KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR
IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN
CHARLES B. UPTON
MEMBER
JOHN C. ROBERTS
MEMBER

November 15, 1979

KOSHRC #542&544

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

THE CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY — RESPONDENTS

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners:

PER CURIAM:

The Recommended Orders of Hearing Officer John T. Fowler, Sr., are presently before this Commission for review pursuant to Petitions for Discretionary Review filed by the Complainant.

Due to the similarity of issues and the same Respondent in both actions, the cases have been consolidated for decision by this Commission.

In KOSHRC #542 an inspection of the Respondent's facility in Lexington, Kentucky, was conducted pursuant to a search warrant issued by the Fayette District Court. The inspection of the Respondent's Ludlow yard, KOSHRC #544, was conducted under a search warrant issued by the Kenton District Court.

The fundamental issue in both proceedings is whether the District Court was the proper forum in which to seek and have issued a search warrant or court order authorizing a safety and health inspection after a refusal of entry.

As noted by the Hearing Officer, this is a case of first impression, a question generated, but unanswered, by the decision in Yocom v. Burnette Tractor Co., Inc., 566 SW2d 775.

In Yocom, the Kentucky Court of Appeals and Supreme Court clearly stated that unless a business is inherently dangerous, subject to federal or state regulation and/or license, or pervasively regulated, or had a long history of regulation, a search of the closed areas not generally open to the public will not be permitted without a search warrant or court order based upon a showing of probable cause. The probable cause determination should be made by a neutral magistrate, not the enforcing authority.

The Review Commission must now grapple with the question of which court, or courts, shall make the requisite determination. The Respondent argues that KRS 338.101(2)[1] controls the issuance of warrants or orders of entry, therefore the warrants issued by the District Courts, and the inspections thereunder, were improper. The Complainant contends that the term "may," as used in the statutory section, is permissive in that it allows recourse to the Franklin Circuit Court or any other court of competent jurisdiction to obtain the necessary authorization for inspection.

Hearing Officer Fowler finds and concludes that under the statutory term "may," in cases of refusal of entry, the Department of Labor can seek the appropriate court authorization, based on a showing of probable cause, from the Franklin Circuit Court or the Department can choose to forgo further proceedings. The Hearing Officer further concluded that, "KRS 338.101(2) means exactly what it says and that it gives to the Franklin Circuit Court the exclusive venue for issuing a warrant for inspection under the Occupational Safety and Health Laws." In light of these conclusions it was decided that the evidence should not be considered since the investigations were conducted improperly under search warrants issued by the District Courts.

The Review Commission believes that the Hearing Officer's decision on this critical point is essentially correct. The Yocom case has obviously refined and interpreted KRS 338.101 but the provision specifying Franklin Circuit Court as the forum for judical authorization of inspections, after initial refusal, remains intact.

As noted above, the Yocom case requires a court order or warrant based upon a showing of probable cause. The determination is to be made by a neutral magistrate and although the District Courts possess jurisdictional authority to make such determinations the statute specifies the Franklin Circuit Court as the forum if the Department of Labor elects to seek entry under court authorization.

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[1]KRS 338.101(2): If an employer refuses such entry, then the commissioner may apply to the Franklin Circuit Court for an order to enforce the right of entry.

A second issue is before the Commission in KOSHRC #542. The Respondent contended that the area alongside the railroad tracks was not within the jurisdiction of the Kentucky OSH program having been excluded from coverage by FRA jurisdiction.

Hearing Officer Fowler dismissed the alleged violation of 29 CFR 1910.22(b)(1) finding that the FRA has exercised its authority by passing regulations concerning areas immediately adjacent to the road bed and operating environment.

As noted by the Hearing Officer, the question of jurisdiction and interpretation of KRS 338.021(1) is an enigma for all affected parties. The Review Commission finds that decisions in this case must unfortunately be made on an ad hoc basis.

A review of the facts and circumstances surrounding the location and conditions indicates that the Hearing Officer's decision is correct. The exercise of FRA jurisdiction has excluded the Kentucky OSH program coverage in this particular instance.

Now therefore, IT IS ORDERED by this Commission that the Hearing Officer's Recommended Orders in KOSHRC #542 and 544 are hereby SUSTAINED.

Merle H. Stanton, Chairman

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

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

DATED: November 15, 1979
Frankfort, Kentucky

DECISION NO. 790

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

Hon. Frederick G. Huggins (Messenger Service)
Hon. Cathy Cravens Snell
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Hon. Stewart L. Prather (Cert. Mail #PO4 3613802)
Southern Railway System
Law Department
26th Floor, Citizens Plaza
Louisville, Kentucky 40202

Cincinnati, New Orleans & Texas Pacific (Cert. Mail #PO4 3613803)
Southern Railway System
701 South Broadway Street
Lexington, Kentucky 40508

The Cincinnati, New Orleans and (Cert. Mail #PO4 3613804)
Texas Pacific Railway Company
Oak and Carneal Streets
Ludlow, Kentucky 41016

This 15th day of November, 1979.

Iris R. Barrett
Executive Director

Wayne 25 = 8-17-79
40 = 9-1-79

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR
IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN
CHARLES B. UPTON
MEMBER
JOHN C. ROBERTS
MEMBER

July 23, 1979

KOSHRC # 542

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

THE CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY — 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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Frederick G. Huggins (Messenger Service)
Hon. Cathy Cravens Snell
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Honorable Stewart L. Prather (Cert. Mail #P10 9897804)
Southern Railway System
Law Department
26th Floor, Citizens Plaza
Louisville, Kentucky 40202

Cincinnati, New Orleans & Texas Pacific (Cert. Mail #P10 9897805)
Southern Railway System
701 South Broadway Street
Lexington, Kentucky 40508

This 23rd day of July, 1979.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 542

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

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

THE CINCINNATI, NEW ORLEANS AND
TEXAS PACIFIC RAILWAY COMPANY — RESPONDENT

* * * * * *

The Honorable Cathy J. Cravens, Kentucky Department of Labor, U. S. Highway 127, Frankfort, Kentucky 40601, Attorney for Complainant.

The Honorable Edwin S. Hopson and Honorable Stewart L. Prather, Southern Railway System Law Department, 26th Floor, Citizens Plaza, Louisville, Kentucky 40202, Attorneys for the Respondent.

FOWLER, Hearing Officer.

* * * * * *

On August 22, 1978 an inspection was made by representatives of the Kentucky Department of Labor of the Railroad Yards and its environs of the Cincinnati, New Orleans and Texas Pacific Railway Company, commonly known in the area as the Southern Railway Yards, located at 701 South Broadway Street, Lexington, Kentucky.

As a result of that inspection, citations were issued August 29, 1978, alleging violations against the Respondent company as follows:

(a) Violation of 29 CFR 1910.22(a)(1) in that employees working in the Fayette Service area were required to work around passageways that were not sanitary due to standing pools of horse manure and water.

(b) Violation of 29 CFR 1910.141(a)(5) in that employees were being required to work in the Fayette Service area where vermin were detected and an effective extermination program had not been instituted.

(c) Violation of 29 CFR 1910.22(b)(1) in that employees were required to walk at night beside moving trains where aisles and passageways were not being kept clear of tripping hazards.

(d) Violation of 29 CFR 1910.252(a)(2)(iv)(c) in that two (2) oxygen cylinders being stored on the outside of the carman's office where employees worked were not separated from acetylene cylinders by 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) hours.

(e) Violation of 803 KAR 2:060 Section 2(1) in that the notice informing employees of the protections and obligations provided for in KRS Chapter 338 had not been posted.

The abatement dates and proposed penalties were as follows for violations alleged above:

SUBPARAGRAPH NUMBER	ABATEMENT DATE	PROPOSED PENALTY
(a)	September 27, 1978	None
(b)	September 11, 1978	None
(c)	September 19, 1978	$41.00
(d)	September 11, 1978	None
(e)	September 5, 1978	None

By Stipulation and Settlement Agreement filed in the record, the Complainant deleted citation 2, item 1, which is referred to as subsection (e), and that is not considered in this opinion because of such deletion.

The proposed penalty of $41.00 was vacated because less than ten (10) nonserious violations were alleged to have been committed by the Respondent Company.

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.

The pertinent procedural information is as follows:

1. Inspection was made August 22, 1978 of premises at which employees of the Respondent Company were working at the railroad yards at 701 South Broadway Street, in Lexington, Kentucky.

2. Citations were issued August 29, 1978 listing the citations above mentioned.

3. Notice of Contest was received September 25, 1978 contesting all items.

4. Notice of Contest with copy of citation and proposed penalty was transmitted to the Review Commission September 26, 1978.

5. The record does not disclose any notice of receipt of the contest, but certification of employer form was received

October 12, 1978.

6. The Complaint was received October 10, 1978, and Answer was filed October 26, 1978.

7. The case was assigned to a Hearing Officer on November 1, 1978, and the Hearing was scheduled and held December 5, 1978 in Covington, Kentucky.

8. Notice of Receipt of Transcript of Testimony was mailed on January 12, 1979.

9. A briefing schedule was set for both this action and action number 544, which will be hereinafter described.

10. Briefs were filed by both parties in compliance with the Briefing schedule.

This action, being number 542, was heard on December 5, 1978 and action number 544, involving the same parties, was heard on December 6, 1978, both in Covington, Kentucky.

The cases have followed a similar course, by chance, case number 544 was decided first by your Hearing Officer.

DEFENSES AND ISSUES

The defenses interposed, are two of the same defenses interposed in the previous action, number 544, and the actions have one issue which is not in common. The issues in this case are essentially as follows:

1. Whether the information obtained as a result of the search warrant issued by the Fayette District Court is admissable as evidence when entry was gained under a search warrant issued by the Fayette District Court.

2. Whether the Commissioner has jurisdiction to issue citations, and whether such citations were proper and whether or not the areas regulated were within the Kentucky Occupational Safety and Health Review regulatory jurisdiction, or whether the Federal Railroad Administration has exercised jurisdiction over such areas.

3. Whether the citations issued were proper, and whether the proof sustains the burden of proving the citations, assuming proper search and jurisdiction over the areas.

DISCUSSION OF THE CASE

The parties agree that the following incidents occurred:

On or about July 26, 1978 an inspector of the Department of Labor sought to make an inspection of the premises described above of the Respondent Company, and was refused admission.

On or about August 22, 1978 the Department of Labor obtained a search warrant, based on the alleged plain view observation of the Compliance Officer, together with a safety violation complaint of an employee.

As a result of the search warrant issuance and subsequent inspection, a representative of the Department did regain access to the premises, and they made their inspection on August 22, 1978.

Using the same logic as the Hearing Officer used in determining case number 544, namely, that all the issues should be decided in an order recommended on all of them, on the possibility that the Review Commission may set aside the Hearing Officer's

recommendation, and, if so, would then be in a position to determine the Hearing Officer's views on the balance of the proof for their ultimate review and decision.

The alleged violations will be discussed in the sequence as set forth previously in the opinion:

It is the feeling of the Hearing Officer that the violations alleged under subparagraph (a), standing pools of manure and stagnant water alongside the track, if given jurisdiction, have been proven, and that such condition did in fact exist.

The alleged violations as set forth in subparagraph (b), being employees required to work where vermin were detected, does not seem to be applicable in this situation since the alleged violation, being 29 CFR 1910.141(a)(5) does in itself provide that the work place shall be "enclosed," and there is no question but what the area referred to in the alleged violation is unenclosed, therefore, the Hearing Officer reaches a conclusion that such violation was not shown as specifically charged and such item should be dismissed.

As to subparagraph (c), alleged violation of 29 CFR 1910.22(b)(1), in the opinion of the Hearing Officer, the presence of the metal band does not in itself prove a tripping hazard, and that the evidence in the picture shown as an exhibit clearly does not show such a tripping hazard, that the proof is insufficient to sustain such alleged violation, and that this violation should be dismissed.

As to the alleged violation contained in subparagraph (d), being a violation of 29 CFR 1910.252(a)(2)(iv)(c), in that two oxygen cylinders being stored on the outside of the carman's office were not separated from acetylene cylinders by a minimum of twenty (20) feet, etc., in accordance with the provisions of the regulation, it is the opinion of the Hearing Officer that such violation was proven by sufficient facts and that this violation, assuming proper search, and the validity of the regulation, should be sustained.

As is stated earlier, subparagraph (e) has been deleted by Stipulation and Settlement Agreement and is not considered.

The question raised here is as set forth in the issues, and much has been written concerning the question as to whether or not Occupational Safety Standards apply or whether the FRA has been given primary jurisdiction, and has exercised such jurisdiction by proper regulation. The decisions have been many, and a brief history of the matter essentially is that the FRA has implemented an overall regulatory program which extends into three general areas:

1. Consists of track roadbed and associated devices and structures,

2. Concerns itself with equipment of the railroad, and

3. Human factors.

The cases are fairly in agreement that Occupational Safety and Health Administration does not have jurisdiction to inspect or regulate areas where some other agency, in this case FRA,

has exercised its rule making authority. However, many decisions hold that Occupational Safety authorities may make such rules in the absence of a specific regulatory requirement of FRA, even though FRA may have the authority to make such rule, if in fact the Federal Railway Agency has not actually exercised its rule making authority by passing a specific rule or regulation which covers the matter in controversy.

In a discussion of "environmental areas," the case of Southern Railway vs. OSAHRC, reported at 539 F.2d 335 (4th Cir. 1976), in which Certiorari was denied in 97 S.Ct. 525, the general rule was set forth that whenever an agency has exercised its statutory authority to prescribe standards affecting Occupational Safety and Health for such an area, KOSH is foreclosed from enacting or enforcing similar Occupational Safety and Health standards.

As cited in Respondent's Brief, 49 CFR 213.33 provides:

> "Each drainage or other water carrying facility under or immediately adjacent to the roadbed must be maintained and kept free of obstruction, to accommodate expected water flow from the area concerned."

In this case, the Compliance Officer found piles of horse manure and pools of manure and stagnant water standing on a concrete loading block and around the rails parallel to the dock. It is my opinion that FRA has not made a rule specifically addressing the alleged violation in this matter, and that its regulation applies to the area immediately adjacent to the roadbed and not to the loading dock, and that a violation involving the concrete loading dock and the rails parallel to the dock is work that would be encountered in general industry, and, therefore, Occupational

Safety and Health does have the authority to issue a regulation and to enforce it in that specific instance.

Your Hearing Officer has already determined that the alleged violation in subparagraph (b) does not apply because of the wording of the regulation itself, and that it was not an enclosed area; also, your Hearing Officer reached the conclusion that the mere presence of metal bands alongside the right-of-way did not constitute a hazard, although it is further my opinion, that FRA has exercised its authority by passing regulations concerning areas immediately adjacent to the roadbed and operating environment, and, therefore, does have a right and has issued regulation involving the tripping hazard charged herein, and thus the citation should be dismissed on both counts.

The alleged violation in subparagraph (d) involving the oxygen cylinders and their storage in the carman's office is not in question by the Respondent's Brief, and the Hearing Officer feels that sufficient evidence has been introduced to show such violation, and that it does not, nor is it contended, to be covered by FRA regulations, and that, given authority for the inspection, the violation should be sustained.

In this review, let me say that it is extremely difficult, in some cases, to determine whether or not an agency, in this case FRA, has passed regulations covering a certain area within the railroad environment. Your Hearing Officer has adopted the policy of determining these on an individual basis, and attempting to

read the regulation, in a common sense approach, to attempt to determine if the intent of the regulation is to govern one and the same area in the safety of employees. The problem becomes very gray as opposed to black or white, and I dare say will continue to be such based on individual charges and regulations.

The next question to be addressed is whether the Fayette District Court has authority to issue a search warrant under KRS 338.101(2) assuming refusal of entry on the premises.

It is well settled that a Compliance Officer for the Department of Labor cannot enter and inspect premises without official authority evidenced by a search warrant (Yocom vs. Burnette Tractor Company, Inc., 566 S.W.2d 755, and Yocom vs. Burnette Tractor Company, Inc., 555 S.W.2d 823). It is equally settled that a warrant so issued must be based on probable cause, which in cases of administrative bodies may be based upon employee violation complaint, specific evidence of a violation, or upon a showing that the business was chosen on the basis of a general enforcement plan (Marshall vs. Barlow, CCH Paragraph 22,735 (1978)). The Supreme Court of Kentucky, in its Yocom vs. Burnette Tractor Company, Inc. cases adopted the views set forth in Camara vs. Municipal Court, 387 U.S. 523; 87 S.Ct. 1728, and See vs. City of Seattle, 387 U.S. 541; 87 S. Ct. 1737. Holding that a search warrant must be obtained based on probable cause.

KRS 338.101(2) states as follows:

> "If an employer refuses such entry, then the Commissioner may apply to the Franklin Circuit Court for an Order to enforce the right of entry."

The Complainant, Commissioner of Labor, in its Brief, states that KRS 338.101(2) contains the word "may" and thus argues that the provision of the Commissioner "may" apply for a search warrant is permissive and not mandatory. This is the same argument as is made in case number 544 involving the same parties. It appears to your Hearing Officer that the language of the statute is such to indicate that the Commissioner of Labor may get a warrant in the Franklin Circuit Court or may not do anything in connection with the warrant. The only discretion that we see is in the statute itself. Otherwise, we find it to be mandatory that a warrant issue out of the Franklin Circuit Court.

In Johnson vs. Cornell, Ky., 322 S.W.2d 843, the implied powers of an administrative agency were discussed and the Court held that the powers not conferred on administrative agency are just as plainly prohibited as those which are expressly forbidden.

The Respondent, cites cases which generally recognize that a search warrant is a police weapon whose primary purpose is to aide in the detection and punishment of crime, citing Camden County Beverage Company vs. Blair, 46 F.2d 648 (D.C.N.J. 1930), and also cites Parrott vs. Commonwealth, Ky., 408 S.W.2d 614 (1966), and stands for the proposition that a search warrant may be served by peace officers who have authority to act within the jurisdiction involved.

It is the opinion of the Hearing Officer that a different criteria applies to the issuance of a search warrant in a criminal case as such, as opposed to the issuance of a search warrant by an

administrative agency and based on probable cause that a violation of safety and health regulations exist at the given location.

As is reported in the companion case number 544, much has been written concerning the matter of warrants by various Courts, in California, in the case of Salwasser Manufacturing Company, it was held that an administrative search warrant based on "neutral criteria" approved by the Supreme Court in Barlow's did not apply to California OSHA because of the State's criminal penalties. This in some wise is my view that an administrative search warrant need not provide the criteria as would apply in a criminal violation case.

Effective July 1, 1979 Tennessee enacted legislation permitting the obtaining of an ex-party warrant on showing of administrative probable cause when an employer refused entry. The law apparently provides that a warrant may be issued by an authorized official or a County Court of record on a showing that the inspection is pursuant to an neutral administrative plan; that there is need for an abatement inspection; that the firm is a member of a high hazard industry; or that an employee complaint has been received. The legislation further provides that the search warrant may not take the form of harassment or a sanction for refusing entry.

In a very recent case, and in an interesting observation, the Minnesota Occupational Safety and Health Review Board held that the statutory powers of the Commission or Review Board,

included review of the substantive sufficiency of citations, penalties, and orders of the Commissioner, but did not include the review of Court Orders. Thus, in Burlington Northern, Inc., CCH Paragraph 23,657, it was held that the Minnesota Occupational Safety and Health Review Board is without statutory authority to determine whether an inspection warrant issued by a Minnesota District Judge was based on the showing of probable cause. This would be authority to the effect that I, in recommending, or the Review Commission, in determining, have no power to review the sufficiency of the search warrant in determining the validity thereof. I reject this theory, since I feel that it would deprive the Respondent of his administrative rights if the Review Board cannot determine the sufficiency of a search warrant, then in effect the Respondent would have no administrative rights whatsoever except to appeal to the Court to determine the sufficiency of the warrant, which would seem to be within the purview of the Review Board in determining what evidence was admissible and whether or not such evidence constituted an offense.

As stated in the companion case number 544, it is the opinion of the Hearing Officer that KRS 338.101(2) provides a means for the Department of Labor to get a search warrant, and that such provision and statute is mandatory and not discretionary, and that it sets venue jurisdiction in that Court for the issuance of warrants seeking entry for alleged Occupational and Safety violations. I am sure that if a search warrant is issued out of the Franklin Circuit Court, for inspection of premises in another

County, that the question will be raised that Franklin Circuit Court has no jurisdiction to issue a bench warrant out of its immediate jurisdiction. That matter, however, is not before me at this point, and I do not attempt to decide that. It appears that the parties would be not particularly affected because the Hearing could still be held at the place most convenient to the parties, despite the fact that the warrant would be issued by the Franklin Circuit Court. The Compliance Officer seeking the warrant, and being the one presumably who had previously been refused entry, would again make the inspection and the Hearing could be held at the site of the inspection or a place convenient thereto. It would not mean that all Hearings would have to be held in Frankfort, in my opinion.

In summarization, it is the findings and conclusions of the Hearing Officer as follows:

That the results of the search as conducted by the Compliance Officer of the Occupational Safety and Health Review Commission are not considered, since such investigation was Not conducted properly by reason of a search warrant issued out of the Fayette District Court and contrary to law in that KRS 338.101(2) mandatorily requires the issuance of such warrant by the Franklin Circuit Court.

It is further concluded that the alleged violation in subparagraph (a) is sustained and that the proof is sufficient, and it is the opinion of the Hearing Officer that the FRA has not

made a regulation specifically providing for this matter.

In regard to subparagraph (b), it is the opinion of the Hearing Officer that the FRA has not provided regulations particularly concerning this alleged violation, but that the alleged violation is not sustained by reason of the fact that the wording of the standard itself has not been violated, in accordance with the proof.

In regard to subparagraph (c), it is the opinion of the Hearing Officer that the presence of metal bindings do not in themselves constitute a tripping hazard, and that sufficient proof is not shown to affirm that, and, further, that the FRA has adopted regulations concerning the safety of employees along the right-of-way and roadbed, thus the citation should be dismissed on both of these counts.

In regard to subparagraph (d), it is the opinion of the Hearing Officer that the FRA has not adopted regulations concerning this particular set of facts, and that sufficient evidence is shown to prove the violation, and that the violation should be sustained.

In regard to subparagraph (e), being the posting provisions, has been deleted and is not considered.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citations issued against the Respondent as contained in subparagraph (a) through (d) herein may be and the same are hereby dismissed, because the

search warrant obtained herein was not properly obtained in accordance with KRS 338.101(2).

IT IS FURTHER ORDERED that the citation alleged in subparagraph (e) against the Respondent herein, is dismissed, same having been deleted by agreement of the parties.

JOHN T. FOWLER, SR.
Hearing Officer

DATED: July 23, 1979
Frankfort, Kentucky

DECISION NO. 745