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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

JULIAN M. CARROLL
GOVERNOR
IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
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MERLE H. STANTON
CHAIRMAN
CHARLES B. UPTON
MEMBER
JOHN C. ROBERTS
MEMBER

March 20, 1979

KOSHRC #485

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FORD MOTOR COMPANY

RESPONDENT

* * * * *

LOCAL 862, UAW, DONNIE DAVIS, HEALTH-SAFETY REP.

INTERVENOR

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:


A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of November 2, 1978, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

The item at issue in this case is an alleged non-serious violation of 29 CFR 1910.178(m)(7) (as adopted by 803 KAR 2:020). The Hearing Officer has found that the Respondent did not comply with the provisions of the cited standard but the evidence does not reveal any hazardous condition therefore the citation has been dismissed. We disagree with this Recommended Decision and REVERSE.

The record clearly indicates, and the Hearing Officer has found, that the Respondent did not comply with the provisions of the cited standard. The existence of a hazard is established

KOSHRC #485
(Decision and Order of Review Commission)

by noncompliance with the applicable standard. A nonserious violation of 29 CFR 1910.178(m)(7) is hereby SUSTAINED.


Merle H. Stanton, Chairman

/s/ Charles B. Upton
Charles B. Upton, Commissioner

/s/ John C. Roberts
John C. Roberts, Commissioner

DATED: March 20, 1979
Frankfort, Kentucky

DECISION NO. 693

KOSHRC #485

(Decision and Order of Review Commission)

This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U.S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

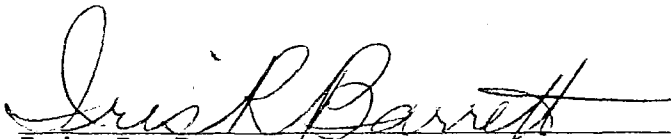
Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
U.S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Timothy P. O'Mara
Assistant Counsel

Mr. L. S. King, Plant Manager (Certified Mail #678467)
Ford Motor Company
Louisville Assembly Plant
Post Office Box 839
Louisville, Kentucky 40201

Honorable J. Rooney (Certified Mail #678468)
Honorable Theodore D. Miloch
Attorneys for FORD MOTOR COMPANY
The American Road, Room 1018
Dearborn, Michigan 48121

Mr. Donnie Davis (Certified Mail #678469)
Health-Safety Representative
LOCAL 862, UAW
6707 Grade Lane
Louisville, Kentucky 40213

This 20th day of March, 1979.


Iris R. Barrett
Executive Director

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

CHARLES B. UPTON
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

Decision No. 632

November 2, 1978

KOSHRC #485

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FORD MOTOR COMPANY

RESPONDENT

* * * * *

LOCAL 862, UAW, DONNIE DAVIS, HEALTH-SAFETY REP.

INTERVENOR

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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

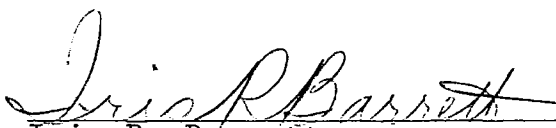
Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
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Attention: Timothy P. O'Mara
Assistant Counsel

Mr. L. S. King, Plant Manager (Certified Mail #457675)
Ford Motor Company
Louisville Assembly Plant
Post Office Box 839
Louisville, Kentucky 40201

Honorable J. Rooney (Certified Mail 457676)
Honorable Theodore D. Miloch
Attorneys for FORD MOTOR COMPANY
The American Road, Room 1018
Dearborn, Michigan 48121

Mr. Donnie Davis (Certified Mail #457677)
Health-Safety Representative
LOCAL 862, UAW
6707 Grade Lane
Louisville, Kentucky 40213

This 2nd day of November, 1978.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 485

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

FORD MOTOR COMPANY

RESPONDENT

LOCAL 862, UAW,
DONNIE DAVIS, HEALTH-SAFETY REPRESENTATIVE

INTERVENOR

* * * * *

Honorable Timothy P. O'Mara, Assistant Counsel, Department of Labor, 801 West Jefferson, Louisville, Kentucky 40202, For the Complainant.

Honorable Theodore C. Miloch, Attorney, The American Road, Room 1018, Dearborn, Michigan, 48121, For the Respondent.

Mr. Donnie Davis, Health-Safety Representative, Local 862, UAW, 6707 Grade Lane, Louisville, Kentucky, 40213, For the Intervenor.

* * * * *

On various dates from February 6 to February 10, 1978, inspection was made by the Department of Labor of premises at which employees of the Respondent company were working located at 11200 Westport Road in Louisville, Kentucky.

As a result of that inspection two citations were issued to the Respondent company by the Department of Labor, and only one of which is reported herein, since at the call of the case paragraph 6 (a) of the Complaint was deleted, leaving only paragraph 6 (b) of the Complaint which is as follows:

(b) An alleged violation of 29 CFR 1910.178 (m) (7)

in that:

A railroad car, being unloaded at the warehouse railroad dock across the aisle from post TW-1, did not have wheel blocks in place to prevent movement of the car.

The offense was alleged to be of the nonserious variety and no penalty was proposed.

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 palce. After hearing and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty.

The pertinent procedural information in this case is as follows:

1. Inspection February 6 to February 10, 1978,
2. Citations issued April 28, 1978 listing two (2) Citations, one of which is the subject matter of this Recommended Order.

3. Notice of Contest was received May 22, 1978, contesting all items.
4. Notice of Contest with a copy of the citation and proposed penalty was transmitted to the Review Commission on May 24, 1978.

5. Notice of Receipt of Contest was mailed May 25, 1978 and Certification of Employer Form was received June 5, 1978.

6. Complaint was received June 12, 1978 and Answer was filed June 23, 1978.

7. The case was assigned to a Hearing Officer on July 7, 1978 and Hearing was scheduled for August 9, 1978 and subsequently rescheduled for August 30, 1978 and heard at the Department of Labor in Louisville, Kentucky.

8. On July 12, 1978 and Order permitting intervention of Union was permitted and this case was consolidated with Cases No. 475 and No. 477, both of which are reported simultaneously with this Recommended Order.

This Case was consolidated with Cases KOSHRC NO. 475 and KOSHRC NO. 477, and they were assigned to one day to be heard separately one after the other.

Cases No. 475 and No. 477 were both dismissed by the Department of Labor at the call of the case and upon call of this action the Department of Labor moved to delete paragraph 6 (a) of the Complaint which was sustained by the Hearing Officer, leaving only paragraph 6 (b) of the Complaint which is stated heretofore and which allegedly constituted a nonserious offense for which no penalty was provided.

DISCUSSION OF THE CASE

The first eight pages or so of the Testimony concerned a discussion of the dismissal of the companion Cases No. 475 and No. 477 and also a deletion of paragraph 6 (a) of the Complaint by the Department of Labor leaving only the one (1) item in

controversy to be determined.

The Intervenor was permitted to remain, although his apparent interest was in Cases #475 and #477, which were dismissed and to which he expressed no objection, (TE 10); Mr. John Arnold, who is now safety coordinator to Brown and Williamson Tobacco Company, was the Compliance Officer at the time this inspection was made and he testified that he conducted an opening and walk-around inspection, (TE 11 - 13), and states the basis for the alleged violation and reads the standard into the record, (TE 15).

There is an introduction of a photographic exhibit which purportedly shows a railroad car at the dock partially unloaded with no wheel blocks in place, (TE 16); the testimony is that there were no employees working in the area at the time that the inspection or the photograph was made; there is no direct testimony of any witness and only a relation of a history of not placing blocks under railroad cars by Respondent that is revealed by the record. These are railroad cars which are loaded and unloaded by forklift trucks, (TE 19).

On cross-examination the qualifications of the Compliance Officer are gone into and a copy of the field manual was requested, (TE 24 - 27); the field manual was not present and there was a call made to bring it in, (TE 29); the Compliance Officer stated that he did not see the railroad car in question being unloaded, (TE 30); that there was a dock board being used between the dock and the railroad car, (TE 31); and that there was a chance that the forklift truck could fall with the metal

dock plates being used between the car and the platform, (TE 33 & 34); the hand brakes of the railroad car were set according to the testimony, (TE 34).

For the Respondent, Edward E. Meyer, Corporate Safety Engineer of North American Operations for the Ford Motor Company, testified, (TE 37 & 38); the witness stated that he was familiar with the use of the forklift trucks in the railroad industry, (TE 39); describes the method used by the railroad in switching cars to load and unload including a derail attachment which prevents a car from entering the dock area except on turning of the derail switch, (TE 40). The witness states that he is familiar with the ANSI Standards dealing with powered industrial trucks, (TE 41), and identifies Federal and Kentucky Standards as being identical. The witness explains the basis of OSHA and Kentucky Regulations, 29 CFR 1910.178(m)(7) and its relations to the ANSI Standard. An explanation is given that the ANSI Standard is the consensus standard recommended for good, safe practice and that these standards were taken over by OSHA as being the regulations at the time OSHA took jurisdiction over the subject, (TE 43). There is an explanation showing the purpose of the dock plate and the difficulty in moving a railroad car, (TE 47).

On cross-examination the witness testified that he was not an engineer and that he had inspected the plant shortly before the Hearing and that chocks were not being used at the plant at that time; Counsel states in closing that Respondent is not in strict compliance and cites the case of Clifford Hannay vs. OSHRC, ¶22,525.

DISCUSSION OF THE FACTS

The facts, as revealed by the testimony, indicate that the Respondent took many precautions in the placing of railroad cars for the purpose of loading and unloading, including a warning device, a derail, switch and bumper, in addition to dock plates to enter and leave the railroad car. It is conceded that no wheel blocks were used and that such was not the custom of the company; that the hand brakes were set on the railroad car, and that other precautions were taken consistent with the safety of the employees working in the area.

The facts are clear that such portions of the standard which require the wheels of the railroad car to be chocked were not fulfilled by the Respondent company. The question to be decided, as I see it, is whether or not the condition which existed constituted a hazard to employees of the Respondent company who were or might afterwards work on the railroad loading dock.

DISCUSSION OF THE LAW

The case of Brennan vs. OSHRC, and Underhill Construction Company, reported by the Second Circuit Court of Appeals in 1975 at 513 F(2nd) 1032, has been the subject of many further decisions and discussion among various authorities.

The important legal principle established in that case is that the existence of a hazard is established by the mere fact that the standard was not complied with.

Prior to the Underhill case, previously quoted, one of the Commissioners at the Federal level at OSHA in dissenting opinions had maintained that when the Compliance Officer cites

an employer because the requirements of some safety standards are not being observed, the establishment of that fact is sufficient to convict the cited employer unless the employer can prove that no employee could be hurt as a result of that noncompliance. This had long been the Commissioner's dissenting opinion in Secretary vs. Bechtel Corporation, 12 OSAHRC, 774 (1974); Secretary vs. W. B. Meredith, Inc., 9 OSAHRC 245 (1974); Secretary vs. J. E. Roupp Company, 7 OSAHRC 919 (1974).

Until the Underhill case, subsequently sustained by the Second Circuit Court of Appeals as aforesaid, none of the other Judges and no member of the Commission had agreed with such a radical departure from the presumption of innocence doctrine which had prevailed in all areas of American Jurisprudence. In the Underhill case, however, one of the other Commissioners adopted the same view and the thrust of the change in the law and the subsequent burden of proof is contained in one sentence of the decision in Underhill as follows: "The existence of a hazard is established by the fact that the standard was not complied with."

Many cases prior to Underhill had held that the existence of a hazard had to be proved by evidence which established that an employee of a cited employer was exposed to danger as a result of noncompliance with the cited standard. This was held in Secretary vs. Otis Elevator, 12 OSAHRC 127 (1974); Secretary vs. Stetten Construction Company, 12 OSAHRC 40 (1974); Secretary vs. Hawkins Construction Company, 8 OSAHRC 569 (1974).

The Underhill Construction Corporation case is cited at CCH-OSHD ¶20,563. The Second Circuit Court Decision was reported

at OSHD ¶19,401, in addition to the Federal citation previously supplied. In the Underhill case, at OSHD ¶20,563, there is a dissenting opinion by Commissioner Moran, and your Hearing Officer is convinced that the dissent is the proper application of the law as opposed to the majority opinion in Underhill and the subsequent Second Circuit Court of Appeals Decision.

The effect of Underhill in presuming the existence of a hazard because of the noncompliance with the standard in effect shifts the burden of proof to the employer to show that a hazard did not exist, which is contrary to the law and to the Federal and Kentucky Acts wherein the burden of proof is on the Department of Labor.

There is no question in this case but what a portion, although only a relatively small portion, of the standard is admitted to have been violated. However, the facts in the case do not indicate that there was any hazard involved to any employee working about the premises as a result of the failure to put chocks under the railroad cars, in view of the other many safety devices which existed.

It seems to your Hearing Officer that there must not only be a violation of the standard, but there must also be a hazard to employees and I am not willing to concede that by reason of the facts some portion of the standard is not complied with, that a hazard exists in the absence of proof establishing that fact.

The Department of Labor, in this action, testified that the danger, in the view of the Compliance Officer, was that the

forklift truck could slip off of the dock board or the dock board could become disengaged, and the forklift could fall between the railroad car and the loading dock. In view of the relative proximity of the railroad car and the loading dock, this seems a remote possibility to even reconstruct much less to occur in the normal course of events.

It is my view in this case, that the Respondent admitted that they did not comply with a portion of the standard involved, but that under the factual situation in this case, no hazard existed to employees who were working in or near the railroad cars at the time of the inspection, or by reason of the failure to put chocks under the railroad cars.

FINDINGS OF FACT

It is found as a matter of fact as follows:

1. That the Respondent admitted it did not comply with the provision of the standard requiring wheel blocks to be placed on the wheels of the railroad car being loaded.
2. That such evidence, and the evidence of this case does not reveal to your Hearing Officer any hazardous condition under which the employees of the Respondent company were working.
3. That every reasonable precaution was used for the safety of the employees in the manner in which the railroad cars were brought into and out of the loading area, the setting of the brakes, the setting of the derailler and other precautions which were entered into to ensure employee safety.

It is concluded as a matter of law as follows:

1. The rationale of the Underhill Rule as set forth in Underhill Construction Company cited above, does not apply in the factual situation of this case, and the failure to comply with a standard does not in itself prove that a hazard existed to employees, in the absence of other proof.

2. That the Commission has jurisdiction of this matter.

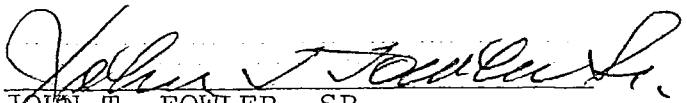
3. That no search warrant question is involved.

4. That proper inspection, open conference, walk-around, and closing conferences were held and the rights of the Respondent were afforded to him in all respects by the Department.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED, that paragraph 6(a) of the Complaint may be and is hereby, on Motion of the Complainant at Hearing, dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that on the proof heard, paragraph 6(b), the citation contested herein may be and the same is hereby dismissed, and the no penalty provision is not applicable because of the dismissal of this action.


JOHN T. FOWLER, SR.
Hearing Officer

Dated: November 2, 1978
Frankfort, Kentucky

DECISION NO. 632