

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**TRANSITAMERICA SERVICES, INC.
93 CAHILL STREET
SAN JOSE, CA 95110**

Employer

Inspection No.
1583201

**ORDER RE
MOTION TO DISMISS**

Background

On March 10, 2022, an employee of Transit America Services, Inc. (Employer) erroneously released a prior restriction on the train while workers were still occupying the track. As a result, Train 506 was dispatched to the area while workers and vehicles were still on the track. A collision ensued, resulting in property damage and injury to a Balfour Beatty employee. At the time of the collision, Employer's employees were providing track protection (i.e. flagging services) for Balfour Beatty employees who were unloading poles from the San Bruno Station materials yard onto vehicles that were on Main Track 2. The poles were to be used by Balfour Beatty for the installation of an overhead catenary electrification project alongside the rail track.¹

On September 9, 2022, the Division of Occupational Safety and Health (Division) issued one citation to Employer, asserting a violation of California Code of Regulations, title 8, section 3332, subdivision (b), which provides: "Controls to safeguard personnel during railcar movement shall be instituted." The four "controls" that the Division asserts Employer failed to implement are references to federal regulations.

Employer filed a Motion to Dismiss (Motion) based on an assertion that the Division does not have jurisdiction over Employer for the circumstances alleged in the citation. Employer asserts that the railroad operations that led to the accident are regulated at the federal level and the Division's jurisdiction is thereby preempted. The Division filed an Opposition to the Motion and Employer subsequently filed its Reply to the Division's Opposition. Additionally, the parties filed a Joint Stipulation of Facts. The jurisdictional issue was bifurcated from the merits of the citation and submitted on the briefs. No oral argument or testimony was taken.

¹ The facts set forth in this paragraph were stipulations by the parties.

Analysis

Federal Regulation of the Railroad Industry

Railway safety is regulated at the federal level by the Federal Railway Administration (FRA), through the implementation of the Federal Railway Safety Act (FRSA) (49 U.S.C. § 20101, et seq.). The FRA, as the regulatory agency for the Secretary of Transportation, has jurisdiction for “every area of railroad safety...” (49 U.S.C. §20103(a).)

In order to determine whether the FRSA preempts the California Occupational Safety and Health Act with regard to employee safety during railroad operations, the ultimate question is one of intent: Did Congress intend to oust the States of jurisdiction over the conduct in question? (*Southern Pacific Transportation*, Cal/OSHA App. 94-3142, Decision After Reconsideration (July 23, 1999).)

In 1978, the FRA issued a formal notification that it was withdrawing its notice of proposed rulemaking with respect to railroad occupational safety and health standards, based on a determination that it should not attempt to regulate in an area already covered by the Federal Occupational Safety and Health Standards Administration (Fed/OSHA). (43 Fed.Reg. 10583 (March 14, 1978).)

In these traditional areas of railroad safety, FRA has developed a special expertise which makes this agency uniquely qualified to play the primary role in the Federal Government’s efforts to assure safe employment and places of employment for railroad employees engaged in activities related to railroad operations. We, therefore, believe that FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.

[...]

Implicit in each major area of regulation is the three-fold objective of protecting passengers, persons along the right-of-way, and railroad employees... As a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe

transportation of persons and property. Therefore, it is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations.

(43 Fed.Reg. 10585 (March 14, 1978).)

The FRA Policy Statement makes it clear that the Department of Transportation has chosen to confine its regulatory activity to those areas of the railway industry that are directly related to railroad operations and to forego the exercise of regulatory power over hazards similar to those found in the industry at large. (*Southern Pacific Transportation, supra*, Cal/OSHA App. 94-3142.)

Thus, the FRA preempts Fed/OSHA in employee safety and health in areas involving railroad operations, but not necessarily all areas of employee safety and health.

Federal Preemption Over State Regulation of Railroads

Additionally, the FRSA contains an express preemption clause with regard to State regulation of railroad safety matters where there are regulations “covering” the same subject matter:

A State may adopt or continue in force a law, regulation, or order related to railroad safety or security *until the Secretary of Transportation* (with respect to railroad safety matters) [...] *prescribes a regulation or issues an order covering the subject matter of the State requirement.*

(49 U.S.C. §20106 (a)(2). Emphasis added.)

To prevail on the claim that the regulations have pre-emptive effect, [...] *pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.* [...]

(*Southern Pacific Transportation, supra*, Cal/OSHA App. 94-3142, citing to *CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658. Emphasis added.)

The Division cited Employer for a violation of California Code of Regulations, title 8, section 3332, subdivision (b), which provides only that “[c]ontrols to safeguard personnel during railcar movement shall be instituted.” In order for the Division to find that this regulation related to the movement of the train that resulted in the accident in this matter, the Division alleged

certain “violations” by incorporating numerous federal regulations under the FRSA into the citation.

As set forth in Employer’s Motion:

The Citation states [Employer] should have established and defined “working limits through track occupancy by one of the following physical features...” This seems to have been taken from 49 CFR 214.321(c). It also requires ensuring that “movements of trains and roadway maintenance machines” be operated “at restricted speed”. This comes from 49 CFR 214.321(d). The Citation cites [Employer] for failing to ensure the Roadway Worker in Charge “to whom foul time was transmitted orally repeated” several identifiers. This is a restatement of 49 CFR 214.323(a). The Citation further cites [Employer] for failing to ensure the Roadway Worker in Charge “did not permit the movement of trains or other on-track equipment into or within working limits protected by foul time.” This appears to come from 49 CFR 214.323(d).

(Motion, p. 7.)

The Division’s use of the federal requirements in its citation supports a finding that there are no California regulations related to the allegations in the citation. As a result, the Division relied on the FRSA provisions in its attempt to establish what it believed was the cause of the accident.

Here, the Secretary of Transportation has prescribed regulations “covering the subject matter of the State requirement” because California does not have regulations about the subject matter. (49 U.S.C. §20106 (a)(2).) Indeed, it appears that California has appropriately left the regulation of railroad operations to the FRSA, as was originally intended by Congress. Nonetheless, in the instant matter, the Division seeks to infringe upon the FRA’s authority through the issuance of a citation that attempts to enforce various FRSA regulations.

California Regulation of Railroad Workers

In addition to federal preemption as a general consideration, the Division’s own enabling statutes preclude the Division from regulating the circumstances that led to the accident in this matter.

Prior to the 1973 act, the Division, in submitting the California Occupational Safety and Health plan to the United States Secretary of Labor pursuant to the federal Occupational Safety and Health Act of 1970, stated: “California statutes

specify those categories of workers that are subject to the enforcement regulations of the Division of Industrial Safety. By such statutes, the Division's authority extends to virtually every place of employment in California Certain categories are excluded, however In practice, the principal exceptions are Federal government agencies, maritime workers, household domestic service workers, and *railroad workers except those employed in railroad shops.*" [Citation omitted in original.]

(*Division of Industrial Safety v. Municipal Court* (1976) 61 Cal. App. 3d 696, 701. Emphasis in original.)

Labor Code section 6307 defines the Division's broad jurisdictional powers:

The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment.

"Place of employment" is defined as "any place, and the premises appurtenant thereto, where employment is carried on, except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division." (Lab. Code § 6303, subd. (a).)

As set forth above, the FRA, as the regulatory agency for the Secretary of Transportation, has jurisdiction for "every area of railroad safety..." (49 U.S.C. §20103(a).) The FRA divested itself of *some* aspects of employee health and safety. However, the FRA determined that its role "in the area of occupational safety in the immediate future is one that will concentrate our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence." (43 Fed.Reg. 10585 (March 14, 1978).)

The FRA is actively exercising that vested jurisdiction with regard to the railroad operation regulations under which the Division seeks to cite Employer. Indeed, after the accident at issue herein, the FRA conducted an inspection into the accident and issued findings of various violations of the FRSA. (Employer's Motion, Exh. G.) The FRA's enforcement of its safety regulations involves conducting an inspection, finding violations and mandating that remedial measures need to be taken, and potential civil penalties.

Thus, because the railway where the accident occurred was “a place where health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division,” it was not a “place of employment” over which the Division has jurisdiction. (Lab. Code §§ 6303, subd. (a), and 6307.)

Division’s Limited Regulatory Jurisdiction Over Railroad Employees

Labor Code section 6800 sets forth the very specific circumstances under which the Division may regulate the railroad industry:

- (a) The safety and health of *railroad employees employed in offices and in shops devoted to the construction, maintenance or repair of railroad equipment*, and all *other railroad employees with respect to occupational health*, including, but not limited to, air contaminants, noise, sanitation and availability of drinking water.

[...]

(Lab. Code § 6800, subd. (a). Emphasis added.)

“[T]he specific provisions of [Labor Code] section 6800 must be held to control over the general provisions of the California Occupational Safety and Health Act of 1973 (including Lab. Code, § 6307)...” (*San Francisco Bay Area Rapid Transit Dist. v. Division of Occupational Saf. & Health* (1980) 111 Cal. App. 3d 362, 366.)

The accident that gave rise to the citations did not involve employees in an office or shop devoted to the construction, maintenance, or repair of railroad equipment. It involved other non-shop employees.² However, the Division’s regulatory authority over those employees relates only to “occupational health,” not safety. (Lab. Code § 6800, subd. (a).)

This limited regulatory authority over certain railroad employees in offices and shops is apparent in the Division’s few regulations related to railroad employees, located at California Code of Regulations, title 8, section 3332 through 3335. These regulations relate to work being performed while railcars are in a yard or while they are immobilized for maintenance.

As set forth above, the lack of a set of regulations that relates to railroad operations evidences Cal/OSHA’s ceding of its regulatory authority of those particular operations to the FRA.

² Joint Stipulation of Facts, No. 6.

Employer has established that the Division does not have jurisdiction over Employer for the issuance of the citation in this matter. Accordingly, Citation 1 is dismissed.

IT IS SO ORDERED.

Dated: 08/05/2024

/s/ Kerry Lewis

Kerry Lewis
Presiding Administrative Law Judge

The attached order was issued on the date indicated therein. If you are dissatisfied with the order, you have thirty days from the date of service of the order in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**