Technical Note #2: Exemption from OSHA Jurisdiction

Coverage by Other Federal Statutes: In Northwest Airlines, Inc.,[1] the Commission held that there are four categories of § 4(b)(1) cases, depending on the purpose of the other regulatory statute:

- cases involving statutes concerned solely with employee safety and health (e.g., mine safety cases);
- cases where another agency has acted to regulate employee safety and health, but the statutory authority serving as the basis of the agency's actions pertains to matters other than employee safety and health (e.g., actions pursuant to General Services Administration and Department of Defense procurement statutes);
- cases where an agency is empowered by statute to regulate an aspect of public safety and health, and its regulations directed toward that end incidentally affect the working conditions of employees in a manner unrelated to the statutory purpose (e.g., regulation of meat processors under the Wholesome Meat Act);
- cases where a statute authorizes an agency to regulate an aspect of public safety or health, and certain employees directly receive the protection the statute is intended to provide (e.g., Department of Transportation Motor Carrier Safety Regulations).

The Northwest decision strongly implies that there will be preemption in the first and fourth categories, but no preemption in the second and third categories. The effect of the decision is to expand the number of statutes giving rise to preemption by including statutes designed to protect public safety and health where employees also receive direct protection.

Actual Exercise of Authority by Other Agency. The exercise of statutory authority involves both the prescribing and the enforcing of standards or regulations. In Northwest, the Commission upheld the validity of the somewhat unusual regulatory scheme whereby the Federal Aviation Administration (FAA) enforces company maintenance manuals regulating the working conditions of airline ground maintenance personnel. According to the Commission, the employer's maintenance manuals had the force of law because there was statutory authority for the FAA to regulate working conditions. In rejecting OSHA's argument that there should be preemption only for regulations produced by a Federal agency, the Commission stated that "the fact that a procedure is not ideal is no reason to reject it entirely...."

A related legal issue is whether an agency's notice of proposed rulemaking is sufficient to preempt OSHA jurisdiction pursuant to § 4(b)(l).

In Consolidated Rail Corp.,[2] the Commission held that a Federal Railway Administration (FRA) policy, in a statement that was the end result of along deliberative

1. 8 0.S.H. Cas. (BNA) 1982 (1980), petitions for review dismissed, Nos. 80-4218, 80-4222 (2dCir. 1981).
2. 10 0.S.H. Cas. (BNA) 1577, petition for review dismissed, No. 82-3302 (3rd Cir. 1982).

process, including advance public notice and agency investigation, preempted OSHA from enforcing standards dealing with hazards over which the FRA, in its policy statement, claimed authority.

The Commission has long held that for preemption to exist under § A(b)(l), the other agency' s regulations need not be similar or equally stringent. Recent cases, however, also have held that § 4(b)(l) "does not permit the Commission to oversee the adequacy of another agency's enforcement efforts."[3] It is possible that the Commission would find § 4(b)(1) preemption even where the other agency undertook no enforcement activity whatsoever.

Other Agency has Acted to Exempt Entire Industry. In the leading cases of Southern Railway v. OSHRC,[4] and *Southern* Pacific Transportation Co. v. Usery,[5] the Fourth and Fifth Circuits affirmed the Commission and rejected the contention of the railroads that § 4(b)(1) provides the railroads with an industry-wide exemption= The courts based their decisions on a literal reading of the term "working conditions," used in § 4(b)(l), and an inquiry into the statutory objectives of OSHA. According to the Fourth Circuit, an industry-wide exemption would result in unregulated working conditions for thousands of workers, which would "utterly frustrate the legislative purpose."[6]

The view that there are no industry-wide exemptions under S 4(b)(1) was for wed in numerous Commission[7] and judicial decisions.[8] In Dillingham *Tug & Barge Corp.*,[9] however, the Commission overruled prior decisions and held that § A(b)(l) "in certain circumstances" can create industry wide exemptions. According to the majority opinion, without industry-wide exemptions, employers may have an unreasonable burden to determine the requirements of two sets of regulations.

If there is no industry-wide exemption, then it must be decided whether specifically cited working conditions are exempt from OSHA jurisdiction. This has proven to be another difficult issue. In *Southern Railway,* the Fourth Circuit defined "working conditions" to mean "the environmental area in which an employee customarily goes about his daily tasks."[10] Under this broad definition, larger areas of the workplace would be exempt. By contrast, in *Southern* Pacific, the Fifth Circuit defined "working conditions" to include both "surroundings" (such as general pro ems of toxic liquids) and " "hazards" (a location, a category of items, or a specific item).[11] Under this more

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3. Pennsuco Cement & Aggregates, Inc., 8 O.S.H. Cas. (BNA) 1378 (1980). Accord Northwest Airlines, Inc., 8 O.S.H. Cas. (BNA) 1982 (1980) petitions for review dismissed, Nos. 80-4218, 80-4222 (2nd Cir. 1981).
4. 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976).
5. 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).
6. 539 F.2d at 338.
7. See, e.g., Puget Sound Tug & Barge, 9 O.S.H. Cas. (BNA) 1764 (1981), petition for review dismissed, No. 81-7406 (9th Cir. 1983); Seaboard Coast Line R. R., 6 O.S.H. Cas. (BNA) 1433 (1978); Greyhound Lines, Inc., 5 O.S.H. Cas. (BNA) 1132 (1977); Lee Way Motor Freight, Inc., 4 O.S.H. Cas. (BNA) 1968 (1977).
8. See, e.g., Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119 (2d Cir. 1978); Baltimore & O. R.R. v. OSHRC, 548 F.2d 1052 (D.C. Cir. 1976); Union Pac. R.R. v. Johnson, 264 N.W.2d 796 (Iowa 1978).
9. 10 O.S.H. Cas. (BNA) 1859 (1982).
10. 539 F.2d at 339. Accord U.S. Air, Inc. v. OSHRC, 689 F.2d 1191 (4th Cir. 1982).

flexible definition, OSHA coverage would be broader and therefore the exemptions to coverage more limited.

Proponents of the Fifth Circuit definition argue that it prevents gaps in coverage of employees, while proponents of the Fourth Circuit definition argue that it gives employers greater notice of what conditions are covered by each agency. The Commission's current position on this issue is not clear, but he courts are clearly split, with the First Circuit adopting the Fifth Circuit definition[11][12] and the Third Circuit adopting the Fourth Circuit definition.[13]

11. 539 F.2d at 390.
12. PBR, Inc. v. Secretary of Labor, 643 F.2d890(lst Cir. 1981).
13. Columbia Gas of pa., Inc. v. Marshall, 636 F.2d 913 (3d Cir. 1980).