.S. at 515.

This concern is especially significant when the railroad's denial of foreseeability rests on its own

failure to ensure that mandatory daily safety inspections were performed before assigning its employees to work with on-rail vehicles. Respondent disputes (at 29) that the inspection regulation even applies, incorporating its previous arguments on in use. But, this misses the mark. Respondent does not dispute its failure to inspect UP5683 the day before the incident when using it to power the southbound train from Chicago to Salem. It incorrectly claims (at 5, n.2) that the evidence of the engine's operation was equivocal. However, the unrebutted evidence showed the engine "was actually running [when it arrived in Salem] and [LeDure] had to shut it down," a point that was conceded by respondent's original counsel during the summary judgment hearing. Doc. 87 at 7 ("the testimony was that th[is] locomotive was idling at the time, and so [LeDure's] task was to shut it off."). The railroad's failure to inspect creates a jury issue since mechanical inspections, under lighting conditions far brighter than the nighttime conditions encountered by petitioner, could have identified the oil spot to be removed. Respondent's further selective reference to other evidence merely highlights the presence of a jury dispute, particularly when the evidence also showed oil could have been dripped during fueling before the train left Chicago and LeDure unequivocally denied that the oil came from occasionally wearing his boots on his farm some indeterminable number of days earlier. Doc. 49-1 at 173-176.

2. Respondent fails to refute that other circuit court decisions have consistently recognized that foreseeability presents a jury question in all but extremely limited circumstances, which are not present here.

3. By granting summary judgment on this issue, the lower courts deprived petitioner of his fundamental FELA right to a jury determination of foreseeability. It also undermined FELA's purpose of reducing injuries by requiring that equipment is inspected and safe to use before assigning it to transportation employees and affording compensation when that is not done. Given the patently incorrect decision below and importance of the interests protected by the FELA, review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NELSON G. WOLFF
Counsel of Record
JEROME J. SCHLICHTER
SCHLICHTER BOGARD & DENTON LLP
100 South Fourth Street, Suite 1200
Saint Louis, MO 63102
(314) 621-6115

April 23, 2021