



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 13, 1976

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision
Order No. 342*

CONSOLIDATED
KOSHRC #132,
133, 163 & 168

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION AND ORDER OF
REVIEW COMMISSION

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

Before STANTON, Chairman, STOWERS and UPTON, Commissioners.

PER CURIAM:

These four cases all involving citations issued under the Kentucky Occupational Safety and Health Act by the Complainant, Department of Labor, against the Respondent, Louisville & Nashville Railroad Co., were consolidated for hearing. They were also consolidated for oral argument held before the full Commission herein on September 23, 1976, following the granting of Petition for Discretionary Review in each case filed by respondent, which was granted.

The main question now before this Commission in these cases is whether or not the Department of Labor had jurisdiction over the respondent company, or more particularly the worksites of the respondent in each instance.

Voluminous briefs have been filed, in addition to the oral argument before the Commission. The theories advanced have been studied with much interest. However, it is the holding and finding of this Commission that in each instance herein the Department of Labor had jurisdiction and the citations were properly issued.

The cases now are becoming legion which hold unequivocally there is no industry-wide exemption under the OSH Act, but rather there is an exemption for specific working conditions when that working condition is covered by safety and health laws or regulations being exercised by another Federal agency.

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This Commission has consistently and firmly held that there is no industry-wide exemption under the Act for any industry and that each working condition must be evaluated to determine whether or not another Federal agency has control and is exercising that control of the working condition in which each employee is found. See DOL vs. A & H Trucking Co., KOSHRC Docket #46, (affirmed by the Supreme Court of Kentucky, 4-19-76); DOL vs. L&NRR, KOSHRC #55; DOL vs. L&NRR, KOSHRC #67; DOL vs. Illinois Central Gulf, KOSHRC #80; DOL vs. L&NRR, KOSHRC #85; DOL vs. L&NRR, KOSHRC #88.

The industry-wide exemption urged by the Respondent would leave a great host of its employees without safety and health protection. Admittedly, the Department of Transportation could adopt such regulations, and the record shows efforts are being made in this direction; but the majority of the safety rules governing railroads apply to over-the-road operations, and certainly the FRA regulations in effect on the dates of the citations challenged in these actions did not embrace the particular working conditions cited and consequently do not have a displacing effect of the OSH Act.

While the OSH Act intended to avoid duplication of regulatory effort by various agencies, State and Federal, the Act was intended to provide comprehensive safety and health coverage of all workers across the Nation, (see Southern Railway Co. v. OS&H Review Commission, No. 75-1055 (4th Circuit, 1976) 1975-1976 OSHD #20,414), and in order to displace OSH coverage of any worker in his working condition, a Federal agency must specifically exercise control for that purpose--to assure safe and healthful working conditions.

In the very recent case of Southern Pacific Transportation Co. v. Occupational Safety and Health Review Commission, U. S. Court of Appeals for the Fifth Circuit, CCH Para. 21,102, it was stated:

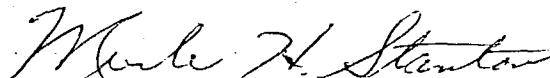
"Thus, comprehensive FRA treatment of the general problem of railroad fire protection will displace all OSHA regulations on fire protection, even if the FRA activity does not encompass every detail of the OSHA fire protection standards; but FRA regulation of portable fire extinguishers will not displace OSHA standards on fire alarm signaling systems."

And further, from the same opinion:

"To summarize our view of section 4(b)(1), OSHA coverage is displaced by an "exercise" of DOT authority only for the "working condition" embraced by that exercise. Since DOT has not yet exercised its authority on the working conditions which are the subject of these OSHRC orders, the petitions for review are denied."

It is therefore the finding of this Commission and its Order that the Department of Labor had jurisdiction of the subject matter in each cited violation involved. These citations were made under standards, adopted by proper Kentucky regulations, as follows: 29 CFR 1910.22(b)(1); 29 CFR 1910.23(d)(1)(iv); 803 KAR 2:060 Section 2(1); 29 CFR 1910.309(a) three items, in Docket #132. 803 KAR 2:060 Sec. 2(1); 29 CFR 1910.252(a)(2)(iv)(c); 29 CFR 1910.252(a)(2)(ii)(b); 29 CFR 1910.22(a)(1); 29 CFR 1910.22(c); 29 CFR 1910.23(c)(2); 29 CFR 1910.141(c)(1)(i), in Docket #133. 29 CFR 1910.22(a)(1); 29 CFR 1910.22(b)(1), in Docket #163. 29 CFR 1910.22(a)(1), in Docket #168.

It is therefore the Order of this Commission that the Recommended Order of the Hearing Officer, issued herein in these cases under date of March 31, 1976, is hereby AFFIRMED.



Merle H. Stanton, Chairman

/s/ H. L. Stowers

H. L. Stowers, Commissioner

/s/ Charles B. Upton

Charles B. Upton, Commissioner

Dated: October 13, 1976
 Frankfort, Kentucky

DECISION NO. 342

*Issue
Decision 256*



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge St.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 31, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

CONSOLIDATED
KOSHRC #132, 133, 163 &
168

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber - Thomas M. Rhoads
Assistant Counsel


The Hon. Robert C. Moore (Certified Mail #467192)
Assistant General Solicitor
L & N Railroad Company
908 West Broadway
Louisville, Kentucky 40201

L & N Railroad Co (132) (Certified Mail #467193)
401 Kentucky Street
Bowling Green, Kentucky 42101

L & N Railroad Company (133) (Certified Mail #467194)
P. O. Box 1198
Louisville, Kentucky 40201

L & N Railroad Co. (163-168) (Certified Mail #467195)
908 West Broadway
Louisville, Kentucky 40201

This 31st day of March, 1976


Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 132

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

KOSHRC NO. 133

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

KOSHRC NO. 163

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

KOSHRC NO. 168

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

Thomas M. Rhoads, Assistant Counsel, Department of Labor, Frankfort, Kentucky, for the Complainant.

Peter J. Glauber, Assistant Counsel, Department of Labor, Frankfort, Kentucky, for the Complainant.

Robert C. Moore, Assistant General Solicitor, Louisville & Nashville Railroad Co., 908 W. Broadway, Louisville, Kentucky, for the Respondent.

FOWLER - Hearing Officer.

These actions are consolidated for hearing by agreement of the parties, by Motion made by the Complainant and agreed to by the Respondent, at a hearing held in this action on February 18, 1976. The actions are consolidated for hearing because they have a common question to be decided, one of jurisdiction.

The Complainant has claimed certain alleged violations of the Kentucky Occupational Safety and Health Act and the Respondent has denied the violations of the said Act, based on the lack of jurisdiction over the Respondent company.

The information concerning each of the cases will be discussed independently and the question to be decided of jurisdiction will be set forth collectively, in this Findings of Fact, Conclusions of Law, and Recommended Order.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from Citations, Notifications

and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty.

KOSHRC NO. 132: As a result of an inspection of February 6, 1975, at a place of employment at 401 Kentucky Street, Bowling Green, Kentucky, which was a place at which employees of the Respondent company were engaged in work, there was a citation issued by the Department of Labor on February 25, 1975, setting forth one (1) citation with six (6) alleged violations as follows:

Item 1, 29 CFR 1910.22(b)(1):

"Passageways (walkways) were not kept clear and in good repair (rocks and debris along east side of "Sears" track, deteriorated condition of walkway along east side of main track from power switch to switch leading into "Sears" track and No. 3 passenger track, north end of yard; muddy, slippery condition of walkways between No. 4 and No. 8 switches)."

Item 2, 29 CFR 1910.23(d)(1)(iv):

"Flights of stairs more than 44 inches wide but less than 88 inches wide, having four or more risers and both sides open, were not equipped with standard stair railings on each open side (stairs at new switchmen's shanty)."

Item 3, 803 KAR 2:060 Section 2(1):

"The notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted."

Item 4, "National Electrical Code" Article 400-5 (as adopted by 1910.309(a):

"Flexible cord was not used in continuous length without splice (cord to ice machine was spliced, new switchmen's shanty)."

Item 5, "National Electrical Code" Article 250-45(d)(1) (as adopted by 1910.309(a):

"Exposed noncurrent-carrying metal parts of a cord and plug-connected refrigerator were not grounded ("Hotpoint" refrigerator, new switchmen's shanty)."

Item 6, "National Electrical Code" Article 400-4 (as adopted by 1910.309(a):

"Flexible cord was used as a substitute for the fixed wiring of a structure (extension cord along wall to coffee pot, new switchmen's shanty)."

The abatement date for all items was set for March 20, 1975.

A proposed violation of \$52.00 was assessed for Item No. 1, and a proposed penalty of \$44.00 was set for the alleged violation of Item No. 2. There was no proposed penalty for the other alleged items of violation.

The pertinent procedural information in this case is as follows:

1. Inspection, February 6, 1975, by Compliance Officers of the Department of Labor at the above address.
2. Citation issued February 25, 1975, listing one (1) citation with six (6) items, all of which are in contest.
3. Notice of Contest was received on March 14, 1975, contesting all items.
4. Notice of Contest, with copy of citations and proposed penalty transmitted to the Review Commission on March 17, 1975.

5. Notice of Receipt of Contest mailed March 17, 1975, and Certification of Employer Form received March 26, 1975.

6. Complaint received March 18, 1975, and no formal Answer is found in the file, only the Notice of Contest.

7. The matter was originally assigned to a Hearing Officer on April 9, 1975, and due to the death of the Hearing Officer, was reassigned to the present Hearing Officer, on January 15, 1976.

8. Hearing was originally scheduled for May 1, 1975, in Bowling Green, Kentucky, but was not held and was subsequently submitted on the jurisdictional question and Briefs of the parties, after Motions for Continuance and abatement had been made.

KOSHRC NO. 133: In this action, as a result of an inspection of February 20, 1975, at a place of employment of the Respondent company, Highway 100, Franklin, Kentucky, wherein employees of the Respondent company were switching and pulling cars, there was a citation issued by the Department of Labor through its Compliance Officers, on February 28, 1975, listing one (1) citation and 7 Items, all of a non-serious nature as follows:

Citation 1, Item 1, 803 KAR 2:060 Sec. 2(1):

"The notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted."

Item 2, 29 CFR 1910.252(a)(2)(iv)(c):

"Oxygen and fuel-gas cylinders in storage were not separated a minimum distance of twenty (20) feet or by a non-combustible barrier at least five (5) feet high having a fire-resistance rating of at least one-half (1/2) hour. (Five (5) oxygen and two (2) acetylene cylinders stored together; outside signal office.)"

Item 3, 29 CFR 1910.252(a)(2)(ii)(b):

"Compressed gas cylinders were located where they could be knocked over or damaged by passing or falling objects. (Oxygen and acetylene cylinders standing unsecured; outside signal office.)"

Item 4, 29 CFR 1910.22(a)(1):

"Passageways were not kept clean and orderly and in a sanitary condition. (Broken bottles, cross ties, tin, cans, rail anchors, scrap lumber with protruding nails and dead animals were lying in the passageways from signal office to Farmers elevators on the west side of the tracks, and between the main track and the house track.)"

Item 5, 29 CFR 1910.22(c):

"Covers or guardrails were not provided to protect personnel from the hazards of open pits and ditches. (Open ditch; west side of tracks.) (Open pits; runway next to Farmers elevator.)"

Item 6, 29 CFR 1910.23(c)(2):

"A runway was not guarded by a standard railing (or the equivalent) on one open side four (4) feet or more above the ground level. (Runway with one open side; west side of tracks next to Farmers elevators.)"

Item 7, 29 CFR 1910.141(c)(1)(i):

"A toilet facility was not provided at a place of employment. (No indoor or outdoor facilities provided at worksite.) (No means of transportation provided to toilet facilities.)"

The abatement date for all of the said violations was set for March 25, 1975, and a penalty of \$52.00 was proposed for the alleged violation of Item No. 4; a penalty of \$44.00 was proposed for the alleged violation of Item No. 5; a proposed penalty for the alleged violation of Item No. 6 of \$44.00. There was no suggested penalties for other alleged violations.

The pertinent procedural information is as follows:

1. Inspection, February 20, 1975, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued February 28, 1975, listing one (1) citation with seven (7) Items.
3. Notice of Contest received March 14, 1975, contesting all Items.
4. Notice of Contest with copy of citations and proposed penalty transmitted to Review Commission on March 17, 1975.
5. Notice of Receipt of Contest mailed March 18, 1975, and Certification of Employer Form received March 26, 1975.
6. Complaint received April 1, 1975, and Answer filed March 26, 1975.
7. The case was originally assigned to a Hearing Officer for April 18, 1975, for hearing May 1, 1975, in Bowling Green, Kentucky.
8. Due to the death of the Hearing Officer, the case was reassigned to the present Hearing Officer on January 15, 1976.
9. Hearing was held February 18, 1975, at 2:00 P.M., in Louisville, Kentucky, wherein the parties agreed that the actions be consolidated and that Briefs be filed by both parties, which has been done.

KOSHRC NO. 163: As a result of inspections of May 20, 21, and 22, 1975, by the Department of Labor at a place of employment of the Respondent company located at the International Harvester Spur, 5005 Crittenden Drive, Louisville, Kentucky, there was a citation issued June 5, 1975, listing one (1) citation and two (2) Items of alleged violation as follows:

Citation 1, Item 1, 29 CFR 1910.22(a)(1):

"Metal rings, rocks, scrap wood and metal, and other trash were scattered along the tracks at the east side of the north end of track six (6), at track five (5) by the machine shop, at the lead track for tracks nine (9) and ten (10), at the junction of tracks nine (9) and ten (10), and at the junction of the lead track and track six (6). Employees walking along the tracks in the areas were exposed to the tripping hazards."

Item 2, 29 CFR 1910.22(b)(1):

"The passageways along track nine (9) at the scrap dump area were obstructed by coke, rocks, and other debris, and at the pit area by a metal railing that had been discarded. The passageways along track six (6) were obstructed by International Harvester inventory, scrap lumber, rocks, and uneven ground at the south end, and on the north end the passageway was obstructed on the east side by equipment and scrap metal."

The abatement date for both Items was set for July 22, 1975, and no penalty was proposed for either said violations.

The pertinent procedural information is as follows:

1. Inspection, May 20, 21, and 22, 1975, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued June 5, 1975, listing one (1) citation with two (2) Items, both of which are in contest.
3. Notice of Contest received June 24, 1975, contesting all Items.

4. Notice of Contest with copy of citation and proposed penalty transmitted to Review Commission on June 27, 1975.
5. Notice of Receipt of Contest was mailed June 27, 1975, and Certification of Employer Form received July 21, 1975.
6. Complaint received July 9, 1975, and Answer filed August 6, 1975.
7. The matter was originally assigned to a Hearing Officer August 22, 1975, and due to his death was reassigned to the present Hearing Officer, January 15, 1976.
8. The matter was scheduled for hearing on October 10, 1975, in Louisville, but various Motions were made resulting in consolidation of the cases and stipulation of the matter of jurisdiction as being the issue to be decided in the case.

KOSHRC NO. 168: As a result of an inspection of June 10, 1975, by the Department of Labor through its Compliance Officers, at the Elizabethtown Station, Elizabethtown, Kentucky, there was a citation issued June 18, 1975, listing one (1) violation alleged as follows:

Citation 1, Item 1, 29 CFR 1910.22(a)(1):

"The working platforms of the Jordan Spreader #MON 80015 before and behind the control cab, had rotten and deteriorated wooden deckings and were cluttered with spikes, wrenches, various sizes of iron plates and miscellaneous metal pieces. This created a stumbling and/or tripping hazard to employees working on/or operating this equipment."

The abatement date for the abatement of the alleged violation was set for June 27, 1975, and no penalty was proposed.

The pertinent procedural information is as follows:

1. Inspection, June 10, 1975, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued June 18, 1975, listing one (1) citation which is in contest.
3. Notice of Contest was received July 3, 1975, contesting the Item.
4. Notice of Contest with copy of citation and proposed penalty transmitted to the Review Commission on July 7, 1975.
5. Notice of Receipt of Contest mailed July 7, 1975, and Certification of Employer Form received July 21, 1975.
6. Complaint received July 9, 1975, and Answer filed August 6, 1975.
7. The matter was originally assigned to a Hearing Officer August 22, 1975, and due to his death, was reassigned to the present Hearing Officer on January 15, 1976.
8. The matter was originally set for hearing October 10, 1975, in Louisville, Kentucky, but was not held because the matter was consolidated for the purpose of hearing and was submitted on Briefs of the parties.

DISCUSSION OF CONSOLIDATED CASES

The cases thus consolidated were agreed to be consolidated by sustaining of a Motion to consolidate cases No. 132, No. 133, No. 163, and No. 168.

Complainant's position is in all these cases that the acts set forth in the alleged violations constituted a violation of the Kentucky Occupational Safety and Health Act and Respondent's position is that they do not constitute any violation because of the failure of the Occupational Act to apply to the Railroad industry and to this particular Railroad in the given case.

As was determined at the oral hearing of February 18, 1976, the sole question to be decided by the Hearing Officer is whether or not the Kentucky Occupational Safety and Health Act applies to Railroads or whether they are exempted from the Act by the exemption clauses of the Occupational Safety and Health Act and the Kentucky Occupational Safety and Health Act.

There are no findings of fact necessary in determining these actions, since the findings of fact are admitted, insofar as their occurrence is concerned, but a denial exists that those acts constitute a violation of the law, insofar as these cases are concerned, because of the Respondent's position that the act does not give jurisdiction over Railroads.

STATUTORY JURISDICTION BY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION OVER RAILROADS OPERATING WITHIN
THE STATE OF KENTUCKY

The sole question raised in this case, and which is consolidated as above stated, and in other companion cases, which have an identical jurisdiction question, is whether or not the Kentucky Occupational Safety and Health Review Commission has jurisdiction over Railroads or whether such jurisdiction is excluded within the act.

The parties to the action, Complainant and Respondent, have both filed voluminous and exhaustive Briefs in support of their respective positions. The Briefs, are, in the opinion of the Hearing Officer, excellent in their research and presentation and cover all the facets of the case in its present stature. In order to put the matter in context for decision, we first look at the exclusion within the Acts, both Federal and State.

Section 4 (b) 1 of the Federal Occupational Safety and Health Acts states in part: "Nothing in this act shall apply to working conditions of employees with respect to which other Federal agencies--exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

The section of the Kentucky Act which provides the exclusion is KRS 338.021 (1) b and states as follows: "Employers, employees in places of employment over which Federal Agencies other than the United States Department of Labor exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

Whether or not there has been an affirmative exercise of statutory power by another agency is a question which also must be determined in arriving at a decision on jurisdiction in this matter.

Complainant urges that no other Federal Agency has in fact adopted standards or regulations for occupational safety and that, therefore, the regulations of the Kentucky Occupational Safety and Health Review Commission are applicable and that the exclusionary features of the law of both Federal and State have not

come into play because of the failure of the Department of Transportation under its powers and under the Federal Railway Act to promulgate and enforce safety regulations which cover the same safety features that the Kentucky law embraces. Respondent urges that the Department of Transportation has exclusive jurisdiction for the enforcement of regulations over Railroads and that said Department, by reason of the power given to it by Congress and the subsequent passage of the Federal Railway Safety Act, that the Department of Transportation not only has that power, but has actually undertaken to adopt preliminary regulations concerning the same safety features which would be accomplished by the Occupational Safety and Health regulations.

The Respondent has given an expert presentation on the history of the Railroad industry within the United States; of the intent of Congress in the passage of the various Railroad Acts and other Acts including the OSHA Act, and the intent of Congress in the passage of the Occupational Safety and Health Act and the conclusions of the Respondent as to the Congressional intent in the passage of all matters and Acts which are the subject matter of this jurisdictional dispute.

The fact that there is much merit on both sides seems indicated by the vast amount of litigation which this very jurisdictional question has invoked in various Circuit Courts of Appeals of the United States.

The matter to be decided is purely a question of law and the interpretation thereof, and a reading of the Briefs of the parties, and research of the cases in point, lead the Hearing Officer to the following Conclusions of Law.

CONCLUSIONS OF LAW

In a series of rulings, commenced and controlled by Southern

Pacific Transportation Co., OSHA Para. CCH 19,054, the Federal Review Commission in a series of two-to-one rulings, has upheld the principle that railroads are subject to the Occupational Safety and Health Act. There are presently pending appeals in the Fifth, Seventh, Eighth and District of Columbia Circuit Courts of Appeals, as well as decisions from the Fourth Circuit Court of Appeals, all resulting from cases by the same split two-to-one series of rulings by the Review Commission. There are at present at least 19 cases involving 11 railroads which have been consolidated for the Review Commissioner's decision in Belt Railway of Chicago, OSHD Para. 20,069 from which Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Burlington Northern and Southern Pacific Transportation Company have appealed. The same issue was decided at OSHD Para. 20,185 from which Seaboard Coastline and Winston-Salem Southbound Railway Company are appealing, and Southern Railway is appealing from a decision published at OSHD 20,091.

In more recent vintage, is the case of Chicago and Northwestern Transportation Company, OSHD Para. 20,356 in which the ruling was that Section 4 (b) 1 of the Act does not provide for an overall exemption of Railroad industry since the Secretary of Transportation has failed to exercise his regulatory authority over the working conditions in question.

On February 12, 1976, the Fourth Circuit Court of Appeals ruled that the Railroad industry is generally subject to OSHA coverage and upheld the Review Commission findings that Southern Railway, Para. OSHD 20,414, was

in non serious violation of 9 OSHA Standards. That decision held essentially that the exemption applied only when another Federal Agency has actually exercised its statutory authority to regulate working conditions.

It further held, that although the Department of Transportation administers the Railroad safety laws, it has never regulated the Occupational Safety and Health aspects of Railroad offices or shop and repair facilities. The Court goes on to say in that case that had the Agency prescribed standards affecting safety or health in these areas, that they would be exempt from OSHA coverage.

On March 2, 1976, in accordance with its February ruling in Southern Railway, as above stated, the Fourth Circuit Court of Appeals affirmed the Review Commission in Penn Central, OSHD 19,133; Chesapeake & Ohio Railway Company, OSHD 19,168. In the United States Court of Appeals for the Fourth Circuit, No. 75-1102 and No. 75-1182, reported at OSHD Para. 20,470 and Para. 20,471.

It is interesting to note that the Tennessee Supreme Court ruled on February 2, 1976, that the State enabling legislation specifically exempts from coverage railroad employees whose safety and health are "subject to protection" under the Federal Safety Appliances Act or the Federal Railroad Safety Act. Under the language of the Tennessee Act, the Court ruled, that promulgation of safety regulations was immaterial since the exemption is in terms of potential protection and not in terms of whether the regulations had actually been promulgated and enforced. The language of the Tennessee Act appears to be contrary to the language in the Kentucky Act and, thus, the difference seems to exist to your Hearing Officer.

The above cases from the Fourth Circuit are both mentioned in the more recent Briefs filed by the parties, with the Complainant citing the authority as controlling and the Respondent distinguishing the opinion from the case at hand.

Respondent takes the position that there are currently three views on the scope of the exemptions afforded railroads under the Federal and Kentucky job safety laws. Respondent states, 1) industry wide exclusion; 2) the standard by standard exclusion; 3) the environmental area exclusion, which Respondent concludes to be the concept of the Fourth Circuit Case, as being the three theories concerning the exemption afforded railroads under the safety laws.

A complete and exhaustive resume of the three views of exemption are set forth by the Respondent in a very comprehensive and excellent Brief.

Your Hearing Officer is impressed with the language of the Fourth Circuit Court of Appeals in the Southern Railway case as above stated, in that the Court has stated that the safety regulations of the Department of Transportation are confined almost exclusively to those areas of the Railway industry which affect over-the-road operations such as locomotives, rolling stock, signal installations, road beds, and related facilities. While the regulatory program in these areas reflects a concern for the safety of employees, it is directed primarily toward the general safety of transportation operations. The Court further states that on the other hand the Department of Transportation and the Federal Railway Act do not purport to regulate the occupational health and safety aspects of Railroad offices or shop and repair facilities. Thus, it would appear from the language of the Court to your Hearing Officer that there are certainly

some operations of the Railroad industry which are governed and controlled by the Department of Transportation and the Federal Railway Act, but in those areas which are not controlled, that the intention of Congress and the Occupational Safety Act was to include such areas, not encompassed within the Department of Transportation and Federal Railway Act Regulations, which affect the safety and health of railroad employees.

All arguments being considered, including the questions of authority granted by the Federal Railway Safety Act, the emphasis on "national uniformity" and the position that the Federal Standard is preemptive unless certain criteria is met and including the proposition as to whether or not any Federal Agency has exercised its authority to prescribe and enforce standards affecting Occupational Safety or Health, and further considering the opinions of this Board as set forth by Kentucky Occupational Safety and Health Review Commission in, Commissioner of Labor vs. L & N, KOSHRC No. 55, and Commissioner of Labor vs. L & N, KOSHRC No. 85; Commissioner of Labor vs. L & N, KOSHRC No. 67, and further considering the series of two-to-one split decisions of the Review Commission in the cases above recited, and in further consideration of the rulings of the Fourth Circuit Court of Appeals relative to jurisdiction, it is the conclusion of your Hearing Officer that the Kentucky Occupational Safety and Health Review Commission does have jurisdiction over Railroads for the alleged violation of Safety and Health regulations, and that the Kentucky Occupational Safety and Health Act is applicable to Railroads operating within this State.

The rationale of this decision is that there has been no showing that the specific working conditions to which Kentucky standards are addressed have been shown to be covered by any existing Federal law or regulation, thus, the exception to KRS 338 is not applicable, and jurisdiction exists. It is further determined that the Federal Agency, Department of Transportation need only exercise its authority in order to retain jurisdiction, but that it has not done so and that the content and purpose of the Occupational Safety and Health Act is to assure a working condition for every worker which is safe and healthful. In order for an exemption to be applicable, it must be shown that the condition which is charged in a violation must in fact be covered by a regulation from the other Federal Agency involved. It has not been shown by the Respondents that the conditions which are the basis of the allegation of violations by the Respondent company is covered by any other regulation and in the interest of the protection of the workers, it is necessary to insure that the standards of the Occupational Safety and Health Act be applied. It is the opinion of the Hearing Officer that there may be circumstances which are covered by other Departments of Transportation or Federal Railway Act provisions and that if such is shown, they would not be covered by the Occupational Safety and Health Standards. It is the opinion of the Hearing Officer that there is no industry exemption from the Acts and that to grant an industry exemption from the Occupational Safety and Health Act would leave many workers with no protection under any Act and

I do not feel that this was the intention of creating the exemption clause of the Statute.

It is, thus, concluded that the KOSHRC does have jurisdiction under KRS. 338, to enforce its regulations over the railroads doing business and having employees working within the State of Kentucky.

RECOMMENDED ORDER

IN RE: KOSHRC NO. 132:

IT IS ORDERED that the violation as alleged in Citation 1, Items 1 through 6, are hereby sustained. The proposed penalty of \$52.00 for Item No. 1 and \$44.00 for Item No. 2 is also sustained. The no penalty provision for the other Items are hereby sustained. The abatement date is set for as soon as possible, not to exceed 30 days from the effective date of this Order.

IN RE: KOSHRC NO. 133:

IT IS ORDERED that the violations contained in Citation 1, Items 1 through 7, are hereby sustained and the penalty provision of \$52.00 for Item No. 4; \$44.00 for Item No. 5; and \$44.00 for Item No. 6 are also hereby sustained. The no penalty provision for Items 1, 2, 3, and 7 are hereby sustained. Abatement date is set for as soon as possible, not to exceed 30 days from the effective date of this Order.

*Decision
Dec. # 256*



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge St.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 31, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

CONSOLIDATED
KOSHRC #132, 133, 163 &
168

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber - Thomas M. Rhoads
Assistant Counsel


The Hon. Robert C. Moore (Certified Mail #467192)
Assistant General Solicitor
L & N Railroad Company
908 West Broadway
Louisville, Kentucky 40201

L & N Railroad Co (132) (Certified Mail #467193)
401 Kentucky Street
Bowling Green, Kentucky 42101

L & N Railroad Company (133) (Certified Mail #467194)
P. O. Box 1198
Louisville, Kentucky 40201

L & N Railroad Co. (163-168) (Certified Mail #467195)
908 West Broadway
Louisville, Kentucky 40201

This 31st day of March, 1976



Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 132

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

KOSHRC NO. 133

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

KOSHRC NO. 163

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

KOSHRC NO. 168

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

RESPONDENT

* * * * *

Thomas M. Rhoads, Assistant Counsel, Department of Labor, Frankfort, Kentucky, for the Complainant.

Peter J. Glauber, Assistant Counsel, Department of Labor, Frankfort, Kentucky, for the Complainant.

Robert C. Moore, Assistant General Solicitor, Louisville & Nashville Railroad Co., 908 W. Broadway, Louisville, Kentucky, for the Respondent.

FOWLER - Hearing Officer.

These actions are consolidated for hearing by agreement of the parties, by Motion made by the Complainant and agreed to by the Respondent, at a hearing held in this action on February 18, 1976. The actions are consolidated for hearing because they have a common question to be decided, one of jurisdiction.

The Complainant has claimed certain alleged violations of the Kentucky Occupational Safety and Health Act and the Respondent has denied the violations of the said Act, based on the lack of jurisdiction over the Respondent company.

The information concerning each of the cases will be discussed independently and the question to be decided of jurisdiction will be set forth collectively, in this Findings of Fact, Conclusions of Law, and Recommended Order.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from Citations, Notifications

and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty.

KOSHRC NO. 132: As a result of an inspection of February 6, 1975, at a place of employment at 401 Kentucky Street, Bowling Green, Kentucky, which was a place at which employees of the Respondent company were engaged in work, there was a citation issued by the Department of Labor on February 25, 1975, setting forth one (1) citation with six (6) alleged violations as follows:

Item 1, 29 CFR 1910.22(b)(1):

"Passageways (walkways) were not kept clear and in good repair (rocks and debris along east side of "Sears" track, deteriorated condition of walkway along east side of main track from power switch to switch leading into "Sears" track and No. 3 passenger track, north end of yard; muddy, slippery condition of walkways between No. 4 and No. 8 switches)."

Item 2, 29 CFR 1910.23(d)(1)(iv):

"Flights of stairs more than 44 inches wide but less than 88 inches wide, having four or more risers and both sides open, were not equipped with standard stair railings on each open side (stairs at new switchmen's shanty)."

Item 3, 803 KAR 2:060 Section 2(1):

"The notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted."

Item 4, "National Electrical Code" Article 400-5 (as adopted by 1910.309(a):

"Flexible cord was not used in continuous length without splice (cord to ice machine was spliced, new switchmen's shanty)."

Item 5, "National Electrical Code" Article 250-45(d)(1) (as adopted by 1910.309(a):

"Exposed noncurrent-carrying metal parts of a cord and plug-connected refrigerator were not grounded ("Hotpoint" refrigerator, new switchmen's shanty)."

Item 6, "National Electrical Code" Article 400-4 (as adopted by 1910.309(a):

"Flexible cord was used as a substitute for the fixed wiring of a structure (extension cord along wall to coffee pot, new switchmen's shanty)."

The abatement date for all items was set for March 20, 1975.

A proposed violation of \$52.00 was assessed for Item No. 1, and a proposed penalty of \$44.00 was set for the alleged violation of Item No. 2. There was no proposed penalty for the other alleged items of violation.

The pertinent procedural information in this case is as follows:

1. Inspection, February 6, 1975, by Compliance Officers of the Department of Labor at the above address.
2. Citation issued February 25, 1975, listing one (1) citation with six (6) Items, all of which are in contest.
3. Notice of Contest was received on March 14, 1975, contesting all Items.
4. Notice of Contest, with copy of citations and proposed penalty transmitted to the Review Commission on March 17, 1975.

5. Notice of Receipt of Contest mailed March 17, 1975, and Certification of Employer Form received March 26, 1975.
6. Complaint received March 18, 1975, and no formal Answer is found in the file, only the Notice of Contest.
7. The matter was originally assigned to a Hearing Officer on April 9, 1975, and due to the death of the Hearing Officer, was reássigned to the present Hearing Officer, on January 15, 1976.
8. Hearing was originally scheduled for May 1, 1975, in Bowling Green, Kentucky, but was not held and was subsequently submitted on the jurisdictional question and Briefs of the parties, after Motions for Continuance and abatement had been made.

KOSHRC NO. 133: In this action, as a result of an inspection of February 20, 1975, at a place of employment of the Respondent company, Highway 100, Franklin, Kentucky, wherein employees of the Respondent company were switching and pulling cars, there was a citation issued by the Department of Labor through its Compliance Officers, on February 28, 1975, listing one (1) citation and 7 Items, all of a non-serious nature as follows:

Citation 1, Item 1, 803 KAR 2:060 Sec. 2(1):

"The notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted."

Item 2, 29 CFR 1910.252(a)(2)(iv)(c):

"Oxygen and fuel-gas cylinders in storage were not separated a minimum distance of twenty (20) feet or by a non-combustible barrier at least five (5) feet high having a fire-resistance rating of at least one-half (1/2) hour. (Five (5) oxygen and two (2) acetylene cylinders stored together; outside signal office.)"

Item 3, 29 CFR 1910.252(a)(2)(ii)(b):

"Compressed gas cylinders were located where they could be knocked over or damaged by passing or falling objects. (Oxygen and acetylene cylinders standing unsecured; outside signal office.)"

Item 4, 29 CFR 1910.22(a)(1):

"Passageways were not kept clean and orderly and in a sanitary condition. (Broken bottles, cross ties, tin, cans, rail anchors, scrap lumber with protruding nails and dead animals were lying in the passageways from signal office to Farmers elevators on the west side of the tracks, and between the main track and the house track.)"

Item 5, 29 CFR 1910.22(c):

"Covers or guardrails were not provided to protect personnel from the hazards of open pits and ditches. (Open ditch; west side of tracks.) (Open pits; runway next to Farmers elevator.)"

Item 6, 29 CFR 1910.23(c)(2):

"A runway was not guarded by a standard railing (or the equivalent) on one open side four (4) feet or more above the ground level. (Runway with one open side; west side of tracks next to Farmers elevators.)"

Item 7, 29 CFR 1910.141(c)(1)(i):

"A toilet facility was not provided at a place of employment. (No indoor or outdoor facilities provided at worksite.) (No means of transportation provided to toilet facilities.)"

The abatement date for all of the said violations was set for March 25, 1975, and a penalty of \$52.00 was proposed for the alleged violation of Item No. 4; a penalty of \$44.00 was proposed for the alleged violation of Item No. 5; a proposed penalty for the alleged violation of Item No. 6 of \$44.00. There was no suggested penalties for other alleged violations.

The pertinent procedural information is as follows:

1. Inspection, February 20, 1975, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued February 28, 1975, listing one (1) citation with seven (7) Items.
3. Notice of Contest received March 14, 1975, contesting all Items.
4. Notice of Contest with copy of citations and proposed penalty transmitted to Review Commission on March 17, 1975.
5. Notice of Receipt of Contest mailed March 18, 1975, and Certification of Employer Form received March 26, 1975.
6. Complaint received April 1, 1975, and Answer filed March 26, 1975.
7. The case was originally assigned to a Hearing Officer for April 18, 1975, for hearing May 1, 1975, in Bowling Green, Kentucky.
8. Due to the death of the Hearing Officer, the case was reassigned to the present Hearing Officer on January 15, 1976.
9. Hearing was held February 18, 1975, at 2:00 P.M., in Louisville, Kentucky, wherein the parties agreed that the actions be consolidated and that Briefs be filed by both parties, which has been done.

KOSHRC NO. 163: As a result of inspections of May 20, 21, and 22, 1975, by the Department of Labor at a place of employment of the Respondent company located at the International Harvester Spur, 5005 Crittenden Drive, Louisville, Kentucky, there was a citation issued June 5, 1975, listing one (1) citation and two (2) Items of alleged violation as follows:

Citation 1, Item 1, 29 CFR 1910.22(a)(1):

"Metal rings, rocks, scrap wood and metal, and other trash were scattered along the tracks at the east side of the north end of track six (6), at track five (5) by the machine shop, at the lead track for tracks nine (9) and ten (10), at the junction of tracks nine (9) and ten (10), and at the junction of the lead track and track six (6). Employees walking along the tracks in the areas were exposed to the tripping hazards."

Item 2, 29 CFR 1910.22(b)(1):

"The passageways along track nine (9) at the scrap dump area were obstructed by coke, rocks, and other debris, and at the pit area by a metal railing that had been discarded. The passageways along track six (6) were obstructed by International Harvester inventory, scrap lumber, rocks, and uneven ground at the south end, and on the north end the passageway was obstructed on the east side by equipment and scrap metal."

The abatement date for both Items was set for July 22, 1975, and no penalty was proposed for either said violations.

The pertinent procedural information is as follows:

1. Inspection, May 20, 21, and 22, 1975, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued June 5, 1975, listing one (1) citation with two (2) Items, both of which are in contest.
3. Notice of Contest received June 24, 1975, contesting all Items.

4. Notice of Contest with copy of citation and proposed penalty transmitted to Review Commission on June 27, 1975.
5. Notice of Receipt of Contest was mailed June 27, 1975, and Certification of Employer Form received July 21, 1975.
6. Complaint received July 9, 1975, and Answer filed August 6, 1975.
7. The matter was originally assigned to a Hearing Officer August 22, 1975, and due to his death was reassigned to the present Hearing Officer, January 15, 1976.
8. The matter was scheduled for hearing on October 10, 1975, in Louisville, but various Motions were made resulting in consolidation of the cases and stipulation of the matter of jurisdiction as being the issue to be decided in the case.

KOSHRC NO. 168: As a result of an inspection of June 10, 1975, by the Department of Labor through its Compliance Officers, at the Elizabethtown Station, Elizabethtown, Kentucky, there was a citation issued June 18, 1975, listing one (1) violation alleged as follows:

Citation 1, Item 1, 29 CFR 1910.22(a)(1):

"The working platforms of the Jordan Spreader # MON 80015 before and behind the control cab, had rotten and deteriorated wooden deckings and were cluttered with spikes, wrenches, various sizes of iron plates and miscellaneous metal pieces. This created a stumbling and/or tripping hazard to employees working on/or operating this equipment."

The abatement date for the abatement of the alleged violation was set for June 27, 1975, and no penalty was proposed.

The pertinent procedural information is as follows:

1. Inspection, June 10, 1975, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued June 18, 1975, listing one (1) citation which is in contest.
3. Notice of Contest was received July 3, 1975, contesting the Item.
4. Notice of Contest with copy of citation and proposed penalty transmitted to the Review Commission on July 7, 1975.
5. Notice of Receipt of Contest mailed July 7, 1975, and Certification of Employer Form received July 21, 1975.
6. Complaint received July 9, 1975, and Answer filed August 6, 1975.
7. The matter was originally assigned to a Hearing Officer August 22, 1975, and due to his death, was reassigned to the present Hearing Officer on January 15, 1976.
8. The matter was originally set for hearing October 10, 1975, in Louisville, Kentucky, but was not held because the matter was consolidated for the purpose of hearing and was submitted on Briefs of the parties.

DISCUSSION OF CONSOLIDATED CASES

The cases thus consolidated were agreed to be consolidated by sustaining of a Motion to consolidate cases No. 132, No. 133, No. 163, and No. 168.

Complainant's position is in all these cases that the acts set forth in the alleged violations constituted a violation of the Kentucky Occupational Safety and Health Act and Respondent's position is that they do not constitute any violation because of the failure of the Occupational Act to apply to the Railroad industry and to this particular Railroad in the given case.

As was determined at the oral hearing of February 18, 1976, the sole question to be decided by the Hearing Officer is whether or not the Kentucky Occupational Safety and Health Act applies to Railroads or whether they are exempted from the Act by the exemption clauses of the Occupational Safety and Health Act and the Kentucky Occupational Safety and Health Act.

There are no findings of fact necessary in determining these actions, since the findings of fact are admitted, insofar as their occurrence is concerned, but a denial exists that those acts constitute a violation of the law, insofar as these cases are concerned, because of the Respondent's position that the act does not give jurisdiction over Railroads.

STATUTORY JURISDICTION BY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION OVER RAILROADS OPERATING WITHIN
THE STATE OF KENTUCKY

The sole question raised in this case, and which is consolidated as above stated, and in other companion cases, which have an identical jurisdiction question, is whether or not the Kentucky Occupational Safety and Health Review Commission has jurisdiction over Railroads or whether such jurisdiction is excluded within the act.

The parties to the action, Complainant and Respondent, have both filed voluminous and exhaustive Briefs in support of their respective positions. The Briefs, are, in the opinion of the Hearing Officer, excellent in their research and presentation and cover all the facets of the case in its present stature. In order to put the matter in context for decision, we first look at the exclusion within the Acts, both Federal and State.

Section 4 (b) 1 of the Federal Occupational Safety and Health Acts states in part: "Nothing in this act shall apply to working conditions of employees with respect to which other Federal agencies--exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

The section of the Kentucky Act which provides the exclusion is KRS 338.021 (1) b and states as follows: "Employers, employees in places of employment over which Federal Agencies other than the United States Department of Labor exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

Whether or not there has been an affirmative exercise of statutory power by another agency is a question which also must be determined in arriving at a decision on jurisdiction in this matter.

Complainant urges that no other Federal Agency has in fact adopted standards or regulations for occupational safety and that, therefore, the regulations of the Kentucky Occupational Safety and Health Review Commission are applicable and that the exclusionary features of the law of both Federal and State have not

come into play because of the failure of the Department of Transportation under its powers and under the Federal Railway Act to promulgate and enforce safety regulations which cover the same safety features that the Kentucky law embraces. Respondent urges that the Department of Transportation has exclusive jurisdiction for the enforcement of regulations over Railroads and that said Department, by reason of the power given to it by Congress and the subsequent passage of the Federal Railway Safety Act, that the Department of Transportation not only has that power, but has actually undertaken to adopt preliminary regulations concerning the same safety features which would be accomplished by the Occupational Safety and Health regulations.

The Respondent has given an expert presentation on the history of the Railroad industry within the United States; of the intent of Congress in the passage of the various Railroad Acts and other Acts including the OSHA Act, and the intent of Congress in the passage of the Occupational Safety and Health Act and the conclusions of the Respondent as to the Congressional intent in the passage of all matters and Acts which are the subject matter of this jurisdictional dispute.

The fact that there is much merit on both sides seems indicated by the vast amount of litigation which this very jurisdictional question has invoked in various Circuit Courts of Appeals of the United States.

The matter to be decided is purely a question of law and the interpretation thereof, and a reading of the Briefs of the parties, and research of the cases in point, lead the Hearing Officer to the following Conclusions of Law.

CONCLUSIONS OF LAW

In a series of rulings, commenced and controlled by Southern

Pacific Transportation Co., OSHA Para. CCH 19,054, the Federal Review Commission in a series of two-to-one rulings, has upheld the principle that railroads are subject to the Occupational Safety and Health Act. There are presently pending appeals in the Fifth, Seventh, Eighth and District of Columbia Circuit Courts of Appeals, as well as decisions from the Fourth Circuit Court of Appeals, all resulting from cases by the same split two-to-one series of rulings by the Review Commission. There are at present at least 19 cases involving 11 railroads which have been consolidated for the Review Commissioner's decision in Belt Railway of Chicago, OSHD Para. 20,069 from which Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Burlington Northern and Southern Pacific Transportation Company have appealed. The same issue was decided at OSHD Para. 20,185 from which Seaboard Coastline and Winston-Salem Southbound Railway Company are appealing, and Southern Railway is appealing from a decision published at OSHD 20,091.

In more recent vintage, is the case of Chicago and Northwestern Transportation Company, OSHD Para. 20,356 in which the ruling was that Section 4 (b) 1 of the Act does not provide for an overall exemption of Railroad industry since the Secretary of Transportation has failed to exercise his regulatory authority over the working conditions in question.

On February 12, 1976, the Fourth Circuit Court of Appeals ruled that the Railroad industry is generally subject to OSHA coverage and upheld the Review Commission findings that Southern Railway, Para. OSHD 20,414, was

in non serious violation of 9 OSHA Standards. That decision held essentially that the exemption applied only when another Federal Agency has actually exercised its statutory authority to regulate working conditions.

It further held, that although the Department of Transportation administers the Railroad safety laws, it has never regulated the Occupational Safety and Health aspects of Railroad offices or shop and repair facilities. The Court goes on to say in that case that had the Agency prescribed standards affecting safety or health in these areas, that they would be exempt from OSHA coverage.

On March 2, 1976, in accordance with its February ruling in Southern Railway, as above stated, the Fourth Circuit Court of Appeals affirmed the Review Commission in Penn Central, OSHD 19,133; Chesapeake & Ohio Railway Company, OSHD 19,168. In the United States Court of Appeals for the Fourth Circuit, No. 75-1102 and No. 75-1182, reported at OSHD Para. 20,470 and Para. 20,471.

It is interesting to note that the Tennessee Supreme Court ruled on February 2, 1976, that the State enabling legislation specifically exempts from coverage railroad employees whose safety and health are "subject to protection" under the Federal Safety Appliances Act or the Federal Railroad Safety Act. Under the language of the Tennessee Act, the Court ruled, that promulgation of safety regulations was immaterial since the exemption is in terms of potential protection and not in terms of whether the regulations had actually been promulgated and enforced. The language of the Tennessee Act appears to be contrary to the language in the Kentucky Act and, thus, the difference seems to exist to your Hearing Officer.

The above cases from the Fourth Circuit are both mentioned in the more recent Briefs filed by the parties, with the Complainant citing the authority as controlling and the Respondent distinguishing the opinion from the case at hand.

Respondent takes the position that there are currently three views on the scope of the exemptions afforded railroads under the Federal and Kentucky job safety laws. Respondent states, 1) industry wide exclusion; 2) the standard by standard exclusion; 3) the environmental area exclusion, which Respondent concludes to be the concept of the Fourth Circuit Case, as being the three theories concerning the exemption afforded railroads under the safety laws.

A complete and exhaustive resume of the three views of exemption are set forth by the Respondent in a very comprehensive and excellent Brief.

Your Hearing Officer is impressed with the language of the Fourth Circuit Court of Appeals in the Southern Railway case as above stated, in that the Court has stated that the safety regulations of the Department of Transportation are confined almost exclusively to those areas of the Railway industry which affect over-the-road operations such as locomotives, rolling stock, signal installations, road beds, and related facilities. While the regulatory program in these areas reflects a concern for the safety of employees, it is directed primarily toward the general safety of transportation operations. The Court further states that on the other hand the Department of Transportation and the Federal Railway Act do not purport to regulate the occupational health and safety aspects of Railroad offices or shop and repair facilities. Thus, it would appear from the language of the Court to your Hearing Officer that there are certainly

some operations of the Railroad industry which are governed and controlled by the Department of Transportation and the Federal Railway Act, but in those areas which are not controlled, that the intention of Congress and the Occupational Safety Act was to include such areas, not encompassed within the Department of Transportation and Federal Railway Act Regulations, which affect the safety and health of railroad employees.

All arguments being considered, including the questions of authority granted by the Federal Railway Safety Act, the emphasis on "national uniformity" and the position that the Federal Standard is preemptive unless certain criteria is met and including the proposition as to whether or not any Federal Agency has exercised its authority to prescribe and enforce standards affecting Occupational Safety or Health, and further considering the opinions of this Board as set forth by Kentucky Occupational Safety and Health Review Commission in, Commissioner of Labor vs. L & N, KOSHRC No. 55, and Commissioner of Labor vs. L & N, KOSHRC No. 85; Commissioner of Labor vs. L & N, KOSHRC No. 67, and further considering the series of two-to-one split decisions of the Review Commission in the cases above recited, and in further consideration of the rulings of the Fourth Circuit Court of Appeals relative to jurisdiction, it is the conclusion of your Hearing Officer that the Kentucky Occupational Safety and Health Review Commission does have jurisdiction over Railroads for the alleged violation of Safety and Health regulations, and that the Kentucky Occupational Safety and Health Act is applicable to Railroads operating within this State.

The rationale of this decision is that there has been no showing that the specific working conditions to which Kentucky standards are addressed have been shown to be covered by any existing Federal law or regulation, thus, the exception to KRS 338 is not applicable, and jurisdiction exists. It is further determined that the Federal Agency, Department of Transportation need only exercise its authority in order to retain jurisdiction, but that it has not done so and that the content and purpose of the Occupational Safety and Health Act is to assure a working condition for every worker which is safe and healthful. In order for an exemption to be applicable, it must be shown that the condition which is charged in a violation must in fact be covered by a regulation from the other Federal Agency involved. It has not been shown by the Respondents that the conditions which are the basis of the allegation of violations by the Respondent company is covered by any other regulation and in the interest of the protection of the workers, it is necessary to insure that the standards of the Occupational Safety and Health Act be applied. It is the opinion of the Hearing Officer that there may be circumstances which are covered by other Departments of Transportation or Federal Railway Act provisions and that if such is shown, they would not be covered by the Occupational Safety and Health Standards. It is the opinion of the Hearing Officer that there is no industry exemption from the Acts and that to grant an industry exemption from the Occupational Safety and Health Act would leave many workers with no protection under any Act and

I do not feel that this was the intention of creating the exemption clause of the Statute.

It is, thus, concluded that the KOSHRC does have jurisdiction under KRS. 338, to enforce its regulations over the railroads doing business and having employees working within the State of Kentucky.

RECOMMENDED ORDER

IN RE: KOSHRC NO. 132:

IT IS ORDERED that the violation as alleged in Citation 1, Items 1 through 6, are hereby sustained. The proposed penalty of \$52.00 for Item No. 1 and \$44.00 for Item No. 2 is also sustained. The no penalty provision for the other Items are hereby sustained. The abatement date is set for as soon as possible, not to exceed 30 days from the effective date of this Order.

IN RE: KOSHRC NO. 133:

IT IS ORDERED that the violations contained in Citation 1, Items 1 through 7, are hereby sustained and the penalty provision of \$52.00 for Item No. 4; \$44.00 for Item No. 5; and \$44.00 for Item No. 6 are also hereby sustained. The no penalty provision for Items 1, 2, 3, and 7 are hereby sustained. Abatement date is set for as soon as possible, not to exceed 30 days from the effective date of this Order.

IN RE: KOSHRC NO. 163:

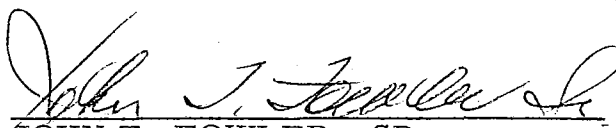
IT IS ORDERED that the violations as alleged in Citation 1, Items 1 and 2, and the no penalty provisions therefore, may be and the same are hereby sustained. The abatement date is set for as soon as possible, but not to exceed 30 days from the effective date of this Order.

IN RE: KOSHRC NO. 168:

IT IS ORDERED AND ADJUDGED that Citation 1, Item 1, and the no penalty provision for that violation is hereby sustained. Abatement date is set for as soon as possible, not to exceed 30 days from the effective date of this Order.

IT IS FURTHER ORDERED that the provisions of KRS 338 are applicable generally to the Railroad industry operating within the State of Kentucky.

DATED: March 31, 1976
Frankfort, Kentucky



JOHN T. FOWLER, SR.
Hearing Officer

Decision No. 256