UNITED STATES OF AMERICA
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SECRETARY OF LABOR, Complainant v. CONAGRA, INC., Respondent.	OSHRC Docket Nos. 92-2140

ORDER

This matter is before the Commission on a direction for review entered by Chairman Stuart E. Weisberg, Chairman, on August 8, 1994. The parties have now filed a joint motion to withdraw direction for review.

Having reviewed the record, and based upon the representations appearing in the joint motion, we conclude that this case raises no matters warranting further review by the Commission. The terms of the joint motion do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the joint motion into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the joint motion. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Stuart E. Weisberg
Stuart E. Weisberg, Chairman

Edwin G Foulke Jr
Edwin G. Foulke, Jr., Commissioner

Velma Montoya
Velma Montoya, Commissioner

Date: April 19, 1995

1995 OSHRC 25

I certify that I served the attached order on the following persons on April 19, 1995:

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SECRETARY OF LABOR
Complainant,
v.
CONAGRA, INC.
Respondent.

OSHRC DOCKET
NO. 91-2140

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 13, 1994. The decision of the Judge will become a final order of the Commission on August 12, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 2, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 13, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2140

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	OSHRC
	:	DOCKET NO. 91-2140
v.	:	
	:	
CONAGRA, INC.,	:	
	:	
Respondent.	:	
	:	

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

Dean G. Kratz, Esq.
McGrath, North,
Mullin & Kratz, P.C.
Omaha, NE
For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., *et. seq.*, ("the Act"), to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

ConAgra, Inc. ("ConAgra") was issued three citations on July 29, 1991, stemming from an investigation conducted by the Occupational Safety and Health Administration ("OSHA") of an accident which occurred at ConAgra's grain elevator facility in Buffalo, New York (Tr. 10). On March 5, 1992, a ConAgra employee working in the facility's unloading area was seriously injured when the steel wire cable of a rail car puller snapped, striking the employee (Tr. 14, 86, 215, 272, 527, 606, 643; Exhibits C-37A & B). Robert Upton, an OSHA safety engineer, began the accident investigation on March 8, 1991, and visited the Buffalo facility six times over a period ending July 25, 1991 (Tr. 10, 635, 638-39,

644-45, 978). The subject citations - one serious, one willful, and one other-than-serious - include an alleged willful violation of § 5(a)(1) of the Act and a total proposed penalty of $40,000.[1]

ConAgra filed a timely notice of contest and a hearing was held in Buffalo, New York from January 5, 1993 to January 7, 1993 before Judge Richard Gordon and from December 1, 1993 to December 2, 1993 before the undersigned judge.[2] Both parties have filed post-hearing briefs and this matter is now ready for decision.

BACKGROUND

ConAgra operates a flour mill and two grain elevators at its Buffalo facility (Tr. 25, 1364; Exhibit R-3). One of the elevators, known as the Peavey Elevator ("Peavey") because it was owned by the Peavey Elevator Company before being purchased by ConAgra, serves as the storage and delivery point for grain belonging to the Cargill Company ("Cargill") (Tr. 25, 28-29, 153-54, 243-44, 1364-66, 1455-56).[3] ConAgra apparently operated Peavey from 1982 to 1984 before shutting the facility down for approximately two years; it was then reopened in 1986 (Tr. 175, 243-44, 343-44, 420, 495-96, 592).

Most of the grain stored at Peavey is received by ship or barge, but during the winter months when the adjacent Buffalo River is not navigable, shipments are received by truck or rail car (Tr. 11, 34-35, 97-99, 152-53, 989-90, 1078, 1375, 1452-56; Exhibits R-1 & R-2). In order to handle rail car deliveries, Peavey has an unloading area which contains two rail tracks and large bins or pits into which grain is released from the rail cars (Tr. 11, 36-37, 45, 47, 117, 276, 939, 1387; Exhibits C-3, C-8, C-41, R-1 & R-3). Strings of five loaded rail cars

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[1] The third item of the serious citation, together with its $5,000 penalty, was withdrawn by the Secretary in his complaint, reducing the total penalty proposed to $40,000 (Tr. 869). The Secretary also withdrew instance (b) of the sole willful violation alleged, but made no reduction in the $35,000 penalty proposed for this item (Tr. 847-49). Finally, the Secretary's post-hearing motion to amend his complaint so as to allege in the alternative to the violations set forth in both the serious citation and the willful citation, the violation of an additional general industry standard and several marine terminal standards, was granted.

[2] Judge Gordon left OSHRC July, 1993; Judge Hassenfeld-Rutberg was assigned on August 23, 1993 to complete the case proceedings.

[3] The second grain elevator at the Buffalo facility is known as the Lake and Rail Elevator and was purchased by ConAgra in 1988 from International Multifoods (Tr. 25, 244, 344). It serves the flour mill located at this facility (Tr. 1364, 1383).

are brought into the unloading area on each track by a small locomotive engine at which point a crew of ConAgra employees takes over the unloading process (Tr. 37, 44, 47-48, 369, 421-22, 500).

Each rail car contains three cargo compartments, each of which must be positioned over the storage pit before the "slide" at the bottom of the compartment can be opened, releasing the grain (Tr. 37, 40-41, 44-46, 56-57, 96, 370, 382, 501). At the time of the accident, ConAgra utilized a rail car puller at Peavey to "spot" each of these compartments over the storage pit (Tr. 11, 40-41, 45, 48, 55-57, 116-18, 133, 211-12, 369-70, 377-78, 500-02, 596-97).[4] The puller, which was part of the Peavey facility when ConAgra purchased it, was located partially underground in between the two rail tracks and consisted of two drums or "spools" mounted on a shaft with 3/4 inch steel wire cable wound around each drum (Tr. 12, 49, 75-76, 138, 143, 345-46, 667, 669, 763-64, 766-67, 893, 938, 1159; Exhibits C-6, C-7, C-9, C-10, C-11, C-16, C-17, C-18, C-20, C-23, C-24, C-26, C-32, C-33, C-35 & C-47). Although large steel plates covered most of the mechanism, two cut-outs in the plates exposed the drums, whose flanges extended about six inches above ground level (Tr. 76-77, 143; Exhibits C-6, C-7, C-16, C-23 & C-24). A small shanty positioned north of the mechanism and between the two tracks contained the puller's controls (Tr. 48-49, 53-54, 221, 390-92, 660, 718; Exhibits C-3, C-4, C-8 & C-22).

When unloading rail cars from the east track, the steel cable running from the puller's east drum was directly attached to one of the rail cars with a large hook, while the cable running from the west drum was lengthened by a "messenger" cable and looped through a sheave or pulley at the north end of the tracks before being attached to the same car (Tr. 44-45, 48, 74-75, 133, 135-39, 285-95, 298-99, 369-70, 500-01, 540-41, 596, 724-25, 730-31, 938, 1258-59; Exhibits C-25 & C-26). Connected to the shaft linking the puller's two drums was a clutch or "key" which shifted the power of the puller's wound rotor motor from one drum to the other, depending upon which direction the cars were being pulled (Tr. 134-35, 292, 296-97, 570, 662-63, 722-23, 884-85, 1205-06; Exhibits C-9, C-11, C-24 & C-44). As such,

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[4] At the neighboring Lake and Rail Elevator, a locomotive engine is used to spot rail cars over the storage bins (Tr. 92-93, 169, 174). ConAgra currently utilizes the same type of engine at Peavey since the rail car puller in question has not been used since the 1991 accident (Tr. 55, 93, 169-70, 400).

only one drum was actually powered at any given time; the other drum remained "neutral" (Tr. 12, 187, 296-97). During the puller's operation, the cable running from the powered drum was tense or taut, while the cable running from the unpowered drum was slack or loose (Tr. 187-88, 304-05, 310-11, 322, 538, 543). In recognition of the fact that a powered cable might snap when under tension or that its hook might become dislodged from the rail car, members of the ConAgra unloading crew working in close proximity to the puller usually stood on the side of the neutral, unpowered drum, considered the "safe side", not the side of the powered drum, known as the "sui-side [sic]" (Tr. 193-94, 216-18, 230, 232-33, 236-37, 306, 310-11, 322, 328-30, 374-76, 427-29, 462, 472, 548-49, 619, 627-28, 631-333, 810-11, 1017-20, 1028-29).

In addition to spotting rail cars over the storage bins, the puller was also used to transport cars across Childs Street, a road which intersects Peavey's unloading tracks at its south end (Tr. 11, 594-95; Exhibit R-1). This "crossing" procedure was performed after three of the rail cars in a five-car string were emptied of their load (Tr. 502-03, 540, 597). Operating the car puller at its full capacity, the entire string of cars was pushed across the street and while the string was still moving, two of the empty cars were uncoupled or released, freeing them to travel to the other side of the street to a rail car storage area (Tr. 133-34, 145-47, 200, 300, 308-09, 327, 376, 383-84, 400-05, 503, 507-09, 597-98, 609). After the cars were uncoupled, the puller's power would be cut and the clutch thrown in order to switch the power from one drum to the other, thus reversing the direction of the puller's operation so that the remaining rail cars could be pulled back into the unloading area (Tr. 134, 144-45, 196, 237-38, 292, 296-97, 300, 309-10, 327, 384-85, 462-64, 471, 504-06, 545, 598-600, 609). Three employees were needed to perform a crossing: one employee to operate the puller from the shanty; one employee to stand in the street so that he could uncouple the two rail cars and signal back to his co-workers when he had done so; and one employee to throw the puller's clutch so that the remaining cars could be pulled back (Tr. 142-45, 196, 237-38, 300-04, 371, 422-24, 460-61, 503-04, 526-27, 597-98; Exhibit R-1). These tasks were typically rotated among the employees within the unloading crew (Tr. 41, 52-53, 120, 230-31, 429-31, 460-61).

At the time of the accident, the ConAgra unloading crew was in the process of crossing a string of cars over Childs Street. On that day, Bernard Sheehan had relieved Frank Long at the puller's controls, Michael Avino had gone out to stand in Childs Street, and George Smith was designated to operate the clutch (Tr. 304, 395, 461, 525-26, 605, 617-18). Sheehan, Long, and Smith were all familiar with the unloading operation, having previously worked for the Peavey Elevator Company when it owned the facility (Tr. 175-78, 343-45, 419-20, 495-99, 537-38). Just before the accident occurred, Sheehan had begun to move a string of five cars along the east track towards Childs Street; therefore, the puller's east drum was powered, while the west drum remained "neutral" (Tr. 299-300, 363, 372-73, 448, 451, 542-43, 544, 574-76, 605, 623-24, 630, 1080; Exhibit R-1). When the cable on the west drum snapped, Smith was standing on the puller's "safe side" - the side of the neutral west drum - near the flour mill wall about 15 to 18 feet away from the west track, waiting for the moment when he would have to approach the puller in order to throw the clutch (Tr. 189, 215, 229-30, 273, 306, 372-74, 426, 525-27, 542-44, 549, 605-06, 628, 1081).

While the east drum was pulling the rail cars towards Childs Street, the slack cable on the unpowered west drum apparently "overspooled" up over the flange and wrapped itself around the shaft connecting the two drums (Tr. 273-74, 397-98, 417, 448, 451, 527-29, 533, 661, 695-96, 700-03, 803; Exhibits C-9, C-16, C-17, C-18 & C-41). During the puller's operation, the drum which was not powered, whether east or west, was capable of moving freely in either direction, a condition known as "freewheeling" (Tr. 12-13, 18, 208, 361, 364, 600-01, 1182). As a result, its slack cable spooled out easily and if enough cable unwound, it could "overspool" to the point that it lifted up over the drum's flange, disrupting the puller's operation (Tr. 13-14, 18, 154-57, 208, 361-62, 364, 378-79, 521-23, 557-58, 1183, 1263-64, 1270).[5]

When this facility was owned by the Peavey Elevator Company, both of the puller's drums were equipped with a "drag brake", designed to hold the cable in place as it unwound by applying pressure or resistance to the drum, limiting its ability to freewheel and allowing

[5] Although the "overspooling" of the neutral drum's cable occurred both when the rails cars were being spotted over the storage bins and when the cars were being moved across Childs Street, it apparently happened more frequently during the crossing procedure (Tr. 360-61, 447, 509-11).

the cable to spool off evenly (Tr. 15, 62-63, 161, 346-37, 436-38, 675-94, 1184-85, 1269, 1359; Exhibits C-11 through C-15). Sometime during their ownership of the facility, these brakes were partially removed and never replaced, but parts of the brake system remained in the puller's pit and were still present there in March of 1991 (Tr. 15, 62-63, 106-07, 161, 171, 201-02, 352, 436-38, 516-17, 551-52, 577, 668-70, 675-894; Exhibits C-11, C-12, C-13 & C-15). According to the ConAgra employees who worked for the Peavey Elevator Company in the unloading area when this system was being used, the drag brakes significantly reduced the occurrence of overspooling during the puller's operation (Tr. 170-71, 434-35, 489, 552-53). At least one of these employees complained to both Robert Gavin, who was ConAgra's supervisor at Peavey until two months before the accident, and to David DiLiberto, his replacement, about the problems the crew was having with overspooling and specifically informed them about the prior use of this brake system (Tr. 22, 97, 122-26, 149-51, 154, 62-66, 161-62, 194, 353-60, 365-68, 440-43, 445, 452-54, 512-16, 604, 619-21, 815-17, 820-21).[6]

Whenever overspooling did occur, the puller's power was immediately cut and the cable straightened, then rewound onto its drum (Tr. 154-57, 227-28, 360, 367, 379-81, 444-45, 530-33, 555-56, 602, 1032). If the overspooled cable became entangled on the puller's shaft, it had to be pried loose with a crowbar (Tr. 364-65, 444, 522-23, 531, 555-56, 602). On the day of the accident, however, the ConAgra crew was apparently unaware that the neutral drum's cable had overspooled and become entangled on the puller's shaft; since the cable was no longer able to unwind as the puller continued to operate, it ultimately built up enough tension to break, fly up in the air, and ricochet off of a metal garbage can positioned in front of the shanty, before whipping back towards the mill wall where Smith stood, throwing him several feet down the tracks (Tr. 192, 396-97, 417, 527, 539, 562-64, 578-79,

[6] Although Gavin insisted that he was told by Long, Sheehan, and Smith that the overspooling occurred on the puller's *powered* drum, it is clear from the record that overspooling, as described, could occur only on the drum whose cable was slack - the unpowered or "neutral" drum (Tr. 189, 192-94, 207-08, 213-15).

606-07, 704, 708, 712-14, 726, 787-88, 803, 1264, 1268, 1270-73; Exhibit C-19, C-20, C-21, C-26, C-37A & B, & C-41).[7]

DISCUSSION

I. Applicability of the Marine Terminal Standards

Because it receives most of its grain by ship or barge, ConAgra maintains that Peavey is actually a "marine terminal" as defined by 29 C.F.R. § 1917.2(u) and therefore, is subject to the marine terminal standards (Tr. 979-96, 1374-90, 1438-39). Under this definition, a marine terminal is essentially a facility that is "...associated with the primary movements of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidation and loading or delivery of waterborne shipments...." § 1917.2(u).

It is undisputed that at the time of Smith's accident, ConAgra was receiving grain at Peavey by rail car, not by ship. Thus, to the extent that it was not moving cargo to or from a "vessel" and was not involved in the handling of "waterborne shipments", the facility was *not* operating as a marine terminal at that time.[8] Under these circumstances, the marine terminal standards cannot apply.

II. Willful Citation 2, Item 1

The Secretary alleges that ConAgra violated § 5(a)(1) of the Act by exposing its employees to the hazard of being struck by the recoil of a broken wire rope cable during the operation of the rail car puller in the Peavey unloading area. Specifically, the citation states that "overspooling" caused the cable on the puller's neutral drum to come off of the drum, wrap around the shaft, and break, striking Smith and causing serious injury. In order to establish a violation of the general duty clause, the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to its employees; (2)

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[7] ConAgra claims in its post-hearing brief that this accident could have been the result of negligence on the part of the puller operator who may have "caused" the overspooling condition by accelerating the puller too rapidly (ConAgra's Post-Hearing Brief at 67). Not only does the record fail to support such an assertion, but ConAgra did not plead employee misconduct, or any other affirmative defense, in its answer. See Commission Rules of Procedure 34(b)(3) and 34(b)(4), 29 C.F.R. § 2200.34(b)(3) & (b)(4).

[8] Whether Peavey could be considered a marine terminal for that part of the year during which it receives grain by ship is a matter that is not before this tribunal.

either the cited employer or its industry recognized the condition or activity as hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1218, 1221, 1993 CCH OSHD ¶ 30,048 (No. 89-3389, 1993).

ConAgra does not appear to dispute that as operated, the rail car puller in the Peavey unloading area posed a hazard to the employees working around it. Indeed, according to Gavin, ConAgra's former supervisor at Peavey, the unloading employees knew from experience not to enter the area of the car puller when the cables were in motion (Tr. 217-18, 374, 618-19). The puller was also equipped with a horn which the puller operator would sound in order to alert the unloading crew that he was about to power the puller and begin moving the rail cars (Tr. 165-67, 203-06, 217-18, 394, 474-75, 530, 608-09).[9] Moreover, by terming one side of the puller "safe" and the other, the "sui-side [sic]", the members of the unloading crew, as well as ConAgra's management, clearly recognized that standing on the side of the puller's powered drum was unsafe because the taut cable could snap or the one of the rail car hooks could become dislodged. Even when standing on the so-called "safe" side of the puller, most of the employees stood as far away from the neutral drum as possible, positioning themselves near the wall of either the flour mill or the elevator - depending upon which track the crew was working from - as Smith did on the day of the accident (Tr. 375-76, 627, 631-33).[10]

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[9] Although *written* safety rules are apparently no longer utilized by ConAgra to provide safety information to its employees, an outdated version of these rules submitted into evidence by the Secretary specifically requires all car pullers to be equipped with a horn or siren that must sound for five seconds before any cars are moved; the rules also generally provide that employees should stand out of the line of the car puller hook (Tr. 267-70, 1490-91; Exhibit C-1). These precautions are reiterated in an even older set of safety rules developed by the Peavey Elevator Company, but identified by Wayne Bellinger, ConAgra's safety director, as rules which were followed by ConAgra's unloading employees (Tr. 791-98; Exhibits C-38 & C-39).

[10] Some employees, like Sheehan, apparently remained at the puller during the crossing procedure in order to be ready to throw the clutch each time the puller's direction had to be reversed; Long and Avino indicated, however, that they, like most employees, moved away from the puller when it was powered (Tr. 374-76, 580-84, 612-13, 618-19, 633).

These practices correspond with the experience of the Secretary's expert, Elmer Renner, who testified that in his many visits to various facilities with different types of car pullers, he was always instructed to keep away from the puller's cables (Tr. 1279-80). In addition, two of the six puller manuals or brochures submitted into evidence by the Secretary identify the immediate area surrounding a car puller during its operation as a "danger zone" and warn that all personnel must be kept clear of this area (Tr. 1251, 1281; Exhibits C-42A & C-52).[11] A third brochure similarly cautions that in order to avoid accident and injury, personnel should not be allowed in the line of a puller's rope or cable whenever it is under tension and/or being wound on the drum (Tr. 1280-81; Exhibit C-46). Thus, as ConAgra's own counsel admitted at the hearing, "everybody knows" that it is dangerous to work with puller cables and that employees should stay clear of them (Tr. 1026, 1032-33).

Clearly, the overspooling condition described in the record exacerbated any hazard inherent to the puller's operation. All three of the unloading employees who testified at the hearing indicated that overspooling disrupted the normal operation of the puller, particularly if the cable became wrapped around the puller's shaft as it did on the day of the accident. An overspooling cable was also capable of developing into a "bird's nest" or a knot, a condition in which the cable would overlap itself on the drum, become tangled, and crimp (Tr. 157-59, 381, 405-07, 1262-63, 1274-75). As noted *supra*, correcting these problems required the employees to stop the puller and constantly handle the cable as they straightened it, realigned it on its drum, or pried it from the shaft with a crowbar. If not corrected, an overspooled cable caught on the puller's shaft or knotted into a "bird's nest" would begin to tighten, then stretch as the power of the puller's motor was transferred to the entangled cable; according to Renner, once this occurs, control of the puller is lost (Tr.

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[11] The fact that these puller manufacturer brochures refer to car pullers of varying types and not necessarily to pullers identical to the one used at Peavey does not in any way diminish the weight to be given the information contained therein (Tr. 837). According to Renner and Upton, the OSHA safety engineer, these brochures were obtained from several current puller manufacturers both before the subject citation was issued and in preparation for these proceedings (Tr. 808-09, 821-24, 1213). Since the car puller in the Peavey unloading area was installed before 1940 and was apparently somewhat unique in that it had two drums instead of one, printed information about this particular puller was simply no longer available (Tr. 318-19, 1159, 1203, 1206-07, 1213). Because these pullers are sufficiently similar to the puller in question, I find the information provided by these brochures to have application here (Tr. 1207-28).

538-39, 1264-68, 1270-73, 1278). As such, contrary to ConAgra's claim that there was "no hazard" on the side of the puller's neutral drum, overspooling transformed a normally slack, and presumably "safe", cable into a *tense* cable, the very condition which the unloading employees identified as a hazard and sought to avoid. A cable that is subject to these conditions is certainly more susceptible to damage or breakage.[12] Therefore, the overspooling, which evidently occurred quite often during the operation of the Peavey car puller, essentially worsened an operation which was already, under normal circumstances, considered to be hazardous (Tr. 364, 510-12, 521-24, 601-02).

ConAgra also does not dispute that its supervisory personnel were told by members of the unloading crew that overspooling was occurring during the puller's operation. Specifically, Long spoke with Gavin, as well as his successor, DiLiberto, on more than one occasion after he became the regular car puller operator, at least two months prior to Smith's accident, about both the overspooling and the brake system used to alleviate the problem when the facility was owned by the Peavey Elevator Company (Tr. 353-60, 365-69, 440-43, 452-54). At the hearing, Gavin and DiLiberto confirmed that Long had discussed this matter with them and Avino, another unloading employee, testified that he actually witnessed the conversation between Long and DiLiberto the week before the accident (Tr. 62-66, 150, 161-62, 603-05, 619-21). Gavin also conceded that other unloading employees, such as Sheehan and Smith, had complained to him about the overspooling and Sheehan confirmed that he had spoken with management several times about the overspooling problem and the use of the brake system to address it (Tr. 149-51, 153-54, 512-16, 554-56). Thus, both Gavin and DiLiberto were well aware that overspooling was occurring on the Peavey puller.

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[12] Whenever a cable became frayed or damaged on the Peavey puller, it was replaced by one of ConAgra's maintenance employees known as "millwrights" (Tr. 132, 186, 407-08, 414, 485-86). In fact, according to Long, the cable that struck Smith had recently been installed on the puller in place of a damaged cable (Tr. 409, 411, 775-80; Exhibit C-35). Although Gavin testified that the puller's cables had been replaced approximately ten or twelve times during his tenure as Peavey supervisor, he claims that a cable never actually snapped during the puller's operation over this period (Tr. 131-32, 184-87). Long and Sheehan, however, recalled a few instances in which the cable had actually broken in two and had to be replaced (Tr. 410-14, 457, 481-85, 518-21).

ConAgra maintains, however, that neither supervisor understood the overspooling condition to be hazardous. According to Gavin and DiLiberto, none of the employees who spoke with them about this condition ever actually identified it as dangerous or life-threatening; instead, they claim, the employees' complaints focused on the fact that overspooling was a "nuisance" and "inconvenient" since it disrupted the unloading operation each time it occurred (Tr. 64-65, 149, 154, 196). Sheehan and Long admit that they considered the overspooling to be a nuisance and do not deny that their complaints included comments to that effect (Tr. 367-68, 444-46, 455, 556). Both employees claim, however, that their complaints to Gavin and DiLiberto also included statements indicating that the overspooling was "dangerous" and that someone might get hurt if the condition was not addressed (Tr. 354, 358-60, 367, 444, 516, 556).

In challenging the credibility of these employees, ConAgra questions both the presentation and timing of their complaints. For instance, ConAgra contends that the absence of complaints about overspooling to the company's safety committee, as well as complaints to management until two months before Smith's accident, demonstrates that the employees themselves did not consider the overspooling to be hazardous (Tr. 106, 312-14, 441-42, 445-46, 457-58). This argument, however, fails to address Sheehan's claim that he began complaining to Gavin about the overspooling in 1986 when ConAgra reopened the Peavey facility; Gavin, who was unable to recall exactly when Sheehan had discussed this matter with him, could only surmise that the discussions had occurred some time within the year prior to the accident (Tr. 150-51, 513-14, 554-55). ConAgra also overlooks Gavin's claim that the car puller at Peavey was not actually used until late 1990 just after the Cargill grain storage contract was obtained which, if accurate, would certainly explain the onset of overspooling complaints in January of 1991 (Tr. 122, 125-26, 151-53).

Furthermore, the fact that these employees chose to report the overspooling problem directly to Gavin and DiLiberto rather than raise the issue before the company safety committee is not as significant as ConAgra would like to believe. Apparently, in order to bring a safety matter to the safety committee's attention, the complaint first had to be related to one of the two or three employees representing the crews at both Peavey and the Lake and Rail Elevator on the committee; these representatives, in turn, would then report

the complaint at the next monthly meeting of the committee, only to have it referred back to the appropriate elevator supervisor or his maintenance department for corrective action (Tr. 60, 102-04, 113-14, 258-59, 457-58). As such, it is unlikely that the employees perceived there to be any advantage to reporting a safety problem to the company's safety committee instead of their own supervisor, particularly if they felt the problem required immediate attention. Neither of these objections, therefore, merit a blanket dismissal of Sheehan and Long's testimony as unreliable.

More compelling is ConAgra's emphasis of management's claim that Long, in particular, did not present the overspooling condition as one with urgent consequences for the safety of the unloading employees. Indeed, according to Gavin, DiLiberto, and even Bellinger, Long, who served for approximately two years as the union steward for this facility, was never hesitant about pointing out safety problems to management and "loudly" demanding that corrective action be taken (Tr. 65, 150, 194-95, 454-55, 1391-94). Apparently on these occasions, the problems were promptly remedied by ConAgra (Tr. 314-15, 459-60). In this particular instance, though, Gavin and DiLiberto maintain that their inaction can be attributed in part to Long's failure to convey his complaints about the overspooling with the same sense of "urgency" or immediacy with which he conveyed previous safety complaints (Tr. 65, 72-73, 163-64, 195).

While it seems improbable that either Sheehan or Long, each with extensive car puller experience, would have judged the numerous incidents of overspooling they observed during the Peavey unloading operation to be nothing more than a nuisance, their admission that their complaints included descriptions of overspooling as inconvenient and a nuisance does suggest that they may not have appeared as concerned as they claim they were about the safety of this operation when reporting these incidents to management. Indeed, it is telling that Long's comments, in light of his seemingly well-established reputation for forcefully informing ConAgra's management whenever a safety problem required immediate attention, did not provoke the typically prompt response from management that his prior reports had. Thus, the possibility that Gavin and DiLiberto may have perceived these employees to be conveying a sense of annoyance with the interruptions that overspooling

created rather than one of concern for the safety of the unloading crew is not an unreasonable one.

Nonetheless, it is difficult to believe that unless the employees presented their complaints with raised voices and specifically included the words "dangerous" and "serious injury", Gavin and DiLiberto were incapable of concluding on their own that the overspooling was hazardous. Granted, their testimony at the hearing revealed that both supervisors had a limited knowledge of the car puller operation. Gavin, for instance, mistakenly believed that overspooling occurred on the powered drum, not the neutral drum, and DiLiberto was apparently unaware that the unloading employees utilized the car puller to move empty rail cars into the storage area across Childs Street (Tr. 77-78, 160, 189, 192-93, 214-15). It is also true that both supervisors, not having worked with a car puller prior to their employment at this facility, relied almost entirely upon the experience and skills of the unloading employees with regard to the puller's safe operation; as DiLiberto himself acknowledged, everything he knows about car pullers he has learned from these employees (Tr. 50-51, 126-28, 159, 165-67, 218, 393-94, 476-77, 529-30, 565-66, 607-08).

At the same time, though, both Gavin and DiLiberto demonstrated a basic understanding of the puller's operation and at least Gavin distinctly recognized the hazards inherent to this process. Although DiLiberto never actually discussed the dangers involved in working near a car puller or the unloading employees' observance of the safe side versus "sui-side [sic]" rule, he thought enough of Long's comments to him about the overspooling condition to consult with ConAgra's two maintenance workers or "millwrights" about the brake system, both of whom told him that reinstalling the brake was a "good idea" (Tr. 71-72). In fact, both supervisors admit that based on their perception of the situation, the use of a drag brake would have decreased the incidence of overspooling (Tr. 72-73, 170-71).

Thus, when more than one employee reports that the puller's steel wire cables are jumping off of their drums, twisting into knots, and becoming tangled on the puller's shaft, it should not have to be spelled out that this is a potentially unsafe condition which should be pursued beyond simple discussion. Even Bellinger, who was only generally familiar with the unloading operation at the Peavey facility, indicated that if he had observed the overspooling condition, he would have recognized it to be a problem that required resolution

and "would have pursued it vigorously" (Tr. 1439-46, 1495). Therefore, given their fundamental knowledge of the car puller's operation, Gavin and DiLiberto should have recognized this condition for the obvious hazard that it was.[13] *See Litton Systems, Inc., Ingalls Shipbuilding Div.*, 10 BNA OSHC 1179, 1182, 1981 CCH OSHD ¶ 25,817 (No. 76-900, 1981) ("Recognition of the hazard [under an alleged § 5(a)(1) violation] can be inferred from the obvious nature of the hazard."). *See also Donovan v. Missouri Farmers Association*, 674 F.2d 690 (8th Cir. 1982).

There is also evidence in the record to suggest that car puller manufacturers have recognized that a puller's cables should not be allowed to overspool. One of the puller manuals in evidence expressly links overspooling to the creation of "safety problems" and three of the brochures indicate that their one-way car pullers are equipped with a standard drag brake in order to prevent the puller's drum from freewheeling (Tr. 822, 956-57, 1235-38, 1338-39, 1342, 1357; Exhibits C-42A & B at 7, C-46 at 4-5, C-50 at 11, & C-51 at 4). Although two manuals from The Aldon Company and one from Thern, Inc. indicate that a drag brake and jaw clutch are optional accessories on their pullers, all three manuals seem to suggest that this is because these components can only be safely used on pullers which operate on a flat track, not on an incline or grade (Tr. 1238-44, 1247-48, 1338-41; Exhibits C-42A & B at 13, C-52 at 'V', & C-53 at 37).[14]

Moreover, Renner indicated that a drag brake ceases to be an optional or, as one manual referred to it, an "anti-nuisance" feature, when the puller, like the one used at the Peavey facility, consists of *two* one-way car pullers; as he explained it, reducing overspooling and containing the cables on their respective drums is central to safely operating and maintaining control of this type of "closed loop" puller (Tr. 1252, 1258-73, 1276-77, 1341-42;

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[13] That no accidents had occurred at Peavey prior to Smith's does not alter this conclusion (Tr. 182, 340, 421, 456-57, 487-88). One of the Act's goals is to prevent the first accident from ever occurring. *Lee Way Motor Freight, Inc. v. Secretary of Labor*, 511 F.2d 864, 869-70 (10th Cir. 1975). *See also St. Joe Minerals v. OSHRC*, 647 F.2d 840, 845 n.7 (8th Cir. 1981). As such, "recognition of a hazard should not wait upon the occurrence of a fatal accident." *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1045 (7th Cir. 1989).

[14] Renner also indicated that winch-type car pullers that are not used for moving or pulling cars may not actually need to be equipped with a clutch or drag brake (Tr. 1357-58).

Exhibit C-46 at 4). Consistent with this analysis, the puller used at the Peavey facility seems to have been originally installed with a drag brake system since parts of the brake assembly appear to be actually embedded in the concrete wall of the puller pit (Tr. 352, 436-37, 670, 676, 678, 691; Exhibits C-11, C-12, C-13 & C-15). As such, it was arguably the intent of the puller's manufacturer, by designing the puller with a brake system, or the Peavey Elevator Company, by requesting the installation of this feature, or both, that this puller be operated with a brake system.

It has already been established that the reinstallation and use of the drag brake system would have significantly reduced the incidence of overspooling at Peavey (Tr. 72-73, 170-71, 381, 434-35, 489, 552-53, 1184-86, 1269, 1273, 1289, 1337, 1358-59).[15] That the brake was known to freeze in the winter does not render its use infeasible here (Tr. 202, 349-51, 439, 1295, 1499, 1500, 1508). Long testified that antifreeze was used successfully during Peavey's ownership to eliminate the freezing problem (Tr. 350-51, 439, 1295, 1499). If, however, as Bellinger testified, the use of antifreeze was not advised because the substance drained down into the adjacent river, Renner suggested that the use of a heating element in the puller pit or a sump pump to remove excess water would also have remedied the freezing problem and neither of these options were shown by ConAgra to be infeasible (Tr. 1295-96, 1499-1500). Other methods of addressing the hazards presented by overspooling suggested by Renner and not shown by ConAgra to be infeasible include relocating the shanty housing the puller's controls to a position *behind* the mechanism so that the operator can directly observe the operation of the puller's drums and cables, as well as motorizing the puller's clutch so as to eliminate the need for an unloading employee to have to approach the puller in order to operate the switch (Tr. 1282-84, 1288-90).

Thus, having shown that allowing the puller's cables to overspool posed a hazard to ConAgra's employees, that the car puller industry, as well as ConAgra's management, recognized or should have recognized this condition to be unsafe, that serious physical harm to ConAgra employees could result if the condition were not addressed, and that the use of

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[15] With regard to the third element of proof under the alleged violation of § 5(a)(1), there is no question that a snapped steel wire cable could cause serious physical harm, as it did in Smith's case, to the unloading employees.

an already existing brake system would have reduced the occurrence of this condition, the Secretary has established a violation of § 5(a)(1).

A willful violation is defined as one that is voluntarily committed with an intentional disregard for the requirements of the Act or with a plain indifference to employee safety. *General Dynamics Land Systems Div. Inc.*, 15 BNA OSHC 1275, 1287, 1991 CCH OSHD ¶ 29,467 (No. 83-1293, 1991), *aff'd*, 985 F.2d 560 (6th Cir. 1993) ("*General Dynamics*"). When the violation in question arises under the general duty clause, however, the burden of proving that the violation was willful is notably more difficult since the Secretary must show that the employer intentionally disregarded or was indifferent to its statutory duty to furnish a workplace free of recognized hazards causing or likely to cause death or serious physical harm. *Id. See also St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 847-48 (8th Cir. 1981). It is not enough, therefore, to simply claim that the employer had knowledge of the cited condition; there must be concrete evidence, beyond that of establishing knowledge, that the employer intentionally disregarded or was indifferent to this duty. *See General Dynamics* at 1287. The Secretary has failed to provide such evidence here.

Although it is clear that ConAgra's management should have acted to address the overspooling after being told several times about its incidence, their failure to do so was not due to any conscious disregard or even plain indifference. To the contrary, their inaction was the result of their mistaken belief, born not only of their unfamiliarity with the puller's operation, but also of the manner in which these complaints appear to have been presented, that the overspooling was believed by ConAgra as a condition which did not require immediate attention as it was just a "nuisance". Both Long and Sheehan conceded that their complaints were couched in terms of the overspooling being a nuisance; in fact, Sheehan admitted that his complaints were "mostly" about the inconvenience involved with correcting the condition (Tr. 556). It has also been shown that neither Gavin nor DiLiberto completely understood the operation of the car puller at Peavey; Gavin's insistence at the hearing that the employees had specifically told him that the overspooling problem was confined to the puller's powered drum illustrates this point perfectly. Under these circumstances, their failure to investigate the employee complaints about overspooling and pursue the reinstallation of a brake system which both knew would alleviate the problem,

certainly constitutes a lack of diligence on their part but it does not rise to the level of disregard or even indifference necessary to establish a willful violation. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2174, 1993 CCH OSHD ¶29,962 (No. 87-0922, 1993); *Williams Enterp. Inc.*, 13 BNA OSHC 1249, 1257, 1986-87 CCH OSHD ¶27,893 (No. 85-355, 1987).

The Secretary has also failed to prove that ConAgra's decision to rely primarily upon the combined experience of its unloading employees to ensure the puller's safe operation is indicative of an indifference towards safety matters. Since, as Renner and Upton indicated, comprehensive data about a car puller of this type was no longer available, these employees, some of whom had worked at this same elevator for over twenty years, were likely to be the most complete source of information, safety or otherwise, about this particular puller, and as a result, were in the best position to evaluate its operation. Indeed, the employees had developed their own safety procedures, taught to supervisors and fellow co-workers alike, for operating the puller, and with the exception of a few minor injuries, their efforts were for the most part successful (Tr. 50-52, 127-28, 166-67, 203-07, 340, 393-95, 421, 456, 476-77, 487-88, 565-66, 607-08, 1425-26). Thus, not only was there no current information available for ConAgra to obtain about this puller, but there was virtually no need to teach the employees what, to paraphrase Long, they already knew better than their supervisors (Tr. 477). Furthermore, although it relied heavily upon the experience of these employees, ConAgra did not simply ignore its safety obligations to them. Long testified, for instance, that his complaint about the steel plates covering the puller being bent was promptly addressed by management (Tr. 314-15, 459-60). Clearly such a response is inconsistent with the notion of a company that disregards or is indifferent about the elimination of safety hazards from its workplace.

In sum, there was no deliberate intent on ConAgra's part to disregard its duty to protect its employees from a workplace hazard. Nor does the evidence presented suggest that ConAgra was indifferent to the safety of its employees. Thus, a willful violation of § 5(a)(1) has not been established. Given the fact that serious physical harm could have resulted, and did result, from this hazardous condition, the violation is affirmed as a serious one. With regard to penalty, Upton testified that the $5,000 base penalty he calculated was multiplied by a willful factor of seven, for a total proposed penalty of $35,000 for this item

(Tr. 856). He also indicated that had the violation not been cited as willful, he would have applied a 15% reduction for good faith (Tr. 865, 1076). Upon consideration of this testimony, as well as the penalty criteria at § 17(j) of the Act, 29 U.S.C. § 666(j), I find a penalty of $4,250 to be reasonable and appropriate for this violation.

III. Serious Citation 1, Item 1

Under this item, the Secretary alleges that two open-sided platforms at the Peavey facility, one in the unloading area and one in the loading area, were not guarded by standard guardrails in violation of § 1910.23(c)(1) and (c)(3), respectively.[16] ConAgra does not dispute that these platforms, both of which serve to connect two small sets of stairs positioned at entrances to the elevator workhouse, lacked guardrails at the time of the inspection (Tr. 732-59, 857-58, 863-64; Exhibits C-27, C-28, & C-31). It does, however, question whether the Secretary has satisfied its burden of proving that the cited standards are applicable to the platforms in question.[17] *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993) ("*Unarco*"); *Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1873, 1992 CCH OSHD ¶ 29,829 (No. 88-1167, 1992).

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[16] These standards provide in relevant part:

> § 1910.23(c) *Protection of open-sided floors, platforms, and runways.*
> (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.
>
> * * * *
>
> (3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

[17] Although ConAgra's challenge focuses solely on the applicability of § 1910.23(c)(1) to the unloading area platform, its argument is equally relevant to determining whether the Secretary has shown that § 1910.23(c)(3) is applicable to the loading area platform (ConAgra's Post-Hearing Brief at 85). Not only are the two platforms identical in appearance, but the testimony cited by ConAgra in support of its objection raises questions about the applicability of *any* standard found under § 1910.23 to the platforms in question (Exhibits C-27 through C-31).

For the purposes of the cited standards, a "platform" is defined at § 1910.21(a)(4) as:

> A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment.

According to ConAgra's safety director, none of its employees perform work on the cited platforms (Tr. 1396). In fact, Upton testified that the employees only "use" these platforms to enter the elevator's workhouse and access the equipment contained therein (Tr. 858, 998-1000).[18] Based on this testimony, neither platform appears to constitute a "working space" as described in § 1910.21(a)(4). *See, e.g., Unarco* at 1502 (anode rails, PVC pipes, and carry arms located above chemical and hot water tanks are not "working spaces" under § 1910.21(a)(4) simply because employees occasionally set foot on them while working). *See also General Elec. Co. v. OSHRC*, 583 F.2d 61, 64-65 (2d Cir. 1978). *Cf. Superior Elec. Co.*, 16 BNA OSHC 1494, 1496 (No. 91-1597, 1993) (three-foot wide catwalk installed above the ceiling to provide access to equipment and serve as surface to stand on while repairing equipment constitutes an elevated working space under the definition of "platform" found at § 1926.502(e)).

In apparent recognition of this fact, the Secretary concedes in his post-hearing brief that "other standards may have application to the cited area[s]..." (Secretary's Brief at 36). Indeed, one of these "other" standards, § 1910.21(b)(4), appears to describe the platforms in more accurate terms than § 1910.21(a)(4): "An extended step or landing breaking a continuous run of stairs." Even Upton referred to the platform in the unloading area as "a landing platform at the top of the stairs" (Tr. 1082). As such, § 1910.24(h), the standard which governs the guarding of stair platforms, is more applicable to the conditions cited than either of the originally charged standards.[19]

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[18] Although Upton maintains that he was told the unloading area platform was used at one time to load and unload rail cars, at the time of the inspection, it was apparently used only to access the adjacent workhouse (Tr. 858, 998-1000, 1082, 1084-85).

[19] Section 1910.24(h) provides in relevant part:

(continued...)

Under all three standards, however, the guarding requirements remain the same; whether these areas are considered working spaces or stair landings, they still must be equipped with standard guardrails. The cited condition (failing to guard a platform), as well as the method of abatement (installing guardrails), are also identical no matter which standard is applied. Under these circumstances, allowing the Secretary to amend his complaint so as to allege the violation of the more applicable standard should not prejudice ConAgra or its case.[20] *Usery v. Marquette Cement Mfg. Co.*, 569 F.2d 902, 906 (2d Cir. 1977). *See also Morrison-Knudsen Co./Yonkers Contrac. Co.*, 16 BNA OSHC 1105, 1112-14, 1993 CCH OSHD ¶ 30,048 (No. 88-572, 1993), *petition for review filed*, No. 93-1385 (D.C. Cir. June 15, 1993) (*"Morrison-Knudsen"*). Where, as here, an amendment would change only the standard under which the condition is cited and not the factual basis for the violation, the employer has not been deprived of alleging any defenses that were not already available to it under the cited provisions. *Morrison-Knudsen* at 1114. Moreover, any objections which ConAgra may have had regarding such an amendment could easily have been indicated in its reply brief.[21] Accordingly, the Secretary's motion is granted and the complaint is amended to allege a violation of § 1910.24(h) with regard to each platform.

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[19](...continued)

> Standard railings shall be provided on the open sides of all exposed stairways and stair platforms.

[20] Since the Secretary's motion to amend his complaint to conform to the evidence was made in his post-hearing brief, Rule 15(b) of the Federal Rules of Civil Procedure governs his request (Secretary's Brief at 37 & n.20 [incorporating arguments made with respect to Item 1a to those made with respect to Item 1b]). This rule is applicable to Review Commission proceedings pursuant to Commission Rule of Procedure 2(b), 29 C.F.R. § 2200.2(b) ["In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure."].

[21] Indeed, ConAgra included in its reply brief an objection to amending the complaint to allege violations of relevant portions of the marine terminal standards, if found applicable here (ConAgra's Reply Brief at 11). Any claim on ConAgra's part that this argument should also be considered an objection to the amendment of this particular item must fail since ConAgra has not indicated in any way how it would be prejudiced by *either* amendment.

As noted *supra*, the cited platforms were not equipped with standard guardrails at the time of the inspection. In addition, a fall from either platform, one measuring four feet from the ground and the other over three and a half feet, could have resulted in serous physical injury to ConAgra employees using these areas to access the workhouse, particularly if they happened to fall into the path of a rail car travelling along the tracks adjacent to the platforms (Tr. 741-42, 858-60, 863-64, 904, 998-999; Exhibits C-27 through C-31). Accordingly, the violations are affirmed as serious. With regard to penalty, Upton testified that he would have applied a 15% reduction for good faith to the proposed penalty of $2,500 if the issued citations had not included a willful allegation (Tr. 860-64). Since the Secretary has not sustained the willful characterization of that violation, the reduction should apply. Thus, upon consideration of this testimony, as well as the penalty criteria at § 17(j) of the Act, 29 U.S.C. § 666(j), I find a penalty of $2,125 to be reasonable and appropriate for this violation.

IV. Serious Citation 1, Item 2

Under this item, the Secretary alleges that the two sets of stairs positioned outside the entrances to the elevator workhouse, one in the unloading area and the other in the loading area, were not guarded on their open sides by standard railings or handrails in violation of § 1910.23(d)(1)(ii).[22] It is undisputed that both sets of stairs lacked the proper railings, had more than four risers each, and were approximately 29 inches wide (Tr. 733, 736, 865-67; Exhibits C-27 through C-31). Accordingly, the alleged violation must be affirmed.

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[22] This standard provides:

> § 1910.23(d) *Stairway railings and guards.*
> (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(1)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:
>
> * * *
>
> (ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.

Like the platforms which connect each set of stairs, a fall from any of the four flights could have caused serious physical injury to ConAgra employees using the stairs to access the workhouse, particularly if they happened to fall into the path of moving rail car on the adjacent tracks (Tr. 866-67). Thus, the violation was properly characterized as serious. Again, with regard to penalty, Upton testified that he would have applied a 15% reduction for good faith to the proposed penalty of $2,500 had the issued citations not included a willful allegation (Tr. 868-69). Since the Secretary has not sustained the willful characterization of that violation, the reduction should apply. Thus, upon consideration of this testimony, as well as the penalty criteria at § 17(j) of the Act, 29 U.S.C. § 666(j), I find a penalty of $2,125 to be reasonable and appropriate for this violation.

V. Other than Serious Citation 3, Item 1

Under this item, the Secretary alleges that ConAgra violated § 1910.147(c)(6)(ii) by failing to certify that periodic inspections of its energy control procedures had been performed.[23] Section § 1910.147(c)(6) requires an employer to conduct a periodic inspection of its energy control procedure at least annually in order to ensure that both the procedure and the requirements of OSHA's lockout/tagout standards are being followed.

Upton claims that the August 17, 1990 inspection form supplied to him by ConAgra's safety director during the inspection indicates that ConAgra failed to certify that its energy control procedures were being followed with regard to locked-out equipment (Tr. 869-72; Exhibit C-40). The cited standard, however, only requires an employer to certify that the inspection has been performed, not certify that its procedures have been followed with regard to a specific piece of equipment. ConAgra has clearly complied with this requirement. The inspection form clearly states that a periodic inspection was performed by Wayne Bellinger during the week of August 13, 1990. Although Bellinger testified, and

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[23] This standard provides:

> The employer shall certify that the periodic inspections have been performed. The certification shall identify the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection.

the form confirms, that he did not encounter any locked-out equipment during his inspection and therefore, was unable to verify whether ConAgra's procedures had been followed, it does not alter the fact that the form certifies that an inspection was performed (Tr. 1421-22, 1519-25).[24] Therefore, the alleged violation must be vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

ORDER

Serious citation 1, item 1, alleging violations of 29 C.F.R. § 1910.24(h) is AFFIRMED and a penalty of $2,125 is assessed.

Serious citation 1, item 2, alleging a violation of 29 C.F.R. § 1910.23(d)(1)(ii) is AFFIRMED and a penalty of $2,125 is assessed.

Serious citation 1, item 3 was WITHDRAWN by the Complainant.

Willful citation 2, item 1, alleging a violation of § 5(a)(1) of the Act is AFFIRMED as a serious violation and a penalty of $4,250 is assessed.

Other than serious citation 3, item 1, alleging a violation of 29 C.F.R. § 1910.147(c)(6)(ii) is VACATED.

Barbara L. Hassenfeld-Rutberg

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: July 8, 1994
Boston, Massachusetts

[24] If, as Upton's testimony suggests, an inspection of this nature does not satisfy OSHA's requirements for ensuring that energy control procedures are being followed, then the condition should have been cited as such under the standard(s) regulating the format of these inspections; § 1910.147(c)(6)(ii) governs only the administrative aspect of certifying that these inspections have been performed.