United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
HOLT CARGO SYSTEMS, INC.
Respondent.

OSHRC DOCKET
NO. 94-1475

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 September 8, 1995. The decision of the Judge will become a final order of the Commission on October 10, 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 September 28, 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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./jw

Date: September 8, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-1475

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Kenneth D. Kleinman, Esquire
Stevens & Lee
One Glenhardie Corporate Center
1275 Drummers Lane
P. O. Box 236
Wayne, PA 19087

John A. Evans, Esquire
Holt Cargo Systems, Inc.
P. O. Box 8698
Philadelphia, PA 19101

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00106742034:02

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5405 Fax: (202) 606-5409

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 94-1475
HOLT CARGO SYSTEMS, INC.,	:	
Respondent.	:	

APPEARANCES:

Patricia M. Rodenhausen, Esq.
Regional Solicitor
Janice Silberstein, Esq.
Office of the Solicitor
U.S. Department of Labor
201 Varick Street
New York, New York 10014
For Complainant

Kenneth D. Kleinman, Esq.
Stevens & Lee
One Glenhardie Corporate Center
1275 Drummers Lane P.O. Box 236
Wayne, Pennsylvania 19087-0236
For Respondent

Before: Chief Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review citations issued by the Secretary of Labor pursuant to

section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act. The citations and notification of proposed penalty were issued following an inspection at Holt's worksite at the Beckett Street Terminal of the South Jersey Port Authority in Camden, New Jersey, where Holt's stevedore employees were unloading pallets of plywood from a vessel named the Pan Queen. (Tr. 9-10). Citation no. 1 alleged three serious violations of the Act and citation no. 2 alleged two repeated violations. The Secretary proposed penalties totaling $9000 for items 1, 2, and 3 of citation no. 1 and a single penalty of $50,000 for items 1a and 1b of citation no. 2. Holt filed a timely notice of contest placing all the citation items and penalties in issue. Accordingly, the Commission has jurisdiction of this proceeding. Holt admits that it is engaged in a business affecting commerce. Therefore, Holt is an employer under section 3(5) of the Act, and the Act applies to its work activities.

CITATION NO. 1, ITEM 1—INOPERABLE HORNS ON FORKLIFTS

The cited standard provides as follows:

§ 1917.43 Powered industrial trucks.

. . . .

(c)*Maintenance*

. . . .

(5) Powered industrial trucks shall be maintained in safe working order. Safety devices shall not be removed or made inoperative except as otherwise provided in this section. Trucks with a fuel system leak or any other safety defect shall not be operated.

The Secretary's inspector, William C. DuComb, determined that three of eight forklift trucks in use at the time had defective horns. (Tr. 12-13, 16, 121). They were operating on a narrow apron of the pier, between the vessel and the transit shed where the plywood was being stored. Because of the narrowness of the area, approximately twenty-six other individuals such as cargo checkers and other longshoremen unhooking the lifting bridles from the cargo would not be able to readily avoid the forklifts and thus were exposed to the hazard of being struck. (Tr. 15-16, 19).

Maintenance of forklifts is an continual process. Employees of other stevedoring companies as well as port employees tamper with or damage Holt's forklifts at times when Holt does not have

its own employees present and working at the terminal.[1] There is longshoremen's union mechanic stationed at each vessel, but under union rules, actual mechanical repairs can only be performed by a member of the machinists' union. Holt has a shop at another location, the Packer Avenue Terminal, where forklifts are taken for repair. (Tr. 159-60, 201-02). Holt's witness, Walter Francis Curran, its Director of Stevedoring in charge of all terminal operations (T 167-68), believed that the absence of operating horns presented no hazard because of the way forklifts are operated. Longshoremen normally cannot see around their loads so they drive in reverse looking behind, and all employees are aware that forklifts are being operated. In his view, longshoremen have no need to use a horn even in the close confines of the ship itself where there is even less room than on the pier. Curran knew of no accidents resulting from lack of a horn during the five and a half years he had worked for Holt. (Tr. 167, 205-06).

Holt contends that the citation item should be vacated because no hazard existed and because it could not feasibly repair the forklifts at the site and had no alternative but to continue unloading the vessel with defective forklifts. The cited standard, however, does not require the Secretary to prove the existence of a hazard. Rather, it assumes the existence of a hazard if its terms are not met. *Compare Anoplate Corp.*, 12 BNA OSHC 1678, 1681-82, 1986-87 CCH OSHD ¶ 27,519, p. 35,680 (No. 80-4109, 1986). By its plain terms, it does not permit either employers or employees to decide for themselves whether safety equipment originally installed is or is not needed for safety reasons in any particular situation.

The Commission does recognize a defense where the employer demonstrates that compliance with the requirements of a standard would be infeasible in the circumstances and that an alternative protective measure either was in use or itself was infeasible. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228, 1991-93 CCH OSHD ¶ 29,442, p. 39,685 (No. 88-821, 1991). Here, Holt took no alternative protective measure, and its witness, Captain James L. Hassall, the supervisor in charge of the unloading of the Pan Queen, testified that he did not determine whether there were

---

[1]Like all stevedoring companies, Holt assigns employees to work on an as-needed basis depending on the number of vessels and the type of cargo needed to be handled on any given day. (Tr. 129-30). Holt employees had not done any work at the terminal for two weeks before the inspection. (Tr. 138).

any operable forklifts available at its shop at Packer Avenue. (Tr. 162). Accordingly, the preponderance of the evidence fails to support the elements of the defense. I therefore affirm this item.

The determination of what constitutes an appropriate penalty is within the discretion of the Commission. *Long Mfg. Co., N.C. v. OSHRC*, 554 F.2d 903, 908-09 (8th Cir. 1977). Although the parties present arguments regarding the mechanism for computing penalties set forth in the Secretary's Field Operations Manual, as the Secretary concedes, the manual is not binding on the Commission. *FMC Corp.*, 5 BNA OSHC 1707, 1977-78 CCH OSHD ¶ 22,060 (No. 13155, 1977). In assessing penalties, the Commission takes into account the employer's size, its good faith, its history of previous violations, and most important, the gravity of the violation. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, 41,033 (No. 87-2059, 1993). Here, almost half of Holt's forklifts had inoperable horns, and a substantial number of employees were exposed to the hazard. On the other hand, Holt's evidence establishes that the likelihood of injury is low. Holt is a moderately-sized employer with up to as many as 250 employees working at any one time (Tr. 168-69), and it has a history of prior violations. However, its active program for maintenance and repair of forklifts, as shown by exh. R-7, demonstrates good faith. I find that a penalty of $1000 is appropriate.

CITATION NO. 1, ITEM 2—EMPLOYEE RIDING BLADES OF FORKLIFT

The cited standard provides, in pertinent part:

§ 1917.43 Powered industrial trucks.

. . . .

(e) *Fork lift trucks.*

. . . .

(6) *Lifting of employees.* Employees may be elevated by fork lift trucks only when a platform is secured to the lifting carriage or forks.

During the inspection, DuComb observed a cargo checker being lifted approximately three feet while standing directly on the blades of a forklift. No platform or lifting cage was provided. (Tr. 21). However, Holt's safety rules prohibit lifting workers on forklifts. (Tr. 157, 206). Safety meetings are held regularly at which employees are informed of safety rules, and there is a safety

incentive awards program. (Tr. 157, 185, 191, 206; exhs. R-2 through R-4, R-8).[2] The foreman of each gang as well as each vessel supervisor is expected to inform management of any refusal by an employee to comply with a safety rule. (Tr. 175, 193). Sanctions for violations of safety rules range from oral and written reprimands to loss of time and ultimately termination. (Tr. 170-71, 198; exh. R-8). Curran, who has disciplinary authority, had taken disciplinary action with respect to unsafe operation of forklifts in four instances. (Tr. 169-70, 210). However, there has never been a prior instance in which an employee had ridden the blades of a forklift. (Tr. 144, 159).

In order to prove a violation, the Secretary must demonstrate that the employer knew, or with reasonable diligence could have known, of the existence of a violation. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2006-07, 1991-93 CCH OSHD ¶ 29,223, pp. 39,127-28 (No. 85-369, 1991). In a situation such as this, in which a violation consists of misconduct by an employee, an employer is not chargeable with knowledge if the misconduct is unpreventable, that is, if the employer took reasonable measures to preclude it from occurring. Generally speaking, misconduct is considered unpreventable if it is contrary to an established workrule that is effectively communicated to employees and enforced through supervision adequate to detect failures to comply and discipline sufficient to discourage such violations. *Id.*; *H.E. Wiese, Inc.*, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD ¶ 25,985, p. 32,614 (No. 78-204, 1982), *aff'd without published opinion*, 705 F.2d 449 (5th Cir. 1983).

The record demonstrates that Holt maintained an adequate safety program with respect to carrying employees on the forks of forklifts. It had instituted a rule prohibiting such conduct, had communicated that rule to employees, and had implemented an enforcement mechanism. The fact that Curran had disciplined employees for other types of infractions involving operation of forklifts

---

[2]The Secretary contends that Hassall's testimony that employees were warned at a safety meeting not to carry riders on the forks is not credible because the minutes of Holt's safety meetings (exhs. R-2 through R-4) do not reflect that such an instruction was given. Having observed the demeanor of Hassall and Curran, I find that they testified in a forthright and straightforward manner, and they impressed me as sincere and trustworthy individuals with a genuine concern for the safety of their employees. Moreover, their testimony is consistent with the documentary evidence showing that Holt has established safety rules and has a mechanism for enforcement of those rules. Accordingly, I find them to be totally credible, and I have no reason to disbelieve their testimony regarding the extent of the safety instructions given to employees.

indicates that Holt had sufficient means for detecting infractions of its safety rules. Accordingly, I find by a preponderance of the evidence that it acted with reasonable diligence and is not chargeable with knowledge of the violation of section 1917.43(e)(6).

CITATION NO. 1, ITEM 3—FAILURE TO TEST FOR CARBON MONOXIDE

The cited standard provides in pertinent part:

> **§ 1918.93 Ventilation and atmospheric conditions**
> (a) Ventilation requirements with respect to carbon monoxide:
> (1)(I) When internal combustion engines exhaust into a hold, an intermediate deck, or any other compartment, the employer shall see that tests of the atmosphere are made with such frequency as is found by test to be necessary in the type and location of the operation, and under the conditions existing, to insure that dangerous concentrations do not develop.

The essential facts are undisputed. One forklift was operating in each cargo hold; these trucks had propane-fueled internal combustion engines. Holt had not performed any tests for carbon monoxide levels. (Tr. 25-29; exhs. C-3a, C-3b). However, the facts also show that each hatch was approximately 100 feet long and 80 or 90 feet wide, with the hatch opening slightly more than half as large. Forklifts are operated in the area below the hatch opening. The weather at the time of the inspection was clear and windy. (Tr. 200). DuComb himself admitted that the holds were open to the outside, and there was airflow in and out. (Tr. 106). In these circumstances, Curran was of the opinion that there was no risk whatever of carbon monoxide exposure to employees working on or near the forklifts. After the inspection, Holt had a consultant test the holds of a vessel very similar to the Pan Queen; no hazardous levels of carbon monoxide were measured. (Tr. 200).

These facts establish a violation of the standard. As in the case of the standard at issue in item 1, section 1918.93(a)(1)(I) assumes the existence of a hazard if its terms are not met.[3] In short, the standard imposes a mandatory requirement that the employer conduct at least an initial test to

---

[3]Holt relies on *International Shipping Co.*, 77 OSAHRC 112/C14, 1977 WL 6882 (No. 76-540), *aff'd*, 5 BNA OSHC 1800 (1977) in which Judge Paul L. Brady vacated a citation for violation of this standard where the employer took no tests but submitted evidence which demonstrated that at the time of the inspection conditions were such that dangerous concentrations of carbon monoxide would not exist. However, when the Commission affirmed Judge Brady's decision, it was accorded the status of an unreviewed judge's decision and therefore has no precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).

determine whether continued carbon monoxide testing is warranted; it does not allow the employer to forego any testing whatever based on the employer's estimation of the likelihood of carbon monoxide occurring. Similarly, I cannot, as Holt argues, find the violation *de minimis* in nature. A *de minimis* violation is one having no tangible relationship with safety and health. *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1621, 1991-93 CCH OSHD ¶ 29,681, p. 40,245 (No. 89-2019, 1992). The hazard here is not the presence of carbon monoxide resulting from operation of internal combustion engines in cargo holds; rather, it is the *failure to conduct appropriate testing*. The detection of carbon monoxide through tests intended specifically for that purpose clearly has a direct relationship with safety and health. On the facts here, however, I find that there was little, if any, probability of injury to employees in view of the fact that carbon monoxide was subsequently found to be non-existent. Accordingly, I find that the violation is non-serious in nature and that no penalty is appropriate.

CITATION NO. 2, ITEMS 1a & 1b—FAILURE TO WEAR HARD HATS

The two cited standards provide:

> **§ 1917.93 Head protection.**
> (a) The employer shall direct that employees exposed to impact, falling or flying objects, or electric shocks or burns wear protective hats.
>
> **§ 1918.105(a) Head protection.**
> (a) Employees shall be protected by protective hats meeting the specifications contained in the American National Standard Safety Requirements for Industrial Head Protection, Z89.1 (1969).

DuComb observed employees working on the pier and on the deck and in the holds of the vessel who were exposed to the hazard of being struck by either the loads or the lifting apparatus. (Tr. 32-39, 43, 99; exhs. C-4(a) through C-4(c), C-5(a) through C-5(d), C-6)).[4] He saw cargo coming as close as within 1 foot of the employees' heads. (Tr. 41). Seven of twelve employees exposed on the vessel and sixteen of the twenty employees exposed on the pier were not wearing hard hats. (Tr. 45).

---

[4]The standards in Part 1918 cover cargo-handling operations aboard vessels, whereas Part 1917 applies to such operations on piers and dock areas. 29 C.F.R. § 1910.16.

Employees are instructed that they must wear hard hats, both by Holt directly and on the taped message from which employees receive their work assignments. It also is a requirement of the collective bargaining agreement with the Longshoremen's union. The use of hard hats is discussed and emphasized at Holt's safety meetings. (Tr. 68, 119, 162, 172, 194, 195; exhs. R-2 through R-6). The major problem with hard hats is not that employees refuse to wear them but that they will occasionally fall off when an employee bends over, and the employee will not bother to put the hat back on. Consequently, Hassall kept a small supply of hard hats in his car and would require any employee who did not have a hat to obtain one and wear it. (Tr. 69, 134-35, 142, 159, 161, 165, 196).[5] As noted above in the discussion of citation no. 1, item 2 dealing with an employee riding the blades of the forklift, Curran had disciplinary authority, and any employee who did refuse to wear a hard hat would be reported to him for appropriate action. (Tr. 134, 143, 165, 171). DuComb agreed that no adverse action should be taken against an employee not wearing a hard hat if the employee put on a hard hat after being instructed to do so. (Tr. 126).

Holt furnishes hard hats for use by its employees. Most employees leave their hard hats in gang houses at the terminal, although some keep their hard hats with them when they go off work. (Tr. 135-36). Gang houses are modified containers with lockable doors that are equipped with heaters and benches and are used to store various personal items, including rain gear and boots. Since each gang is assigned its own house, no one would have any occasion to go to a gang house or check it except at times when Holt's employees have a work assignment at the terminal. When work commenced on the day of the inspection, it was discovered that the gang houses had been vandalized and all their contents stolen, including the hard hats. (Tr. 137, 139). Such a theft had never previously occurred. Hassall attempted to get hard hats from the Packer Avenue Terminal but was told that none were available. He distributed the remaining hard hats he had in his car but had to proceed with unloading the Pan Queen; to do otherwise would have obstructed commerce and

---

[5]Hassall denied having told DuComb that some employees refused to wear hard hats. (Tr. 38, 142). As indicated above, I find Hassall to be a credible witness. *See supra* note 2. Moreover, DuComb, who had been employed by Holt during a 4½-year period before the inspection (Tr. 7), testified that he could not recall any employee who refused to wear a hard hat. (Tr. 69). His testimony on this point therefore corroborates Hassall's.

disrupted terminal operations. The next ship Holt was scheduled to unload was one week later, by which time the Packer Avenue Terminal had received a new supply of hard hats, which were dispensed to those who needed them. (Tr. 140-42, 198-99).

Based on the evidence, it is abundantly clear that the absence of hard hats on the day of he inspection was not due to any deficiency in Holt's safety program—indeed, I find that Holt had a fully implemented and enforced requirement that hard hats be worn—but rather was attributable to the unusual circumstances existing on that day. Based on those circumstances, I conclude that Holt has established the elements of the defense of infeasibility of compliance. In the first place, the evidence preponderates in favor of a finding that Holt could not feasibly have declined to unload the Pan Queen. Furthermore, it could not reasonably have known of the theft of the hard hats beforehand and therefore would have had no reason to obtain additional hard hats before sending employees to the terminal on the day of the inspection. Once the theft was discovered, Holt attempted to equip as many employees as possible with hard hats, and there was no other way to protect the remaining employees from the hazard.

In *Seibel*, the Commission stated that the infeasibility defense applies where an abatement method cannot be implemented in a reasonable and practical manner:

> [The] cases show that employers must alter their customary work practices to the extent that alterations are reasonably necessary to accommodate the abatement measures specified by OSHA standards. . . . These cases do not stand for the proposition, however, that employers cannot rely on genuinely practical circumstances revealing the unreasonableness of an abatement measure. An abatement measure must be useable, during employees' work activities, for its intended purpose of protecting employees. If there is no way to use a measure for its intended purpose without unreasonably disrupting the work activities, the mere fact that the measure's installation is physically possible does not in our view mean that we should compel the employer to install the measure.

15 BNA OSHC at 1227, 1991-93 CCH OSHD at p. 39,683. On the facts here, the criteria the Commission set forth in *Seibel* have been satisfied, and I vacate the citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the Findings of Facts, Conclusions of Law, and the entire record, it is hereby ordered:

1) Item 1 of citation no. 1 is affirmed, and a penalty of $1000 is assessed.

2) Item 2 of citation no. 1 is vacated.

3) Item 3 of citation no. 1 is affirmed as a non-serious violation, and no penalty is assessed.

4) Citation no. 2 is vacated.

IRVING SOMMER
Chief Judge

DATED:
SEP - 6 1985
Washington, D.C.