UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W.— 9th Floor
Washington, DC 20036–3419

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-3292
YELLOW FREIGHT SYSTEMS, INC.,	:	
Respondent.	:	
TEAMSTERS LOCAL UNION NO. 17,	:	
Authorized Employee Representative.	:	

DECISION

Before: WEISBERG, Chairman; MONTOYA, Commissioner.*

BY THE COMMISSION:

At issue here is whether the Secretary of Labor ("Secretary") is preempted from enforcing certain standards promulgated by the Occupational Safety and Health Administration ("OSHA") against Yellow Freight Systems, Inc, ("YFS") because those standards are preempted by regulations promulgated by the Department of Transportation ("DOT"). The matter turns on whether language in the statute authorizing the DOT regulations precludes their preemptive effect. Administrative Law Judge James H. Barkley

*Commissioner Daniel Guttman did not participate in this case.

found that preemption was not precluded. We find that the language of the statute precludes preemption and that the cited OSHA standards are enforceable against YFS.

The case arose out of a 1993 inspection OSHA conducted at YFS' freight terminal in Aurora, Colorado. OSHA subsequently issued one serious and one other than serious citation. On review are seven items/subitems from serious Citation 1 and three subitems from other than serious Citation 2. Except for subitems 1a and 1b of serious Citation 1, the case is before us on a stipulated record and two volumes of exhibits. We affirm all the citation items and subitems on review, with two exceptions, which we remand to the administrative law judge.

We turn first to YFS' claim of preemption.

PREEMPTION

To prove an exemption under section 4(b)(1),[1] 29 U.S.C. § 653(b)(1), of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678, an employer must establish that another federal agency has the statutory authority to regulate the cited working conditions and that it has exercised that authority by issuing regulations that have the force and effect of law. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-4, 1991-93 CCH OSHD ¶ 29,758, p. 40,449 (No. 89-1017, 1992).

It is undisputed that DOT has the statutory authority to regulate the working conditions cited here. Section 1805(a) of the Hazardous Materials Transportation Act, enacted on January 3, 1975 ("1975 Hazmat Act"), provides:

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[1]Section 4(b)(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 and health.

§ 1805. Handling of hazardous materials

(a) Criteria. The Secretary is authorized to establish criteria for handling hazardous materials. Such criteria may include, but need not be limited to, a minimum number of personnel; a minimum level of training and qualification for such personnel; type and frequency of inspection; equipment to be used for detection, warning and control of risks posed by such materials; specifications regarding the use of equipment and facilities used in the handling and transportation of such materials; and a system of monitoring safety assurance procedures for the transportation of such materials. The Secretary may revise such criteria as required.

It is also undisputed that DOT has promulgated regulations regarding motor carrier safety and specifically pertaining to hazardous materials pursuant to this authority. See 49 C.F.R. Parts 171-180 (1994).

What is disputed is the meaning of the following language in section 1805(b), which first appears in the amended version of the Hazmat Act, *i.e.*, the 1990 Hazmat Act:

> For purposes of section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)), no action taken by the [DOT] Secretary pursuant to this section shall be deemed to be an exercise of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.[2]

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[2]That subsection in its entirety reads:

> **(b) Training criteria for safe handling and transportation.** (1) Federal requirements. Within 18 months after the date of the enactment of the Hazardous Materials Transportation Uniform Safety Act of 1990 (" the 1990 Hazmat Act") [enacted Nov. 16, 1990], the [DOT] Secretary shall issue, by regulation, requirements for training to be given by all hazmat employers to their hazmat employees regarding the safe loading, unloading, handling, storage, and transporting of hazardous materials and emergency preparedness for responding to accidents or incidents involving the transportation of hazardous materials.
> (2) Different training requirements. The regulations issued under paragraph (1) may provide for different training for different classes or categories of hazardous materials and hazmat employees.
> (3) Coordination of emergency response training regulations. In consultation

(continued...)

The judge rejected the Secretary's contention that by using this language "Congress extinguished the preemptive effects of all DOT regulations promulgated pursuant to section 1805 on OSHA regulations:"

> The language relied upon by the Secretary is contained within subsection (b) [of the 1990 Hazmat Act], which deals exclusively with training regulations not yet promulgated. It is preceded in subsection (b)(1) by a mandate to issue training regulations, and earlier in subsection (b)(3) by an edict that said training regulations not conflict with OSHA hazardous waste and emergency response regulations. The remaining portions of subsection (b) relate solely to training. The placement of the non-preemption language deep within subsection (b) [of section 1805 of the 1990 Hazmat Act] *rather than under subsection (a), which authorizes regulations covering the entire scope of hazardous materials handling* appears to limit the effect of the non-preemption language to training regulations issued pursuant to § 1805(b). The Secretary has offered no evidence of a contrary intent by Congress. (emphasis supplied)

The DOT, at our invitation, provided the Commission with its interpretation of the "reverse 4(b)(1)" language:

> The words "pursuant to this section," found in § 1805(b)(3), referred to the entirety of § 1805, entitled "Handling," and not solely to subsection 1805(b)(3), which pertained to emergency response training. This view is supported by the plain meaning of the word "section,"and the fact that Congress used the word "subsection" in the sentence immediately preceding

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[2](...continued)

> with the Administrator and the Secretary of Labor, the [DOT] Secretary shall take such actions as may be necessary to ensure that the training requirements established under this subsection do not conflict with the requirements of the regulations issued by the Occupational Safety and Health Administration of the Department of Labor relating to hazardous waste operations and emergency response contained in Part 1910 of title 29 of the Code of Federal Regulations (and amendments thereto) and the regulations issued by the Environmental Protection Agency relating to worker protection standards for hazardous waste operations contained in Part 311 of Title 40 of such Code (and amendments thereto). For purposes of section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)), no action taken by the [DOT]Secretary pursuant to this section shall be deemed to be an exercise of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

> the word "section" to refer to the emergency response training requirements of §1805(b)(3). Congress clearly knew how to refer to subsection 1805(b)(3) when it intended to do so.

We do not consider such statements controlling, but the Commission gives considerable weight to representations by federal agencies that they do or do not have the statutory authority to regulate certain working conditions, particularly where, as here, the statute reasonably supports the agency's interpretation. *Northwest Airlines*, 8 BNA OSHC 1982, 1986, 1988 & n.14, 1980 CCH OSHD ¶ 24,751, p. 30,487 & n. 14 (No. 13649, 1980). We have looked at the language of section 1805 and reached a conclusion similar to that of DOT. Giving the word *section* in §1805(b)(3) its intended meaning extends the effect of the "reverse 4(b)(1)" language beyond the training referred to in subsection 1805(b)(3) to all of section 1805. Thus, the DOT regulations issued under the authority of section 1805 relied on by YFS do not preempt the cited OSHA standards.

YFS' arguments regarding the continuing effect and reach of the regulations on which it relies do not affect our conclusion. We find here that Congress has eliminated any preemptive effect such regulations might have had. We do not otherwise address the continuing effect of those regulations. The reach of the "reverse 4(b)(1)" language clearly extends to regulations issued prior to the 1990 Hazmat Act along with post-1990 regulations. The operative language in section 1805 refers to action *taken* by the Transportation Secretary, which would refer to regulations already in existence in 1990 as well as those issued under the 1975 Hazmat Act.

Congress reaffirmed its reverse-preemption intention in 1994, after the citations in this case were issued. In the 1994 Recodification of the Hazmat Act, the "reverse 4(b)(1)" language was relocated.[3] The passage now appears as follows:

> **§ 5107. Hazmat employee training requirements and grants**
>
> . . . .
>
> **(f) Relationship to other laws.**

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[3]The Act was recodified at 49 U.S.C. § 5107(f)(2) on July 5, 1994.

. . . .

> **(2)** An action of the Secretary of Transportation under subsections (a)-(d)[4] of this section and sections 5106,[5] 5108(a)-(g)(1) and (h)[6], and 5109[7] of this title is not an exercise, under section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)), of statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

P.L. 103-272, July 5, 1994, 108 Stat. 745 (USSCAN, paper bound Vol. 5, August 1994).

This language confirms our conclusion that Congress intended to nullify the preemptive effect of DOT actions taken under section 1805. It specifically encompasses training provisions, as YFS argues, *as well as* section 5106, the recodified version of the

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[4]Subsection (a) is entitled "Training requirements," (b) "Certification of Training," (c) "Certification of training," and (d) "Coordination of training requirements."

[5]Section 5106 provides:

> **§ 5106. Handling Criteria**
>
> The Secretary of Transportation may prescribe criteria for handling hazardous material, including--
> **(1)** a minimum number of personnel;
> **(2)** minimum levels of training and qualifications for personnel;
> **(3)** the kind and frequency of inspections;
> **(4)** equipment for detecting, warning of, and controlling risks posed by the hazardous material;
> **(5)** specifications for the use of equipment and facilities used in handling and transporting the hazardous material; and
> **(6)** a system of monitoring safety procedures for transporting the hazardous material.

[6]Section 5108 is entitled "Registration." Subpart (a) is entitled "Persons required to file," (b) "Form, contents, and limitation on filings," (c) "Filing deadlines and amendments," (d) "Simplifying the registration process," (e) "Cooperation with Administrator," (f) "Availability of statements," and (g) "Fees."

[7]Section 5109 is entitled "Motor carrier safety permits."

broad materials handling provision formerly at section 1805(a) of the 1990 Hazmat Act.[8]

We now turn to the individual citation items.[9]

CITATION ITEMS

The judge found that YFS established preemption with regard to serious citation 1, items 1a and 1b. He rejected YFS' preemption claim for the remainder of the items, finding that the DOT regulations YFS relied on did not govern the cited working conditions. As we held above, because all the DOT regulations relied on by YFS were promulgated pursuant to section 1805, they do not involve an exercise of statutory authority that would preempt OSHA; thus the cited OSHA standards are enforceable against YFS. We therefore need not consider the judge's reasons for finding that DOT regulations were or were not preemptive. We consider only his treatment of the merits of each item.

Serious Citation 1, Items 1a and 1b

In Item 1a, the Secretary alleges that YFS violated 29 C.F.R. § 1910.38(a)(2) by not including the minimum required elements outlined in section 1910.38(b)(2)in its Emergency Evacuation Plan. In Item 1b, the Secretary alleges that YFS violated 29 C.F.R. § 1910.120(q)(1) by not developing and implementing an emergency response program to handle hazardous materials emergencies involving the release of certain chemicals.

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[8]YFS' reliance on unreviewed judges' decisions is misplaced. Unreviewed judges' decisions do not constitute Commission precedent. *E.g., Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1087, 1986-87 CCH OSHD § 27,814 (No. 81-984, 1987). In addition, we note that in *Yellow Freight System, Inc.* (Docket No. 90-85, 1991)(consolidated)(ALJ), the Secretary's decision to withdraw a citation and pursue a matter at a later time was a matter of prosecutorial discretion. *See Peavey Co.*, 16 BNA OSHC 2022, 2026, 1994 CCH OSHD ¶ 30,572, p. 42,324 (No. 89-2836, 1994). It was not a concession of DOT preemption.

[9]But for the 1994 recodification of the Hazmat Act, Commissioner Montoya would have affirmed Judge Barkley's decision that OSHA was preempted. However, by incorporating the exact language of section 4(b)(1) in this recodification, Congress has left no doubt that it intends for DOT's enforcement efforts under these provisions to have no effect on OSHA enforcement authority, even if OSHA's enforcement efforts would merely duplicate those of DOT. Though she considers such an open invitation to duplicative regulation to have been unwise, she believes the language of the recodification cannot be read any other way.

The judge vacated items 1a and 1b because he found that the cited OSHA standards were preempted by the DOT regulations at 49 C.F.R. §§ 172.602-604. For the reasons set forth above, we set aside the judge's action. However, because the stipulations of the parties do not cover the merits of items 1a and 1b and there is no record evidence on the items, they are remanded to the judge for further proceedings.

Serious Citation 1, Item 3

The Secretary alleges that YFS violated 29 C.F.R. § 1910.132(a)[10] by failing to provide personal protective equipment such as boots, gloves or an apron to a dock worker/driver who cleaned up a substance called Essentialube after his forklift truck blade ruptured a shipping container and caused the release of about 15 gallons of that material. The material safety data sheet for Essentialube indicates that it is made up of hazardous components that include "severely hydrotreated" mineral oil and flammable liquid solvent, and that plastic gloves and safety glasses are required for safe cleanup. It was stipulated that the employee who cleaned up the Essentialube spill was not provided with "chemical resistant gloves, boots, or an apron for use during the clean-up" [and that] "the employee was not injured in any way nor did he require any medical treatment." The judge affirmed the item but downgraded the characterization to other than serious after finding that the Secretary had not established a serious violation on a stipulated record that does not contain evidence

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[10]Section 1910.132(a) provides:

> **§ 1910.132 General requirements.**
>
> (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

of any health hazards associated with Essentialube beyond dermatitis. The judge did not assess any penalty.

We agree with the judge. The stipulation of the parties that the employee engaged in the spill cleanup was not provided with the appropriate personal protective equipment establishes that YFS did not comply with section 1910.132(a). Since the Secretary does not argue that the judge erred in characterizing the item as other than serious or in failing to assess a penalty, we affirm an other than serious violation of section 1910.132(a) and assess no penalty.

Serious Citation 1, Items 4a-4d

The Secretary alleges that YFS violated 29 C.F.R. §§ 1910.134(e)(1), (e)(3), (e)(5), and (e)(5)(i)[11] in that standard procedures were not developed for a specified Survivair

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[11]Sections 1910.134(e)(1), (e)(3), (e)(5), and (e)(5)(i) provide:

> **§ 1910.134 Respiratory protection.**
>
> . . . .
>
> (e) *Use of respirators.* (1) Standard procedures shall be developed for respirator use. These should include all information and guidance necessary for their proper selection, use, and care. Possible emergency and routine uses of respirators should be anticipated and planned for.
>
> . . . .
>
> (3) Written procedures shall be prepared covering safe use of respirators in dangerous atmospheres that might be encountered in normal operations or in emergencies. Personnel shall be familiar with these procedures and the available respirators.
>
> . . . .
>
> (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.
>
> . . . .
>
> (i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to

(continued...)

respirator used by an employee during a spill cleanup operation involving Nitrobond 881 Epoxy Resin((e)(1)); written procedures were not prepared covering safe use of the Survivair respirator and a Scottoramic gas mask used during the cleanup operation ((e)(3)); neither supervisors nor employees were trained on the proper selection, use, and maintenance of the Survivair or Scottoramic ((e)(5)); and both the Survivair and Scottoramic were worn under conditions preventing a good face seal ((e)(5)(I)).

The subitems arose out of a September 29, 1993, incident in which the contents of a container of Nitrobond 881 Epoxy Resin spilled inside a trailer parked at a loading dock at the YFS terminal. The following facts are stipulated: YFS employee Craig Strong was assigned to clean up the spill of the corrosive liquid (which may cause damage to the skin, eyes, gastrointestinal tract and lungs). Strong was provided with a Scottoramic gas mask respirator and a Survivair half-mask air-purifying respirator for use during the cleanup. He wore a beard at the time and was not provided with a respirator fit test. Strong was exposed to hazardous epoxy fumes during the cleanup and although he was wearing an unidentified-type of respirator, he subsequently received "medical treatment" as a result of his exposure to those fumes. YFS had not developed any written procedures for the safe use of either the Survivair or Scottoramic respirator in dangerous atmospheres.

The judge affirmed all four subitems and assessed an $1800 penalty. He found that YFS had failed to demonstrate that DOT had issued regulations intended to govern the cited working conditions -- a hazardous spill clean-up -- and that YFS did not comply with the

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[11](...continued)

> adjust it, and how to determine if it fits properly. Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also, the absence of one or both dentures can seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check. To assure proper protection, the facepiece fit shall be checked by the wearer each time he puts on the respirator. This may be done by following the manufacturer's facepiece fitting instructions.

cited provisions of section 1910.134. Because YFS has stipulated that its defense to all four subitems is "based exclusively on DOT safety regulation preemption," and we find no preemption here, the stipulated facts amount to a concession by YFS that it violated the cited standards. The facts also establish a violation. We therefore affirm the four citation items.

The Secretary proposed a combined penalty of $1800 for these items and the judge found that amount appropriate. YFS is a very large employer, with about 600 facilities nationwide; it has been cited many times nationwide. While the gravity of these violations is low to moderate, we note that the probability of an injury was relatively high. As the judge pointed out, the use of an inadequate respirator in a toxic atmosphere by an employee who thinks that he is adequately protected could lead to serious injury; the employee exposed here did require medical treatment. Based on the statutory criteria in section 17(j) of the Act, 29 U.S.C. § 666(j), and YFS' failure to contest the amount of the penalty on review, we assess a combined penalty of $1800 for these four subitems.

Other than serious Citation 2, Subitems 1a-1c

The Secretary alleges that YFS violated three standards: section 1910.134(f)(2)(i)[12]

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[12]Sections 1910.134(f)(2)(i), (f)(2)(iv), and (f)(5)(i) provide:

> **§ 1910.134 Respiratory protection.**
>
> . . . .
>
> (f) *Maintenance and care of respirators.*
>
> . . . .
>
> (2)(i) All respirators shall be inspected routinely before and after each use. A respirator that is not routinely used but is kept ready for emergency use shall be inspected after each use and at least monthly to assure that it is in satisfactory working condition.
>
> . . . .
>
> (iv) A record shall be kept of inspection dates and findings for respirators maintained for emergency use.
>
> . . . .
>
> (5)(i) After inspection, cleaning, and necessary repair, respirators shall be stored to protect against dust, sunlight, heat, extreme cold, excessive moisture, or damaging chemicals. Respirators placed at stations and work areas for

(continued...)

by failing to inspect monthly a specified Scottoramic gas mask kept ready for emergency use; section 1910.134(f)(2)(iv) by failing to maintain the required inspection records for the Scottoramic gas mask; and section 1910.134(f)(5)(i) by failing to clearly mark the storage cabinet to indicate that it contained the Scottoramic gas mask and Survivair respirator. No penalty was proposed.

The parties stipulated that:

> Yellow did not conduct monthly inspections to ascertain the satisfactory working conditions of the Scottoramic [Subitem 1a] . . . . Yellow did not maintain records of inspection dates and results for the Scottoramic stored on the South Dock Platform [Subitem 1b]. The cabinet in which the Scottoramic was stored was not labeled or marked to indicate that it was stored therein [Subitem 1c].

The judge affirmed these subitems. YFS has stipulated that its defense is "based exclusively on DOT safety regulation preemption," thereby impliedly conceding that it violated the cited OSHA standards. Furthermore, we find that the stipulated facts above establish the violations. We therefore affirm other than serious violations of all three items.

ORDER

Accordingly, the Commission:

(1) Reverses the judge's action in vacating subitems 1a and 1b of serious Citation 1 and remands those items to the judge for further proceedings in accordance with this decision;

(2) Affirms the judge's finding of an other than serious violation, without penalty, of item 3 of serious Citation 1;

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[12](...continued)

> emergency use should be quickly accessible at all times and should be stored in compartments built for the purpose. The compartments should be clearly marked. Routinely used respirators, such as dust respirators, may be placed in plastic bags. Respirators should not be stored in such places as lockers or tool boxes unless they are in carrying cases or cartons.

(3) Affirms the judge's findings of serious violations, with a combined penalty of $1800, of subitems 4a-4d of serious Citation 1; and

(4) Affirms the judge's findings, without penalty, as to subitems 1a-1c of other than serious Citation 2.

Stuart E. Weisberg
Chairman

Velma Montoya
Commissioner

Dated: July 31, 1996

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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 93-3292
YELLOW FREIGHT SYSTEMS, INC.,	
Respondent.	
TEAMSTERS LOCAL UNION NO. 17,	
Authorized Employee Representative.	

NOTICE OF COMMISSION DECISION AND REMAND

The attached decision and remand order by the Occupational Safety and Health Review Commission was issued on July 31, 1996.

FOR THE COMMISSION

Date: July 31, 1996

Ray H. Darling, Jr.
Executive Secretary

93-3292

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR Complainant, v. YELLOW FREIGHT SYSTEM, INC., Respondent, TEAMSTERS LOCAL UNION NO. 17, Authorized Employee Representative.	OSHRC DOCKET NO. 93-3292

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 16, 1994. The decision of the Judge will become a final order of the Commission on January 17, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 5, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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Petitioning parties shall also mail a copy to:

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ES-3'

DOCKET NO. 93-3292

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 16, 1994

Ray H. Darling, Jr.
Executive Secretary

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SECRETARY OF LABOR,
Complainant,

v.

YELLOW FREIGHT SYSTEM, INC.,
Respondent,

- - - - - - - - - - - - - - - - - -

TEAMSTERS LOCAL UNION NO. 17,

Authorized Employee
Representative.

OSHRC DOCKET
NO. 93-3292

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Yellow Freight System, Inc. (Yellow Freight), at all times relevant to this action maintained a worksite at 15950 E. Smith Road, Aurora, Colorado, where it operated a terminal facility incident to the interstate transport of freight. Yellow Freight is an employer engaged in a business affecting commerce and as such is subject to the requirements of the Act, except where its provisions are preempted by Department of Transportation regulations at 49 CFR parts 171-180 (1994). *See*, this judge's Orders dated July 26, 1994, and September 7, 1994.

Pursuant to a 1993 inspection of Yellow Freight's Aurora worksite, the Occupational Safety and Health Administration (OSHA) issued "serious" and "other than serious" citations, together with proposed penalties, alleging violations of the Act. By

filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

In lieu of a hearing, the parties have elected to submit this case on a stipulated record, pursuant to Commission Rule §2200.61. This matter is now ready for disposition.

Alleged Violations

Serious citation 1, items 1a and 1b.

Summary Judgment granted in favor of Yellow Freight. *See*; this judge's September 7, 1994 Order.

Serious citation 1, item 1c.

This item cites OSHA training regulations, which are specifically not preempted, pursuant to §1805(b)(3) of the HMTA. *See*; this judge's September 7, 1994 Order.

Citation 1, item 1c alleges:

§29 CFR 1910.120(q)(6): Training was not based on the duties and function to be performed by each responder of an emergency response organization:

> (a) Supervisors and shift operations managers did not receive adequate training on how to properly select and use personal protective equipment, the basic hazard risk assessment techniques, and the techniques as detailed for the first responder operations level employees in 1910.120(q)(6)(ii).

Facts

The parties have stipulated that Yellow Freight loads and unloads hazardous materials incident to the transport of freight. Yellow's operations include, *inter alia*, the handling and shipping of containers of flammable and/or combustible paints, sulfuric acid, ethyl alcohol (flammable), hydrochloric acid (combustible), flammable ink, alkali liquids (combustible), acetic acid solution (corrosive), methylene chloride (corrosive), naphtha (flammable), and nitric acid (oxidizer). [Stip. #2]

Yellow Freight provides hazardous materials training and testing for its supervisory personnel including instruction on hazardous material release and emergency response. [Stip. #16]

During the OSHA inspection at Yellow's terminal on September 29, 1993, the Compliance Officer (CO) attended a hazardous materials training session with two new supervisors, Dudley Thompson and Doug Potts, who were hired on September 11 and 20, respectively. Both Thompson and Potts are "first responders" for purposes of the cited standard. The 9/29 training session lasted approximately four hours and omitted "module 5" material dealing with hazardous materials releases. At that time, neither Thompson nor Potts were tested on their knowledge of hazardous materials release procedures. [Stip. #18]

Discussion

Section 1910.120(q)(6)(ii) requires that before "first responders" at the operations level are permitted to take part in actual emergency operations, they shall receive at least eight hours of training or have sufficient experience to objectively demonstrate competency in:

A. Knowledge of the basic hazard and risk assessment techniques.
B. Know how to select and use proper personal protective equipment provided to the first responder operational level.
C. An understanding of basic hazardous materials terms.
D. Know how to perform basic control, containment and/or confinement operations within the capabilities of the resources and personal protective equipment available with their unit.
E. Know how to implement basic decontamination procedures.
F. An understanding of the relevant standard operating procedures and termination procedures.

Complainant failed to show that Yellow Freight was in violation of §1920.120(q)(6)(ii). The stipulated record contains only portions of the written training program [J. Exh. 6, 10, 11]. Moreover, the standard specifically provides for the substitution of experience for formal training. It is impossible to state, based solely on the facts in the record, that Yellow Freight's program would not have ensured its "first responder's" familiarity with the topics listed in the standard. The undersigned, therefore, cannot find that Yellow Freight's hazardous materials training program was inadequate.

Nor has Complainant shown that supervisors Thompson's and Potts' training was inadequate under the standard. Both were recent hires who had been with the company less than three weeks. Nothing in the record establishes that either would have been permitted, at the time of the inspection, to take part in actual emergency operations, or that they would not have completed their training prior to doing so.

Complainant has failed to establish, by a preponderance of the evidence, that Yellow Freight was in violation of the cited standard. Citation 1, item 1c is, therefore, dismissed.

Serious citation 1, item 2a.

The citation alleges:

29 CFR 1910.110(f)(2)(ii): LP gas container(s) stored inside were located near or in area(s) normally used or intended for the safe exit of employees:

> (a) In the south platform area on the loading dock, containers of propane were stored adjacent to the stairwell leading down to the employee restroom on or about September 15 and 16, 1993.

Facts

At the time of the OSHA inspection Yellow Freight stored approximately 88 containers of liquid propane gas directly adjacent to a stairwell leading down to an employee restroom, the only room at the bottom of the stair. There is no terminal exit in the restroom area [Stip. #22; J. Exh. 18A]. In the event of fire, the cylinders could rupture explosively [J. Exh. 28], blocking employee exit from the restroom area.

Discussion

The cited standard states:

> Containers when stored inside shall not be located near exits, stairways, or in areas normally used or intended for the safe exit of people.

Yellow Freight's storage of LP containers violates the plain language of the cited standard, which prohibits storage of containers near stairways, as well as the purpose of the standard, which is to eliminate additional fire hazards which might block employees' means of egress. Complainant has established the cited violation.

Penalty

Yellow Freight is a large employer, with over 600 facilities nationwide. [Stip. #29] Respondent employed approximately 160 workers at the Aurora facility at the time of the inspection [Stip. #5]. There is no record of any prior violations of the Act at the Aurora facility [Stip. #29].

The cited violation is properly classified as serious, because the violation, in the event an employee was trapped by fire, would likely result in serious injury. However, the gravity of the violation is moderately low, based on the small number of employees likely to be exposed to the risk of injury at any given time, resulting in a low probability of occurrence of injury. *See, Secretary v. National Realty and Construction Co.*, 1 BNA OSHC 1049, 1971 CCH OSHD ¶15,188 (No. 85, 1971).

The Secretary has proposed a combined penalty of $4,500.00 for this item and item 2b, which has been settled by the parties. Based on the relevant factors, the undersigned finds that Complainant overstated the gravity of the violation. A penalty of $1,000.00 is deemed appropriate.

Serious citation 1, item 2b.

Settlement reached by the parties. *See;* Stipulation No. 11.

Serious citation 1, item 3.

Summary Judgment denied based on Respondent's failure to demonstrate that DOT has issued safety and health regulations intended to govern the cited working condition, i.e. hazardous spill clean-up. *See*; this judge's September 7, 1994 Order.

This item alleges:

29 CFR 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

> (a) Personal protective equipment in the form of boots, gloves or an apron was not provided to the combination dock worker/driver who was engaged in a hazardous material spill clean up operation involving Essentialube a flammable liquid during the second shift on or about September 28, 1993.

Facts

On September 28, 1993, a forklift truck blade ruptured a shipping container of Essentialube, releasing approximately 15 gallons of the substance. [Stip. #23] The MSDS for Essentialube indicates that it is made up of hazardous components, i.e. severely hydrotreated mineral oil and flammable liquid solvent, and that plastic gloves and safety glasses are required for safe clean-up. [J. Exh. 19A] Yellow Freight supervisors' duties in response to a hazardous materials release clean-up include issuing necessary protective equipment to employees. The employee who cleaned up the Essentialube spill was not provided with chemical resistant gloves. [Stip. #23]

Discussion & Penalty

Section 1910.132(a) requires that appropriate protective equipment be provided wherever an employee may be injured through absorption, inhalation or physical contact with chemical hazards. The stipulated facts establish the cited violation.

Complainant failed, however, to establish that the violation was "serious." The stipulated record does not mention any health hazards associated with Essentialube. The MSDS lists no acute or chronic health hazards caused by skin contact with the hazardous components found in Essentialube. The sole health hazard noted by the OSHA CO is "dermatitis." [J. Exh. 28]. In the absence of additional evidence, this judge cannot find that Complainant carried its burden of proof. Accordingly, the violation is affirmed as an other than serious violation without penalty.

Serious citation 1, items 4a-4d.

Summary Judgment denied based on Respondent's failure to demonstrate that DOT has issued safety and health regulations intended to govern the cited working condition, i.e. hazardous spill clean-up. *See*; this judge's September 7, 1994 Order.

Yellow Freight otherwise stipulates to these violations. [Stip. #12]

Penalty

The citations allege violations of the following:

29 CFR §1910.134(e)(1) Standard procedures shall be developed for respirator use.

29 CFR §1910.134(e)(3) Written procedures shall be prepared covering safe use of respirators in dangerous atmospheres that might be encountered in normal operations or in emergencies.

29 CFR §1910.134(e)(5) [The respirator user must be] properly instructed in its selection, use, and maintenance . . . . Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

29 CFR §1910.134(e)(5)(i) Respirators shall not be worn when conditions prevent a good face seal.

Serious respiratory injury is the probable result of an accident resulting from an employer's failure to develop standardized procedures for respirator use, including user training.

On September 29, 1993, Craig Strong, a Yellow Freight employee, was assigned to clean up a spill of Nitrobond 881 Epoxy Resin, a corrosive liquid which may cause damage to the skin, eyes, gastrointestinal tract and lungs [J. Exh. 21]. Strong was provided a Scottoramic gas mask respirator and Survivair half mask air-purifying respirator, but was not provided with a fit-test, and had a beard at the time he used the respirator [Stip. #24, 25]. As a result, Strong inhaled epoxy resin fumes. Strong received medical treatment for bronchospasms and was placed on work restriction [Stip. #25; J. Exh. 22].

The Secretary has proposed a combined penalty of $1,800.00 for these violations. The probability of an untrained employee misusing respiratory equipment in a toxic atmosphere, thinking he is protected, is high, as evidenced by Mr. Strong's injury. Taking into account the gravity of the violation, as well as the other relevant factors discussed above, the undersigned finds the proposed penalty appropriate.

Serious citation 1, item 5.

The citation alleges:

29 CFR 1910.151(c): Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use.

> (a) On the dock, the Respond Eyewash stations, located on the South Platform and the North Platform were not suitable for the quick drenching of the body and eyes in that a flushing capacity of at least fifteen minutes was not available for employee use in the event of a spill or splash of corrosive materials during freight unloading, loading or moving operations.

Facts

At the time of the OSHA inspection, Yellow Freight maintained five eyewash stations at the Terminal. Each station was equipped with three sixteen-ounce spray bottles of Eye and Skin Flushing Solution, Sterile and Isotonic. [Stip. #26; J. Exh. 23]

In 1993 Yellow Freight has experienced spills of hazardous materials such as sulfuric acid, ethyl alcohol, paint, corrosive cleaning compounds including ferric sulfate, methylene chloride, and alkali liquids, hydrochloric acid, mineral spirits, acetic acid solution insecticide and nitric acid. Most of the spills involved between a tablespoon and a gallon of material [J. Exh. 17, 27].

Discussion

The cited standard requires that "suitable" facilities for quick drenching or flushing be provided. The Commission has held that the suitability of a facility depends on the nature and amount of the material to which the eyes are exposed and the distance between the work area and the washing facility. *E.I. DuPont DeNemours & Co., Inc.*, 10 BNA OSHC 1320, 1982 CCH OSHD ¶25,883 (No. 76-2400, 1982).

Complainant introduced no evidence establishing the need for providing 15 minutes of uninterrupted flushing in the particular circumstances described here, or the inadequacy of Yellow's eyewash facility given its employees' limited exposures to hazardous materials normally sealed while in transit. The undersigned is unable, therefore, to determine that Respondent's facility was not "suitable." The Secretary has failed to carry his burden of proof, and the cited standard will be vacated.

Serious citation 1, items 6a, 6b.

Settlement reached by the parties. *See;* Stipulation No. 11.

Serious citation 1, item 7a-7b

These items cite OSHA training regulations, which are specifically not preempted, pursuant to §1805(b)(3) of the HMTA. *See*; this judge's September 7, 1994 Order.

Item 7a alleges violation of 29 CFR 1910.1200(b)(4)(iii), which provides:

> (4) In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:
>
> * * *
>
> (iii) Employers shall insure that employees are provided with information and training in accordance with paragraph (h) of this section (except for the location and availability of the written hazard communication program under paragraph (h)(1)(iii)), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container.

Paragraph (h) requires that employees be provided training in:

> (i) methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);
>
> (ii) The physical and health hazards of the chemicals in the work area;
>
> (iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used;
>
> (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

Item 7a alleges that Yellow Freight did not ensure that its employees were provided with information and training in accordance with 29 CFR 1910.1200(h), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container. Specifically, the citation states that combination dock

workers/drivers, dockworkers, casual workers, and janitorial personnel working on the Yellow Freight loading dock were not provided with appropriate information and training, including the location of material safety data sheets (MSDS) and:

> an explanation of the information on the MSDS, how employees can obtain and use the appropriate hazard information, and on the types of protective equipment and measures available to be used in the event of a spill or leak of hazardous chemicals such as but not limited to hydrochloric acid, flammable paints, sulfuric acid, ethyl alcohol, epoxy paints.

Facts

Yellow Freight employees receive hazardous materials training and testing based on their job classification [Stip. #15]. All employees are provided with a copy of Yellow Freight's Hazardous Materials Handbook, and Chemicals in the Workplace Guide [Stip. #14]. Those documents tell the employee how to recognize a hazmat exposure, how to avoid exposure and who to contact in the event of a hazmat incident. The contents and means of obtaining an MSDS are listed [J. Exh. 6, 8].

In addition, Respondent conducts monthly safety meetings for employees covering hazardous materials issues [Stip. #14]. Material covering hazmat protective equipment was circulated to all employees; Respondent's evacuation plan and hazcom program, as well as charts showing the compatibility and labeling of various hazardous materials are posted throughout the terminal [Stip. #20, J. Exh. 16b through 16e]. Posters containing emergency contact numbers are located throughout the terminal [Stip. #20; J. Exh. 16A].

Discussion

The intent of subsection 1200(b)(4) is to address the problem of employers such as Yellow Freight, who do not work with, but handle hazardous materials only in transit. Their employees may encounter a large number of different types of chemicals, to which they would be exposed only in the event of an accident. Those employees require hazmat training which is not chemical specific, but is broad based, and provides them with means of accessing appropriate hazard information when necessary.

Based on the limited evidence available, the undersigned is unable to say that Yellow Freight employees do not receive the information required by the cited standard.

The Secretary has failed to demonstrate a violation of the cited standard. Item 7a will be vacated.

Item 7b alleges:

29 CFR 1910.1200(h) Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area.

> (a) Information and specific training such as the location of the material data sheets and the written program, how to obtain and use the hazard information, the specific physical and health hazards as outlined by the standard was not conducted for the dock workers and the combination dockworker/drivers for the propane used to operate the Toyota forklifts on the loading dock at Yellow Freight Systems, Incorporated.

Facts

A copy of the MSDS for every chemical used or stored at the Yellow facility, including propane, is filed in its Right to Know Manual, and is available in the office of every Yellow Freight terminal [Stip. #14].

Discussion

Contrary to Respondent's assertions, the chemical specific training requirements of paragraph (h) are applicable where chemicals, such as propane, are routinely maintained in the employees' work area. Merely maintaining the MSDS for chemicals to which employees are predictably exposed is insufficient to meet the training requirements of the cited standard. *ARA Living Centers of Texas, Inc.*, 1992 CCH OSHD ¶29,552 (No. 89-1894, 1991).

The Secretary has established the cited violation.

Penalty

The Secretary proposes a combined penalty of $3,150.00 for the hazcom violations alleged in item 7a, which was dismissed, and item 7b.

The MSDS establishes that inhalation of propane may result in convulsions, unconsciousness and death from asphyxiation. The violation is, therefore, properly characterized as serious. Taking into account the gravity of the violation, which is

deemed moderately low, and the other relevant factors, discussed above, a penalty of $1,000.00 is deemed appropriate.

Other than serious citation 2, items 1a-1c.

Summary Judgment denied based on Respondent's failure to demonstrate that DOT has issued safety and health regulations intended to govern the cited working condition, i.e. hazardous spill clean-up. *See*; this judge's September 7, 1994 Order.

Yellow Freight otherwise stipulates to these violations, for which no penalty was proposed. *See;* Stipulation No. 12.

Other than serious citation 2, item 2.

Summary Judgment granted in favor of Yellow Freight. *See*; this judge's September 7, 1994 Order.

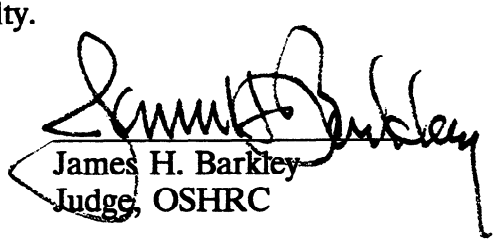
Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 1c, alleging violation of §1910.120(q)(6) is VACATED.
2. Serious citation 1, item 2a, alleging violation of §1920.110(f)(2)(ii) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of §1910.132(a) is AFFIRMED as an "Other than serious," violation without penalty.
4. Serious citation 1, item 4a-4d, alleging violations of §1910.134 *et seq.* are AFFIRMED, and a penalty of $1,800.00 is ASSESSED.
5. Serious citation 1, item 5, alleging violation of §1910.151(c) is VACATED.
6. Serious citation 1, item 7a, alleging violation of §1910.1200(b)(4) is VACATED.
7. Serious citation 1, item 7b, alleging violation of §1910.1200(h) is AFFIRMED and a penalty of $1,000.00 is ASSESSED.

8. Other than serious citation 2, items 1a-1c, alleging violations of §1910.134 *et seq.* are AFFIRMED without penalty.



James H. Barkley
Judge, OSHRC

Dated: December 9, 1994