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GOVERNOR

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August 10, 1983

KOSHRC #980

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

ARMCO, INC. — RESPONDENT

UNITED STEELWORKERS OF AMERICA — AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION AND ORDER OF
REVIEW COMMISSION

Before COBB, Chairman; RUH and BRADEN, Commissioners.

COBB and BRADEN, For the Majority:

A Recommended Order of Hearing Officer Shirley A. Cunningham, Jr., issued under date of March 29, 1983, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Summary of the Case

In early 1979 the Respondent, Armco, Inc., initiated research and planning for use of radio-controlled locomotives at their Ashland, Kentucky, works. As part of the initial research, management representatives visited other operations utilizing this technology. On the basis of research and information gathered on these visits the company opted for Cattron/Motorola remote radio transmitter control units. In July or August of 1979 radio control equipment was placed in service at the B.O. Shop Desulfurization. In 1981 a management task force was formed to study further use of the radio controls, additional site visits were made and the technology was phased into other aspects of the Armco operation in Ashland.

The rail area between various segments of the Armco plant is approximately 500 yards long and 800 to 1000 yards wide, with 500 acres and 84 miles of track in the west works. Pedestrian and vehicular traffic traverse the tracks in this area, and despite basic rail area safety training the employees frequently cross at points other than the designated crossings.

In April of 1982, Homer Moore, an Armco employee and USWA Safety Committee Chairman, filed a complaint alleging operation of the radio remote-control locomotives without point protection. The complaint indicated that the issue had been the subject of a union/management grievance procedure which resulted in a disagreement as to the meaning of point protection.

The inspection by the Department of Labor was conducted on May 7, 10, 11, 1982, at the Ashland facility in response to the aforementioned employee complaint. During the course of the inspection, the Compliance Officer observed two separate train movements using the remote-control device which served as the basis for the citation. The citation alleges a violation of the statutory general duty clause:

> KRS 338.031 Obligations of employers and employees
>
> (1) Each employer:
>
> (a) Shall furnish to each of his employes employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employes.

A description of the alleged violation provides:

> The employer did not furnish to each employee a place of employment free from a recognized hazard that is likely to cause death or serious physical harm to employees, in that point protection was not required in the movement of rail traffic in the yard, (i.e. the remote-control locomotive operators did not have a clear 180° view at all times in the direction of travel).

A penalty of $640 was proposed for the violation.

The Respondent filed a timely contest to the citation and penalty proposed. A thorough hearing was conducted before the Hearing Officer over the course of two days. In addition to the testimony of numerous witnesses and introduction of exhibits, the proceeding included a visit to the Respondent's worksite in Ashland.

After consideration of the record and briefs submitted by the parties, the Hearing Officer issued his recommended order sustaining the violation of KRS 338.031(1)(a) along with the penalty as proposed. The Respondent filed a timely Petition for Discretionary Review of the order below, and the order granting review placed this action before the Commission for decision.

Decision of the Commission

Prior to consideration of the merits of this action, we must address a pending motion by the Secretary of the Commerce Cabinet for Leave to Appear and File a Brief as an Amicus Curiae. This Commission's Rules of Procedure, Sections 46(1), 47(3) and 48(5) provide for briefs by any party, there is no specific provision for an amicus brief. Section 4 of the rules provides that in absence of a specific provision, procedure shall be in accord with the Kentucky Rules of Civil Procedure. The Civil Rules, CR 76.12(1), clearly provide that briefs other than those of the parties will be considered only with leave of the court. In this action we have had the benefit of thoroughly researched and well written briefs by the parties at both the hearing officer and review levels. We do not need the assistance of non-parties in order to resolve the issues before us; therefore, the Secretary's motion is denied. The proffered brief has not been considered by this Commission in reaching its decision on the merits.

The Kentucky Occupational Safety and Health Act is a preventive and remedial piece of legislation, and the cited general duty clause is something of a catch-all designed for those instances in which employees are exposed to serious hazards to which no specific standard applies. Standards, adopted pursuant to the process set forth in KRS 338.031 and KRS Chapter 13, cannot specifically address the myriad of conditions, methods, practices and operations presented by the varied types of employment and places of employment which are subject to the Act. The general duty clause extends protection to employees by supplementing, rather than superseding, the standards.

The Kentucky general duty clause, KRS 338.031(1)(a), is the counterpart of Section 5(a)(1) of the Federal Act. In considering and ruling upon cases involving provisions of the State Act and standards, we frequently refer to and consider reported federal decisions involving parallel provisions in the Federal Act and standards. Reported federal decisions, while not binding, are persuasive and advisory for our decision making. See: J.A. Jones, KOSHRC #571 (1980).

The preeminent federal case involving the general duty clause is National Realty and Construction Co. v. OSHRC, 17,018 OSHD (1973-74) 495 F.2d 1294. In National Realty, the United States Court of

Appeals for the District of Columbia, recognizing the general nature of the charge, noted the specific elements of proof which must be established by the Secretary in order to sustain a general duty violation. There must be a showing that:

1) The employer failed to render its workplace "free" of a hazard which was

2) recognized and

3) causing or likely to cause death or serious physical harm.

The decision further clarifies that the duty to render "free" of hazards must be an achievable one, and the Complainant's proof must indicate demonstrably feasible corrective measures.

Although the general duty clause does not appear in our cases with great frequency, this Commission and its hearing officers have dealt with the provision in a number of cases, e.g., Range Mfg. Dept., General Electric, KOSHRC #217 (1976); Barmet of Ky., Inc., KOSHRC #402 (1978); Padgett Welding, KOSHRC #672 (1980); Sipple Brick, KOSHRC #749 (1981); E & L Transport, KOSHRC #826 (1982). These Commission decisions and unreviewed hearing officer orders have in most instances concerned a single aspect of the Complainant's proof requirements necessary to establish a general duty violation. The decision below cites the National Realty decision and sets forth the elements of proof required (R.O., 15,16). We have implicitly adopted the National Realty proof requirements in previous decisions; and to clarify any potential confusion, we hereby adopt them explicitly.

In light of the foregoing, our initial inquiry is what, if any, is the alleged hazard in this action. The Respondent posed this issue by its motion to dismiss for failure to state a claim. The significant features and safety aspects of the remote-control units are fully described in the record (Tr. II, 137-138; 145-149) and are depicted in the company training manual (CE-7) and a video tape training program (RE-1). The Compliance Officer who conducted the inspection had no problems with the control units:

> "I saw nothing wrong with the box itself as far as the operation was concerned during the period that we observed." (Tr. I, 20.)

Homer Moore, employee and union safety committeeman, stated that after visiting other operations and meeting with management,

> "we discussed that we didn't see a big major problem with the operation of the box itself or the remote mechanism." (Tr. III, 53.)

Although a great deal of time and effort were expended in discussing the safety of the "black box," there seems to be no real controversy involving the safety of this new technology.

A review of the pleadings and record indicate that the hazard alleged in this case is the movement of rail traffic in the yard without continuous point protection, continuous point protection being a continuously maintained adequate safe view ahead of the forward motion of the train. The varied terminology used by the parties at the hearing unfortunately generated confusion which tended to obscure a rather obvious allegation of a hazard. We find that the Respondent has been provided fair and adequate notice of the charge, sufficient to allow preparation and maintenance of its defense. See: Sipple Brick, KOSHRC #749 (1981).

Having noted the alleged hazard, the next step is to consider whether the Complainant has established the recognized nature of the same. The issue of whether a hazard is recognized is quite often the most significant aspect of a case involving the general duty clause. Recognition of a hazard can be established by the objective measure of industry knowledge or by a showing of the cited employer's actual knowledge of the hazard.

In Litton Systems, Inc., Ingalls Shipbuilding Div., 25,817 OSHD (1982), the Federal Review Commission held that the hazard of a large vehicle, in this case a 30-ton straddle crane, moving with obstructed vision through an area commonly used by employees presents a danger which is a matter of common knowledge therefore the recognition of the hazard can be inferred from the obvious nature of the hazard.

Based upon the reasoning of Litton, we find that the movement of trains, without continuous point protection, in the Respondent's yard area, where employee traffic crosses the tracks at random, is a hazard within common knowledge and common sense therefore the Respondent's recognition of the danger can be inferred.

Under the circumstances of the present case, rather brief consideration may be given to the issue of whether the hazard is one which is causing or is likely to cause death or serious physical harm. Common knowledge and common sense again indicate that an employee struck by a moving locomotive or train is very likely to suffer death or serious physical harm as a result of the encounter.

The significant issue in this case is whether the Respondent has failed in its duty to furnish a workplace free from the recognized hazard. The Respondent's duty must be an achievable one; and the Complainant, as part of its proof, must set forth feasible corrective measures. See: National Realty, supra. In dealing with this issue, we are considering steps to be taken to alleviate the hazard, in other words, abatement. See: Continental Oil Company, 24,745 OSHD (1980) 630 F.2d 446; Wheeling Pittsburgh Steel Corp., 25,801 OSHD (1981).

The Complainant, as part of its case, has set forth a work procedure which it believes is a feasible corrective measure--positioning the remote locomotive operator so that a constant 180° view of the direction of travel is maintained. Contrary to the Respondent's claim, the Complainant has not attempted to establish a standard without following appropriate statutory procedures. The parenthetical inclusion of this proposed measure in the description of the violation and hazard has evidently caused a good deal of confusion. The Complainant's abatement measure need not be recognized by the employer or within the employer's industry. In fact, feasible measures above and beyond those considered reasonable and customary by an industry may be required. See: Litton Systems, Inc., supra; Southern Railway Co., 20,091 OSHD (1975-76).

The Respondent maintains that its work area is free of any recognized hazard, and this condition is maintained because the remote-control locomotives are operated under a procedure, known as the range of vision rule, which is commonly used throughout the industry. Mr. William Benecke, an expert witness for the company, described the range of vision rule:

> "If I'm shoving or pulling, I must ride on or precede. If I'm switching, I must have a full range of vision in my switching area." (Tr. II, 200.)

The witness further indicated that to provide protection and the full range of vision the operator may have to move and position himself in order to see into the area in which he is headed. Paul Anderson, an employee and train operator who started with the company some forty years ago, explained that the range of vision rule requires visual contact beyond the engine, across the track and down the track. (Tr. II, 245.)

After consideration of the record below, we find that the corrective measure advanced by the Complainant is a feasible means of addressing the hazard in this case. We further find that the range of vision rule presented by the Respondent is also a feasible measure which can correct the hazard presented by movement of rail traffic.

We do not agree with the finding in Magma Copper Company, 24,050 OSHD (1979) 608 F.2d 373, that the Complainant must now prove that the company's safety precautions are unacceptable in the industry or a relevant industry. Our position is based on the point that an objective industry standard is relevant to recognition of the hazard, not to the appropriate corrective measures. When the Complainant sets forth a feasible corrective measure, the Respondent may, as Armco has done, present their existing measure as part of its defense. If the Respondent's practice is in accord with widespread industry practice, that fact will give weight to their claim that they are effectively correcting the problem.

In order to sustain a violation and the corrective measure advanced by the Complainant, it must be established that the measure materially reduces the hazard. See: Litton Systems, Inc., supra, and National Realty, supra. While the Complainant's proposed measure would materially reduce the risk when compared to operating with no point protection, we are not convinced it would significantly or materially effect a reduction in hazard when compared to operation with a properly maintained range of vision. Our decision on this point is based in large part upon an argument set forth in the Respondent's brief before the Hearing Officer. (Respondent's H. O. Brief, 17-18.)

To properly operate under the range of vision rule, the operator must maintain visual contact with the engine, be able to see down and across the tracts on which he is proceeding and ride on or precede the engine when shoving or pulling. The appropriate range of vision must include a view of both rails and the length of the blind spot must be considered in light of the speed and stopping distance of the train and employee traffic in the area. Proper maintenance of the range of vision may require significant movement on the operator's part, particularly in those instances, noted in the record, in which cars are present on parallel tracks, thus preventing a walk out to obtain a view ahead (Tr. III, 68). As noted by Mr. Klaiber, a witness for Armco, operation under the range of vision is a performance rule relying on the judgment of the trained operator under the circumstances presented. (Tr. II, 300.)

Although we find that operation under a properly maintained range of vision rule can correct the hazard, the record indicates that the Respondent has been operating its remote-control locomotives without point protection. In the incident involving operator Booth, he passed behind a moving drag and proceeded to walk beside it. This situation involved movement without point protection and clearly violated the range of vision rule (Tr. II, 218). The train movement by Mr. Connelly violated the range of vision rule and was without point protection when he rode the stirrup at the rear of the drag and had a view of the engine and only one rail (Tr. I, 94, 96). The record confirms other examples of operation in violation of the range of vision rule without point protection. Most of the operator witnesses stated that they had lost eye contact with their engine. (Tr. III, 64,87,101.)

These incidents are not examples of idiosyncratic employee violation of a company rule or procedure; they are rather an indication of a failure to effectively communicate and train workers to operate under the rule. The company's video tape program (RE-1) and training manuals (CE-7 and CE-8) make no reference to positioning of the remote-control operator to properly maintain range of vision and provide point protection. The Yellow Book (CE-8) was drafted prior to the remote-control era and is written primarily for a crew operation. (Tr. I,

107; II, 173,180.) Employee testimony also raised serious questions about the efficacy of the on-the-job portion of the remote-control training program. (Tr. III, 29,124.) The record does reveal that a Job Safety Analysis or JSA, apparently a detailed description of the correct and safe way to perform specific job procedures, was being developed for the train movements when the citation was issued. (Tr. II, 293.) If the employer chooses a safety procedure which relys to a large extent on the performance of trained operators, it must make sure that the employees are in fact adequately trained to exercise their judgment in a safe manner.

Based upon the reasoning set forth in this opinion, we find that the Respondent has violated the general duty clause. It is further found that the proposed penalty is just and appropriate.

ORDER

IT IS THE ORDER OF THIS COMMISSION that the alleged violation of KRS 338.031(1)(a) is SUSTAINED. IT IS FURTHER ORDERED that the proposed penalty of $640 is likewise SUSTAINED.

Robert T. Cobb, Chairman

s/Charles E. Braden
Charles E. Braden, Commissioner

RUH, Commissioner, concurring in part, dissenting in part:

I am in agreement with the reasoning and ultimate order of the majority in this case, but I dissent from that portion of the decision denying the motion of the Secretary of the Commerce Cabinet for leave to file an Amicus Brief. The Secretary of the Cabinet is concerned with the business and working climate in the Commonwealth and would add new perspective to this case and, in any event, would cause no harm.

Carl J. Ruh, Commissioner

DATE: August 10, 1983

DECISION NO. 1237

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

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This 10th day of August, 1983.

Sue Ramsey
Executive Secretary
KOSH Review Commission