BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

ABF FREIGHT SYSTEMS, INC

RESPONDENT.

DOCKET NO. OSHANC 97-3580
OSHA INSPECTION NO. 300075462
CSHO ID NO. W4302

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 25th day of June, 1999 in Room 2115 of the Dobbs Building located at 430 North Salisbury Street, Raleigh, North Carolina by Henry Whitesides, acting Chair and Carroll D. Tuttle, Designated Member of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Thomas H. Davis, Jr., Attorney At Law, of Poyner & Spruill, L.L.P. Raleigh, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did the Hearing Examiner commit an error of law when she found that the Safety and Health Review Board had jurisdiction over Respondent, a trucking company, for an alleged violation of 29 C.F.R. §1910.178(m)(7) for failure to set the brakes and use wheel chocks behind the rear wheels of its highway trucks to prevent movement of the trucks while loading and unloading?

2. Was the Hearing Examiner's finding that the Respondent committed a non-serious violation of 29 C.F.R. §1910.178(m)(7) for failure to use wheel chocks behind the wheels of its trailers during fork lift operations supported by substantial evidence and by a preponderance of the evidence?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 C.F.R. §1910.178(m)(7) which states:

> Brakes shall be set and wheel blocks shall be in place to prevent movement of trucks, trailers, or railroad cars while loading or unloading. Fixed jacks may be necessary to support a semitrailer during loading or unloading when the trailer is not coupled to a tractor. The flooring of trucks, trailers, and railroad cars shall be checked for breaks and weakness before they are driven onto.

2. §4(b)(1) of the federal OSH Act, which provides, *inter alia*, as follows:

> 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 or health.

3. §392.20 of the Federal Motor Carrier Safety Regulations, provides as follows:

> No commercial motor vehicle shall be left unattended until the parking brake has been securely set and all reasonable precautions have been taken to prevent the movement of such commercial motor vehicle.

4. §18(b) of the federal OSHA act which provides, *inter alia*, as follows:

> "**Submission of State plan for development and enforcement of State standards to preempt applicable Federal Standards**
>
> > "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary under the OSHA Act] shall submit a State plan for the development of such standards and their enforcement." 29 U.S.C. 667(b).

Having reviewed and considered the record and the briefs of the parties and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby AFFIRMS the decision of the hearing examiner, and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The Respondent, ABF Freight Systems, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. Respondent timely filed a notice of contest and on July 29, 1998, a hearing was held before the Honorable Ellen Gelbin.

6. On September 21, 1998, the Hearing examiner issued an order affirming Citation 2, Item 2 as a non-serious violation of 29 C.F.R. §1910.178(m)(7) with no penalty.

7. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 17.

8. The failure of Respondent to use wheel chocks behind the wheels of its trailers while they were being loaded and unloaded by forklifts created the hazard that the trailers would move and the fork lift with the driver would fall into the space between the trailer and the loading dock. (T p 57).

9. Respondent's employees were exposed to the hazard.

10. Respondent knew of the condition that created the hazard in that it admitted through its Kernersville North Carolina Branch Manager, Mr. Richard Dickens, that it had not used wheel chocks behind the wheels of its trailers since it had merged with Carolina Freight in 1995. (T, pp 166-169).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before the Board.

3. The Commissioner has proven by the preponderance of the evidence and by substantial evidence that the Respondent committed a nonserious violation of 29 C.F.R. §1910.178(m)(7) for failure to use wheel chocks behind the wheels of its trailers during the loading and unloading of the trailers with fork lifts.

DISCUSSION

The question of whether the Safety and Health Review Board has jurisdiction over Respondent is a mixed question of fact and law; to the extent that it is a matter of statutory interpretation, it is a question of law. See, Brooks v. McWhirter, 303 N.C. 573 (1981).The scope of review for errors of law is a de novo review. This is a question of first impression for both the Hearing Examiner and the Board and Judge Gelbin does a commendable job of stating the law and applying it to the facts of this case and the Board adopts Judge Gelbin's entire discussion of the case as its own.

However, in order to comply with the mandate of N.C.G.S. §95-135(i) that the Board's order "shall include findings of fact, conclusions of law, and the reasons or bases for them on all the material issues of fact, law, or discretion presented on the record", the Board will examine each of the issues presented by Respondent in its appeal

Respondent first argues that the Board lacks jurisdiction to hear the case because pursuant to Section 4(b)(1) of the Federal OSH Act the United States Department of Transportation has preempted Federal OSHA's enforcement of 29 CFR §1910.178(m)(7) under the Federal Motor Carrier regulation 49 CFR 392.20. This argument fails because Section 4(b)(1) applies only to the federal Occupational Safety and Health Division and is applied only in those states that are under federal Occupational Safety and Health jurisdiction , i.e. those states that have not adopted a state plan. If a state has adopted a state plan pursuant to Section 18(b) of the federal OSH Act, then the *state standards preempt the federal standards*.

> Congress not only reserved certain areas to state regulation, but it also, in §18(b) of the Act, gave the States the option of preempting federal regulation entirely. That section provides:
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> > **"Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.**
> >
> > "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary under the OSH Act] shall submit a State plan for the development of such standards and their enforcement. 29 U.S.C. 667(b).

Gade v. National Solid Wastes Management Association, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73, 1991-1993 OSHD 40,328, at 40,331 (1992) (dictum in plurality decision by Justice O'Conner).

In addition to preempting the federal regulations, a state plan may enact stricter standards than the federal regulation. Section 18(c)(2) of the federal OSH Act provides that the state safety and health standards must be "at least as effective" as the federal standards. 29 USC §667(c)(2). "The 'at least as effective' provision clearly implies that a state that has an approved plan may adopt standards that are more effective than corresponding federal standards dealing with the same issues". Bokat and Thompson, Occupational Safety and Health Law, 686 (1988). "Section 18(b) of the Act permits states to adopt more effective standards only through the vehicle of an approved state plan". Bokat and Thompson, Occupational Safety and Health Law, 686, n.28 (1988) (quoted with approval in footnote 1 of Gade, supra. at page 40,331).

After having determined that a state that has adopted a state plan may enact laws and standards that preempt the federal laws and standards and that they may pass laws and standards that are more stringent than the federal laws and standards, we next look to see if North Carolina has adopted a state plan pursuant to section 18 of the

federal OSH Act and it is among those states. 29 CFR 1952.154(a). Next, we look to the North Carolina Occupational Safety and Health Act, N. C. Gen. Stat. §95-126 et. seq. to determine if it has exempted the federal Motor Carrier Act from its coverage.

In §95-128 the coverage of the act is delineated:

> The provisions of this Article or any standard or regulation promulgated pursuant to this article shall apply to all employers and employees except:

N.C. Gen. Stat. §95-128. The Statute then lists 6 exceptions to the coverage and lists the federal acts which preempt the North Carolina OSH Act and the Federal Motor Carrier Act is not among them. The conclusion to be drawn from the absence of the Federal Motor Carrier Act from the list of the federal acts which preempt the North Carolina OSH Act is that the Federal Motor Carrier Regulation 49 CFR §392.20 does not preempt North Carolina's enforcement of 29 CFR §1910.178(m)(7) against the Respondent.

This interpretation is consistent with the policy objectives of the North Carolina OSH Act "to assure so far as possible every working man and woman in the state of North Carolina safe and healthful working conditions..." N.C.Gen. State. 95-126(b)(2). "Courts ascertain legislative intent from the policy objectives behind the statute's passage, and the consequences which would follow from a construction one way or another" Electric Supply Co. v. Swain Electrical Co., 328 N.C. 651 (1991). Requiring that wheel chocks be used behind the wheels of trailers while they are being loaded and unloaded with fork lifts prevents the trailers from shifting and keeps the fork lifts and drivers form falling into the space between the trailer and the loading dock and helps assure "safe and healthful working conditions".

Respondent cites federal decisions that concluded that the federal OSH Act is preempted by the Motor Carrier Regulations and then argues that, therefore, the North Carolina OSH Act is preempted and the Safety and Health Review Board lacks jurisdiction. Respondent's conclusion does not follow from his premise for two reasons. The first is that the North Carolina OSH Act may be more stringent than the federal OSH act (see argument and authority cited above), and the second is that the Board has long held that federal decisions are not binding on the North Carolina Safety and Health Review Board, although they may be looked to for guidance. Brooks v. Southern Bell Telephone and Telegraph Company., 2 NCOSHD 283 (RB 1981); Brooks v. Baker Cammack Hosiery Mills, 2 NCOSHD 94 (RB 1977); Brooks v. McDevitt & Street Company., 2 NCOSHD 1032 (RB 1987).

In Friday Temporary Services, OSHANC # 93-2651, the Board held that the General Assembly based the coverage of the North Carolina OSH Act on the exercise of "its powers" N.C. Gen. Stat. 95-126(a)(2), rather than on the commerce clause and that the North Carolina definition of employer was therefore "broader than the federal one, in that it is not limited by the commerce clause and includes state and political subdivisions thereof within its coverage. " The Board has, therefore, held that the North Carolina OSH Division may exercise greater jurisdiction over employers than the federal OSH Division.

The Supreme Court of California has dealt with the same proposition put forth by Respondent that the state OSHA division cannot exceed the jurisdictional limits placed on federal OSHA by §4(a)(1) of the federal Act and succinctly stated the following:

> United initially argues that since the state agency draws authority from the Federal Occupational Safety and Health Act (see 29 U.S.C. §667) the division cannot exceed the jurisdiction limits placed on Fed/OSHA by United States Code section 653(b)(1) (same as 4(b)(1) of the Federal Act) as interpreted by such decisions as Northwest.
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> . . .
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> Under the section 667 scheme, California is preempted from regulating matters covered by Fed/OSHA standards unless the state has adopted a federally approved plan. The section does not, however, confer federal power on a state-like California-that has adopted such a plan; it merely removes federal preemption so that the state may exercise its own sovereign powers over

> occupational safety and health. (citations omitted). There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by Fed/OSHA (citations omitted) or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by Fed/OSHA. A state is required only to provide a program "at least as effective"as Fed/OSHA's. (29 U.S.C. §667(c)(2).). Thus, contrary to United claim, the federal act does not limit the division's jurisdiction to that exercised by Fed/OSHA.

United Air Lines v. Occupational Safety and Health Review Appeals Board and Division of Occupational Safety and Health, 1982 OSHD 33,316, at 33,320-33,321 (Cal. S.Ct. 1982). For the same reasons the federal act does not limit the North Carolina OSH Division's jurisdiction to that exercised by the federal OSH Division.

After having decided that the division of Occupational Safety and Health may enforce 29 CFR §1910.178(m)(7) against the Respondent and require the use of wheel chocks behind the wheels of Respondent's trailers while the trailers are being unloaded by fork lifts, we next look to Respondent's arguments that the spring brakes on Respondent's trucks provided safety and security equal to that of chocks. Respondent argues that since spring brakes provide equivalent safety that there was no hazard and no employee exposure. This is a question of fact and the Board will apply the whole record test. There is substantial evidence in the record through the testimony of Complainant's witnesses (T pp 139-145), the testimony of Respondent's employees (T pp 112-115) and Respondent's Maintenance Supervisor (T p 233) that the spring brakes can fail. Although there is testimony presented to the contrary about the effectiveness of the spring brake system, the Hearing Examiner considered that testimony and did not find it persuasive and neither do we. In addition, it is common knowledge that no brake system is fail proof and that all brake systems fail at one time or another. The Complainant has proven by substantial evidence and by a preponderance of the evidence that Respondent committed a violation of 29 CFR §1910.178(m)(7) .

The evidence presented by Complainant was that the substantial probable result of the trailer pulling away form the loading dock because of lack of chocks would be cuts, bruises, and scrapes which are nonserious injuries and this is what the Hearing Examiner found in her findings of fact numbered 17, however, common sense and case scenarios would indicate that serious injuries and death could result from a fork lift falling between the space between the trailer and loading dock. It is easy to see how a fork lift could turn over and crush an employee or an employee could be thrown from the forklift and crushed by the forklift. However, Complainant, for reasons known only to Complainant has decided to cite the Respondent for a nonserious violation of 29 CFR §1910.178(m)(7) and the Board will not disturb that citation or finding. All Complainant has to show to prove a nonserious violation is that:

> "there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." Mark A. Rothstein, Occupational Safety and Health Law § 312, at 332 (3rd ed. 1990) (hereinafter Rothstein); Stephen A. Bokat & Horace A. Thompson III, Occupational Safety and Health Law 263 (1988).

Associated Mechanical Contractors, Inc., 118 N.C. App. 54 (1995), overruled on other grounds, 342 N.C. 825, 467 S.E.2d 398 (1996). Complainant may meets its burden of proving a nonserious violation by showing that a hazard existed, employees were exposed, the hazard created the possibility of an accident, the substantially probable result of an accident would be an injury that does not result in death or serious physical harm and that the Respondent knew or should have known of the conditions that created the hazard. The Board had made findings of fact or has adopted findings of fact of the Hearing Examiner that show that Complainant has proven all of the elements necessary to prove a nonserious violation of 29 CFR §1910.178(m)(7). The Board finds that the Complainant has proven by substantial evidence and by the preponderance of the evidence that the Respondent has committed, at the least, a nonserious violation of 29 CFR §1910.178(m)(7).

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's September 21, 1998 Order in this cause is, **AFFIRMED** in all respects and Respondent is found to have committed a

nonserious violation of 29 CFR §1910.178(m)(7) with no penalty.

This the 2nd day of November, 1999.

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HENRY M. WHITESIDES, ACTING CHAIR

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CARROLL D. TUTTLE, DESIGNATED MEMBER