

Secretary of Labor,
Complainant,
v.
Kelly-Hill Company,
Respondent.

OSHRC Docket No. 02-0447

Appearances:

Kayden B. Howard, Esq., Stephen G. Reynolds, Esq., Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri
For Complainant

Michael D. Fitzgerald, Esq., Van Osdol, Magruder, Erickson and Redmond, P.C., Kansas City, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Kelly-Hill Company (KHC) is engaged in constructing and maintaining railroad tracks for railroads and private industry. On September 10, 2001, at the KHC main office and shop, a crane operator was lifting a tie inserter from a truck trailer when the boom cable came in contact with overhead power lines. An employee on the ground who had his right hand on the tie inserter was electrocuted. Based on the fatality, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Brian T. Drake conducted an inspection of the worksite on September 11, 2001. As a result of the inspection, KHC received serious and willful citations on February 8, 2002. KHC timely filed a notice of contest.

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.550(a)(1) for failing to comply with the manufacturer's specifications and limitations applicable to the operation of a crane; Item 2 alleges a serious violation of 29 C.F.R. § 1926.550(a)(2) for failing to conspicuously post on the crane the rated load capacities and recommended operating speeds; Item 3 alleges a serious violation of 29 C.F.R. § 1926.550(b)(2) for failing to meet applicable requirements for inspection of cranes and testing of crane operators; and Item 4 alleges a serious violation of 29 C.F.R.

§ 1926.550(a)(19) for failing to keep employees clear of loads about to be lifted and/or suspended. The total penalty for the serious violations is \$12,000.00

Citation 2, Item 1, alleges a willful violation of 29 C.F.R. § 1926.21(b)(2) for failing to instruct employees in the recognition and avoidance of unsafe conditions and the regulations applicable to operation of a crane within 10 feet of energized power lines; and Item 2 alleges a willful violation of 29 C.F.R. § 1926.550(a)(15)(i) for operating a crane within 10 feet of energized overhead power lines. The total penalty for the willful violations is \$70,000.00.

The hearing was held on July 30–31, 2002, in Kansas City, Missouri. Jurisdiction and coverage are stipulated. At the hearing, the Secretary’s motion to amend Citation 1, Item 1(b) to include “and at times prior thereto” after “On or about September 10, 2001,” was granted. Both parties submitted post-hearing briefs.

KHC denies the violations and asserts the affirmative defense of unpreventable employee misconduct. KHC withdraws its affirmative defenses of greater hazard and infeasibility (Tr. 4).

For the following reasons, KHC’s unpreventable employee misconduct defense is rejected; the serious violations are affirmed; the willful violations are affirmed as serious; and total penalties of \$17,000.00 are assessed.

Background

KHC is engaged in the business of building and maintaining railroad tracks for railroads and private companies in Missouri, Kansas, Iowa and Nebraska (Tr. 254). KHC is a member of the National Construction and Railroad Maintenance Association (Exh. C-9). KHC’s main office, shop, and storage lots are in Northmoor, Missouri (Tr. 17). KHC owns approximately 300 pieces of equipment, most of which are railroad related (Tr. 256). Neil Houser and his wife purchased the company in October, 1987 (Tr. 254-255). Houser manages the outside workforce (Tr. 254). The vice-president and safety coordinator is Greg Wright, Mrs. Houser’s son. Approximately 70 employees work for KHC; most work in the field; and 4-5 employees work primarily at the shop (Tr. 59, 255).

The shop supervisor is Roy Schademann, who had only been supervisor for five months prior to the accident. Schademann is responsible for maintaining, repairing, and sending equipment to the various field job sites (Tr. 305).

On September 10, 2001, the day of the accident, Schademann instructed employees Edward Snoke and Ascencion (“Chon”) Bermudez to unload a tie inserter¹ from the back of a low-boy trailer parked in the upper lot. The tie inserter was to be set on tracks so that it could be rolled into the shop for repairs (Tr. 19, 317). Schademann did not say anything to Snoke about the overhead power lines that run across the site (Exh. C-2; Tr. 20, 348). At the time of the accident, Snoke had been with KHC for approximately two and one-half years as a crane operator (trained by KHC) and truck driver hauling equipment to and from the main office site to field job sites (Tr. 16, 17, 26). Bermudez, who was also a crane operator, was working primarily as a laborer and truck driver. He had been with KHC for 28 years (Tr. 259).

The tie inserter weighed 12,000 pounds or 6 tons (Tr. 33). The crane was a 20-ton hydraulic rough terrain crane, manufactured by American Crane Corporation, model #213.² The crane remains at the shop and is used to load and unload equipment (Tr. 258). The low-boy trailer, without a truck attached, had been parked in the same location for approximately a week (Tr. 25, 35). Schademann had used the American crane to lift another tie inserter from the trailer the week before the accident (Tr. 321). The trailer was approximately 49 feet long and 7½ feet wide and had rails on the bed in order to hold the railroad equipment (Exh. C-6; Tr. 59, 180, 271).

On the day of the accident, the crane was facing west and was parked near the low-boy trailer, which sat lengthwise east to west, parallel to the overhead power lines, north of the trailer (Exh. ALJ-1; Tr. 85). The tie inserter was to be placed on rail tracks that ran east to west and were south of the trailer. The tie inserter was the only piece of equipment on the trailer.

Crane operator Snoke testified that before he got into the American crane, he walked around it looking for leaks, the proper inflation of tires, and the outriggers (Tr. 65). He then got inside the crane, moved it slightly to the east to be closer to the trailer, and extended the outriggers (Exh. ALJ-1; Tr. 25). Even though the crane was moved approximately 20 feet to the east, it remained the same distance from the overhead power lines (Tr. 342).

¹ A tie inserter is a machine that sits on rail tracks and, with its articulating boom and a clamp on the end, can remove and insert rail ties from underneath rails (Tr. 12-13, 19).

² The citation describes the American crane as 40 tons. KHC describes the crane as 20 tons. This court accepts 20 tons.

Just prior to the lift, Schademann walked past the crane and saw Snoke's set up of the crane (Tr. 125, 328). According to Schademann, Snoke extended the boom approximately 60 feet, which is full extension (Tr. 328). Schademann told Snoke to center the boom (Exh. C-8 at p. 26).

Bermudez then hooked a single load line to the attachment point of the tie inserter on the trailer (Tr. 21, 61, 62). Bermudez got on the ground beside the tie inserter on the south side of the trailer (Tr. 21, 24). Snoke testified that he lifted the tie inserter approximately a foot off of the trailer while Bermudez was steadying it from spinning around with his hands rather than with a tag line (Tr. 22). Snoke said that when he hit the switch to turn the crane to the right, the boom cables went to the left and into the overhead power lines (Tr. 46). When the cables hit the power lines, Snoke saw Bermudez fall to the ground (Tr. 23, 69). Bermudez was electrocuted. Snoke let the boom cables move back into the power lines a second time and dropped the load on the other side of the trailer (Tr. 24). The power lines broke (Tr. 24). The accident occurred between 2:00-2:15 p.m. (Tr. 124).

The Northmoor Police arrived at 2:43 p.m. to investigate the fatality accident (Exh. C-6). The police report indicates that two of the crane's outriggers were not fully extended (Exh. C-6). Also, a Kansas City Power and Light (KCPL) investigator arrived approximately two hours after the accident to investigate the contact with KCPL power lines (Exh. C-2).

On September 11, 2001, safety coordinator Wright called the Kansas City OSHA office and reported the fatality (Tr. 95). That same day, CO Drake initiated an inspection of the fatality site. After his opening conference, CO Drake videotaped and took measurements of the accident scene. He also interviewed employees Snoke, Schademann, and Wright (Exh. C-1A, C-8, C-9). A few days later, he took additional videotape of the crane (Exh. C-1A; Tr. 98). On July 29, 2002, CO Drake videotaped KCPL measuring the cross-arms of the two power poles on either side of the accident scene (Exh. C-1B).

DISCUSSION

Alleged Violations

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving:

(a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Part 1926 construction standards apply to KHC's railroad construction work. The KHC shop maintains and repairs equipment used in the field to perform its railroad construction work. The Commission has long held that construction work applies to "related activities that are an integral and necessary part of construction work." *Royal Logging Co.*, 7 BNA OSHC 1744, 1749-1750 (No. 15169, 1979), *aff'd*. 645 F.2d 822 (9th Cir. 1981). KHC does not dispute the applicability of these standards.

KHC's knowledge of the violative conditions is imputed to it through its supervisor, Schademann. Schademann was the supervisor at the shop and directed the work activities of the two employees, Snoke and Bermudez (Tr. 64, 306). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). "[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

In the instant case, Schademann told the two employees to unload the tie inserter. Just before the accident, Schademann walked by the crane and observed Snoke's set-up of the crane immediately prior to the lift. Additionally, owner Houser testified that he saw the low-boy trailer with the tie inserter on it and the crane parked in the area of the power poles on the weekend just before the accident (Tr. 269).

Citation 1

Item 1 - Alleged Serious Violation of 29 C. F. R. § 1926.550(a)(1)

The citation alleges that KHC failed to comply with the manufacturer's specifications for operating an American hydraulic rough terrain crane in that: all four outriggers were not fully extended and down and the tires were not completely off the ground [Item 1(a)]; the crane was not

set up using the load chart specifications for the weight of the lift [Item 1(b)]; and a clearance of 10 feet was not maintained around overhead power lines [Item 1(c)]. Section 1926.550(a)(1) provides:

(a) *General requirements.* (1) The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. Where manufacturer's specifications are not available, the limitations assigned to the equipment shall be based on the determinations of a qualified engineer competent in this field and such determinations will be appropriately documented and recorded. Attachments used with cranes shall not exceed the capacity, rating, or scope recommended by the manufacturer.

The manufacturer's specifications for American crane model #213 are in its Operating and Maintenance Manual, which require that: when lifting on the outriggers, the outriggers should be fully extended and the tires should be completely off the ground (Exh. C-7 at p. 1002.03); the load chart must be used (Exh. C-7 at pp. 1001.01, 1002.00-1002.02, and handwritten pages 151-152); and the boom must be kept at least 10 feet away from energized power lines (Exh. C-7 at 1001.00, 1776.00).

Item 1(a) – Outriggers. KHC claims that it does not matter whether the outriggers were fully extended or not because, according to the load chart, the 20-ton American crane could lift the 6-ton tie inserter on either outriggers or tires.

Snoke testified that he had never seen the crane's operating manual (Tr. 74). On the day of the accident, Snoke thought the outriggers were fully extended; he could see the front two from the cab of the crane and the back left one with the mirrors (Tr. 47, 67). He did not get out of the cab to check whether the outriggers were fully extended (Tr. 68). The KCPL photographs show, and the police report states, that two outriggers were not fully extended (Exhs. C-2, photos 6A and 6B, C-6). KHC failed to comply with the manufacturer's specifications that, when lifting on outriggers, the outriggers should be fully extended.

Item 1(b) - Load chart. Schademann stated the he never used a load chart for the American crane because they always made light-weight lifts (Tr. 324, 325). Snoke testified that he had never seen a load chart, never used a load chart, and never made a determination of how much something weighs before he lifted it (Tr. 27, 49, 64). Snoke was taught to operate the crane by another crane operator when he started work at KHC about three years ago. Since then, he estimated that he has made 40-60 lifts with the American crane before the accident (Tr. 26, 37, 83). He did not consider

the tie inserter heavy enough to need a load chart (Tr. 49). However, failure to consult the load chart is contrary to the manufacturer's specifications. In addition to the weight of the lift, the length of the boom and its angle must also be considered.

Item 1(c) – 10-foot clearance. It is undisputed that employees knew the overhead power lines were in front of the shop and the lines were energized. At the time Snoke was instructed to unload the tie inserter, Schademann did not say anything to Snoke about the overhead power lines (Tr. 20, 348). No one had ever discussed with Snoke the operation of the crane near overhead power lines (Tr. 27). He did not measure the distance from the power lines to the load (Tr. 28). Schademann testified that he did not know whether the power lines were less than 10 feet away (Tr. 343). Based on calculations by CO Drake and engineer Matthew Burkart, the overhead power lines were approximately 4 feet from the boom cable (Exh. C-5; Tr. 139, 143-144, 225). The manufacturer's 10-foot clearance specification was not followed by KHC.

As a result of KHC's failure to comply with the crane manufacturer's specifications, the violation of § 1926.550(a)(1) is affirmed.

Under § 17(k) of the Occupational Safety and Health Act (Act), a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative conditions. 29 U. S. C. § 666(k). “[I]n determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur.” *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

In this case, the violation is serious because failure to comply with the manufacturer's specifications could result in an employee exposed to serious injury or death from the crane falling, loss of control of the boom or load, and contact with power lines. An employee was electrocuted in this case.

The violation of § 1926.550(a)(1) is affirmed as serious.

Item 2 - Alleged Serious Violation of 29 C. F. R. § 1926.550(a)(2)

The citation alleges that KHC failed to provide to employees or conspicuously post on the American crane the crane's rated load capacity chart and recommended operating speeds. Section 1926.550(a)(2) provides:

(2) Rated load capacities, and recommended operating speeds, special hazard warnings, or instruction, shall be conspicuously posted on all equipment. Instructions or warnings shall be visible to the operator while he is at his control station.

CO Drake inspected the American crane and did not see a load chart and operating speeds posted in the cab (Tr. 150). Schademann told him that he had never seen the load chart and operating speeds in the cab (Tr. 150). Snoke also stated that he had never seen the crane's manual or load chart. Houser admitted that the manual and load chart were kept in the office building (Tr. 278).

KHC claims that it was not necessary to use a load chart since the 20-ton American crane could easily lift the 6-ton tie inserter. This argument fails because the crane also was used to lift other pieces of equipment and as stated weight is not the only factor to consider. The length of the boom and angle of the boom should also be considered. Regardless, the standard requires that the load capacity chart be posted conspicuously in the crane.

The violation of § 1926.550(a)(2) is serious because failure to post the load chart and operating speeds might result in lifting a load too heavy for the crane. Serious injury or death could occur if the crane tipped over, the boom broke or collapsed, or the load fell from the boom.

The violation of §1926.550(a)(2) is affirmed as serious.

Item 3 - Alleged Serious Violation of 29 C. F. R. § 1926.550(b)(2)

The citation alleges that KHC: failed to conduct frequent inspections for any defects which might appear between regular inspections of the American crane [Item 3(a)]; failed to conduct periodic inspections to learn of any deficiencies of the American crane [Item 3(b)]; failed to make monthly written, dated, and signed inspection reports and records on critical items of the American crane [Item 3(c)]; and failed to require operators of the American crane to pass a practical operating examination specific to the American crane [Item 3(d)]. Section 1926.550(b)(2) provides:

(2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes. However, the written, dated, and signed inspection reports and records of the monthly inspection of critical items prescribed in section 5-2.1.5 of the ANSI B30.5-1968 standards are not required. Instead, the employer shall prepare a certification record which includes the date the crane items were inspected; the

signature of the person who inspected the crane items; and a serial number, or other identifier, for the crane inspected. The most recent certification record shall be maintained on file until a new one is prepared.

The American National Standards Institute (ANSI) B30.5-1968 Safety Code, Chapter 5-2, requires frequent (daily to monthly) and periodic (one to twelve month intervals or as specifically recommended by the manufacturer) inspections for cranes; Chapter 5-3 requires crane operators to pass a practical operating exam for the specific type of equipment that will be operated (Exh. C-4).

Items 3(a) & (b) – Inspections. Supervisor Schademann testified that the American crane was inspected every time it was used (Tr. 330). Schademann told CO Drake that the inspection involved walking around the crane, checking tire inflation, oil levels, and looking at the crane lining and rigging (Tr. 155).

This procedure fails to meet Section 5-2.1.2 of the ANSI standard for frequent inspections, which requires inspection of all control mechanisms, safety devices, air or hydraulic systems, crane hooks, rope reeving, and electrical apparatus. It also fails to meet the Section 5-2.1.3 standard for periodic inspections, which includes the requirements of Section 5-2.1.2 and further requires inspection of all crane structure and boom, bolts or rivets, sheaves and drums, pins, bearings, shafts, gears, rollers, locking devices, brake and clutch system parts, linings, pawls, ratchets, accuracy in load or boom angle, power plants, chains and chain-driven sprockets, travel steering, braking, locking devices, and tires for wear and damage (Exh. C-4).

Item 3(c) – Records. CO Drake requested the records certifying that KHC had conducted maintenance inspections for the American crane and was told that KHC did not have any inspection records (Tr. 155).

Item 3(d) – Practical Operating Exam. CO Drake asked KHC for documents to show that employees were trained on the crane. He was told that there were none (Tr. 157). Snoke said that he was shown how to operate the American crane by another operator but he was not given an operating exam (Tr. 27). Schademann testified that he had never had an operating exam on any crane and he did not believe an exam was necessary if there is on-the-job training (Tr. 335, 336). KHC failed to comply with the ANSI requirement of Section 5-3.1.2 that crane operators shall pass a practical operating exam.

The violation is serious because without proper inspections, the crane could malfunction and the result could be serious injury or death to an employee. Also, without an exam, the operator could make a mistake in the operation of the crane that could result in serious injury or death.

The violation of § 1926.550(b)(2) is affirmed as serious.

Item 4 – Alleged Serious Violation of 29 C. F. R. § 1926.550(a)(19)

The citation alleges that KHC failed to keep an employee clear of a suspended load that was being lifted with an American crane. Section 1926.550(a)(19) provides:

All employees shall be kept clear of loads about to be lifted and of suspended loads.

It is undisputed that employees were not kept clear of suspended loads as evidenced by the fatality. Snoke testified that most of the time the employees kept the suspended loads steady with their hands rather than using a tag line (Tr. 22). Even though Schademann testified that employees had been warned not to touch suspended loads, he admitted that he did not discipline employees for failing to follow his warning (Tr. 349). Furthermore, he stated that this was a recurring problem (Tr. 349).

The violation of § 1926.550(a)(19) is affirmed as serious. Failure to keep employees clear of suspended loads could result in serious injury or death from the loads hitting or falling on an employee or electrocution, as occurred in this case.

Citation 2

Item 1 - Alleged Willful Violation of 29 C. F. R. § 1926.21(b)(2)

The citation alleges that KHC failed to adequately instruct employees on the hazards associated with operating a crane within 10 feet of an energized overhead power line and on the appropriate precautions and procedures to be taken to minimize the hazard. Section 1926.21(b)(2) provides:

(b) *Employer responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

To establish a violation of § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on “(1) how to recognize and avoid unsafe conditions they may encounter on the job, and (2) the regulations applicable to those hazardous conditions.” *Superior*

Custom Cabinet Co., 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd. without published opinion*, 158 F.3d 583 (5th Cir. 1998). An employer's instructions must be modeled on the applicable standards and must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425, nn. 6 & 7 (No. 90-1106, 1993).

There was no showing that KHC employees were trained in the recognition and avoidance of the hazard of operating a crane within 10 feet of energized power lines at the worksite and the applicable regulations. KHC provides to its employees a 44-page "Safety Program" booklet and claims that employees are asked to read it (Exh. R-6; Tr. 300).³ According to Wright, the booklet is based on the Railroad Contractor Safety Program of the National Construction and Railroad Maintenance Association (Exh. C-9, at p. 5). Employees are required to sign a statement that they have received the booklet; however, they do not have to acknowledge that they have read it (Exhs. C-3, R-7). Snoke testified that he had not read the entire safety booklet; rather, he glanced through it when he received it (Tr. 52). Supervisor Schademann also admitted that he had not read the entire safety booklet (Tr. 346).

KHC argues that there is a danger sign regarding "Electrocution Hazard" in the cab of the American crane which employees can read (Exh. R-4; Tr. 44, 265, 333). However, this does not constitute specific training on the hazards and the applicable regulations.

Houser testified that every employee, including Snoke and Bermudez, attended a one-day safety training session every year in order to obtain the Federal Railway Authority (FRA) card (Tr. 263-265). However, this training was FRA training involving safety around trains and railroad tracks and not specific training on hazards of operating a crane within 10 feet of overhead power lines.

Houser also stated that he had personally warned employees about getting close to the overhead power lines (Tr. 275). Snoke testified that no one at KHC had ever discussed with him the operation of the crane near overhead power lines (Tr. 27). Employers must provide more than "weak admonitions" or "vague advice" for safety training and hazard recognition in order to give its

³ There is a provision in the booklet under the "Working with Crane Trucks" section that states: "Do not operate booms within ten feet of high voltage lines." (Exh. R-6 at p. 26).

employees the opportunity to protect themselves. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997).

Houser testified that KHC foremen are supposed to have daily safety meetings with the employees. Although Schademann told him he held daily safety meetings, the record shows that Schademann did not hold daily meetings (Tr. 297, 298). Snoke testified that there was no safety meeting on the morning of the accident and nothing was said to him about the overhead power lines before he made the lift (Tr. 20, 35). The standard requires KHC to do more than give employees a safety booklet, have warning signs, and give vague advice. It requires KHC to adequately and specifically instruct employees in the recognition and avoidance of electrocution hazards and the applicable OSHA standards.

The violation of § 1926.21(b)(2) is established.

Item 2 - Alleged Willful Violation of 29 C. F. R. § 1926.550(a)(15)(i)

The citation alleges that an employee was fatally electrocuted when KHC failed to ensure that an American crane was not operating within 10 feet of energized overhead power lines rated 13,182 volts phase to phase. Section 1926.550(a)(15)(i) provides:

(15) Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.

It is undisputed that the overhead power lines were energized (12-13 kV.) and did not have insulating barriers (Exh. C-2, C-6). Also, Snoke was operating the crane within 10 feet of the overhead power lines as evidenced by the crane's contact with the power lines. The distance from the load line of the crane at the attachment point of the tie inserter where it was sitting on the trailer to an "imaginary" power pole was measured to be 8 feet, 11 inches (Exh. C-5; Tr. 143-144).⁴ The wheel of the trailer was 5 feet, 3 ½ inches from the "imaginary" power pole (Exh. C-5; Tr. 139). The

⁴ In order to measure the distance from the machinery to the power lines and power pole, CO Drake projected the position of an imaginary power pole that was directly in line with the two actual power poles; hence, an "imaginary" power pole.

power poles had 10-foot long cross-arms, as measured by KCPL, with three sets of power lines on the cross-arm (Exh. C-1B, C-5; Tr. 103, 106). This places the wheels of the trailer within inches of the end of the cross-arm and thus within inches of the closest power line. The Secretary's engineer, Matthew Burkart, testified that in his opinion, based on his examination of the record, the nearest power line was approximately 4 feet from the boom cable of the crane (Tr. 225). Burkart's conclusions were not refuted by KHC.

The violation of § 1926.550(a)(15)(i) is established.

Willful Classification of Citation 2

The violations of §§ 1926.21(b)(2) and 1926.550(a)(15)(i) are classified as willful. The Secretary contends that KHC intentionally disregarded the requirement to instruct employees about the dangers of working near energized power lines and failed to ensure the American crane was not within 10 feet of energized power lines. The Secretary bases the willful classifications on KHC's failure to instruct employees about its safety program, Schademann's knowledge of how close the load and crane were to the power lines, and Schademann's previous discussion with Bermudez about moving the trailer to the lower lot because it was a place of choice to unload equipment (Tr. 164, 168).

"It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). "It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation. . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

The Secretary failed to establish that KHC intentionally disregarded or had a heightened awareness of the standards' requirements to instruct employees and to keep the crane 10 feet away from power lines. "The Commission has found heightened awareness 'where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist.'" *Propellex Corp.*, 18 BNA OSHC 1677,

1684 (No. 96-0265, 1999). In this case, KHC has never been cited or inspected by OSHA. The Secretary failed to show that KHC was well aware of the standards.

KHC made a good faith effort to instruct employees on safety as exemplified by its safety booklet, safety meetings, and numerous warnings by Houser. It is well established “that actions an employer takes to enhance safety on its worksite can negate willfulness even if those efforts are not sufficient to fully eliminate the hazardous conditions.” *Beta Construction Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993), *aff’d. per curiam*, 17 BNA OSHC 1276 (D. C. Cir. 1995).

Although supervisor Schademann was aware of the 10-foot requirement for power lines, there is no showing that he had a “heightened awareness” of the violation. To the contrary, Schademann believed that the load was more than 10 feet away from the power lines because he had unloaded another tie inserter from the same trailer in the same location the week before the accident and he did not have any problem with the power lines (Tr. 321). Because Schademann reasonably believed, even though he did not measure the distance, that the load and crane were more than 10 feet from the power lines, he did not instruct Snoko about the power lines before he made the lift. Also, even though Schademann had previously discussed moving the trailer to unload the tie inserter in the lower lot, which is a place of choice to unload the tie inserter, he did not move the trailer because the tie inserter needed repair work and its location in the upper lot was more convenient (closer to the shop) to work on it (Exh. C-8, at pp. 17-18; Tr. 343). Under these circumstances, Schademann was not acting willfully.

The evidence is insufficient to show that KHC acted with “plain indifference” to employee safety. The Secretary must show that the employer possessed “a ‘state of mind . . . such that, if he were informed of the [standard], he would not care’.” *Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051 (No. 90-2179, 1993). In this case the Secretary did not present any evidence that KHC did not care that it was in violation of the Act.

The Secretary has failed to establish that the violations of §§ 1926.21(b)(2) and 1926.550(a)(15)(i) were willful. Because operation of a crane within 10 feet of power lines can result in serious injury or death due to electrical shock, the violations are reclassified as serious.

Unpreventable Employee Misconduct Defense
as to Citations 1 and 2

KHC asserts the affirmative defense of unpreventable employee misconduct based on Snoke's moving the boom in the wrong direction toward the power lines and Bermudez's touching the suspended tie inserter.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show:

(1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated the rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

The employer must first show that it has established work rules designed to implement the requirements of the standard. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994). KHC had a rule against touching suspended loads and against operating a crane boom within 10 feet of power lines in its safety booklet (Exh. R-6, at pp. 25-26).

The second requirement for the employee misconduct defense is that an employer must show that it has adequately communicated the rules to its employees. KHC claims that employees were told not to touch a suspended load. Nevertheless, employees routinely used their hands to steady suspended loads. Houser testified that he had personally warned employees about getting close to the overhead power lines (Tr. 275). However, Snoke stated that no one at KHC had ever warned him about operating the crane near the overhead power lines. Although KHC provided a 44-page safety booklet to all employees, it did not discuss the rules in the booklet with its employees and had no way of knowing if employees read and understood the booklet. Both Snoke and Schademann admitted that they had not read the entire booklet. Obviously, KHC failed to adequately communicate these rules to its employees.

Third, an employer must show that it has taken steps to discover violations. "Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards." *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). KHC employees were touching suspended loads and were

operating the American crane within 10 feet of power lines, as evidenced by the accident. KHC did not show that it made any diligent efforts to discover violations of these rules.

Finally, the employer must effectively enforce the rules when violations have been discovered. “To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred.” *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996). “Evidence of verbal reprimands alone suggests an ineffective disciplinary system.” *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff’d without published opinion*, 106 F.3d 401 (6th Cir. 1997). In this case, employees were not disciplined for touching suspended loads or for operating the crane within 10 feet of power lines. KHC did not present any evidence of a formal discipline program consisting of increasingly harsher discipline measures, such as verbal warnings, written warnings, work suspension, and termination.

KHC has not established that Snoke or Bermudez engaged in unpreventable employee misconduct. KHC has not established that it adequately communicated the power lines and suspended load rules, that it took steps to discover the violations, and that it enforced the rules. KHC’s employee misconduct defense is rejected.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give “due consideration” to four criteria: (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

KHC is a small company with approximately 70 employees. Two employees were involved in the crane lifting operation. KHC is entitled to credit for size.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In this case, the gravity

is severe. Although only two employees were exposed to the hazard, the likelihood of electrocution was high and one employee was electrocuted.

The recommended penalty did not include any reduction for good faith because willful violations were involved (Tr. 166). KHC exhibited good faith. It was cooperative during the inspection and did have a written safety program. Because the willful violations are reclassified as serious, credit is given for good faith.

KHC has no prior history of OSHA violations or any previous contact with OSHA. Credit is given for good history.

Based on these factors, a penalty of \$3,000.00 is reasonable for Citation 1, Item 1; \$2,000.00 for Citation 1, Item 2; \$2,000.00 for Citation 1, Item 3; \$3,000.00 for Citation 1, Item 4; \$3,500.00 for Citation 2, Item 1; and \$3,500.00 for Citation 2, Item 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding decision constitutes the findings of fact and conclusions of law in accordance with Rule 51(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the preceding decision, it is ORDERED:

1. Citation 1, Item 1, alleging a serious violation of 29 C. F. R. § 550(a)(1), is affirmed and a penalty of \$3,000.00 is assessed.
2. Citation 1, Item 2, alleging a serious violation of 29 C. F. R. § 550(a)(2), is affirmed and a penalty of \$2,000.00 is assessed.
3. Citation 1, Item 3, alleging a serious violation of 29 C. F. R. § 550(b)(2), is affirmed and a penalty of \$2,000.00 is assessed.
4. Citation 1, Item 4, alleging a serious violation of 29 C. F. R. § 550(a)(19), is affirmed and a penalty of \$3,000.00 is assessed.
5. Citation 2, Item 1, alleging a willful violation of 29 C. F. R. § 1926.21(b)(2), is affirmed as serious and a penalty of \$3,500.00 is assessed.
6. Citation 2, Item 2, alleging a willful violation of 29 C. F. R. § 1926.550(a)(15)(i), is affirmed as serious and a penalty of \$3,500.00 is assessed.

