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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 13, 1976

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision #
Order No. 341*

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

CONSOLIDATED
KOSHRC #79, 137
and 207

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION AND ORDER OF
REVIEW COMMISSION

THE CHESAPEAKE & OHIO
RAILWAY COMPANY

RESPONDENT

Before STANTON, Chairman, STOWERS and UPTON, Commissioners.

PER CURIAM:

This Commission now has before it for consideration the three above docket numbered cases, each involving citations issued to the respondent charging violations of standards promulgated under the Kentucky Occupational Safety and Health Act. There has been an agreed statement of facts in each case, the basic area of contention being to the jurisdiction of the Department of Labor to cite railroads for infractions of the OSH standards. The Chesapeake and Ohio Railroad claims exemption from these inspections and citations on the ground that sole jurisdiction of safety or health inspections rests in the Department of Transportation, as controlling agency of the railroads.

Many hundreds of pages of briefs, as well as oral arguments before the full Commission on September 23, 1976, have been carefully considered in this matter. These cases have been drawn out over a long period of time, the citation in Docket #79 being issued following an inspection August 6, 1974.

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.

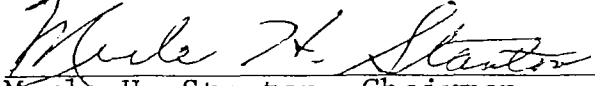
In the very recent case of Southern Pacific Transportation Co. v. Occupational Safety and Health Review Commission, U. S. Court of Appeals for the Fifth Circuit, CCH Para. 21,102, it was stated:

"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 Order of this Commission that in each instance, in each case now before this Commission, the Kentucky Occupational Safety and Health provisions covered the particular working conditions cited; that the Department of Labor had jurisdiction and in each instance the finding of the Hearing Officer is AFFIRMED. The Recommended Order of the Hearing Officer in Dockets #79, 137 and 207 is AFFIRMED unless in conflict with this order.


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. 341

*Did not
Decis. # 255*



*79, 137
207
(255)*

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 30, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

CONSOLIDATED
KOSHRC # 79, 137 & 207

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THE CHESAPEAKE & OHIO 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
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: Thomas M. Rhoads
Assistant Counsel

The Hon. P. M. Giftos (Certified Mail #467187)
The Chesapeake & Ohio Railway Co.
2 North Charles Street
Baltimore, Maryland 21201


The Hon. Porter M. Gray (79) (Certified Mail #467188)
Gray, Woods & Cooper, Attorneys
908 Second National Bank Bldg.
Ashland, Kentucky 41101

Chessie System Railroad (#79) (Certified Mail #467189)
Shelbiana, Kentucky 40501

Chessie System Martin Switching Yard (#137) (Certified Mail #467190)
P. O. Box 38
Martin, Kentucky 41649

Chesapeake & Ohio Sys. Fed. (207) (Certified Mail #467191)
1020 Carter Avenue
Ashland, Kentucky 41101

This 30th day of March, 1976.


Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 79

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY
VS.
CHESSIE SYSTEM

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

COMPLAINANT
RESPONDENT

* * * * *

KOSHRC NO. 137

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY
VS.
THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

COMPLAINANT
RESPONDENT

* * * * *

KOSHRC NO. 207

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY
VS.
CHESAPEAKE AND OHIO SYS. FED.

COMPLAINANT
RESPONDENT

* * * * *

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

P. M. Giftos, Attorney, The Chesapeake and Ohio Railway Company, 2 North
Charles Street, Baltimore, Maryland 21201, Attorney for Respondent.

FOWLER - Hearing Officer.

These actions are consolidated for hearing by agreement of the parties, the Complainant having claimed certain alleged violations of the Kentucky Occupational Safety and Health Act and the Respondent having denied violation of 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. 79: As a result of an inspection of August 6, 1974, at a place of employment at Winns Branch, Zebulon, Kentucky, which was a coal marshaling yard in connection with the Railway System operated by the Respondent, there was a citation issued by the Department of Labor on August 12, 1974, setting forth two (2) alleged violations as follows:

Alleged violation of 29 CFR 1910.141(c)(1):

"Toilet facilities were not provided at or nearby the Winns Branch coal marshaling yard for the locomotive engine crews, flagmen, and maintenance repairmen."

Citation 1, number 2, alleged violation of 29 CFR 1910.141(d)(2):

"Washing facilities (lavatory) were not available at or nearby the Winns Branch coal marshaling yard for the locomotive engine crews, flagmen, and maintenance repairmen who perform work on and around coal cars."

Abatement date for both of the alleged violations was September 26, 1974, and no penalty was proposed for either violation.

The pertinent procedural information is as follows:

1. Inspection, August 6, 1974, by Compliance Officers of the Department of Labor at the address listed above.
2. Citation issued August 12, 1974, listing one (1) citation with two (2) Items, both of which are in contest.
3. Notice of Contest was received approximately September 11, 1974, contesting both Items.
4. Notice of Contest, with copy of citations and proposed penalty transmitted to the Review Commission September 11, 1974.
5. Notice of Receipt of Contest mailed September 11, 1974, and Certification of Employer Form received, after agreement for delay of same, on September 18, 1974.
6. Complaint received September 11, 1974, and Answer filed September 24, 1974.

7. The matter was originally assigned to a Hearing Officer and due to the death of the Hearing Officer, was reassigned to the present Hearing Officer.

8. Hearing was scheduled on various dates and Motions for Continuance were made including also Motions to Dismiss, resulting in the consolidation of the cases and the agreement of submission on jurisdictional questions only.

9. Case was reassigned to the Present Hearing Officer on January 15, 1976.

10. An Order directing the case to be submitted for decision was entered and mailed January 23, 1976.

KOSHRC NO. 137: In this action, as a result of an inspection by Compliance Officers of the Department of Labor on February 20, 1975, at a place of employment wherein employees of the Respondent were working at Rt. #80, Martin, Kentucky, engaged in the transportation of coal, it was alleged by the Department of Labor that the Respondent company was in violation of the Kentucky Occupational Safety and Health Act in the following way:

Item 1, an alleged violation of 29 CFR 1910.22(a)(1):

"The north side of the switching lead with approximately one-half (1/2) mile of the yard area having scrap material consisting of broken bottles, scrap metal, scrap wood, and several pieces of hydraulic hoses scattered in the area. Twelve (12) switchmen working in this area are exposed to the hazards."

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

The pertinent procedural information is as follows:

1. Inspection, February 20, 1975, by Compliance Officer of the Department of Labor at the above address.
2. Citation issued March 18, 1975, listing one (1) violation, which is in contest.
3. Notice of Contest received April 3, 1975, contesting the Item of alleged violation.
4. Notice of Contest with copy of citations and proposed penalty transmitted to Review Commission on April 7, 1975, and Certification of Employer Form received April 12, 1975.
5. Complaint received April 14, 1975, and Amended Complaint received May 2, 1975.
6. There was a Motion to Dismiss filed May 5, 1975, and an Agreed Statement of Facts filed with the Hearing Officer which is undated.
7. The matter was assigned to a Hearing Officer and due to his death, was reassigned to the Present Hearing Officer January 15, 1976, and on January 23, 1976 an Order submitting the case for decision was entered and served.

KOSHRC NO. 207: As a result of an inspection of August 20, 1975, at a place of employment where employees of the Respondent corporation were employed at Depot Road, Paintsville, Kentucky, while in the process of repairing

track, the Department alleged that the Respondent company was in violation of the following items of the Act:

Citation 1, Item 1, 29 CFR 1910.151(b):

"First aid supplies approved by a consulting physician were not provided."

Item 2, 29 CFR 1910.219(e)(1):

"A V-belt one-half (1/2) inch wide on a "Deming" water pump, on the west side of the kitchen, running horizontally approximately twelve (12) inches above the floor level and approximately six (6) inches between pinch points was not provided with guard protection."

Item 3, 29 CFR 1910.219(d)(1):

"Pulleys on a "Deming" water pump located at the west side of the kitchen department, one approximately three (3) inches in diameter and the other twelve (12) inches in diameter were not provided with guard protection."

Item 4, National Electrical Code Article 110-17(a) (as adopted by 1910.309(a):

"A flexible cord on the west side of the cooking department was spliced and frayed, exposing live bare wires. One employee was exposed."

Item 5, 29 CFR 1910.23(d)(1)(iii):

"A wooden stairway approximately twenty-four (24) inches wide on the west side of car number two (2) with five (5) risers and both sides open was not provided with standard stair railings on each open side. One employee was exposed."

Item 6, 29 CFR 1910.157(e)(1)(ii):

"Fire extinguishers were not provided in the following locations:

- (a) On the west side of the cooking compartment, exposing one employee to flammable materials such as cooking oil and grease.
- (b) In the south section of cars two (2) and three (3) used for sleeping and transportation. Sixteen (16) employees were exposed."

Item 7, 29 CFR 1910.141(g)(3):

"A waste disposal receptacle on the west side of car number one (1) used for the disposal of food and waste materials was not provided with a tight fitting cover. Sixteen (16) employees were exposed."

Item 8, 29 CFR 1910.23(d)(1)(i):

"Wooden stairways, approximately twenty-four (24) inches wide, used as means of entrance and exit to cars number one(1) and two (2), each with six (6) risers, and both sides enclosed were not provided with a hand railing preferably on the right side descending. Sixteen (16) employees were exposed."

Item 9, 29 CFR 1910.23(c)(i):

"Open sided platforms made of wood construction located on the west side of cars number one (1) and two (2) and cars number two (2) and three (3) approximately thirty-six (36) inches wide and four and one-half (4 1/2) feet above the ground level were not provided with guard rails. Sixteen (16) employees are exposed to the platforms."

Item 10, 29 CFR 1910.22(a)(3):

"The floor platform and passageway at the west side between cars number two (2) and three (3) had a partially broken five (5) inch board and a loose board, creating a tripping hazard. Sixteen (16) employees were exposed."

Item 11, 29 CFR 1910.22(a)(1):

"The toilet areas in cars #1, 2, and 3 were not maintained in a clean and orderly and in a sanitary condition."

Item 12, National Electrical Code Article 410-4(as adopted by 1910.309(b):

"Light fixtures installed in damp or wet locations were not approved for such and were not constructed or installed in such a manner that water cannot enter or accumulate in them.

(a) Car #1 shower room.

(b) Car #2 shower room."

Item 13, National Electrical Code Article 410-88 (as adopted by 1910.309(b):

"Electrical lamps in the following locations were located where they would be exposed to physical damage.

(a) Electric light, approximately three (3) feet above the wash basin on the west side of car #2 near the bathroom.

(b) Electric light, approximately three (3) feet above the wash basin in car #2 near the bathroom.

(c) Electric light, approximately three (3) feet above the wash basin in car #3 near the bathroom."

Item 14, National Electrical Code Article 410-54(b) (as adopted by 1910.309(a):

"A wall receptacle located approximately fifteen (15) inches above the kitchen sink, which is a wet location, was not provided with a water proof enclosure, the integrity of which is not affected when the receptacle is in use."

There were various abatement dates set for the above alleged violations, all of which were in September, 1975. There was no proposed penalty for any of the violations except for Item No. 6, which the proposed penalty was \$37.00.

The pertinent procedural information is as follows:

1. Inspection, August 20, 1975, at the above described premises.
2. Citation issued September 8, 1975, listing 1 Citation and 14 Items as above described, all of which are in contest.
3. Notice of Contest was received September 22, 1975, contesting all items.
4. Notice of Contest with copy of citations and proposed penalty transmitted to the Review Commission on September 29, 1975.
5. Notice of Receipt of Contest mailed September 29, 1975, and Certificate of Employer Form received November 10, 1975.
6. Complaint received October 13, 1975.
7. No formal answer is filed in the case, but there is a Joint Motion for Postponement of Hearing and Consolidation and a Statement of Facts applicable to the instant situation.
8. The matter was assigned to a Hearing Officer and due to his death was reassigned to the Present Hearing Officer on January 15, 1976, and on January 23, 1976, an Order was signed and served submitting the case for decision.

DISCUSSION OF CONSOLIDATED CASES

In case No. 79 and case No. 137, there are agreed statement of facts filed indicating that the facts as set forth in Respondent's Complaint did occur, but 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 this case.

In case No. 207, there is a Joint Motion indicating that jurisdiction is the overriding issue and indicating that the parties intend to file a Joint Statement of Facts covering that case also, but none is found in the record. It is assumed from the statements contained in the Joint Motion for Postponement of Hearing, that the overriding issue in this case, that is case No. 207, together with the other two cases involved in this consolidated hearing, is one of jurisdiction and that is the matter which the Hearing Officer must decide.

There are no Findings of Fact necessary in determining these actions, since the facts 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 conclusion 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.

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.

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.

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. 79:

IT IS ORDERED that the violations as alleged in Citation 1, Items 1 and 2, and the no penalty provisions proposed therefore, may be and 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. 137:

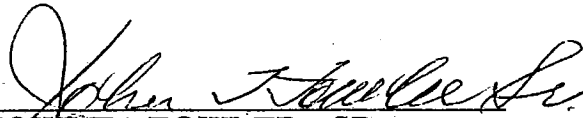
IT IS ORDERED AND ADJUDGED that the violation alleged as Item 1 and the no penalty provision proposed therefore, may be and the same is hereby sustained. The abatement date for said Citation is to be as soon as practicable, not to exceed 30 days from the effective date of this Order.

IN RE: KOSHRC NO. 207:

IT IS ORDERED AND ADJUDGED that the Citation 1, Items 1 through 14, may be and the same are hereby sustained.

IT IS FURTHER ORDERED that the penalty for Item No. 6 is sustained at \$37.00 and that the no penalty provision for the other violations is also hereby sustained. The abatement date for the violation is to be 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.


JOHN T. FOWLER, SR.
Hearing Officer

DATED: March 30, 1976
Frankfort, Kentucky

Decision No. 255