



## State of North Carolina

Department of Justice

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**MICHAEL F. EASLEY**  
ATTORNEY GENERAL

**REPLY TO:**  
Jane A. Gilchrist  
Labor Section  
919/715-4323

### Memorandum

**Date:** November 27, 1995

**To:** Hal Pell  
Assistant Attorney General

**From:** Jane A. Gilchrist *JAG*  
Associate Attorney General

**Re:** North Carolina Jurisdiction of Railroad Employees

**ISSUE:** Does the North Carolina OSH program cover railroad employees?

**ANSWER:** No.

The Occupational Safety and Health Act of North Carolina sets out who is covered by the Act in N.C.G.S. §95-128:

#### §95-128. Coverage

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

\* \* \*

(4) Railroad employees whose safety and health are subject to protection under the Federal Safety Appliance Act (45 U.S.C. 1-50), or the Federal Railroad Safety Act of 1970 (45 U.S.C. 431-41).



In order to ascertain who is affected by this exemption it is necessary to determine the intent of the statute and then determine what employees are covered by the Federal Safety Appliance Act or the Federal Railroad Safety Act of 1970.

The courts of the State of North Carolina have not been called upon to provide an interpretation of N.C.G.S. §95-128. Therefore, it is necessary to look outside the state court system and see how other courts have interpreted the same or similar statutes. In Fowinkle v. Southern Railway Company, 533 S.W.2d 728 (Tenn. 1976), the Supreme Court of Tennessee held that railroads and railroad employees were not covered by the Tennessee Occupational Safety and Health Act of 1972. The court concluded that the Tennessee Occupational Safety and Health Act exempted certain employers and employees including railroad employees "whose safety and health are subject to protection" under the Federal Safety Appliances Act (45 U.S.C. §§ 1-50) or the Federal Railroad Safety Act of 1970 (45 U.S.C. §§ 431-441). This language is identical to the language in N.C.G.S. §95-128(4).

The Tennessee court found that the legislature specifically exempted these railroad employees from coverage under OSHA because their safety and health were subject to protection under the designated acts and that actual promulgation of protective regulations were not material to the issue. The court also stated:

[T]he several states are not precluded from adopting or continuing in force any law or regulation, pending the promulgation of regulations under the federal act. Nor is a state precluded thereafter from adopting or continuing in force 'an additional or more stringent law' when not incompatible, not unduly burdensome on interstate commerce, and when necessary to eliminate or reduce an essentially local safety hazard.

Fowinkle, 533 S.W.2d at 730.

In response to Fowinkle, the Tennessee operational agreement was amended to allow Federal responsibility under the Act to be exercised "with regard to working conditions in railroads, except as to working conditions as to which other Federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. The Federal responsibility will continue only until such time as the State is able to resume jurisdiction in this area." Federal Register, Vol. 41, No. 158, at 34,253, August 13, 1976.

A federal OSHA Review Commission addressed the issue of North Carolina's jurisdiction of railroad employees. It was determined that federal OSHA had jurisdiction to inspect a railroad office because North Carolina's approved plan specifically excluded railroad employees from coverage. The §4(b)(1) limitation on OSHA's authority was inapplicable because there were no Federal Railroad Administration regulations covering the particular work situation. Winston-Salem Southbound Railway Co. Rev. Com. Judge 1975, 75 OSAHRC 11/E14, 1975-1976 OSHD ¶19,891; *affirmed* Rev. Comm. 1975, 175-176 OSHD ¶20,185; *review denied*, CA DofC 1976, 548 F2d 1052, 1976-1977 OSHD ¶21,385.

The Federal Safety Appliance Act (45 U.S.C. 1-50) and the Federal Railroad Safety Act of 1970 (45 U.S.C. 431-41) were repealed by Act July 5, 1994, P.L. 103-272, §7(b), 108 Stat 1379. The subject formerly covered in those sections is now covered generally in 49 U.S.C. §§20101 et seq. According to the legislative history of P.L. 103-272, 45 U.S.C. 1-50 and 45 U.S.C. 431-41 were recodified in order to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation and to enact those laws as subtitles II, III and V-X of title 49, United States Code, and to make other technical improvements in the Code. Rail programs became subtitle V. The legislative history

specifically states "[a]s in other codification bills enacting titles of the United States Code into positive law, this bill makes no substantive change in the law."

The purpose of the 49 U.S.C. §§20101 *et seq.* is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents. This is similar to the purpose declared by Congress for the Federal Railroad Safety Act. In view of the purpose of the Act and the fact that no substantive changes have been made in the law, the legislative intent expressed in the North Carolina Act would preclude coverage of railroad employees.



Harry E. Payne, Jr.  
Commissioner

65 to w  
Steven A. Sykes  
State Plan Coordinator

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December 11, 1995

Ms. Suzanne N. Street  
Area Director  
U.S. Department of Labor  
OSHA  
Room 438 Century Station  
300 Fayetteville Street Mall  
Raleigh, NC 27601

**Re: Coverage of Railroad Employees**

Dear Suzanne:

As you requested, we have secured an advisory opinion (copy enclosed) from the Attorney General's Office related to coverage of railroad employees by the state OSH program. According to their opinion, the North Carolina OSH program does not have coverage over railroad employees.

As you know, in the interest of employee safety and health, we have investigated complaints related to railroad employees in the past if another federal agency did not exercise statutory authority. However, the recent CSX Transportation complaint brought this issue back to the forefront, and a supervisor's contact with the Attorney General's Office, and their conclusion that we do not have jurisdiction, prompted our transfer of this complaint to your office. This decision is not inconsistent with our OPN 97 which addresses the jurisdiction issue. Of course, this decision could be affected by a change in our Act.

Sincerely,

*Steve*

Steven Sykes

enclosure

U.S. Department of Labor

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November 2, 1995

Mr. Charles Jeffress, Director  
North Carolina Department of Labor  
Division of Occupational Safety and Health  
319 Chapanoke Road, Suite 105  
Raleigh, North Carolina 27603-3432

Re: Coverage of Railroad Employees

Dear Mr. Jeffress:

The coverage of railroad employees by occupational safety and health standards has been raised as an issue over the past several months, as a result of the receipt of employee complaints. This has long been a complex jurisdictional problem between the U. S. Department of Labor - OSHA, and the Federal Railroad Administration(FRA). As you know, Section 4(b)(1) of the OSHAct states that, "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."

Due to the general nature of this part of the Act, OSHA's coverage where other Federal agencies also have some authority over safety and health has been defined over the years through a combination of Memoranda of Understanding, court decisions, and past practice. Unfortunately, most of these issues must still be decided on a case-by case basis, taking into consideration the specific hazards involved, the operations performed by the employees, and the other agency's desire for OSHA to exercise jurisdiction in the particular case.

The matter of state versus Federal OSHA jurisdiction in state-plan states further complicates this issue. While states are not restricted by Section 4(b)(1) of the OSHAct, most states - including North Carolina - have generally adhered to Federal jurisdictional boundaries. North Carolina's OSH legislation is silent on the matter of

overlapping coverage by Federal agencies, for the most part. However, North Carolina General Statute 95-128(4), Coverage, states that this Article does not apply to "Railroad employees whose safety and health are subject to protection under the Federal Safety Appliance Act ... or the Federal Railroad Safety Act of 1970..." Until recently, we were under the impression that North Carolina intended to cover railroad employees to the extent that they were covered by the Federal Act. Conversely, when railroad employees were afforded protection by the FRA, they would not be covered by either Federal OSHA or North Carolina OSH.

Regarding the current employee complaint against CSX Transportation, the hazards which are alleged are not covered by the FRA. Therefore, the OSHAct does cover these employees performing these operations. If North Carolina cannot exercise jurisdiction over the safety or health of these and other railroad employees, Federal OSHA will provide coverage, including investigating complaints and taking enforcement action against the employer when necessary. Although OSHA's activity in this area is not great, it frequently involves complex hazards and results in litigation. It is important that we both have a clear understanding of North Carolina's interpretation of G.S. 95-128(4), and of its affect on the level of Federal enforcement in North Carolina.

Please provide me with a written interpretation of OSHNC's coverage of railroad employees, at your earliest convenience. We would appreciate a copy of any documentation, such as legislative intent, etc., that supports whichever position the state takes on this issue. This interpretation should probably come from the North Carolina Attorney General's office.

In the meantime, our office will respond to complaints from railroad employees, including the CSX complaint which you are in the process of transferring to us. I know that your primary concern is the same as ours - to afford these employees protection against unsafe or unhealthful working conditions, regardless of which agency provides that protection.

Thank you for your assistance in this matter.

Sincerely,

  
Suzanne M. Street  
Area Director

cc: R. Davis Layne