



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.

CONRAD YELVINGTON DISTRIBUTORS,
INC.,

Respondent.

OSHRC Docket No. 14-0713

ON BRIEFS:

Ronald Gottlieb, Appellate Attorney; Heather Phillips, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

David M. Toolan, Deputy General Counsel, Oldcastle Law Group, Atlanta, GA
For the Respondent

Veronica Chittim, Trial Attorney; Rebecca Behravesh, Trial Attorney; John Seguin, Assistant Chief Counsel for Safety; Sarah Inderbitzin, Deputy Chief Counsel; Amit Bose, Chief Counsel; Federal Railroad Administration, Washington, DC
Amicus Curiae

Christopher S. Perry, Senior Trial Attorney; Peter Plocki, Deputy Assistant General Counsel for Litigation; Paul M. Geier, Assistant General Counsel for Litigation; Kathryn B. Thompson, General Counsel; United States Department of Transportation, Washington, DC
Amicus Curiae

DECISION

Before: ATTWOOD, Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

At issue before the Commission is a decision of Administrative Law Judge Sharon D. Calhoun affirming a citation issued to Conrad Yelvington Distributors, Inc., a company that distributes aggregate such as ballast stone, concrete, decorative stone, and asphalt, by rail. On October 24, 2013, Conrad was providing aggregate by rail for the construction of a SunRail commuter rail station in Sanford, Florida, when a train it was operating derailed and overturned,

resulting in fatal injuries to the Conrad employee serving as the train's conductor. Following an inspection, the Occupational Safety and Health Administration issued Conrad a citation alleging a serious violation of section 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1).¹

The only issue in dispute on review is whether the judge erred in rejecting Conrad's assertion that OSHA's jurisdiction over the cited working conditions was preempted by the Federal Railroad Administration (FRA). According to the judge, the yard track on which Conrad operated the train at the worksite was a "plant railroad" that the FRA had chosen not to regulate. As discussed below, the judge's decision is affirmed.

DISCUSSION

Under section 4(b)(1) of the OSH Act, OSHA's jurisdiction over working conditions of employees may be preempted by another federal agency if that agency "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). In determining whether there is preemption under § 4(b)(1), the Commission considers: "(1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if the agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law." *JTM Indus., Inc.*, 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001) (citations omitted).

In its briefing notice, the Commission asked the parties, as well as the FRA, to address whether OSHA has jurisdiction over the cited working conditions. On review, Conrad principally reiterates the argument it made before the judge—that the FRA's jurisdiction preempts OSHA's jurisdiction because the FRA has regulated its operations on the yard track. Conrad also states, however, that "[i]f the FRA stipulates that [Conrad's] operations are a Yard Track and not subject to the FRA's regulation, . . . [Conrad] will agree to adopt the FRA's position with regard to those facts."

The FRA, in the *amicus curiae* brief it filed with the Commission, states that it has broad jurisdiction over all railroad carriers. However, as a policy matter, it has chosen to exclude

¹ Section 5(a)(1) provides that: "Each employer shall furnish to each of his employees 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 employees." 29 U.S.C. § 654(a)(1).

“plant railroads” from regulation. *See* 49 C.F.R. pt. 209, app. A. As explained in its brief, the FRA considers an entity to be a plant railroad when the track on which it operates: (1) is leased from a general system railroad for the entity’s exclusive use; (2) is only used by the entity and general system railroad for purposes of moving rail cars shipped to or from the plant; and (3) is immediately adjacent to the plant.² Here, the FRA notes that: (1) Conrad has a lease agreement with the general system railroad for exclusive operation over the yard track; (2) Conrad only operates over the yard track for the purpose of moving rail cars to or from its plant for pick up or set out by a general system railroad; and (3) that track is immediately adjacent to its plant. Thus, according to the FRA, Conrad operates on the yard track as a “plant railroad” and, therefore, the company is “excepted from FRA’s safety jurisdiction.” *Id.* Conrad has not filed a reply brief in response to the FRA’s amicus brief. *See* Commission Rule 93, 29 C.F.R. § 2200.93 (“Any reply brief permitted by these rules or by order shall be filed within 15 days after the second brief is served.”).

Given Conrad’s acceptance of the position set forth by the FRA, we find that OSHA’s jurisdiction over the cited conditions is no longer in dispute. Accordingly, the judge’s decision is affirmed.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: March 30, 2016

² The FRA also defines plant railroads as not operating on the general railroad system and as entirely confined to an industrial installation. *See* 49 C.F.R. pt. 209, app. A.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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Secretary of Labor,
Complainant,

v.

Conrad Yelvington Distributors, Inc.,
Respondent.

OSHRC Docket No. **14-0713**

Appearances:

Rolesia Butler Dancy, U.S. Department of Labor, Atlanta, Georgia,
For the Complainant

David M. Toolan, Esquire, Oldcastle Law Group, Atlanta, Georgia,
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Conrad Yelvington Distributors, Inc. (CYDI) distributes aggregate such as ballast stone, concrete, decorative stone and asphalt by rail for construction projects. On October 24, 2013, the Occupational Safety and Health Administration (OSHA) inspected the jobsite located at the SunRail Station in Sanford, Florida, where CYDI was engaged to transport aggregate for construction activities occurring on the site. The inspection was initiated following notification of a fatality which occurred on the jobsite on October 24, 2013. On that day, an employee of CYDI was fatally injured when the train he was working from derailed, then overturned, crushing him. Safety and Health Compliance (CSHO) Luis Cebollero conducted the inspection of the jobsite for OSHA. As a result of the inspection, the Secretary issued a serious citation to CYDI on April 21, 2014.

The serious citation alleges CYDI violated the general duty clause set out at section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act) by exposing employees to a struck/crushed-by hazard from rail cars and/or material being transported should a train be derailed. The Secretary proposed as a feasible means of abatement, communication between all parties to ensure that everyone is informed of when a train will be

traveling through the SunRail Station construction site. A penalty in the amount of \$6,300.00 was proposed by the Secretary for this alleged violation.

CYDI timely contested the citation. Thereafter, the Court held a hearing in this matter on January 29, 2015, in Orlando, Florida. Post-hearing briefs were filed by the parties on April 14, 2015.

For the reasons discussed below, the Citation is affirmed as serious and a penalty of \$6,300.00 is assessed.

Jurisdiction

CYDI denies jurisdiction of this matter is conferred upon the Commission, contending the Federal Railroad Administration (FRA) has exclusive jurisdiction of this matter. It also alleges as an affirmative defense that OSHA's authority is preempted by the FRA (Answer, ¶ 1, p. 1). Preemption under § 4(b)(1) of the Act by its nature is properly asserted as an affirmative defense, and as such is not jurisdictional, instead it is exemptory. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 13179, n. 2 (No. 15462, 1980); *Chevron Oil Co.*, 5 BNA OSHC 1118, 1119, n. 3 (Nos. 10799, 10646, 10786, 1977). Therefore, CYDI's affirmative defense of preemption will be addressed below in the *Discussion* section of this Decision.

Despite denying jurisdiction on the basis of preemption, CYDI admitted in its Answer and at the hearing that it was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 10-11; Answer ¶ 2, p. 1). Further, CSHO Cebollos testified CYDI engaged in activities that affected interstate commerce (Tr. 114). The Act applies to a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5), *see Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). Therefore, jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act.

Background

The SunRail Station in Sanford, Florida, a commuter rail station for transporting people to other commuter stations, was under construction at the time of OSHA's inspection at issue in this matter (Tr. 90-91). Construction had been ongoing for approximately seven to eight months and the construction was at least 60% complete at the time of the inspection (Tr. 30). A Joint venture between Archer Western and Railworks Maintenance of Way, Inc. (Railworks) was created and this joint venture was the prime contractor for the SunRail Station project (Tr. 155-

156). Railworks was under contract to build the tracks for the SunRail Station and to provide protection for the employees who worked on the tracks (Tr. 29). Archer Western provided employees for the construction work occurring on the project. CYDI was engaged to transport aggregate consisting of ballast stone and rocks by rail for the construction at the SunRail Station.

The aggregate transported by CYDI was to be used to build the tracks on the project. When needed, aggregate was transported by CYDI to an area on the site north of the SunRail Station identified as the yard. CYDI's operations for this project originated from its terminal located south of the SunRail Station construction site and ended at the yard, approximately 1½ miles from the CYDI terminal (Tr. 89-90). The area of the SunRail Station under construction was located between the yard and the CYDI terminal.

Three sets of tracks ran through the SunRail Station. These tracks were identified as Track 1, Track 2, and the Yard Track (Tr. 37). The Yard Track was used only by CYDI to transport the aggregate and was separate from the other tracks on the site (Tr. 37).¹ Tracks 1 and 2 were used by CSX and Amtrak (Tr. 37). Tracks 1 and 2 were described as controlled tracks, meaning they had a dispatcher, train orders and train bulletins to inform of anything which could affect the speed or movement of the train. The train bulletins and orders were provided to all crews working each day on the controlled tracks (Tr. 44). A radio frequency was also used to provide information regarding train activity. The Yard Track was described as non-controlled, meaning it had no dispatcher or other controls for the track (Tr. 82). Therefore, CYDI had no dispatcher, was not on the radio frequency and received no train orders or train bulletins for its operations on the site. CYDI operates only on non-controlled tracks.

The SunRail project also utilized briefings to inform personnel of activities occurring on the project. These briefings were conducted daily by the Employee in Charge (EIC) and by the Point of Contact (POC)(Tr. 43-45). CYDI was not included in these briefings (Tr. 58).

The non-controlled track used by CYDI to transport the aggregate for use on the construction site traversed the area where construction employees were working. Therefore, derails were put in place to protect these employees. Derails were placed on the north and south ends of the station to keep the CYDI train on the non-controlled track from coming through the area where the employees were working (Tr. 105). Because CYDI was not in the

¹ Only CYDI and CSX had authorization through a formal agreement to operate on the non-controlled Yard Track (Tr. 197). No evidence was adduced at the hearing that CSX operated on the Yard Track during the construction of the SunRail Station.

communication loop, the POC would typically communicate face to face with the conductor of the CYDI train once the train stopped short of the construction site (Tr. 38). The train would not proceed through while the employees were working and a derail was in place.

On October 24, 2013, CYDI planned to transport 10 train cars loaded with ballast stone to the yard, place the cars on an empty track and return (Tr. 169-170, 171). Arrangements for the delivery of the ballast stone for that day had been communicated by email to Eric Lawrence, Area Manager² for CYDI by Clint Hoffman of Railworks the day before (Tr. 171-172; Exh. R-1). Hoffman was project manager for the SunRail project (Tr. 183). Lawrence testified CYDI knew the construction crew started early in the morning at 6:30 or 7:00, but this was very unpredictable (Tr. 174). CYDI crews began working at 5:00 a.m. (Tr. 180). According to Lawrence, in order to transport the aggregate through the construction site, CYDI had to transport the aggregate through the construction site before the derails were put in place to protect the workers (Tr. 180).

Lawrence assigned the engineer and conductor to transport the aggregate to the yard (Tr. 173). He was their supervisor (Tr. 162). On the morning of October 24, 2013, the CYDI crew utilized a “push move”³ to transport the aggregate. In a push move, the locomotive or engine is located behind the train cars and pushes the cars forward. It was dark out when the CDYI crew began the push move that morning. The engineer was located in the engine and the conductor was located on the outside of the tenth rail car, putting him in front, in the direction of travel. The conductor was so situated to provide information to the engineer regarding obstacles and other conditions affecting the travel along the track (Tr. 98-99). The engineer and conductor communicated with each other by a two-way radio (walkie-talkies) (Tr. 97, 99). The train was traveling at the authorized speed for a non-controlled track, which was limited to 5 mph (Tr. 40, 179). They were heading north in the direction of the yard (Tr. 100). Shortly after 6:30 a.m. the tenth rail car contacted a derail which had been placed at the south end of the track (Tr. 66). The train cars derailed (Tr. 52-54). At least three of them overturned, including the tenth car upon which the conductor was riding, spilling the ballast stone (Tr. 53-54). The conductor was

² At the time of the hearing, Lawrence held the position of Rail Manager for CYDI. He had held that position for approximately one year (Tr. 161). As Area Manager he supervised approximately 25 employees including the conductor and engineer involved in the accident on October 24, 2013 (Tr. 162).

³ This move was also described at the hearing as a reverse or shoving movement of the train (Tr. 34, 36).

trapped underneath the overturned rail car and ballast stone (Tr. 54). He died as a result of being crushed (Tr. 107).

The derails on the track had been placed there by Travis Kendrick, POC for the SunRail project (Tr. 28-29). Kendrick was employed at that time by Railworks and was responsible for providing protection for the Archer Western employees who were scheduled to pour concrete that morning (Tr. 28, 29, 36-37). His duties involved receiving and conducting briefings; and placing the derails on the Yard Track (Tr. 43-45). On October 24, 2013, Kendrick placed the derail on the south end of the Yard Track at 6:30 a.m., and placed a derail on the north end of the Yard Track approximately 5 minutes later (Tr. 44, 46). According to Kendrick each derail was placed approximately 60 feet from the station (Tr. 45-46, 67). Kendrick testified the lighting conditions were bad that morning. It was dark; however there was other lighting at the very south end of the track (Tr. 49). Once the derails were in place, Kendrick went to his truck to fill out his job briefings (Tr. 75). Shortly after he began working on the job briefings in his truck, he heard a loud crash and then employees knocking on his truck telling him a train “went to the ground.”(Tr. 52). According to Kendrick, they did not say derail, just that it was a bad situation (Tr. 52). Kendrick went to the area of the derailment and learned the conductor was underneath the overturned train cars and ballast stone (Tr. 53). Kendrick called 911, the EIC and his supervisor. He then assisted with trying to free the conductor (Tr. 53).

OSHA initiated its inspection regarding the accident on the same day it occurred. Based on CSHO Cebollero’s inspection findings, the Citation for violation of the general duty clause at issue in this matter was issued to CYDI. Approximately one month after the accident, a re-enactment of the accident was conducted. CSHO Cebollero testified the re-enactment demonstrated the conductor would not have been able to see if there was an obstruction in front of him while he was riding the train. According to CSHO Cebollero, because the train moved very slowly, you could not hear it approaching. Only when the train was within the distance of approximately 100 feet, could it be heard. Because the train had no lights, you could not see it approaching (Tr. 111, 115).

DISCUSSION

Preemption

CYDI contends the Federal Railroad Administration (FRA) has exclusive jurisdiction of this matter, arguing the FRA has the statutory authority to regulate the working conditions cited

in this matter and has exercised that authority by issuing regulations having the force and effect of law (CYDI's brief, p. 6). CYDI relies on *Rockwell International Corp.*, 17 BNA OSHC 1801, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996). Further in support, CYDI cites only to the testimony of two witnesses: CSHO Cebollero's cross examination testimony that no specific aspects of railroad safety are regulated by OSHA (Tr. 132); and Kendrick's answer in the affirmative when asked if it was his "understanding that the FRA provided all the regulations governing your conduct while operating a train and serving as a conductor?" (Tr. 63) (CYDI's brief, p. 7).

The Court is not persuaded by CYDI's arguments and finds the authority and evidence it cites in support insufficient to establish the asserted preemption by the FRA. The Court notes although *Rockwell* sets forth the requirements an employer must establish for preemption of OSHA's jurisdiction in *Rockwell*, NASA had not taken action to preempt OSHA's jurisdiction although it had the legal authority to do so (Id. at 1803). Similarly, as set forth below, the FRA has declined to exercise its statutory authority over the type of working conditions present in the instant matter. The testimony cited to by CYDI also does not further its position, reflecting only the opinions and understandings of two lay witnesses. The Court finds this testimony is outweighed by the FRA's policy determinations regarding activities, such as those found in this matter, it has chosen not to regulate.

Section 4(b)(1) of the Act, 29 U.S.C. § 653(a)(1) 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.

Section 4(b)(1) of the Act does not provide an industry-wide exemption for railroads. The FRA does not divest OSHA of all jurisdiction over railroad safety and health, but only as to the aspects of railroad safety the FRA has chosen to regulate. *Association of American Railroads v. Department of Transportation*, 38 F.3d 582 (D.C. Cir. 1994). The FRA exercises authority over any railroad operating on the "general railroad system of transport," which is defined as "the network of standard gage track over which goods may be transported throughout the nation." 49 C.F.R. Part 209, Appendix A. Although the FRA's statutory authority extends to all railroad carriers, the FRA has chosen, as a matter of policy, not to exercise its jurisdiction under all of its

regulations to the full extent permitted by statute, choosing to regulate something less than the total universe of railroads.

For example, all of FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation (i. e. "plant railroads"), such as those in steel mills that do not go beyond the plant's boundaries . . . Other regulations exclude not only plant railroads, but all other railroads that are not operated as a part of, or over the lines of, the general railroad system of transportation. E.g., 49 CFR 214.3 (railroad workplace safety).

49 C.F.R. Part 209, Appendix A.

The Secretary contends CYDI's rail operations at its Sanford terminal meet the FRA definition of a "plant railroad" for which the FRA does not exercise its regulatory authority. (Secretary's brief, p. 16). The Court agrees. CYDI operated only on the Yard Track, transporting aggregate a distance of approximately 1½ miles from its terminal to the yard (Tr. 99). The record evidence shows its activities were confined to delivering train cars of aggregate and returning to its Sanford terminal. No evidence was adduced at the hearing showing CYDI's operations along the Yard Track extended beyond the area of the SunRail project, or that the Yard Track extended beyond the construction site. Nor does the evidence support a finding the Yard Track was capable of the transport of goods throughout the nation, or the travel of passengers between cities and within metropolitan and suburban areas, as required by the FRA definition of "general railroad system of transportation." 49 C.F.R. Part 209, Appendix A. The FRA exercises its statutory authority only over any railroad operating on what it has defined as the general railroad system of transportation. Accordingly, since the Yard Track does not meet this FRA definition, the undersigned finds CYDI's operations are not regulated by the FRA. Although the FRA has the statutory authority to regulate the operations performed by CYDI, for policy reasons, it has chosen not to do so. CYDI's affirmative defense of preemption, therefore fails.

The Citation

The Citation at issue here alleges a serious violation of the general duty clause, section 5(a)(1) of the Act. Section 5(a)(1) requires each employer to "furnish to each of his employees 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 employees." 29 U.S.C. § 654(a)(1). It alleges that employees were exposed to a struck/crushed-by hazard from rail cars and/or the material being transported should a train be derailed in violation of section 5(a)(1) as follows:

- a) On or about 10/24/2013 an employee riding on the steps of the tenth rail car of a train traveling in reverse on an uncontrolled track was trapped under the tenth rail car when it and three other rail cars derailed after contacting a derailler that had been placed on the track near the Sun Rail station that was under construction.

As a feasible means of abatement, OSHA proposed:

[T]o require communication between all parties to ensure that everyone is informed of when a train will be traveling through the Sun Rail station construction site so that employees can be cleared from the area of the tracks, deraillers are not placed on the tracks and any deraillers that had been placed on the tracks to protect the construction workers are removed from the track so the train can safely pass through.

Elements of a § 5(a)(1) Violation

Section 5(a)(1) of the Act mandates that each employer “furnish to each of his employees 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 employees.” 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

Erickson Air-Crane, Inc., 2012 WL 762001 at *2 (No. 07-0645, 2012). In addition, the evidence must show the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Deep South Cane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff’d Deep South Crane & Rigging Co. v. Seth D. Harris*, 24 BNA OSHD 1089 (5th Cir. 2013); *Otis Elevator Co.*, 21 BNA OSHC 2204 (No. 03-1344, 2007).

Whether an Activity or Condition at the site Constituted a Hazard

The Commission has held that, as part of his burden for proving a § 5(a)(1) violation, the Secretary “must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying the conditions or practices over which the employer can reasonably be expected to exercise control.” *Otis Elevator Co.*, *id* at 2206. The Secretary defines the hazard here as a struck/crushed-by hazard from rail cars and/or the material being transported should a train be derailed. The conductor is exposed to the hazard when transporting aggregate because he rides on the outside of the train car, positioned on a ladder attached to it, maintaining three points of contact with the ladder (Tr. 41-42, 169).

The push move utilized by the CYDI crew at the time of the accident occurred before sunrise and was made with the engine located in the back, and with ten cars ahead of it. Therefore, the engine lights were not available to illuminate the direction of travel for the conductor. The ten train cars carried ballast stone, which weighed in excess of 2,000 tons (approximately 200 tons per train car including the weight of the train car) (Tr. 171; Exh. R-1). The ballast stone was transported uncovered in the train cars (Exh. C-1, pp.1 and 5). Prior to the push move by CYDI, derails had been placed on the track to protect the construction employees. A derail would cause the train to derail so it is prevented from traveling into the area where the employees are located (Tr. 64). The train contacted the derail on the south end of the site and overturned as a result, causing the conductor to be struck and crushed by the load and/or train car (Tr. 52-54).

Because the purpose of the derail is to cause an abrupt stop of the train travel and derail the train, as occurred in the accident here, employees riding on the train at a minimum are subject to the hazard of being struck by materials being carried uncovered in the train cars, should they become dislodged as a result of the derailment. Here not only was the train derailed, but the cars overturned spilling several tons of ballast stone. The overturning of rail cars is not the intended purpose of derailment.

CYDI identifies the hazard as that of an improperly placed derail and acknowledges an improperly placed derail poses a workplace hazard which could cause serious injury or death (CYDI, brief, p. 5). Regardless of whether the derail was improperly placed, the hazard of employees being struck and crushed would be the same due to the abrupt derailment action should a train come into contact with a derail.

The Court finds the Secretary has established a condition or activity on the jobsite which constituted a hazard.

Whether CYDI or its Industry Recognized the Activity or Condition was Hazardous

A recognized hazard is a practice, procedure or condition under the employer's control that is known to be hazardous by the cited employer or the employer's industry. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). The Secretary contends CYDI recognized the hazards associated with a train striking a derail.

The record shows derailment of a train is a condition or practice that can result in hazardous consequences and should be avoided. As evidenced by provisions in its Railroad

Operating Rules Manual, CYDI set forth requirements for its employees to avoid conditions which could result in a derailment (Exh. C-2). Therein, CYDI provides that trains shall be moved at a speed that will permit stopping within one-half the range of vision, stopping short of, among other items, a derail (Tr. 111; Exh. C-2, p. 68). Further, the responsibility of the conductor was to look for obstructions, such as derails on the track, so the train could avoid them (Tr. 98-99).

The record evidence reveals CYDI was aware that derails were placed to protect the construction workers on the SunRail jobsite. CYDI Rail Manager Lawrence's testimony reveals CYDI wanted to deliver the aggregate on the morning of October 24, 2013, before the construction workers began working in order to avoid the derails (Tr. 180). According to Lawrence, "once the Sunrail derails are out they won't take them out and we can't go thru." (Tr. 180). POC Kendrick testified, however, that if they contacted him, he would move the derails so they could proceed through (Tr. 55-56).

Further, as reflected in the photographs admitted into evidence, the train cars carrying the ballast stone were not covered (Exh. C-1, pp. 1, 5). The uncovered aggregate in the train cars was in plain view. The Court finds these conditions establish CYDI's recognition of the hazard of employees being struck or crushed by a train or its contents should the train derail. The second element of the Secretary's case is established.

Whether the Hazard Caused or was Likely to Cause Death or Serious Physical Harm

There is no question, and the facts of this case demonstrate, the hazard cited in this case caused death. The conductor died from injuries he sustained directly as a result of the train coming into contact with the derail, causing the train to derail resulting in at least three cars overturning and spilling their loads. The conductor was trapped beneath the overturned rail car and ballast stone. The Secretary has established the third element of his burden of proof.

Whether Feasible Means Existed to Eliminate or Materially Reduce the Hazard

The Secretary proposes CYDI can eliminate or materially reduce the hazard by requiring communication between all parties regarding train activity. To establish the proposed communication is a feasible means of abatement, the Secretary elicited testimony from CSHO Cebollero. He testified the communication regarding the train activity OSHA was proposing could take place by telephone, by radio, or face to face (Tr. 121, 123, 125-127). In addition, Kendrick, POC for Railworks testified that on one occasion a CYDI employee, whom Kendrick

subsequently befriended, came out and inquired of him whether any derails were up because they needed to come out and get cars out of the yard (Tr. 38). Kendrick communicated face to face with this employee approximately ten times during the several months of construction (Tr. 39). He further testified:

Q. All right. Before the accident, how did Conrad [CYDI] confirm that the yard track was clear or safe for movement?

A. I always saw someone in person.

Q. And how did that personal contact come about?

A. If it was either in the daytime, they would, you know, pull up, and the engine would stop way short of the station. And then a conductor would get off and I would meet him partial the way and we would have a briefing.

Q. What would you discuss in that briefing?

A. What they were going to do, how long it was going to take.

(Tr. 38). This testimony reveals face to face communication was feasible.

In addition, the Secretary asserts CYDI's implementation of his proposed abatement method, in a bulletin it issued after the accident, supports the Secretary's assertion that the proposed communication is feasible (Exh. C-3).

According to CYDI, the prime contractor denied its requests to receive copies of the dispatch bulletins, access to the radio frequency, copies of the project contact list, and to be included on the project contact list (CYDI's brief, p. 5). Therefore, CYDI contends OSHA's proposed abatement could not be implemented prior to the accident and therefore was infeasible (CYDI's brief, p. 5). The Court disagrees. The abatement proposed by the Secretary requires CYDI to communicate with all parties regarding its activities, not that they communicate with CYDI. As set forth above, the Secretary has established a feasible means of abatement.

Whether CYDI had Knowledge of the Violative Condition

An essential requirement for meeting the Secretary's burden of proof is establishing the employer had knowledge of the hazard. "As part of the Secretary's *prima facie* case, [he] must show that the employer had actual knowledge of the violation or could have discovered it with the exercise of reasonable diligence." *Otis Elevator Co.*, 21 BNA OSHC at 2207.

CYDI was aware derails were placed on the tracks to protect the construction employees. Further, it was aware that the time when the construction workers would begin work was unpredictable. CYDI had encountered derails on other occasions at the jobsite. CYDI knew the

load it was transporting on the day of the accident was uncovered and also knew its conductor was positioned on the outside of the rail car.

With reasonable diligence, CYDI could have known the derails had been installed immediately prior to the push move it made to transport the ballast, if it had communicated with the POC and all other parties regarding its activities. Instead of communicating its activities, CYDI gambled it could make the delivery of the aggregate before the Archer Western employees began work that morning. CYDI knew the Archer Western employees could begin work as early as 6:30 a.m., so CYDI began its transport of the aggregate sometime prior to 6:30 a.m. However, it did not begin the transport soon enough. The south end derail had been installed at 6:30 a.m. and the CYDI train made contact with it approximately five minutes later. Its gamble did not pay off. Had CYDI communicated at a minimum with POC Kendrick, it would have known whether the derails were in place.

Lawrence, Rail Manager for CYDI testified he informed project manager Hoffman by telephone the day before the accident that CYDI would be delivering the ballast the first thing in the morning of October 24, 2013, as reflected in his email to Jennifer Hoffman in CYDI's corporate headquarters rail logistics department (Tr. 188-189; Exh. R-1). The Court finds Lawrence's testimony regarding his purported telephone conversation with project manager Hoffman to be self-serving, uncorroborated and therefore not reliable. The Court finds CYDI failed to communicate its transport of the aggregate for the morning of October 24, 2013.

For the foregoing reasons, the undersigned concludes the Secretary has met his burden of proving CYDI exposed its employees to crushing and struck-by recognized hazards. Further the Secretary has established a feasible means of abating the alleged hazard. The Secretary has met his burden of proving the alleged violation in this case. The Citation is affirmed.

Penalty Determination

The Secretary proposed a penalty of \$6,300.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act. CSHO Cebollero testified the gravity of the violation was determined to be high because it resulted in a fatality (Tr. 119). He further testified because CYDI employs approximately 50 employees, no reduction for the size of the company was given, and because the accident resulted in a fatality no reduction for good faith was given (Tr. 114). CYDI had no history of OSHA violations;

therefore they were allowed a 10% reduction for history, resulting in the proposed penalty of \$6,300.00 (Tr. 119). In consideration of these statutory penalty factors, the Court finds the proposed penalty of \$6,300.00 is appropriate.

Motions

At the conclusion of the presentation of the evidence at the hearing, CYDI moved to dismiss the Citation based on the testimony of CSHO Cebollero, arguing Cebollero's testimony establishes the elements of the defense of unpreventable employee misconduct (Tr. 205-207, 210-211). In further clarification, CYDI moved to amend its Answer to conform to the evidence presented at the hearing and moved to amend its Answer to allege the unpreventable employee misconduct defense (Tr. 210-212). The Secretary opposed the motions (Tr. 208). The Court denied the motions to amend on the basis they were prejudicial; the Secretary had not tried the issue by consent; and the evidence adduced by the Secretary was not to establish employee misconduct, but instead to establish knowledge and recognition of the hazard (Tr. 212-213). The Court deferred its ruling on the motion to dismiss, and advised the parties the motion to dismiss would be ruled on in this Decision. For the reasons set forth herein, the Secretary has met his burden of establishing a prima facie violation of §5(a)(1) of the Act, therefore CYDI's motion to dismiss is DENIED.

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 that:

1. Respondent's Motion to Dismiss is DENIED.
2. Item 1 of Citation 1, alleging a serious violation of Section 5(a)(1) of the Act, is AFFIRMED, and a penalty of \$6,300.00 is assessed.

SO ORDERED.

Date: September 28, 2015
Atlanta, Georgia

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge