

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,  
Complainant,

v.

ENSERCH CORPORATION, D/B/A LONE  
STAR GAS COMPANY,  
Respondent.

OSHRC DOCKET NO. 77-2289

December 30, 1981

DECISION

Before: CLEARY and COTTINE, Commissioners.<sup>1</sup>

BY THE COMMISSION:

The Secretary of Labor ('the Secretary') has petitioned for review of a decision of Administrative Law Judge Harold O. Bullis. The judge granted the motion of Lone Star Gas Company ('Lone Star') to vacate the Secretary's citation. The Secretary's petition for review was granted, and Judge Bullis' decision is before the Commission for review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ('the Act'). We affirm the judge's decision.

Inasmuch as Judge Bullis' decision sets out the facts in detail, we only summarize them here. The citation alleges that Lone Star's procedures for working on a natural gas pipeline violated section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). Lone Star filed a motion to vacate the citation, claiming that the cited working conditions were exempt under section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1). Section 4(b)(1) states:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

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<sup>1</sup> Chairman Rowland did not participate in this decision.

Judge Bullis found that pipeline safety standards covering the cited working conditions had been adopted by the United States Department of Transportation ('DOT') and were enforced by the Texas Railroad Commission under 49 U.S.C. § 1675(a), section 5(a) of the National Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1671 et seq. ('the NGPSA') (before 1979 amendment). Section 5(a) of the NGPSA provides that, with the exceptions noted below, the NGPSA does not apply to intrastate natural gas pipelines when a state agency certifies that it has adopted and is enforcing DOT safety standards.<sup>1</sup> If the Secretary of Transportation determines that the state agency is not satisfactorily enforcing compliance with federal safety standards, he may reject the certification and take action to achieve adequate enforcement, including the assertion of federal jurisdiction. Section 12(b) of the NGPSA, 49 U.S.C. § 1681(b), also empowers the Secretary of Transportation to monitor a state's enforcement practices, and to inspect and investigate to aid in the enforcement of the NGPSA and DOT standards. Section 3(b), 49 U.S.C. § 1672(b), authorizes him to require a pipeline operator to eliminate any hazards to life or property from a pipeline facility. In effect, the NGPSA requires compliance with DOT standards in states covered by section 5(a) certifications. Judge Bullis therefore found that, even if section 4(b)(1) were read to require prescription and enforcement of standards by a federal agency, the NGPSA regulatory scheme nevertheless satisfies that requirement because it mandates that DOT standards be adopted and because DOT closely monitors state enforcement.

We affirm Judge Bullis' decision on that ground.<sup>2</sup> We do not reach the Secretary's argument, based on the maxim *expressio unius est exclusio alterius*, that section 4(b)(1) exempts working conditions regulated by a state agency only where that agency acts under section 274 of the Atomic Energy Act of 1954. We agree with Judge Bullis that the NGPSA constitutes a type of federal prescription and enforcement within the meaning of section 4(b)(1) of the Act.<sup>3</sup> Finally, as

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<sup>1</sup> The state may adopt additional or more stringent standards for intrastate pipeline facilities, provided they are not incompatible with federal standards.

<sup>2</sup> Judge Bullis interpreted section 4(b)(1) to impose an exemption when a federal agency prescribes or enforces safety and health standards. Inasmuch as we endorse the judge's alternative finding that the NGPSA scheme satisfies both requirements in section 4(b)(1), it is unnecessary to consider the interpretive question further.

<sup>3</sup> The cited working conditions are covered by standards promulgated by DOT and adopted by the TRC. We reserve decision on whether section 4(b)(1) applies where a state agency adopts additional or different standards.

the judge recognized, the purpose of section 4(b)(1) is to prevent duplication of, and yet leave no gaps in, federal regulation of occupational hazards. *Allegheny Airlines, Inc.*, 81 OSAHRC 37/A14, 9 BNA OSHC 1623, 1628, 1981 CCH OSHD ¶25,339, p. 31,443 (No. 14291 & 14345, 1981), *pet. for rev. filed*, No. 81-1528 (4th Cir. June 19, 1981). That purpose would be disserved if no exemption were found here.

SO ORDERED.

FOR THE COMMISSION:

Ray H. Darling, Jr.  
Executive Secretary  
DATED: DEC 30, 1981

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,  
Complainant,

v.

ENSERCH CORPORATION, D/B/A LONE  
STAR GAS COMPANY,  
Respondent.

OSHR DOCKET NO. 77-2289

March 15, 1978

Appearances:

Joe N. McClendon, Esq. Dallas, Texas Attorney for the Respondent

Gail M. Dickenson Dallas, Texas Attorney for the Complainant

DECISION AND ORDER

BULLIS, Judge:

Following a fatal accident during the repair of one of its transmission lines, Lone Star Gas Co. (Lone Star) was charged with two violations of the general duty clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, (the Act), for failure to furnish its employees a work place free from hazards likely to cause death or serious physical harm.<sup>1</sup> The Secretary has since moved to amend its complaint to consolidate the two alleged violations into one violation of the general duty clause.

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<sup>1</sup> The two violations charged in the citation read as follows:

1. 'On February 22, 1977, three employees were assigned to repair an 8 inch natural gas transmission line operating at 472 psig without the company determining the condition of the pipe and taking appropriate action.'
2. 'On February 22, 1977, three employees were assigned to repair an 8 inch natural gas transmission line operating at 472 psig without taking the following precautions:
  - a. Each segment of transmission line pipe with general corrosion and remaining wall thickness less than that required for the maximum allowable operating pressure

On September 20, 1977, Lone Star moved to dismiss the citation for lack of jurisdiction, contending that its activities were exempt from coverage by section 4(b)(1) of the Act. Lone Star's motion was denied without prejudice for the reason that the record did not contain sufficient facts to make a determination whether 4(b)(1) was applicable to its operations.

A hearing on the merits was scheduled for January 4, 1978. Prior to the hearing date both parties requested that the January 4th hearing be limited to the question of jurisdiction. That motion was granted. The bifurcated hearing was held on January 4, 1978, and both parties have briefed the question.

After careful consideration of the record and the excellent briefs filed by the parties, it is determined that Lone Star's activities which were the subject of the instant citation, are exempt by section 4(b)(1) of the Act. Lone Star's motion to dismiss is granted and the citation is vacated.

Section 4(b)(1) of the Act provides:

'Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.'

It is well settled that section 4(b)(1) does not establish an industrywide exemption. For the exemption to obtain, it must be shown that the other Federal agency has authority to promulgate or enforce standards affecting the specific working conditions involved, and that it has in fact exercised that authority. *See Secretary v. Southern Pacific Transportation Co.*, 74 OSAHRC 83/A2, BNA 5 OSHC 1888, CCH 1974-75 OSHD ¶19,054 (No. 1348, 1975), *aff'd* 539 F2 386 (5th Cir. 1976).

The Secretary has bottomed his opposition to Lone Star's motion on two grounds. First, he contends that the section 4(b)(1) exemption is applicable only to Federal agencies and that since the agency that actually has authority to regulate the working conditions here is the Texas Railroad Commission, the exemption does not apply. Secondly, the Secretary argues that there are no Texas Railroad Commission standards that apply to the specific working conditions involved.

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of the pipeline was not replaced and/or the pressure was not reduced commensurate with the actual remaining wall thickness—or

b. Leaks were not repaired by taking the pipeline out of service and replacing defective portions with pipe of similar or greater wall thickness.'

The Secretary points out that with the exception of State agencies acting under section 274 of the Atomic Energy Act of 1954, the language of section 4(b)(1) applies only to the exercise of statutory authority by other Federal agencies. He argues that two canons of construction, the canon against surplusage and the canon of *expressio unius est exclusio alterius*, require a determination that no other exercise of authority by a State agency was intended to be included in the exemption of 4(b)(1).

Lone Star agrees that, with the exception of State agencies acting under the Atomic Energy Act, the 4(b)(1) exemption requires Federal agency involvement. Lone Star argues, however, that a Federal agency, the Department of Transportation, has exercised its statutory authority, has promulgated the applicable regulations, and has enforced those regulations through the agency of the Texas Railroad Commission.

The canons of construction suggested by the Secretary are not particularly helpful here. While there are some similarities between section 2021 of the Atomic Energy Act and the provisions of the Gas Pipeline Safety Act, there are also some glaring differences. Both Acts provide for State regulation under certain conditions. Section 2021 of the Atomic Energy Act, however, after stating one of the purposes of the section is to clarify the respective responsibilities of the States and the Atomic Energy Commission, authorizes the Commission to enter into agreements with ' the Governor of any State providing for the *discontinuance* of the regulatory authority of the Commission' in certain specified areas of activity. (emphasis added). This, in effect, leaves the State as the sole regulatory authority in those areas. The State is not required to adopt Federal standards, the only requirement being that its 'program is compatible with the Commission's program'.

The Gas Pipeline Safety Act (49 U.S.C. 1671 *et seq.*), on the other hand, requires the Secretary of Transportation to promulgate minimum safety standards, provides for State regulation only when the State adopts each Federal safety standard and is enforcing such standard, requires annual certification, permits reassertion of Federal jurisdiction if the Secretary determines the State agency is not satisfactorily enforcing compliance with Federal safety standards, and requires the State agency to promptly notify the Secretary of any violation it discovers of a Federal safety standard.

The effect of the Gas Pipeline Safety Act, unlike the Atomic Energy Act where the regulatory authority of the Atomic Energy Commission is discontinued in certain areas of activity,

is to require strict compliance with Federal safety standards even though enforcement may be carried out by a State agency. It must be presumed that Congress was cognizant of the dissimilarities in these two Acts when it specified in section 4(b)(1) that the Occupational Safety and Health Act did not apply to State agencies acting under section 274 (42 U.S.C. 2021) of the Atomic Energy Act. It seems totally illogical that Congress would exempt State regulation under the Atomic Energy Act and intend not to exempt State enforcement under the Gas Pipeline Safety Act, an Act requiring strict compliance with Federal safety standards and requiring much closer Federal supervision. The logical answer is that Congress deemed regulation under the Gas Pipeline Safety Act to be Federal regulation enforced through the instrumentality of the State.

The plain language of section 4(b)(1) does not require Federal enforcement of safety standards promulgated by a Federal agency. The use of the disjunctive in requiring the exercise of ‘statutory authority to prescribe or enforce standards’ indicates either the promulgation or enforcement of standards affecting occupational safety and health, not both, would satisfy the requirements of section 4(b)(1). It is clear that a Federal agency, the Department of Transportation, has prescribed the standards in question here. But even if ‘or’ were construed to mean ‘and’, requiring both the prescribing and the enforcement of standards by a Federal agency, the close monitoring of State enforcement required by the Gas Pipeline Safety Act could, without a strained interpretation, be deemed to be Federal enforcement.

The Secretary argues that the standards enforced by the Texas Railroad Commission, even though originally promulgated by the Secretary of Transportation, lost their identity as Federal standards when adopted by the State of Texas. He likens it to ANSI standards that become OSHA standards when adopted by the Secretary of Labor under section 6(a) of the Act.

While the Federal standards promulgated under the Gas Pipeline Safety Act may become State standards when adopted by a State, they also remain as Federal standards. Language contained in the Gas Pipeline Safety Act clearly indicates such to be the case. Section 1674 requires each annual certification by the State to include ‘(iii) the record maintenance, reporting, and inspection practiced by the State agency to enforce compliance with such Federal safety standards, . . .’. That section also provides for assertion of Federal Jurisdiction after annual certification if the State agency ‘is not satisfactorily enforcing compliance with Federal safety standards’. Such language not only indicates that the Federal standards remain extant, it evidences an intent by Congress that the State becomes merely the enforcing agency for the Federal safety standards.

The Secretary's final argument is that the Texas Railroad Commission has not adopted standards that cover the specific working conditions for which Lone Star was cited. The citation alleged a violation of the general duty clause of the Act, presumably because no specific OSHA standards have been promulgated to cover the repair of pipelines. While there is nothing in the record to indicate that the Department of Transportation has promulgated the equivalent of OSHA's general duty clause, it has promulgated specific standards, adopted by the State of Texas, covering the repair of pipelines.

In essence the OSHA citation alleges that Lone Star assigned a crew to repair a transmission line without determining the condition of the pipe and taking appropriate precautions of reducing the pressure in the line or taking it out of service. The provisions of 49 CFR 192, promulgated by the Department of Transportation and adopted by the State of Texas under Gas Utilities Docket No. 446 (Exhibits RX-1, 2 and 3) specifically require the line to be taken out of service or the pressure reduced when making repairs.<sup>2</sup>

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<sup>2</sup> Section 192.713 states:

'Transmission lines: permanent field repair of imperfections and damages.

(a) Except as provided in paragraph (b) of this section, each imperfection or damage that impairs the serviceability of a segment of steel transmission line operating at or above 40 percent of SMYS must be repaired as follows:

(1) If it is feasible to take the segment out of service, the imperfection or damage must be removed by cutting out a cylindrical piece of pipe and replacing it with pipe of similar or greater design strength.

(2) If it is not feasible to take the segment out of service, a full encirclement welded split sleeve of appropriate design must be applied over the imperfection or damage.

(3) If the segment is not taken out of service, the operating pressure must be reduced to a safe level during the repair operations.'

Section 192.717 states: 'Transmission lines: permanent field repair of leaks.

(a) Except as provided in paragraph (b) of this section, each permanent field repair of a leak on a transmission line must be made as follows:

(1) If feasible, the segment of transmission line must be taken out of service and repaired by cutting out a cylindrical piece of pipe and replacing it with pipe of similar or greater design strength.

(2) If it is not feasible to take the segment of transmission line out of service, repairs must be made by installing a full encirclement welded split sleeve of appropriate design, unless the transmission line—

The Commission has held that section 4(b)(1) does not require the Department of Transportation regulations to be similar or even equally stringent to the OSHA standards. *Secretary v. Mushroom Transportation Co., Inc.*, 73 OSAHRC 51/E10, BNA 1 OSHC 1390, CCH 1973-74 OSHD ¶16,881. Here the Department of Transportation standards adopted and enforced by the State of Texas cover specifically the general violation alleged by OSHA, and penalties are provided by the State of Texas at least equal to those under the Act by Article 6053(C) of the Gas Utilities Act. (Exhibit RX-3)

It is recognized that section 4(b)(1) provides an exemption from coverage under the Act and as such is to be narrowly construed. It is also recognized that the Act should be broadly interpreted to carry out its avowed purpose of assuring 'so far as possible every working man and woman in the Nation safe and healthful working conditions'. But Congress, in enacting the Act, clearly did not intend it to be the sole vehicle for carrying out its high purpose. It provided in the Act the mechanism for individual States to assume a great deal of that responsibility and has encouraged the States to do so through grants.

Section 4(b)(1) is intended to avoid duplication, without hiatuses, in the enforcement of job safety and health. Such duplication would occur here if the OSHA citation were allowed to stand.

The record compels a finding that another Federal agency, the Department of Transportation, has exercised its statutory authority by prescribing standards affecting occupational safety and health, that those standards apply to the working conditions that are the subject of the present OSHA citation, that section 4(b)(1) of the Act exempts those conditions from coverage by the Act, and that OSHA is without jurisdiction.

It is therefore ORDERED that Lone Star's motion to dismiss is granted and that Items 1 and 2 of Citation No. 1 are vacated.

HAROLD O. BULLIS

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(i) Is joined by mechanical couplings; and

(ii) Operates at less than 40 percent of SMYS.

(3) If the leak is due to a corrosion pit, the repair may be made by installing a properly designed bolt-on-leak clamp; or, if the leak is due to a corrosion pit and on pipe of not more than 40,000 psi SMYS, the repair may be made by fillet welding over the pitted area a steel plate patch with rounded corners, of the same or greater thickness than the pipe, and not more than one-half of the diameter of the pipe in size.'

Administrative Law Judge  
Date March 15, 1978

Dallas, Texas