UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR, Complainant, v. CONSOLIDATED RAIL CORPORATION, Respondent.	OSHRC Docket Nos. 91-3133 & 91-3134

DECISION

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

Pursuant to Commission Rule 73(b), 29 C.F.R. § 2200.73(b), governing interlocutory review, we have before us an order of an administrative law judge of the Commission denying a prehearing motion presented by Consolidated Rail Corporation ("*Conrail*"). Conrail would have the Commission dismiss the Secretary of Labor's ("*Secretary*") citation in these cases on the basis that the regulations cited therein, promulgated by the Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor, have been preempted by the regulatory action of another agency, the Federal Railroad Administration ("FRA"). For this reason, Conrail asserts, OSHA lacks enforcement authority pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). Section 4(b)(1) states, in pertinent part: "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

I. The FRA Policy Statement and Its Interpretation

The FRA's exercise of regulatory authority is in the form of a statement of policy articulating the conditions under which, in view of the FRA's expertise in the field of railroad operations and the FRA's special understanding of the safety and health needs of railroad employees, OSHA regulations are appropriate for -- and shall apply to -- various specified surroundings or hazards of railroad operations. In order to give formal notice of the policy, the FRA published this statement in the Federal Register. 43 Fed. Reg. 10583 (1978). Thereby, "as the dominant agency in its limited area, the FRA [could] displace OSHA regulations by articulating a formal position that a given working condition should go unregulated [by a federal standard] . . . ." *See Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391-92 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) ("*Southern Pacific*") (positing that another agency can preempt OSHA regulations by formally deciding against issuing any standard or regulation); *Velasquez v. So. Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984) (treating the FRA policy statement as an exercise of statutory authority); ***see also***, *In Re: Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir. 1986) ("*Norfolk Dredging*") (accepting that another agency can preempt OSHA regulations by formally deciding against issuing any standard or regulation). Thus, in 1982, the Commission held that the FRA's policy statement is an exercise of statutory authority which, pursuant to section 4(b)(1) of the Act, is capable of exempting the surroundings and hazards mentioned by the FRA from being governed by OSHA's regulations and enforcement. *Consolidated Rail Corp.*, 10 BNA OSHC 1577, 1580-81, 1982 CCH OSHD ¶ 26,044, pp. 32,708-09 (No. 79-1277, 1982) ("*Conrail II*").

We use the terms "surroundings" and "hazards" advisedly, to emphasize that both matters are critical to analyzing and applying the policy statement. Not long before the FRA policy statement's issuance, two federal circuits rendered interpretations of the term "working conditions" that appears in section 4(b)(1). *Southern Pacific*, 539 F.2d at 390-93; *Southern Ry. Co. v. OSHRC*, 539 F.2d 335, 338-39 (4th Cir.), *cert. denied*, 429 U.S. 999 (1976) ("*Southern Railway*"). Both circuits, the Fourth and the Fifth, rejected the railroads' arguments that the term "working conditions" is synonymous with "industry-wide conditions"

or with the industry's whole employment relationship; an industry cannot claim such an extensive exemption from OSHA regulation just on the simple basis that an agency other than OSHA regulates a portion or an aspect of the industry's occupational safety and health. *Southern Pacific*, 539 F.2d at 390-91; *Southern Railway*, 539 F.2d at 338; *see also, Baltimore and Ohio RR. Co. v. OSHRC*, 548 F.2d 1052, 1053-54 (D.C. Cir. 1976); *Consolidated Rail Corp.*, 10 BNA OSHC 1706, 1708, 1982 CCH OSHD ¶ 26,082, p. 32,827 (No. 80-3495, 1982) ("*Conrail III*"). But the Fourth and Fifth Circuits articulated differing understandings as to how much narrower the effect of another agency's particular regulations might be toward preemption of OSHA's coverage.

Would, for example, an agency's regulation requiring airline employees to keep the exit doors of airport passenger lounges locked or obstructed to inhibit aircraft piracy have any preemptive effect on an OSHA regulation that requires exit doors to be unlocked and unobstructed in case of fire emergencies? *See United States Air, Inc., v. OSHRC*, 689 F.2d 1191 (4th Cir. 1982) ("*U.S. Air*"). That is, is preemption possible if the other agency has regulated the surroundings but not the hazard on which the OSHA regulation focuses? Must the other agency take a hazard-by-hazard approach? The Fourth Circuit thought not. The court held that the other agency's regulation to keep the doors closed preempted OSHA's regulation regarding keeping the doors open, and the court reasoned that, since "[t]he Act was intended both to provide comprehensive coverage to the workers across the country and *to avoid duplication of regulatory effort* by the various Federal agencies" (emphasis added), section 4(b)(1)'s reference to "working conditions" could be construed to mean "the environmental area in which the employee customarily goes about his daily tasks." Therefore, "when an agency has exercised its statutory authority to prescribe standards affecting occupational safety or health for such an area, the authority of the Secretary of Labor [to regulate] in that area is foreclosed." *Southern Railway*, 539 F.2d at 339 (footnote omitted); *see also U.S. Air*, 689 F.2d at 1192-93; *Columbia Gas v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980) (expressly adopting Fourth Circuit's test).

The Fifth Circuit disagreed to the extent of not wanting to make an absolute equation of the term "working conditions" with the term "surroundings." *See Southern Pacific*, 539

F.2d at 391 n.10. Notably, however, the court did not make an absolute equation of "working conditions" with "hazards." The court stated that the term "embraces both 'surroundings,' such as the general problem of the use of toxic liquids, and physical 'hazards,'" but the court said that a hazard "can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace)." Thus the court attached considerable significance to the other agency's choice to focus its regulations on the physical surroundings in which or with which the employees work. The court did indicate, however, that in some circumstances the other agency might have to address the same hazard as OSHA for its regulations to have preemptive effect: "Thus, comprehensive FRA treatment of the general problem of railroad fire protection will displace all OSHA regulations on fire protection, even if the FRA activity does not encompass every detail of the OSHA fire protection standards, but FRA regulation of portable fire extinguishers will not displace OSHA standards on fire alarm signaling systems." *Southern Pacific*, 539 F.2d at 391 (footnote omitted); *compare PBR, Inc., v. Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981) (no preemption absent indication of "a broader effect for" particular FRA track safety regulation); *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1704 n.10, 1992 CCH OSHD ¶ 29,758, p. 40,450 n.10 (No. 89-1017, 1992) (no preemption where Coast Guard "claims no expertise in regulating" factory ship working conditions). In sum, as this recitation of the law reveals, it is the agency's intent that governs preemptive effect:

> We recognize that a regulatory exercise expressed in terms of a category of equipment or a generalized problem may raise questions about whether a given item is covered. Conversely, an exercise expressed in terms of a piece of equipment may create an issue about whether the FRA has regulated the entire category to which that piece belongs. In either situation, the scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulation.

Southern Pacific, 539 F.2d at 392; *compare Norfolk Dredging*, 783 F.2d at 1530-31 (no intent by Coast Guard to regulate other than certain specified subject matters for uninspected vessels); *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 777-80 (2d Cir. 1984) (same). These cases clearly indicate that the FRA need not track OSHA's standards in

every facet of hazard or surroundings -- work location or equipment -- in order to have regulations capable of preempting those of OSHA.

With these principles in mind, we turn now to the text of the FRA's policy statement. There, the FRA stated the following, in pertinent part:

> Within the area of railroad operations, it is [the] FRA which must decide what regulations are necessary and feasible . . . . *[The] FRA has now exercised its statutory authority* . . . . While it is expected that additional regulatory initiative may be undertaken as necessary, . . . *it is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.* Should it be demonstrated that further specific regulatory action is required . . . [the] FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems. Therefore, as the primary regulatory agency, [the] FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations.
>
> . . . .
>
> *OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule.* First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.
>
> Second, as the agency which has exercised jurisdiction over railroad operations, FRA is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc. would not apply to inspection pits in locomotive or car repair facilities. FRA is better equipped to assess proper clearance technology and employee knowledge of existing industry practices as well as the prevalence and severity of hazards represented by specific injury occurrence codes in accident/incident reporting statistics. FRA is responsible for determining what additional regulatory steps, if any, may be necessary in this area in light of overall safety considerations.
>
> *Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, catenary systems, railroad bridges, turntables, and*

> *similar structures or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing designs.*

43 Fed. Reg. at 10586-87 (emphasis added).

II. Recent Rulemaking Regarding Maintenance-of-Way Employees

Ten years after the policy statement's publication, the FRA came under congressional pressure to make a more specific exercise of authority over the safety of maintenance-of-way employees. By statute, Congress said that the FRA "shall within one year after June 22, 1988, issue such rules, regulations, orders and standards as may be necessary for the safety of maintenance of way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used." 45 U.S.C. § 431(n) (amending the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*). Consequently, in March 1989, the FRA's assistant chief counsel for safety wrote a letter to the Associate Solicitor of Labor regarding the FRA's position at that time with respect to the applicability of OSHA regulations to maintenance-of-way employees and with respect to future rulemaking. In pertinent part, the letter states (emphasis added):

> We expect the proposed rule to address personal protective apparatus for use by railroad employees working on walkways, over or near water, or on scaffolds. These devices would include safety belts, lifelines, lanyards, safety nets, boats, railings and respirators.
>
> As to protection of maintenance-of-way workers performing track maintenance or repair, responsibility for their safety is [the] FRA's, according to the Policy Statement issued by [the] FRA [on] March 14, 1978 . . . . [T]he Policy Statement notes that ". . . proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations." 43 F.R. 10585.
>
> In addition, the Policy Statement provides that ". . . *OSHA regulations would not apply to . . . walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they*

> *must be regulated by the agency with primary responsibility for railroad safety.*" 43 F.R. 10587.

The FRA thereafter began rulemaking proceedings for regulation of the safety of maintenance-of-way employees. In January 1991, the FRA published the notice of proposed rulemaking. It states the following regarding the final paragraph of the portion of the policy statement that we have quoted earlier in this decision:

> As this segment of the Policy Statement indicates, FRA intended to displace OSHA regulations with respect to the *surfaces on bridges*, i.e., track structures, but did not intend to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to fall protection and respiratory equipment.

56 Fed. Reg. at 3435 (1991) (emphasis added). Then, in June 1992, the FRA issued safety regulations for maintenance-of-way employees. The preamble thereto stated the following:

> Any working conditions involving the protection of railroad employees working on railroad bridges not within the subject matter addressed by this Chapter, including respiratory protection, hazard communication, hearing protection, welding and lead exposure standards, shall be governed by the regulations of the U.S. Department of Labor, Occupational Safety and Health Administration.

57 Fed. Reg. at 28,130, 1992 CCH Emp. S&H Guide New Developments, ¶ 11,369 at § 214.101(d) (standards only) (1992).

III. Analysis

In the case now before us, Conrail asserts that, "in 1991, the Administrator of the FRA confused the question of FRA/OSHA jurisdiction by arguing that the 1978 policy statement did not intend to preempt OSHA from all aspects of bridge safety," and that "this conflicts with the previously held position of the FRA, as stated in the Policy Statement" and the March 1989 letter. The Secretary's response to this argument is that "the letter relied upon by the Respondent simply does not indicate that FRA is intending to preempt OSHA from all aspects of bridge safety[,] but only those relating to assurance that trackmen are not struck by trains or equipment moving over the tracks."

As we have already discussed, the policy statement does not oust OSHA from regulating the occupational safety and health of railroad employees on an industry-wide

basis. *See also Consolidated Rail Corp.*, 10 BNA OSHC 1869, 1982 CCH OSHD ¶ 26,164 (No. 78-2546, 1982) (OSHA may require personal protective equipment for noise and eye protection and respirators for chemical exposures at railroad repair shops); *Conrail III*, 10 BNA OSHC at 1708, 1982 CCH OSHD at p. 32,827 (OSHA may require occupational injury and illness recordkeeping by railroads); *Conrail II*, 10 BNA OSHC at 1577, 1982 CCH OSHD at pp. 32,709-10 (indication that OSHA may require first aid training at railroad repair shops); *Consolidated Rail Corp.*, 10 BNA OSHC 1564, 1567-68, 1982 CCH OSHD ¶ 26,046, pp. 32,713-15 (No. 78-1504, 1982) (OSHA may require steel-toed shoes at railroad repair shops). OSHA regulation and enforcement is only preempted if the FRA's policy statement evidences an intent to regulate the working conditions, which, as we have already discussed, *are defined in terms of the environmental area in which railroad employees go about their work, their surroundings, or the hazards to which they may be exposed.* Certain matters involved in the cases now before us -- the matters of hazard communication, washing facilities for chemical exposure, and an employer's overall safety program and employee training -- fall outside the policy statement and, in our opinion, into OSHA jurisdiction on the basis of our plain reading of the FRA's policy statement. But the scaffolding items are a different matter. If any scaffold is located on a walkway beside a track in a yard or along a right-of-way, OSHA would be preempted from regulating it, for the FRA's policy statement plainly says that "OSHA regulations would not apply to . . . platforms and other surfaces on . . . railroad bridges . . . and similar structures, or *to walkways beside the tracks in yards or along the right-of-way.*" (Emphasis added.)

We cannot ascertain whether such is the case here. There has been neither a hearing nor any other presentation of fact in these cases, as by affidavits or stipulations. In essence, therefore, there is no factual record from which to understand exactly what relationship these scaffolds have to the policy statement's assertion that "OSHA regulations would not apply to . . . platforms and other surfaces on . . . railroad bridges . . . and similar structures, or to walkways beside the tracks in yards or along the right-of-way." The employer asserts that the employees were on the bridge and the scaffolds were "being used in the bridge work." The Secretary alleges that the bases of the scaffolds were adjacent to the "railroad

trestle pier[s]." And the union for the employees contends that the employees had been digging earth "in the vicinity of" the bridge. Accordingly, we remand these cases to the Commission judge for an evidentiary hearing and for decision on the merits. *See also Burlington Northern R.R. Co.*, 13 BNA OSHC 2099, 2101, 1987-90 CCH OSHD ¶ 28,458, p. 37,670 (No. 87-365, 1989).

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: March 31, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

Secretary of Labor,
Complainant,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

Docket Nos 91-3133 &
91-3134

NOTICE OF COMMISSION DECISION AND REMAND ORDER

The attached Decision of Remand by the Occupational Safety and Health Review Commission was issued on March 31, 1993. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.

March 31, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket Nos. 91-3133 & 91-3134

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloepfer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Nanci A. Hoover
Law Department 16-A
Two Commerce Square
2001 Market Street
P.O. Box 41416
Philadelphia, PA 19101

Christine Beyer
Office of Chief Counsel
Federal Railroad Admin.
400 Seventh Street, S.W.
Washington, D.C. 20590

C. Perry Rapier, District Chairman
c/o Pennsylvania Federation of the Brotherhood
of Maintenance of Way Employees, AFL-CIO-CLC
1835 St. Rt. 502
Greenville, OH 45331

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket Nos. 91-3133 & 91-3134
CONSOLIDATED RAIL CORPORATION,	:	
Respondent.	:	

ORDER

On July 1, 1992, Respondent filed a Petition for Interlocutory Review requesting review of the administrative law judge's order denying its Motion to Dismiss. Respondent argues that under section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(1), the Occupational Safety and Health Administration ("OSHA") lacks jurisdiction over the worksite. Since the worksite involved the repair and maintenance of a railroad bridge, the Respondent argues that it was under the exclusive jurisdiction of the Federal Railroad Administration ("FRA") due to the FRA's assertion of its regulatory authority and the resulting preemption of OSHA's jurisdiction. The Secretary has filed an Opposition to the Petition.

The Commission has reviewed the Petition for Interlocutory Review and the Secretary's Opposition and finds that under Commission Rule 73(a), 29 C.F.R. § 2200.73(a), this case involves an important question of law about which there is substantial ground for difference of opinion and that immediate review of the ruling may materially expedite the

disposition of the proceedings. Accordingly, the Petition for Interlocutory Review is granted. The proceedings before the Administrative Law Judge, including the hearing scheduled for July 24, 1992, are stayed.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated July 22, 1992

Docket Nos. 91-3133 & 91-3134

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on July 22, 1992.

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N.W. Room S4004
Washington, D.C. 20210

William S. Kloepfer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Nanci A. Hoover
Associate General Gounsel
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Christine Beyer
Office of Chief Counsel
Federal Railroad Admin.
400 Seventh Street, S.W.
Washington, D.C. 20590

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C Perry Rapier
District Chairman
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Administrative Law Judge
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Review Commission
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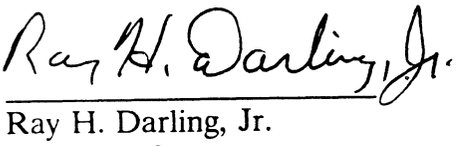
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

FOR THE COMMISSION



Ray H. Darling, Jr.
Executive Secretary