



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.

EMERY AIR FREIGHT CORPORATION,
Respondent.

OSHRC Docket No. 00-1475

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

Emery Air Freight Corporation (“EAF”) operates a facility at the Dayton International Airport in Vandalia, Ohio where it handles and sorts freight. Following an inspection of EAF’s facility, the Occupational Safety and Health Administration (“OSHA”) issued citations alleging several violations of the Occupational Safety and Health Act (“the Act”). Most of the citation items were settled prior to the hearing. At issue on review in Citation 2, Item 1a, instances (g) and (h), is the allegation that Respondent violated section 5(a)(1) of the Act¹ by exposing cargo handlers to fall hazards when they use the elevator platforms on “K-Loader” industrial trucks to load and unload freight from aircraft.

¹ Section 5(a)(1) of the Act provides, in pertinent part:

Each employer...shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or

Before the judge, EAF argued that under section 4(b)(1) of the Act,² it was exempt from the Act's requirements here, specifically those of section 5(a)(1), because the Federal Aviation Administration ("FAA") exercised its authority over the cited working conditions by formally approving the Aircraft Loading Manual of Emery Worldwide Airlines ("EWA"), a separate business entity, and by incorporating the manual into EWA's operations specifications on June 20, 2000. The judge rejected EAF's preemption argument.

We agree with the judge that preemption is not established. The Commission evaluates an employer's section 4(b)(1) argument "by considering (1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if that agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law." *MEI Holdings, Inc.*, 18 BNA OSHC 2025, 2025, 1999 CCH OSHD ¶32,011, p.47,759 (No. 96-740, 2000), *aff'd without published opinion*, 247 F.3d 247 (11th Cir. 2001). Here, there is no dispute that the FAA has the statutory authority to regulate the cited working conditions. The record, however, does not show that there was any preemptive exercise of authority in effect at the time these alleged violations occurred, the critical time for determining jurisdiction. *See Joel Yandell*, 18 BNA OSHC 1623, 1999 CCH OSHD ¶31,782 (No. 94-3080, 1999). Instead, the record establishes the opposite. The violations alleged in items (g) and (h) occurred on February 23, 2000. Yet, the "exercise" EAF points to, the FAA's formal approval of EWA's Aircraft Loading Manual and incorporation into EWA's operations specifications on June 20, 2000, took place after the cited conduct occurred. We therefore find no basis for EAF's section 4(b)(1) claim. Nor do we see any reason to consider whether the FAA's approval would have any future effect. Our opinion on such matters would be an advisory one, which we decline to give. *See Secretary of Labor v. Contractors Welding of Western New York, Inc.*, 996 F.2d

are likely to cause death or serious physical harm to his employees.

² Section 4(b)(1) of the Act provides, in pertinent part:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise authority to prescribe or enforce standards or regulations affecting occupational safety or health.

1409, 1412 (2d Cir. 1993).³

The parties have resolved the other issue directed for review: whether the Secretary met her burden under section 5(a)(1) of the Act of showing that there was a feasible means of protecting employees working on the K-Loader from fall hazards alleged in instances (g) and (h) of Citation 2, Item 1a. In their briefs on review, they now agree that the procedure adopted by EAF after the OSHA inspection is a feasible method of abatement.⁴ Because there is no longer any dispute that there was a feasible means to abate the cited fall hazard, we affirm instances (g) and (h).

ORDER

Accordingly, we affirm the judge's rejection of EAF's section 4(b)(1) preemption argument. We affirm instances (a), (c), (g), (h), (k), (l) and (n) of Citation No. 2, Item 1a, as

³ EAF also argues that the FAA displaced OSHA coverage over the cited working conditions when it issued a 1975 Federal Register notice titled "Occupational Safety or Health Standards for Aircraft Crewmembers," in which the FAA announces that "[a]cting under its responsibility for the occupational safety or health of aircraft crewmembers, the FAA has issued numerous regulations directly affecting the workplace of pilots, flight engineers, cabin attendants, and other persons whose workplace is on aircraft in operation." 40 Fed. Reg. 29,114 (July 10, 1975). We see no indication that this notice applies to the cargo handlers at issue. Although not defined in the notice itself, a "crewmember" is defined in the FAA's regulations as "a person assigned to perform duty in an aircraft during flight time," and "flight time" is defined as "[p]ilot time that commences when an aircraft moves under its own power for the purpose of flight and ends when the aircraft comes to rest after landing." 14 C.F.R. § 1.1.

⁴ EAF safety manager Rusk developed a procedure where cargo handlers were required to stand in a rectangle painted in the middle of the K-Loader elevator while being raised to the bridge at its lowest position, approximately six feet high. The cargo handlers would then walk onto the K-Loader bridge and then hold onto the railing while the bridge is raised to the aircraft's working level.

serious violations of section 5(a)(1) of the Act.⁵ A penalty of \$7,000, as agreed upon in the parties' November 20, 2001 settlement agreement, is assessed.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
Thomasina V. Rogers
Commissioner

/s/ _____
James M. Stephens
Commissioner

Dated: September 14, 2004

⁵ The parties agreed in their November 20, 2001 settlement agreement that if EAF did not prevail in its preemption argument, EAF would accept instances (a), (c), (k), (l) and (n) of Citation 2, Item 1a as additional affirmed instances of violation of that citation item.

Secretary of Labor,

Complainant,

v.

Emery Air Freight Corporation,

Respondent.

OSHRC Docket No. 00-1475

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Emery Air Freight Corporation (Emery) operates freight handling and sorting services for Emery Worldwide Airlines at a facility adjacent to the Dayton International Airport, in Vandalia, Ohio. In January, 2000, the Occupational Safety and Health Administration (OSHA) inspected Emery's operation. As a result of the inspection, Emery received citations on July 19, 2000, which were timely contested.

Prior to hearing, the parties filed partial settlement agreements dated November 20 and October 5, 2001, settling most of the citations, which are approved and incorporated into this decision. The unresolved issues were heard on November 20, 2001, in Dayton, Ohio. Emery stipulated that it is an employer engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act (Act) (Tr. 6).

The unresolved issues involve willful Citation No. 2, item 1a, instances (a), (c), (g), (h), (k), (l), and (n), which allege a violation of § 5(a)(1) of the Act for exposing cargo handlers to fall hazards while using a K-Loader in loading and unloading freight from aircraft. The specific instances contested by Emery allege in instance (a) that cargo handlers standing on the fold-down front platform flaps on the bridge were exposed to falls in excess of 10 feet; in instance (c) that cargo handlers unloading cargo onto a K-Loader were exposed to 15-foot fall because of a 12-inch gap between the bridge and cargo door; in instance (g) that cargo handlers riding the elevator platform down without standard guardrails on all open sides were exposed to a fall hazard in excess of 4 feet; in instance (h) that cargo handlers riding the elevator platform up without standard guardrails on all open sides were exposed to a fall hazard in excess of 13 feet; in instance (k) that cargo handlers were exposed to a fall of 15 feet because the standard guardrail on the left side of the loader did not extend to protect the 25-inch opening between the rail and left side of the plane; in instance (l) that cargo handlers removing freight were exposed to a 15-foot fall without guardrails; and in instance (n) that cargo handlers were exposed to a 15-foot fall while loading freight without standard guardrails.

Emery asserts that OSHA's jurisdiction over the use of K-Loaders is preempted by the Federal Aviation Administration (FAA), pursuant to § 4(b)(1) of the Act. If found not preempted, Emery also argues that instances (g) and (h) of Citation No. 2, item 1a, regarding cargo handlers riding the elevator platform on the K-Loader to access the aircraft's cargo area, do not violate § 5(a)(1) of the Act because the abatement measures recommended by OSHA are not feasible.

According to the parties' settlement agreement dated November 20, 2001, if instances (a), (c), (g), (h), (k), (l) and (n) are not found preempted by FAA's jurisdiction, and instances (g) and (h) are found to be violations of § 5(a)(1) of the Act, the parties agree that Citation No. 2, item 1a, is reclassified to a serious violation with a penalty of \$7,000 (Tr. 4-5).

For the reasons discussed, OSHA's jurisdiction is not preempted by the FAA and instances (g) and (h) are violations of § 5(a)(1) of the Act.

The K-Loader Operation

Emery handles and sorts freight for Emery Worldwide Airlines at a facility adjacent to the Dayton International Airport in Vandalia, Ohio. Emery Worldwide is the FAA certificate aircraft carrier. Freight arriving at the Dayton facility is unloaded, sorted, and reloaded by Emery onto aircraft for distribution throughout the United States. The Dayton facility operates 24 hours a day, 7 days a week (Tr. 22, 55, 87-88, 191).

Emery employs approximately 2,500 cargo handlers. On average, 55-60 aircraft pass through the Dayton facility daily. The majority of the loading and unloading activities occur during “prime time,” which is between midnight and 5:30 a.m. (Tr. 61-62, 145, 190-191).

Freight carried by aircraft is in standardized containers referred to as unit loading devices (ULDs). To load and unload the ULDs from aircraft, Emery uses an industrial truck referred to as a K-Loader. Emery has approximately 38 K-Loaders at the facility. The K-Loader is approximately 8-10 feet wide and 24-36 feet long. The K-Loader has two adjacent, independently controlled platforms referred to as the “bridge,” which is positioned at the aircraft’s cargo door, and the “elevator,” which is behind the bridge, used to raise and lower ULDs from the ground to the bridge. The floor of the platforms has powered bi-directional conveyor rollers which mechanically move the ULDs across the platforms. The ULDs are then moved into or from the aircraft’s cargo area. Both platforms can be raised to a height of 15 feet (Exhs. C-1, C-4, C-5, R-19; Tr. 22-23, 55-56, 97, 99-100, 189-190).

The ULDs are loaded or unloaded from the K-Loader, 2 to 4 at a time, depending on the size of the K-Loader. Tug trucks, typically with 3-5 dollies, transport the ULDs to and from the K-Loader to or from the sorting center. The ULDs are loaded onto or unloaded from the K-Loader’s elevator platform, which can be lowered close to the ground (Tr. 69-71).

Moving the ULDs to and from the aircraft’s cargo area is performed by a crew of approximately 5 cargo handlers and 2 supervisors on the ground. A crew typically loads and unloads a total of 7 aircraft per shift (Tr. 37, 201-202).

The operation of the K-Loader, including raising or lowering the elevator and bridge platforms, is performed from the operator’s control panel located on the bridge, which at its lowest level is approximately 6 feet above the ground. The bridge platform contains a fixed, telescoping metal ladder on the side where the operator’s station is located. The K-loader operator climbs the ladder to access the operator’s station and then drives the K-loader into

position at the aircraft. Opposite the operator's station, there is a guardrail along the bridge platform which extends toward the aircraft's fuselage. There are no guardrails along the sides of the elevator platform (Tr. 59-60, 81, 83-84, 90).

Once the K-loader is positioned next to the aircraft's cargo door, Emery's cargo handlers¹ accessed the cargo area by standing on the unguarded elevator platform, which raised them approximately 13 feet, level with the bridge platform and cargo door. After OSHA's inspection, the cargo handlers were raised on the elevator platform to the level of the bridge platform at its lowest point (approximately 6 feet above the ground). The cargo handlers then crossed to the bridge platform, which was raised to the level of the cargo door (Exh. C-9A; Tr. 35-36, 82-83).

OSHA initiated its inspection of Emery's operation on January 19, 2000, after receiving a referral complaint.² OSHA safety and health compliance officer Gaye Johnson observed Emery's cargo handling operation with the K-Loader on January 23, 2000, for approximately 2 hours (Exh. C-8; Tr. 22, 33-34). Johnson observed on two occasions 4 cargo handlers ride the elevator platform (Tr. 34-35). On one occasion, Johnson saw 4 cargo handlers ride the elevator up to a height of 13 feet (Exh. C-9a; Tr. 35-36). On another occasion, she observed cargo handlers standing at the edge of the elevator platform at a height in excess of 5 feet as the platform was lowered to the ground (Exh. C-9e; Tr. 37-38). In both situations, the elevator platform was unguarded and the cargo handlers were not protected by any form of fall protection (Tr. 38-39). Based on her observations, Johnson recommended a citation for violation of § 5(a)(1) of the Act, referred to as the general duty clause, for failing to provide fall protection.³

Discussion

Preemption - § 4(b)(1) of the Act

Emery argues, pursuant to § 4(b)(1) of the Act, that OSHA's jurisdiction is preempted by the FAA because the safe use of the K-Loader is addressed in an "Aircraft Loading Manual,"

¹Although not specifically identified as Emery's employees, there is no evidence of another employer performing cargo handling, and this was Emery's job. Therefore, the cargo handlers were employed by Emery.

²There is no evidence that the referral involved the operation of the K-Loader.

³There is no showing, and Emery does not assert, that any specific OSHA fall protection standard applies to the conditions alleged.

which was “accepted” and later “approved” by the FAA. Emery asserts that the Manual regulates the safety and health, including fall protection, of its cargo handlers involved in using the K-Loaders when loading and unloading freight.

The “Aircraft Loading Manual” prepared by Emery Worldwide Airlines contains a single reference, pertinent in this case, to K-Loaders. It states:

No GSE [ground service equipment] should touch the aircraft. All beltloaders, stairs, racks/K-Loaders should be positioned 2 inches from the fuselage--no more, no less. The loading/offloading operation will be much more efficient/expeditious/safe if the GSE is positioned according to the above procedure. (Exhs. R-1 and R-1a, Ch. 11, p. 11-8).

The Manual does not specifically address fall protection or the use of the elevator platform to access the aircraft’s cargo hold.

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 and health.

To preempt OSHA’s jurisdiction by another Federal agency’s authority, an employer, as an affirmative defense, must show that (1) the other Federal agency possesses the statutory authority to regulate the working conditions cited by OSHA, and (2) that agency has exercised its authority over the cited conditions by issuing regulations having the force and effect of law. *MEI Holdings, Inc., d/b/a Martin Electronics, Inc.*, 18 BNA OSHC 2025 (No. 96-740, 2000), *aff’d. without published opinion* (11th Cir. 2001).

FAA’s Statutory Authority

The FAA’s authority to regulate airline practices, methods, and procedures, including ground services such as Emery, is derived from § 44701(a)(5) of the Federal Aviation Act of 1958, 49 U.S.C. § 44701(a)(5), which allows the FAA Administrator to issue regulations and minimum standards necessary “for safety in air commerce and national security.” The Review Commission recognizes that “safety in air commerce” includes the authority to regulate “the

ground safety of airline personnel who are an integral part of air commerce.” *Northwest Airlines, Inc.*, 8 BNA OSHC 1982, 1989 (No. 13649, 1980) (OSHA regulations do not apply to working conditions of maintenance employees involved in servicing aircraft landing lights because of FAA’s approval of a maintenance manual pursuant to its authority to promulgate rules governing “safety in air commerce”).

By regulation, the FAA requires that “[e]ach certificate holder shall prepare and keep current a manual for the use and guidance of flight, ground operations, and management personnel in conducting its operations.” 14 C.F.R. § 121.133(a). Emery Worldwide Airlines is the certificate holder (Exh. R-1B). The manual required by § 121.133(a) must meet the requirements of § 121.135, which “include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety” and is to include “other information or instruction relating to safety.” Section 121.137(a) provides that copies of the manual required by § 121.133 are to be provided by the certificate holder to “[i]ts appropriate ground operations and maintenance personnel.” Emery performs ground freight handling operations for Emery Worldwide Airlines.

The “Aircraft Loading Manual” was prepared by Emery Worldwide Airlines pursuant to this authority. The unresolved issues involve the Manual’s force and effect in law and the working conditions covered.

The Manual’s Force and Effect in Law

A manual prepared by an employer, to preempt OSHA’s jurisdiction, must have the force and effect of law and must cover the same working conditions as addressed by OSHA. The Review Commission has found that in order to have sufficient force and effect of law to preempt OSHA jurisdiction, the manual must be required and approved by the FAA. In *Northwest Airlines, Inc.*, *supra*, the Review Commission concluded that a maintenance manual, which established a procedure for locking out wing flaps while an employee is changing the landing lights, has the force and effect of law because the manual was required by the FAA, “subject to FAA disapproval,” and included provisions designed to further the safety of personnel. *Id.* at 1993. In an interpretation letter to Senator Arlen Specter, dated November 14, 1990 (Attach. G to Emery’s Motion for Partial Summary Judgment), OSHA acknowledged that its jurisdiction is

limited to a significant degree by the regulatory authority of the FAA and notes that because the Review Commission ruled “OSHA may not enforce its standards for airline ground crews, such as baggage handlers, mechanics, and others, if the working conditions in question are addressed in an FAA-approved maintenance or operations manual,” OSHA “may issue citations only for those hazards which are not addressed in an FAA-approved manual.” Also, *see American Airlines, Inc.*, 9 BNA OSHC 1415 (No. 78-918, 1981) (OSHA precluded from citing the same working conditions which are contained in an FAA-approved maintenance manual dealing with identical hazards).

Other manuals prepared by airline employers have not been found to have the force and effect of law. In *American Airlines, Inc.*, 17 BNA OSHC 1552, 1554 (No. 93-1817 and 93-1965, 1996), the Review Commission concluded that American’s “General Procedures Manual” did not have the force and effect of law required to preempt OSHA. The Commission stated:

In sum, the FAA only requires the airlines to prepare ground operations manuals. As these manuals are not subject to FAA approval or disapproval, their safety provisions lack the force and effect of law necessary to constitute an exercise of regulatory authority preempting OSHA.

It is noted that American’s “General Procedures Manual” required, among other things, that “platform safety rails are in place” on mobile work platforms used by aircraft maintenance crews. As in this case, American argued that its Manual is the equivalent of an FAA requirement. The Review Commission rejected American’s argument. The FAA, in an *amicus brief*, stated that “ground operations manuals do not have acceptable or approved status pursuant to the pertinent FAA regulations; only maintenance manuals have such status.” The FAA informed the Commission that:

[A]n air carrier has complied with FARs 121.133 and 121.135 by having the required manual(s) and the proper operating procedures in the manual(s). These FARs [Federal aviation regulations] do not contain a federal regulatory requirement that air carrier personnel conduct their operations according to the personnel safety procedures in the manual(s).
(Exh. C-14).

Also, in an earlier case, the FAA’s Deputy Associate Administrator, by affidavit, stated before the Review Commission that the FARs require air carriers only to prepare and maintain

operations manuals; the FARs do not require air carriers or their personnel “to conduct their operations according to the procedures in the manual.” He also stated that “failure to follow manual procedures relating only to the safety of an employee engaged in ground operations is not a violation of the FARs” (Exh. C-13).⁴

In this case, the “Aircraft Loading Manual” used by Emery was reviewed and accepted by the FAA’s Flight Standards District office on August 1, 1998, with a statement that the “instructions and information contained therein [are] sufficiently adequate to allow affected personnel to perform their duties and responsibilities with a high degree of safety” (Exh. R-6). On June 20, 2000, the FAA’s Flight Standards District office approved Revision 8 of the Manual, after the OSHA inspection, but before the issuance of the citation.⁵ The Manual was at that time incorporated into Emery Worldwide Airlines’ Operations Specifications (Exhs. R-7, R-13B, pp. 24-27; Tr. 220-221, 224). Prior to June 20, 2000, the Manual was not part of the Operations Specifications (Exh. R-13B, pp. 46-47). Pursuant to 14 C.F.R. § 119.5(g), air carriers must comply with operations specifications issued to them by the FAA.⁶

Former FAA Principal Operations Inspector Vonderschmidt testified that the FAA had a regular presence at Emery’s Dayton facility during the time of OSHA’s inspection. He stated that as many as 6 FAA inspectors, both maintenance and operations inspectors, were present on a regular basis to ensure compliance⁷ (Exh. R-13B, pp. 12, 15-16, 18). Vonderschmidt testified that there is little difference between acceptance and approval of a manual in terms of an airlines’ obligation to comply (Exh. R-13B, p. 45). He also testified that his review and approval of Revision 8 on June 20, 2000, did not involve the operation of the K-Loader (Exh. R-13B, pp. 46, 67-68). According to Vonderschmidt, if Emery failed to comply with the “Aircraft Loading Manual,” the FAA inspector would first discuss the non-compliant activity with the employee. If

⁴*Allegheny Airlines, Inc.*, 9 BNA OSHC 1623 (No. 14291 and 14345, 1981) *reversed sub nom, U.S. Air, Inc.*, 689 F.2d 1191 (4th Cir. 1982) (Review Commission finding that locked exit doors required in employer’s written security program approved by the FAA did not cover the same working conditions as the OSHA regulation was reversed by the Fourth Circuit). The Review Commission did not make a finding regarding the force and effect of the written security program in law. *Id.* at 1628.

⁵The OSHA citation was issued July 19, 2000, and the OSHA inspection began January 19, 2000.

⁶14 C.F.R. § 119.5(g) provides in part that “No person may operate as a direct air carrier or commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications.”

⁷Because of an accident in February, 2000, there were as many as 25 FAA inspectors (Tr. 245).

non-compliance continued, which in his experience never happened, Vonderschmidt stated that the certificate holder, Emery Worldwide Airlines, would have to get the contractor to comply or find a new contractor. Also, the FAA could issue a Letter of Investigation with proposed penalty or remove the Manual from the Operations Specifications, which would mean cargo could not be loaded or unloaded (Exh. R-13B, pp. 28-31, 40-41).

Vonderschmidt's testimony is supported by Emery Worldwide Airlines' Director of Quality Assurance, James Owens, who testified that Emery's cargo handlers are required to comply with the "Aircraft Loading Manual." The FAA would not allow Emery's cargo handlers to load or unload freight contrary to the Manual (Tr. 219, 225-227, 257-258). It is Owens' understanding that an "accepted" manual is binding with respect to the FAA Flight District Office who has oversight responsibility for the certificate holder and its contractors while an "approved" manual is binding by all FAA Flight District Offices (Tr. 230-232).

The record in this case fails to support Emery's claim that its "Aircraft Loading Manual" has the force and effect of law. The Manual is an operations manual similar to the "General Procedures Manual" in *American Airlines, Inc.*, 17 BNA OSHC at 1554, which the Review Commission found lacked the force and effect of law.

FAA Director of Flight Standards Service Nicholas Sabatini, in an affidavit, states that the FAA has no enforceable regulations pertaining to ground cargo handling personnel involving "[g]uard rails or fall protection on conveyor belt loaders and K-Loaders" when loading or unloading aircraft. He also states that "[t]he FAA has not issued any Administrative Procedures Act rule asserting any nexus between the health or safety of a ground cargo holding person in the conduct of his or her work and aviation safety." He concludes that the FAA cannot enforce the provisions in the air carrier loading manual dealing with "guard rails or fall protection on conveyor belt loaders and K-Loaders" (Exh. C-11).

The Review Commission "gives considerable weight to a Federal agency's representation as to its authority to regulate cited working conditions. However, the Commission independently reviews the statutory and regulatory provisions at issue, as well as the evidence, to determine whether that view is reasonably supported by the record." *JTM Industries, Inc.*, 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001).

The acceptance and approval of an “Aircraft Loading Manual” by an FAA Flight Standards District office does not independently confer legal status on the Manual that is not otherwise enforceable. *American Airlines, Inc.*, 17 BNA OSHC at 1554, n. 2 (evidence “regarding the FAA’s treatment of the manual during investigations and enforcement activities” need not be addressed because the manual lacks force and effect of law). “The Commission does not oversee the adequacy of another agency’s enforcement efforts.” *Northwest Airlines, Inc.*, 8 BNA OSHC at 1990. Since the FAA has not issued any rule asserting a nexus between the health and safety of cargo handlers and aviation safety, the Manual provisions regarding K-Loaders do not have the force and effect of law. Emery’s interpretation of the information published by the FAA is contradicted by the plain language of the text and has been officially repudiated by the FAA (Exh. C-11).

Also, the record fails to show a single instance of an FAA enforcement action for failure to follow an operations manual, as opposed to a maintenance manual. The one letter of FAA investigation produced by Emery relates to a failure by a ground handling contractor to maintain a current “Aircraft Loading Manual,” rather than a failure to follow the manual (Exh. R-11). This is consistent with FAA regulations merely requiring that such a manual be developed and maintained. Without a rule and an FAA finding of a nexus to aviation safety, the FAA cannot enforce the Manual dealing with fall protection on the K-Loader.

The testimony of Vonderschmidt regarding an airline’s legal obligations under the Manual is given little weight. His testimony is confusing as to the FAA’s responsibility with regard to the safety of cargo handlers and the operation of the K-Loader. Vonderschmidt had worked for the FAA as an inspector for less than 4 years, and he personally did not conduct ramp inspections (Exh. R-13B, pp. 6, 69-70). He made clear that the FAA’s primary responsibility was the safety of the aircraft, and only secondarily the safety of cargo handlers entering and exiting the aircraft (Exh. R-13B, p. 49). Further, it is noted that the FAA enforces its regulations by inspecting FAA certified air carriers. Emery did not hold the FAA certificate, was not an air carrier, and was not the subject of FAA enforcement activity. Emery Worldwide Airlines held the FAA certificate and was subject to FAA jurisdiction and enforcement action (Exh. R-13B, p. 48; Tr. 252-253).

Working Conditions

Even if the “Aircraft Loading Manual” has the force and effect of law, the Manual fails to cover the same working conditions addressed by the OSHA citation. Preemption from OSHA jurisdiction is found only if the working conditions at issue are covered by the other agency. The other agency’s safety standards need not be similar or as equally stringent in order to preempt OSHA. The Review Commission stated in *Consolidated Rail Corp.*, 16 BNA OSHC 1033, 1035 (Nos. 91-3133 and 91-3134, 1993), that word-for-word similarity between the OSHA requirements and the requirements by another agency is not required.

The other agency’s standards must be shown to affect the safety of employees. The Supreme Court in *Secretary of Labor v. Mallard Bay Drilling, Inc.*, 122 S.Ct. 738, 19 BNA OSHC 1721 (No. 00-927, 2202), states:

Congress’ use of the word ‘exercise’ makes clear that . . . mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA’s jurisdiction. Furthermore, another federal agency’s minimal exercise of some authority over certain conditions . . . does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes clear that OSHA is only pre-empted if the working conditions at issue are the particular ones ‘with respect to which’ another federal agency has regulated, and if such regulations ‘affect occupational safety or health.’

The issue, in this case, is whether OSHA’s general duty clause violation for lack of guardrails to prevent falls is preempted by the requirement in the “Aircraft Loading Manual” used by Emery to locate the K-Loader no more, or less, than 2 inches from the aircraft’s fuselage. In essence, are the same working conditions cited by OSHA covered by the Manual?

The Supreme Court in *Mallard Bay Drilling Inc.*, id. at 1723 fn. 7, recognizes at least two approaches used by courts in defining “working conditions” -- a “hazard-based” approach and an “area-based” approach.

A “hazard-based” approach, which the Secretary of Labor endorses, focuses on “the particular physical and environmental hazards encountered by an employee” on the job. Brief of Petitioner 24; see, e.g. *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 779-780 (CA 2 1984). In contrast, an “area-based” approach defines “working conditions” as the “area in which an employee customarily goes about his daily tasks.” *Southern R. Co.*

v. Occupational Safety and Health Review Comm'n, 539 F.2d 335, 339 (CA 4 1876).

Although the Supreme Court did not have to choose between the approaches in the *Mallard Bay Drilling* case, it is clear that if the “Aircraft Loading Manual” used by Emery is directed at the employee’s surroundings or hazards, expressed either as a location or a specific item, OSHA coverage may be displaced. The Commission defines working conditions “in terms of the environmental area in which -- employees go about their work, their surroundings, or the hazards to which they may be exposed. *Consolidated Rail Corp.*, 16 BNA OSHC at 1036-1037.

The “Aircraft Loading Manual” is used by Emery’s cargo handlers when loading or unloading freight from aircraft. As noted previously, in accepting the Manual on August 1, 1998, the FAA described the manual as providing “instructions and information contained therein sufficiently adequate to allow affected personnel to perform their duties and responsibilities with a high degree of safety” (Exh. R-6).

With regard to the operation of the K-Loader, the Manual, in pertinent part, states that when an aircraft lands and is ready to be off loaded:

No ground support equipment should touch the aircraft. All beltloaders, stairs, racks/K-Loaders should be positioned 2 inches from the fuselage--no more, no less. The loading/offloading operations will be much more efficient, expeditious, safe if the ground support equipment or GSE is positioned according to the above procedure.
(Exh. R-1; Chapter 11, p. 11-8)

The Manual’s principal concern involves maintaining the integrity of the aircraft’s fuselage, not the safety of cargo handlers. The working conditions preempted by the FAA is the aircraft’s safety and integrity, which includes the proper weight and balancing of cargo in the cargo hold and the entering and exiting of the aircraft. Such working conditions do not extend to the use and operation of the K-Loader, except as to its location at the aircraft. The Manual does not describe the procedure cargo handlers use to access the cargo hold to load and unload freight. It is silent and thus not approved by the FAA. The Manual does not address riding the elevator platform, the bridge platform, or the use of fall protection. The FAA inspections did involve the use of the elevator platform by cargo handlers to access the cargo hold. The inspections were to assure that the K-Loader was positioned to avoid damaging the aircraft’s fuselage (Exh. R-13; Tr.

246-247, 250). Vonderschmidt explained that the Manual's 2-inch provision was intended primarily to protect the aircraft. The safety of employees in crossing from the bridge platform to the aircraft's cargo area was only incidental and secondary to the FAA's primary concern of maintaining aircraft integrity (Exh. R-13B, pp. 49, 52, 62). Although he stated that Emery was required to comply with the 2-inch provision (Exh. R-13B, pp. 18-19), Vonderschmidt also stated that:

An accepted manual has a little leeway inasmuch as what they can say. As we're looking in this -- this thing that I was handed, where the guardrails or fall protection or conveyor belt, K-loaders, machine guards or conveyor belt K-loaders, we have nothing to do with that as far as the FARs are concerned.

These are -- this -- this is wording; not this is wording, but -- but wording can put -- be put in there by the -- operator themselves on how the K-loader can be used, how it's -- how fast it's to be driven and so forth and so on. That has nothing to do with the FAA.

Our--our main thrust is the safety of the aircraft, so--so when the airplane takes off there--there's no problem.
(Exh. R-13B, pp. 63-64).

In other words, an airline employer is permitted to freely establish its own working instructions for employees handling cargo, and as long as it does not affect the safety of the aircraft, the FAA is not involved. The principal purpose of the 2-inch provision is to prevent damaging the aircraft. The working conditions addressed in the Manual involve the aircraft, not the safety of cargo handlers on the K-Loader.

In Citation No. 2, item 1a, the various instances involve alleged failure to protect employees from fall hazards resulting from employees' use of K-Loaders. The Manual does not address the safety of cargo handlers except as incidental to the 2-inch provision. The unsafe conditions cited and abatement differ from the placement of the K-Loader. The placement of the bridge 2-inches from the airplane does not protect employees who are riding on the elevator platform without fall protection

Emery's § 4(b)(1) preemption argument is rejected.

ALLEGED VIOLATIONS

Section 5(a)(1) - General Duty Clause Violation

To establish a violation of § 5(a)(1) of the Act, the Secretary must prove that (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1168 (Nos. 91-3144, 92-238, 92-819, 92-1257, 2000).

Instances (g) and (h) of the citation allege that cargo handlers were riding the elevator platform without fall protection. The facts are undisputed. Four cargo handlers were observed riding the unguarded elevator platform of the K-Loader to approximately 13 feet, level with the cargo door, and riding it down to the approximate 5-foot level (Exhs. C-8, C-9). The cargo handlers were standing near the unguarded edge of the platform and exposed to a fall hazard. The cargo handlers were not protected by any form of fall protection.

Emery Worldwide Airlines' corporate safety and health director John Butler testified that Emery has used the K-Loader for 14 years without an accident as a result of an employee's fall (Tr. 78). CO Johnson confirmed that in reviewing hundreds of Emery's accident reports for a 2-year period, she did not find any accidents involving the use of the elevator platform to access the bridge (Tr. 130-131).

Despite the lack of accidents, a fall in excess of 13 feet to a concrete runway from an open-sided platform is clearly a hazard that could cause serious injury. There is no dispute that a fall from heights in excess of 5 feet is likely to cause serious physical harm. Emery Worldwide's safety director admits that a fall from the elevator platform at a height of even 6 to 7 feet constitutes a serious hazard (Tr. 92-93). Also, it is noted that the elevator platform is uneven with rollers and contains numerous pinch points which could cause injury to employees riding on the platform (Exh. C-1, warning in Emery's safety video). The lack of injuries is not dispositive of whether employees are exposed to an unsafe condition. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1150 (No 88-1250, 1993), *rev'd. in part on unrelated grounds*, 25 F.3d 653 (8th Cir. 1994).

A recognized hazard, as required by § 5(a)(1), is defined in terms of preventable consequence of the work operation. *Morrisson-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-22 (No. 88-572, 1993). The fall hazard involving the K-Loader is recognized by Emery in its “Your Safety” video prepared prior to the OSHA inspection (Exh. C-1). The training instruction with “Your Safety” video specifically prohibits riding the elevator platform. It states that “[n]o one may ride the elevator of a K-Loader, riding the elevator is prohibited and as a K-Loader operator it’s your responsibility to make sure there are no passengers on the elevator of the machine you are operating” (Exh. C-2). Also, written safety materials prepared by Emery prohibit employees from riding the elevator platform (Exhs. C-3, C-4). Emery’s “K-Loader Operations Facilitator’s Guide,” in a test given to trainees, states as true that “ramp workers must never ride the elevator of the K-Loader” (Exh. C-3, p. 2 of 3). The training materials on the safe operation of the K-Loader were developed in 1999 and new cargo handlers were trained with the material in early 2000 (Tr. 57, 59).

Also, the manufacturer’s manual for the K-Loader warns that “[t]he Commander 15 is not designed for use as a transporting vehicle. Any attempt to use it for operations other than cargo transfer may result in injury to personnel or damage to equipment.” It cautions employees when walking on the platforms at all times to “avoid stepping on rollers or cluster roller assemblies” (Exh. C-6). The warning indicates that injury to personnel could cause death. The FMC “Service Bulletin” states:

Personnel should NEVER walk on the platform or ride the platform when the engine is running. All operators must train personnel not to use the rear platform as an elevator to access the bridge. Bridge access should be by the ladder only.
(Exh. C-7, p. 2).

Based on these facts, Emery’s cargo handlers were exposed to a recognized fall hazard that could result in serious injury or death.

The issue in dispute is whether the Secretary’s proposed abatement measures are feasible. As an element of a § 5(a)(1) violation, the Secretary must show that her proposed abatement method would materially reduce the hazard, not that it would necessarily eliminate the hazard. The Act requires that the proposed abatement will “eliminate or materially reduce the hazard.” Also, *see Cardinal Operating Company*, 11 BNA OSHC 1675, 1677 (No. 80-1500, 1983).

As a means of abating the fall hazard in accessing the aircraft's cargo hold, the Secretary recommends that the cargo handlers, instead of using the elevator platform, use (1) crew stairs, (2) other vertical lifting devices, or (3) the stationary ladder at the K-Loader's bridge.

Crew Stairs

There is no dispute that Emery's cargo handlers could use crew stairs to access the cargo area through the aircraft's cabin area on certain wide-body planes. The crew stairs have full length railings on either side to prevent falls. On some wide-body aircraft, a narrow access door in the cabin area allows entry into the cargo area from the cockpit. These wide-body aircraft, however, comprise very few of the aircraft flying in and out of the Dayton facility. The record does not indicate the number or percentage of such wide-body aircraft.

It is undisputed that on the vast majority of aircraft handled by Emery, access to the cargo area from the cockpit is blocked. If the cargo area is full of ULDs, there is no space in which to enter. The first cargo position nearest the cockpit is left in place until all of the other cargo is removed to prevent the aircraft from tipping onto its tail. The first cargo position acts as a counterweight. Also, separating the cargo area from the cockpit may be either a solid metal wall with a narrow access door to one side or a 9G net. The 9G net is used to protect the flight crew from cargo that could inadvertently move forward into the cockpit during flight. According to Emery, the 9G netting cannot be removed by cargo handlers, per FAA regulations. With the 9G netting in place, cargo handlers cannot access the cargo area by using the crew stairs to the cockpit.

CO Johnson agreed that the 9G netting could not be removed. She did not know whether the cargo handlers could access the cargo hold through the 9G net. Johnson also testified that even at the end of the shift when the aircraft is empty and is to be loaded, she did not know if employees could access to the cargo area through the 9G net (Exh. C-9c; Tr. 42, 60, 62-64, 112-114).

Also, the record indicates that a number of different employees use the crew stairs into the cockpit, including maintenance employees, sanitation workers, and others with various flight-related paperwork (Tr. 104-105). The FAA requires that any time the cockpit door is open, the

crew stairs must be in place “to avoid having someone step out of an airplane mistakenly” (Tr. 104).

Based on these problems, CO Johnson concedes that for the vast majority of aircraft, the cargo handlers could not use the crew stairs at the cockpit (Tr. 44, 112-113). She testified that the stairs could not have been used during her inspection on February 23, 2000 (Tr. 44).

Therefore, the Secretary proposes the use of a second set of crew stairs at the cargo door. The Secretary proposes that when an aircraft is fully loaded, the K-Loader operator could remove the first ULD from the cargo hold and move the K-Loader back from the door, allowing a single ground crew member to position crew stairs in front of the cargo door. Cargo handlers would then climb the stairs and enter the cargo area to begin unloading while the K-Loader is re-positioned at the cargo door. After the aircraft is unloaded, the K-Loader would be driven away and the crew stairs moved back to the cargo door to allow the cargo handlers to exit the aircraft. When loading an aircraft, the procedure could be reversed (Tr. 44-45).

Like the use of crew stairs, the record does not show the feasibility of a second set of stairs. As discussed, when the cargo handlers first arrive at a fully loaded aircraft, all of the freight positions in the cargo area are full. The K-Loader must still unload the first ULD and a cargo handler would still have to access the cargo door to remove the ULD unless the K-Loader operator is able to leave his control panel to unload the ULD. This is not shown by the Secretary.

Also, Emery would be required to purchase a significant number of additional crew stairs, making its operation much less efficient by taking longer to perform, and multiplying the opportunities to damage aircraft. OSHA did not show how many additional crew stairs would be needed and the cost of the stairs (Tr. 120-122, 128). Currently, Emery has an estimated 35-40 crew stairs, including 2-3 spare crew stairs (Tr. 180). The record also fails to show that other freight handling employers use stairs for the purpose of accessing the cargo area.

The use of crew stairs is not shown feasible, except in limited situations involving certain wide-body aircraft where the crew stairs could be used.

Vertical lift devices

OSHA also recommends the use of vehicles with hydraulic lifts designed for ground support crews. The platform on vertical lifts is guarded to prevent falls. OSHA claims that such lift devices could be used in the same manner as crew stairs (Exh. C-10; Tr. 50-52).

Emery objects to vehicle-mounted vertical lift devices, as illustrated in ANSI A92.7-1990, for “Airline Ground Support Vehicle-Mounted Vertical Lift Devices,” on the same basis as the additional crew stairs. The record supports Emery’s objection. As in the case of crew stairs, when the cargo area is full, there is no space in which to enter the aircraft (Tr. 114). Thus, the K-Loader would have to remove the first ULD. The Secretary fails to explain how the first ULD could be removed without the cargo handler using the K-Loader.

Also, Emery would be required to purchase a significant number of new pieces of equipment, the cargo handling operation would be much less efficient and take longer, and the opportunities for damage to the aircraft’s fuselage would increase. There is no evidence that other freight handling employers use lifting devices for employees to access the cargo area for loading/unloading purposes (Tr. 66).

OSHA fails to show how many vertical lifting devices would be needed, their costs, where the devices would be located, or whether they would be acceptable to the FAA (Tr. 120-122, 128). Emery estimates that it would need to purchase about 30-40 lifting devices at a cost of about \$60,000 each (Tr. 76, 179-180).

CO Johnson did not identify where such additional equipment would be kept on the ramp except to state “towards the nose of the plane” (Tr. 115-116). It is noted that an OSHA citation issued on July 8, 1998, cited Emery at the Dayton facility for violation of 29 C.F.R. § 1910.176(a) for congestion around the crew stairs (Exh. R-20; Tr. 116-117). There are already 14 different pieces of equipment in the area of an aircraft, including a fuel tanker, crew van, supervisor vehicle, cargo handler vehicle, K-Loader, belt loader, and a tug with 4 dollies (Tr. 74, 177).

CO Johnson testified that ANSI A92.7-1990 was promulgated under the auspices of the Scaffold Industry Association, Inc., and neither Emery, its competitors, trade associations, nor manufacturers of K-Loaders were represented on the ANSI committee (Exh. C-10). She has never seen vertical lift devices used for the purpose of accessing a cargo area for loading/unloading purposes (Tr. 145). Johnson could not testify how the cargo handlers would access the platforms in these vehicles (Tr. 128).

The record fails to show that vertical lifting devices are feasible.

Ladder on K-Loader

Lastly, the Secretary asserts that cargo handlers could access the cargo area by climbing the stationary ladder on the K-Loader at the bridge platform and riding the bridge platform next to the guardrail to the height of the aircraft's cargo door (Tr. 141-142). The side rails on the ladder extend above the bridge platform approximately 3 feet. The bridge platform has a guardrail on one side that extends the length of the bridge (Tr. 46-47). In addition to the side guardrail, one of the K-Loaders observed by CO Johnson also had a front guardrail (Tr. 49). Where both side and front guardrails are present, the Secretary concludes that the cargo handlers would be fully protected from fall hazards while riding the bridge (Tr. 46, 49). On loaders equipped with only the side guardrail, cargo handlers may have to tie off to the guardrail (Tr. 47-48).

K-Loader operators regularly use the ladder attached to the side of the K-Loader to access the operator's station (Tr. 90). Operators use 3-point positioning (both hands and one foot at all times on the ladder) to climb the ladder (Tr. 50, 90). Of the 250 qualified K-Loader operators, Emery uses approximately 38-40 operators per shift (Tr. 191). There is no documented instances of operator injuries while using the ladder to access the K-Loader (Tr. 185).

If OSHA demonstrates that abatement methods exist, Emery must show that those means "will cause consequences so adverse as to render their use infeasible." *Royal Logging Company*, 7 BNA OSHC 1744, 1751 (No. 15169, 1979). Emery Worldwide Airline's safety director Rusk testified that after starting employment at the Dayton facility in September, 2000, a number of employees approached him and expressed concern about using the stationary ladder to access K-Loaders (Tr. 148-149). Their concerns included using the ladder during winter months when the cargo handlers wear bulky foul-weather boots and snow suits (Tr. 149-150). Also, safety director Rusk testified that because the ladder is vertical, a person's center of gravity is typically pulling away from the ladder (Tr. 165-166). If an employee's hand misses the rail of the ladder, as happened to Regina Boyd, the employee would fall backwards (Tr. 164-165). He also identified as risk factors which make use of the ladder more dangerous than the elevator platform, the employee's grip strength, the varying sizes of ladders, including the rungs, which are 1 ½ - 2 inches deep and the 16-inch width of the rails, and the limited area on which to step on the K-Loader, particularly when icy or wet. Rusk opined that since cargo handlers do not use the same

loader each night, the variability between models and the cargo handler's unfamiliarity may cause mis-steps or reaching for rails that are positioned differently on different models (Tr. 166-174).

Frank Baldasare, hourly employee with 20 years of experience, testified that as a team leader for cargo handler crews, the use of the K-Loader elevator platform to access the cargo area is "without question" safer than using the ladder (Tr. 197). He stated that the ladder is not safe because it is "very narrow," vertical, and requires "some physical strength to go up and down" (Tr. 197). He personally has used both the ladder and the elevator, and he did not want his crew to use the ladder (Tr. 198-199).

After OSHA's inspection, Emery required cargo handlers to use the stationary ladder. During the period of January - October, 2000, Emery claims that 9 cargo handlers were injured while using the ladder (Exh. R-16; Tr. 80-81, 185-188). The accident reports show a twisted foot while stepping to the ground (Diana Lavey), a cut shin (Charles Peters), pain in the right shoulder (Mike McReynolds), pain in the buttock as a result of his foot touching the ground (Lucio Tewolds), a pulled calf muscle (Talbert Gall), a leg abrasion and hurt left ankle (Jeffrey Chrisman), a strained calf muscle with a contusion (Stephen Dean), injury to back of right knee (Beth Laycok), and an injured tailbone (Regina Boyd). The injury reports show that 3 cargo handlers (Tewolde, Gall, Dean) were OSHA recordable cases which involved days off work and restricted work activity (Tr. 163-164).

"Under the general duty clause, if a proposed abatement method creates additional hazards rather than reducing or eliminating the alleged hazards, the citation must be vacated for failure to prove feasibility." *KoKosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1875, fn. 19 (No. 92-2569, 1996). Emery argues that its accident experience demonstrates that the use of the stationary ladder on the K-Loader is more dangerous than the employees' use of the elevator platform as the means to access an aircraft's cargo area.

Despite the accidents, the record fails to support Emery's assertion that the ladder is more dangerous. The concerns expressed by Rusk and Baldasare are based on speculation and a fear of change. There is no showing that cargo handlers received any ladder safety training prior to Emery's change in procedure.

For the most part, the reported accidents did not involve falls. The accidents were caused by stepping down too fast or cuts and bruises from equipment. Clearly, none of the injuries involved a fall of 13 feet or more, as could happen from the unguarded elevator platform. The accident in October, 2001, involving Regina Boyd, was a fall of 6 ½ feet from the ladder. However, Boyd, who was in training as an operator, was climbing at the top of the ladder when she reached and missed the rail at the bridge level and fell backwards (Tr. 164-165). She apparently did not maintain her 3-point positioning. Another documented injury (Beth Laycok) involved the ladder, as well as the completely unrelated activity of pushing carts. It is impossible to determine whether, and to what extent, her injury behind her knee was related to climbing the ladder as opposed to pushing carts (Tr. 188).

Also, it is noted that K-Loader operators have used the ladder regularly for many years without injury. The 10 documented injuries must be weighed against the tens of thousands of times operators have used the ladder each year to access the bridge without injury. Emery acknowledges that operators must use the ladder to access the operator's station (Emery Brief, p. 29, fn. 15).

The use of the ladder does not involve any additional costs to Emery. The stationary ladder is designed by the manufacturer for access to the bridge platform. Emery does not dispute the use of the ladder. Although of concern, the injuries reported by Emery do not establish that the cargo handler's use of the ladder as a method of accessing the K-Loader was infeasible.⁸

⁸After the OSHA inspection, the cargo handlers on the elevator platform were raised to the level of the bridge at approximately 6-7 feet above the ground and would walk across the bridge to the guardrail opposite the operator's station before being lifted the remaining distance to the cargo door (Tr. 36, 82-85). This abatement method is not considered. It is not accepted by OSHA and is not the subject of the citation.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

1. The parties' settlement agreements dated November 20, 2001, and October 5, 2001, are approved and incorporated as part of this decision.
2. Emery's § 4(b)(1) preemption argument as to instances (a), (c), (g), (h), (k), (l) and (n) in Citation No. 2, item 1a, is rejected.
3. Instances (g) and (h) of Citation No. 2, item 1a, alleged violation of § 5(a)(1) of the Act, is affirmed.
4. Based on the parties' settlement agreement dated November 20, 2001, Citation No. 2, item 1a, is reclassified as serious and a penalty of \$7,000 is assessed.

Date: April 8, 2002

/s/
KEN S. WELSCH
Judge