



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR  
Complainant,

v.

BOSTON TOWING AND TRANSPORTATION CO.  
Respondent.

OSHRC DOCKET  
NO. 93-2035

**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 April 13, 1995. The decision of the Judge will become a final order of the Commission on May 15, 1995 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 May 4, 1995 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  
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Petitioning parties shall also mail a copy to:

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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.*  
Ray H. Darling, Jr.  
Executive Secretary

Date: April 13, 1995

DOCKET NO. 93-2035

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,  
Complainant,

v.

BOSTON TOWING & TRANSPORTATION,  
A LIMITED PARTNERSHIP,

Respondent.

OSHRC  
Docket No. 93-2035

Appearances:

David L. Baskin, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
For Complainant

Brian P. Flanagan, Esq.  
Flanagan & Hunter, P.C.  
Boston, Massachusetts  
For Respondent

Before: Administrative Law Judge Robert A. Yetman

**DECISION AND ORDER**

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

As a result of an inspection of Respondent's worksite located at the Quincy Shipyard, Quincy, Massachusetts during the period January 25, 1993 to June 10, 1993, Respondent Boston Towing and Transportation Company<sup>1</sup> was issued Serious Citation No. 1 and Repeat Citation No. 1 on June 18, 1993. The Serious citation alleged six violations of construction standards set forth at 29 C.F.R. 1926 and the Repeat Citation alleged one repeat violation

<sup>1</sup>By order dated October 21, 1993, Complainant's motion to identify Respondent as a limited partnership was granted.

of a construction standard. A timely notice of contest was filed by Respondent and a complaint was filed by Complainant with this Commission on October 7, 1993 incorporating the alleged violations contained in the citations. On October 13, 1993 Respondent filed an answer to the complaint admitting the essential elements establishing jurisdiction, generally denying the allegations contained in the citations and complaint and asserting various affirmation defenses.

On December 23, 1993, Complainant filed a motion to amend the complaint as follows:

(1) Withdraw Serious Citation 01, Item 1 and the proposed penalty attached thereto.

(2) Withdraw Serious Citation 01, Item 2 and the proposed penalty attached thereto.

(3) Amend Citation 01, Item 3 to read:

29 C.F.R. §1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

Jobsite: Pier One: Employees were not required to wear personal floatation devices while boarding and exiting the barge via ladder.

(4) Amend Citation 01, Item 4 to read:

29 C.F.R. §1910.25(d)(2)(i): Portable ladders were used at an improper pitch (i.e., the horizontal distance to the foot of the ladder was not, where possible, one quarter of the working length of the ladder) and the ladder(s) were not lashed, held in position, or so placed to prevent slipping:

Jobsite: Pier One: The working length of the ladder used to access the barge exceeded the 25% requirement and was not secured from displacement.

(5) Withdraw Citation 01, Item 5 and the proposed penalty attached thereto.

(6) Withdraw Citation 01, Item 6 and the proposed penalty attached thereto.

(7) Amend Citation 02, Item 1 to read:

29 C.F.R. §1918.23(b) Employee(s) could not step safely to or from wharf, float, barge or river towboat and neither ramp(s) meeting requirements of 29 C.F.R. §1918.23(a) nor safe walkway(s) meeting the requirements of 29 C.F.R. §1918.21(d) were provided.

Jobsite: Pier One: Safe gangways were not provided to board and leave barges.

BOSTON TOW & TRANSPORTATION WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD §1918.11(a), WITH RESPECT TO OSHA INSPECTION NUMBER 107437303, CITATION NO. 01, ITEM 3, ISSUED ON FEBRUARY 11, 1991.

Complainant's motion to amend was granted and Respondent filed a general denial as to the amended complaint.

On May 5, 1994, Complainant filed a Motion For Summary Judgement with supporting documentation based upon a joint stipulation of facts filed by the parties on April 12, 1994. A second stipulation was filed by the parties on May 17, 1994. Respondent filed a cross motion for summary judgement with a supporting memorandum of law on May 23, 1994. Complainant filed a reply brief on June 9, 1994 and Respondent filed a rejoinder on July 1, 1994. The matter is now ready for decision.

The parties submitted the following statement of facts:

"This matter arises as a result of investigation commenced by the government on or about January 25, 1993, at respondent's facility within the Quincy Shipyard. The incident that prompted the investigation was that on that date the remains of a weekend watchman were found floating in the water between one of respondent's barges and the pier.

Respondent's facility at Howard Street, Quincy, Massachusetts, is a Roll On/Roll Off (RO/RO) facility. Within the facility, there is a pier and adjoining wharf area. The pier and facility are used to load and discharge barges, which are moved by means of tugboats, to and from the Massachusetts Water Resources Authority (MWRA) construction site on Deer Island in Boston Harbor. This service is performed by respondent pursuant to a contract between respondent and the MWRA.

Various cargo is delivered to the facility by over-the-road trucks. The trucks are then marshalled at respondent's facility and loaded onto barges by means of a vehicle boarding bridge, similar to that used on car ferries. During the normal course of the work day, all ingress and egress to the respondent's barges and tugboats is via the vehicle boarding bridge.

The issues involved with this particular case stem not from ingress and egress over the vehicle boarding bridge, but, rather, with respect to one barge, the *Seaworthy I*, the ingress and egress first thing in the morning and the last thing in the evening by the crew of the tugboats and by watchmen working in the evenings and on weekends and holidays.

During non-working hours, two tugboats remain married to the barges, or "in the notch." The barges are backed away from the vehicle boarding ramp a few feet. This is to ensure no damage is sustained to either the vessel or the ramp.

Once the tugboat and barge are backed away from the ramp, they are moored to the pier in such a location that it would not differ more than a few inches either way on a day to day basis. Egress from the tug by the members of the tugboat crew is then achieved by moving from the tugboat to the barge, and from the barge to the pier, by means of either a ladder or a gangway. The same evolution is repeated the next morning when the crew needs to board the barge again in order to [board] the tugboat to begin the day's work. This method of ingress and egress was also used by watchmen during non-work hours, to the extent they needed to go aboard the tug. The barge in question was on the north face of the pier at the facility. There was a similar barge and tugboat moored on the south face of the pier at all times relevant to the matters herein. Due to a different configuration of the fendering system on the south side of the pier, a ladder was not normally employed on the south side of the pier, but, rather, a much longer and heavier gangway.

The range of tide in the Weymouth Fore River is approximately 9.8 feet under normal circumstances. At extreme low tide, the deck of the barge<sup>2</sup> is well below the surface of the pier. Prior to January 25, 1993, both a gangway and a wooden ladder were available for individuals to obtain ingress and egress to the barge. At intermediate to high ranges of

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<sup>2</sup>The reference to "barge" in this paragraph apparently refers to the barge inboard of the *Seaworthy I* located on the north side of the pier.

the tide, the gangway was used. At extreme ranges of the tide, the wooden ladder would be used. The ladder would be secured from slippage by being butted against a large deck cleat, which was permanently affixed to the barge. Decedent, Gilligan, was found in the early morning hours of January 25, 1993, floating face up in the water.<sup>3</sup> The wooden ladder was also found at the same location.

Mr. Gilligan and other watchmen at the facility would normally stand their watch aboard the tugboat *Juliet Reinauer*, which was attached to the barge on the other<sup>4</sup> side of the pier. Ladders were not used for ingress and egress to the other barge<sup>5</sup> and the *Juliet Reinauer*, due to the different configuration of the fendering system, which required the barge to lay much further off the pier when moored than the barge on the north side of the pier.”

#### Additional Agreed Facts

1. An autopsy report on Mr. Gilligan indicated a blood alcohol content of .18.
2. Boston Towing and Transportation Company, L.P., has a posted company policy, of which all employees are aware, that the use of alcohol or narcotic drugs is specifically prohibited and grounds for immediate dismissal.
3. Lifejackets were available to all employees, both aboard the tugboats as well as in a storage container located on the pier facility.
4. Respondent’s facility at Howard Street, Quincy, Massachusetts, is a marine terminal within the meaning of 29 C.F.R. 1917.2(u).
5. Respondent’s barges were moored at the terminal on the evening of January 24, 1993, and the morning of January 25, 1993.
6. Respondent did not require employees to wear a personal floatation device when using the ladder as a means of ingress and egress to the barge.

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<sup>3</sup>The parties have failed to state where, in relation to the pier, Mr. Gilligan’s body was discovered. It is inferred that he was found on the north side of the pier where the *Seaworthy I* was tied up since a ladder was used to board and debark that vessel during extreme low tide.

<sup>4</sup>The “other side” apparently refers to the south side of the pier.

<sup>5</sup>The “other barge” apparently refers to the barge on the south side of the pier inboard of the *Juliet Reinauer*.

7. The combination of ladder and gangway used prior to January 25, 1993, has now been replaced with a longer gangway that requires two to three men to manhandle.

8. It would have been feasible to construct a tower on the pier at the marine terminal with a gangway suspended by cables and controlled either by [an] electric or hydraulic motor. This could only have been done, however, with the consent of the MWRA and by the MWRA paying for the construction cost of the gangway. Pursuant to the contract between Boston Towing and Transportation and the MWRA, all capital improvements to the terminal facility beyond the vessels themselves are within the control and discretion of the MWRA.

9. At a normal low tide with the barge made fast to the pier, the lateral distance from the pier to the edge of the barge is 54 inches. The deck of the barge is 84 inches below the top of the pier.

10. On February 1, 1991, the complainant cited the respondent for a violation of 29 C.F.R. 1918.11; Citation 1, item 3 (inspection 107437303). That allegation has been affirmed as a final order of the Commission.

11. The wooden ladder used by Hugh Gilligan on January 24/January 25, 1993 was 14' 10" long. The barge was 54" from the pier and 84" below the pier on the morning of January 25, 1993. The ladder angle under those conditions would have been 57.27° and ladder's working length 8.32'.

#### Discussion

A threshold issue presented by the parties is whether the standards cited by Complainant apply to Respondent's worksite and work activities. The record reflects that the citation originally served upon Respondent alleged six serious and one repeat violations of the construction standards (29 C.F.R. 1926). Respondent answered the complaint filed by the Secretary by asserting, *inter alia*, that the cited standards do not apply to Respondent's work activity. Approximately three months after the original complaint was filed with this Commission, Complainant filed a motion to amend the complaint by withdrawing four of the six serious violations and redesignating the two remaining alleged violations as violations of general industry standards set forth at 29 C.F.R. 1910. The alleged



repeat violation was redesignated as a violation of a longshoring standard set forth at 29 C.F.R. 1918.

Complainant acknowledges that Respondent's workplace and work activities fall within the definition of marine terminal set forth at 29 C.F.R. 1917.2(u).<sup>6</sup> Moreover, the general industry standards set forth at 29 C.F.R. 1910 are "explicitly inapplicable to marine terminals." *See* 29 C.F.R. 1917.1(a)(2). Nevertheless, Complainant asserts that Respondent was properly cited for violations of 1910 standards and a longshoring standard under the circumstances of this case. According to the stipulated facts, in addition to the marine terminal facilities, Respondent owns and its employees work on two tug boats and an unknown number of barges during the workday. Access to the barges and tug boats is normally gained via a vehicle boarding bridge. No safety violations are alleged regarding the use of the vehicle bridge by Respondent's employees. At the end of the work day, however, the barges and tugs are backed away a few feet from the vehicle boarding bridge and secured to the pier for the evening or weekend. The tug boats are secured out board of the barges. One barge and tug boat (Seaworthy I) are secured on the north side of the pier and the other tug boat (Juliet Reinauer) and a barge are secured on the south side of the pier. The crew of the tug boats leave the tug boats at the end of the work day by walking across the barge and thence to the pier via a gangway. The Secretary has not alleged any violations with respect to this procedure. Because of changes in the water level in relation to the pier resulting from tidal variations, Respondent requires its employees to debark and board the barge inboard of the Seaworthy I via a ladder rather than a gangway during extreme low tides. All of the alleged violations are restricted to the use of the ladder by the tug boat crew to leave or board the Seaworthy I at the beginning or at the end of the work day when

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<sup>6</sup>29 C.F.R. 1917.2(u) states:

"Marine Terminal" means wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures 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 and passengers, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas having their own docking facilities and located at a marine terminal nor does the term include storage facilities directly associated with those production or manufacturing areas.

the tide is at extreme low.<sup>7</sup> In addition, the stipulated facts state that Respondent's watchman also has access to the ladder during his work activities. The watchman, therefore, constitutes an exposed employee to the alleged violations.<sup>8</sup>

The Secretary asserts that, although Respondent is engaged in the operation of a marine terminal, the coverage of the standards specifically applicable thereto as set forth at 29 C.F.R. 1917 ends at the "foot of the gangway." In the Federal Register dated July 5, 1983 the Secretary described the coverage of Parts 1917 and 1918 as follows:

In clarifying the boundary between Part 1917 and Part 1918, OSHA's shipboard longshore regulations, the Agency has set the foot of the gangway to mark the limit to which Part 1918 may be applied landward. Similarly, Part 1917's jurisdiction extends out to the ship no further than this point of the gangway.

48 FR 30886, 30891

Thus, the foot of the gangway is a critical point for determining the applicability of the 1917 and 1918 standards. There is no guidance from the Secretary nor have any cases been found which define the location of the foot of the gangway. The Secretary acknowledges that the term "foot of the gangway" is ambiguous for purposes of defining the demarcation between parts 1917 and 1918; however, pursuant to the principle enunciated in *Martin v. OSHRC* 111 S.Ct 1171 (1991), the Secretary, in its legal memorandum in support of its motion, declares that the "foot of the gangway" is the point where the gangway meets the pier (Complainants' Memorandum pg 4, footnote 2). The Secretary cites no support for this conclusion other than the fact that this Commission must defer to the Secretary's interpretation.

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<sup>7</sup>The crew members of the tug boat are not employees subject to coverage under the longshoring standards. See 29 C.F.R. 1918.3(c). Therefore, employee exposure to the violations alleged may not be established by the work activities of the tug boat crew.

<sup>8</sup>The investigation conducted by OSHA in this matter was prompted by the discovery of the body of Respondent's weekend watchman, Mr. Gilligan, floating in the water between one of the barges and the pier with a ladder floating nearby. No one witnessed Mr. Gilligan's fall and no evidence has been presented that he was on the ladder which provided access to the barge at the time he fell. Respondent strongly argues that it is just as likely that Mr. Gilligan fell from the pier and grabbed the ladder while he was falling (Respondent's memorandum pg 3). Moreover, an autopsy of Mr. Gilligan's remains revealed a blood alcohol level of .18. Massachusetts prohibits anyone with a blood level of .10 or more from operating a motor vehicle M.G.L. C.90 §24.

Having concluded that the marine terminal standards (29 C.F.R. 1917) are applicable only to the edge of Respondent's pier, Complainant asserts that the ladder extending from the pier to the barge falls within the coverage of the longshoring standards (29 C.F.R. 1918). This conclusion is based upon the fact that Respondent employs a watchman who uses the ladder during his work activities. Since "watchman" is an employment category relating to longshoring (29 C.F.R. § 1918.3(d) and (j)) and because the longshoring standards apply from the edge of the pier to the barge (Complainant's Memorandum pg 4), the ladder and the watchmen who utilize the ladder to gain access to the barge are covered by the longshoring standards. Moreover, according to Complainant, the longshoring standards do not specifically address all of the hazards found during the OSHA inspection. Therefore general industry standards (29 C.F.R. 1910) apply *L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664 (D.C. Cir. 1982).

The analysis employed by Complainant to arrive at the conclusion that longshoring standards and, more specifically, general industry standards apply to the ladder in question is based upon the premise that coverage of the maritime terminal standards, which Complainant concedes apply to Respondent's work activities, ends "at the foot of the gangway." Furthermore, the foot of the gangway according to Complainant, is the end closest to the pier. A review of the 1917 and 1918 standards however fails to reveal convincing support of this conclusion. The standard set forth at 29 C.F.R. 1918.21(c)<sup>9</sup> indicates that the "foot of the gangway" is its lower end. That standard is designed to protect employees from falling into the water when the lower end of the gangway overhangs the water between the ship and the dock. In *Stevedoring Services of America* 15 BNA OSHC 1064 (1991) the Secretary cited Respondent for failing to provide fall protection at the foot of a gangway in violation of 29 C.F.R. 1918.21(c). The gangway was placed between a ship and a platform which extended out from the pier. A net had been rigged below the

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<sup>9</sup>29 C.F.R. 1918.21(c) states:

(c) When the lower end of a gangway overhangs the water between the ship and the dock in such a manner that there is a danger of employees falling between the ship and the dock, a net or other suitable protection shall be rigged at the foot of the gangway in such a manner as to prevent employees from falling from the end of the gangway. (Emphasis added)

gangway; however, the platform, according to the Secretary, was not properly guarded as required by the cited longshoring standard. Judge Cronin concluded that the “clear language” of the standard requires that the foot of the gangway; i.e. the lower end, requires fall protection. Moreover, the platform extending out from the pier was not subject to the longshoring standards because it was not part of the gangway. The Judge vacated the citation by concluding that the Secretary’s attempt to stretch the meaning of the language of the standard failed to provide employers with fair warning of the scope of the regulation.

In *Stevedoring Services of America, supra* the Judge reasonably interpreted the “foot” of the gangway to be the lower end. However, depending upon the tide, the lower end at any point in time during the day may become the upper end of the gangway. Thus, the jurisdictional limits of the 1917 and 1918 standards would shift from one end of the gangway to the other depending upon the tides or whether the ship is empty or cargo laden. It is clear that the Secretary has struggled with this problem as well. The initial citation contained alleged violations of the construction standards even though Complainant acknowledged that Respondent is not engaged in construction activities. It was only after Respondent contested the citation and litigation had commenced that the Secretary concluded that longshoring standards should be applied to the ladder in question.<sup>10</sup> In order to reach that conclusion, the Secretary has taken the position, as he must, that the marine terminal standards apply only to the edge of the pier. However, if the marine standards apply only to the edge of the pier, any structures extending beyond the pier edge must also fall outside the coverage of marine terminal standards even though such structures are “associated with the primary movements of cargo or materials from vessel to shore or shore to vessel....” (29 C.F.R. 1917.2(u)). This would result in the anomalous situation that different standards apply to the same buildings or structures depending upon whether they

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<sup>10</sup>The Secretary’s problem is further complicated by the absence of longshoring standards applicable to two of the three hazardous conditions listed in the amended complaint. Although general industry standards were cited in lieu of longshoring standards, the Secretary has recently stated in a published proposed rule that general industry standards do not apply to longshoring operations except for hazards not germane to this litigation. See 29 C.F.R. 1910.16(a)(2), 59 Fed. Reg. 28594, 28643 dated June 2, 1994.

are on, or extend beyond the edge of, a pier.<sup>11</sup> For these reasons the jurisdictional demarcation (the foot of the gangway) between marine terminal and longshoring standards is not merely ambiguous, it is unintelligible and incapable of any rational interpretation.

The Secretary concedes that the line of demarcation between parts 1917 and 1918 is “unclear”; nevertheless, it is argued that this Commission must defer to his interpretation of the meaning of “foot of the gangway” for purposes of applying longshoring standards to the cited hazardous conditions. *Martin v. OSHRC, supra*. However, the Supreme Court has declared that deference should be granted “only if the Secretary’s interpretation is reasonable” *id* at 1180 (emphasis in original). Moreover, “the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties” *id* (citations omitted). In this case, Respondent was notified for the first time in Complainant’s amended complaint filed with this Commission that it was subject to general industry standards (by the application of longshoring standards) for the occasional use of a ladder to gain access to a barge during extreme low tides. Based upon a thorough review of the standards and case law, it is concluded that there is no rational basis upon which a marine terminal operator may conclude that the longshoring and general industry standards, under the circumstances of this case, apply to subject ladder. Respondent, therefore, has not been provided with fair notice for the Secretary’s interpretation that longshoring and general industry standards apply to its work activities as set forth in the amended complaint *See East Penn Mfg.* 894 F.2d 640; *Diebold, Inc.* 585 F.2d 1327, 1335; *Diamond Roofing* 528 F.2d 645, 649; *Dravo Corporation* 613 F.2d 1227; *Bethlehem Steel* 573 F.2d 157.

### Conclusion

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<sup>11</sup>To the contrary, the Secretary has stated in the proposed longshoring standards that:

It is important to remember, however, that in ship to shore/shore to ship cargo transfer operations using shore based material handling devices, all lifting device specific aspects of such transfers will be covered by the part 1917 rules. When cargo transfer is accomplished using ship’s cargo gear, the part 1918 rules shall apply. 50 Fed. Reg. No. 105 at P. 28600 (June 2, 1994).

For the foregoing reasons, it is concluded that Complainant has failed to provide a sufficient basis for applying longshoring and general industry standards to the hazardous conditions alleged in the amended complaint. Further, Respondent has not received fair notice of the Secretary's interpretation of those standards as applied in this case. Accordingly, Respondent's Motion For Summary Judgment is **Granted** and the citations and proposed penalties are **Vacated**.

#### **Findings of Fact**

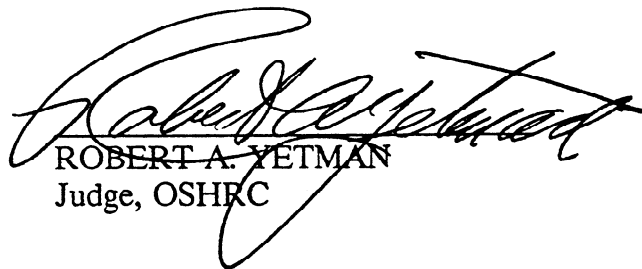
All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

#### **Conclusions of Law**

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Respondent, at all times material to this proceeding was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter of this proceeding.
3. At the time and place alleged, Respondent was not in violation of the standards alleged in the Secretary's Amended Complaint.

#### **Order**

Serious Citation No. 1 and Repeat Citation No. 1 as amended and the penalties proposed thereto are **vacated**.

  
ROBERT A. YETMAN  
Judge, OSHRC

Dated: March 24, 1995  
Boston, Massachusetts