UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. NATIONAL ENGINEERING & CONTRACTING CO., Respondent.	OSHRC Docket No. 92-73

DECISION

Before: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The issue in this case is whether National Engineering & Contracting Co. ("National") violated 29 C.F.R. § 1926.59(f)(5)[1] because it did not attach to a container filled with gasoline a label that stated its contents and provided appropriate hazard warnings. For the reasons that follow, we find that National did violate the standard and assess a $100 penalty.

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[1] Section 1926.59(f)(5) provides:

> **§ 1926.59 Hazard Communication.**
>
> . . . .
>
> (f) *Labels and other forms of warning.*
>
> . . . .
>
> (5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:
> (i) Identity of the hazardous chemical(s) contained therein; and
> (ii) Appropriate hazard warnings.

Discussion

The container in contention was in the back of a National pickup truck assigned to Richard Skube, a laborer foreman. Skube had filled the container with gasoline the morning of the inspection, but could not attach a label because of the extreme cold weather and gasoline overspray on the can. National does not dispute that (1) the cited standard applies to the unlabeled gasoline container, (2) Foreman Skube admitted that the container was not labeled properly, and (3) Foreman Skube had actual knowledge of the unlabeled container, and his knowledge is imputed to National. Employee access to the unlabeled container is the only element of the Secretary's proof of a prima facie case in dispute.

Proof of employee access to a hazard is made by showing "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." The question is whether it is reasonably predictable that an employee will be in the zone of danger. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1994 CCH OSHD ¶ 30,303, p. 41,761 (No. 90-2866, 1993), citing *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86-247, 1990) and *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). Here, the evidence establishes that the unlabeled gasoline container was on the open back of a company pickup truck parked on the portion of the bridge where welders and iron workers were working. Although Skube testified that he would not "allow anyone to use the can in that condition" the record shows that he was not in a position to prevent an employee from using the unlabeled can. Skube testified that he was so busy he did not have time to attach another label to the gasoline can and that he "had to run back and forth on the deck" of the bridge. Taking into account the varied nature of the work, the fact that the unlabeled gasoline container must have been filled for eventual use, and the need for gasoline that could occur, as Skube phrased it, "on a spur of the moment basis," we find that it was reasonably predictable that an employee would need to use gasoline and that the Secretary has established employee access to the violative condition.

Jefferson Smurfit Corp., 15 BNA OSHC 1419, 1421-22, 1991-93 CCH OSHD ¶ 29,551, pp. 39,953-54 (No. 89-553, 1991) cited by National, does not suggest a different result. In order to establish a violation under the machine guarding standard cited in that case, the

Secretary is required to prove that the manner in which the machine functions and the way it is operated exposes employees to a hazard. 15 BNA OSHC at 1421, 1991-93 CCH OSHD at p. 39,953. There, the Commission credited testimony that the machine operators had no reason to come within two feet of a machine's unguarded nip points and thus were not exposed to a hazard. *Id.* Here, the employees worked in the vicinity of the full, unlabeled gasoline can and, as we have found, it was reasonably predictable that they would have to use the gasoline. We therefore conclude that the Secretary has established the elements of a prima facie case showing that National has violated the cited standard.[2]

Affirmative Defenses

National argues that it has shown that it was infeasible to put the label on the container. It claims that it has established that an alternative method of abatement was in use, the second element of the affirmative defense of infeasibility, by showing that Skube kept the container under his control. However, we need not consider National's argument because it is an affirmative defense that should have been, but was not, raised in its Answer, as required by Commission Rule 34(b)(3), 29 C.F.R. § 2200.34(b)(3). Even if the claim had been properly raised, we would reject it because foreman Skube testified that he did not attempt to affix the label to a different spot on the container.

National's claim that it substantially complied with the standard is also without merit. Leaving an unlabeled gasoline container on an open truck back -- also the repository of a labeled gasoline container -- does not demonstrate substantial compliance. We therefore conclude that National violated section 1926.59(f)(5).

Seriousness of the Violation

A violation is serious under section 17(j) of the Act if an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident. *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991-93 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991). National contends that the only evidence offered by the compliance officer to justify a serious characterization was the potential for burns or smoke inhalation that could result from an unlabeled gasoline can if a fire occurred. It

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[2] Because we find from the record that access was established, we do not reach the Secretary's claim that he need not prove exposure under the hazard communication standard.

argues that since the unlabeled gasoline container was in good condition and the Secretary failed to show any smokers were exposed to the can, the violation should be characterized as other than serious. National's argument is without merit. The compliance officer testified that if an accident involving the gasoline occurred the likely injuries could include first, second, or third-degree burns and/or smoke inhalation. A failure to provide the label required by the hazard communication standard on a can of gasoline is serious because a substantial probability exists that death or serious physical harm could result in the event of an accident involving a volatile substance like gasoline. *Ford Development Corp.*, 15 BNA OSHC 2003, 2006-07, 1991-93 CCH OSHD ¶ 29,900, pp. 40,799-800 (No. 90-1505, 1992), *aff'd per curiam*, No. 93-3090 (6th Cir. Feb. 17, 1994). National's arguments are primarily directed at the unlikelihood of an accident occurring, a factor which is not relevant to the characterization of a violation as serious.

The penalty was reduced by the judge from the proposed $1,100 to $100. He concluded that National had demonstrated good faith by its attitude toward the labeling requirements of the cited standard and the actions it took upon learning of the missing label. Neither party objects to the $100 penalty assessment and accordingly we find that a $100 penalty is appropriate here and assess that amount.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

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

Velma Montoya
Velma Montoya
Commissioner

Date: May 25, 1994

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SECRETARY OF LABOR, Complainant, v. NATIONAL ENGINEERING & CONTRACTING CO., Respondent.	:	Docket No. 92-73

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on May 25, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

May 25, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-73

NOTICE IS GIVEN TO THE FOLLOWING:

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Judge Paul Brady
Administrative Law Judge
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SECRETARY OF LABOR
Complainant,
v.
NATIONAL ENGINEERING & CONTRACTING
Respondent.

OSHRC DOCKET
NO. 92-0073

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 March 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 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 March 24, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0073

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SECRETARY OF LABOR, Complainant, v. NATIONAL ENGINEERING AND CONTRACTING COMPANY, INC., Respondent.	OSHRC Docket No. 92-73

Appearances:

Janice L. Thompson, Esquire
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U. S. Department of Labor
Cleveland, Ohio
For Complainant

F. Benjamin Riek, III, Esquire
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

National Engineering & Contracting Co. (National), contests a citation issued to it on December 6, 1991, by the Secretary. The citation contains three items, each alleging a serious violation of the Occupational Safety and Health Act of 1970 (Act). The citation was issued as a result of an inspection conducted by the Occupational Safety and Health Administration (OSHA) of a construction site on which National was the primary contractor (Tr. 72).

Item 1 of the citation alleges that National violated § 1926.59(f)(5), a provision of the hazard communication standard, by failing to label a container of gasoline. Item 2 charges National with a violation of § 1926.550(a)(14)(i), for failure to make available a fire extinguisher in the cab of a crane. Item 3 charges that National violated § 1926. 601(b)(9), for failure to ensure that seat belts were installed in the cab of the crane that is at issue in item 2.

National is a construction contractor whose principal place of business is in Strongsville, Ohio (Tr. 63). During its peak season, National employs from 400 to 500 employees (Tr. 85). In December of 1991, one of National's projects was the reconstruction of the Main Avenue Bridge in Cleveland, Ohio. The Main Avenue Bridge is approximately 8,000 feet long (Tr. 64). The estimated contract price of the project was upwards of $50,000,000 (Tr. 72). In December of 1991, five subcontractors were working on the project, with a total of 75 to 80 employees (Tr. 71, 74).

On December 3, 1991, OSHA Compliance Officer Thomas Henry inspected the Main Avenue Bridge site (Tr. 204). As a result of his inspection, the citation that gave rise to the present case was issued.

Item 1: Alleged Violation of § 1926.59(f)(5)

Item 1 of the citation alleges a serious violation of § 1926.59(f)(5), which provides:

> Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the work place is labeled, tagged or marked with the following information:
>
> (i) Identity of the hazardous chemical(s) contained therein; and
>
> (ii) Appropriate warnings.

Compliance Officer Henry observed a metal container on the back of a flat-bed pickup truck (Exh. C-6). The truck was owned by National and driven by National's labor foreman, Richard Skube (Tr. 285). Skube informed Henry that the container held gasoline (Tr. 211). The container was not labeled, tagged, or marked as to its contents (Tr. 210).

National had the required labels available at the worksite (Tr. Exh. R-4). It was National's policy to label its containers of gasoline in compliance with § 1926.59(f)(5). Skube

explained that on the day of Henry's inspection, the weather was cold. Skube filled up the container with gasoline that morning and affixed an appropriate warning label to it. Because of the low temperature, the label did not adhere to the metal surface of the container. Skube noticed that the label was "flopping half off," and he removed the label and placed it on the truck's dashboard (Tr. 288-289).

Skube testified that he was aware of the requirements of the cited standard and that he intended to comply with them that morning (Tr. 290): "[The container] was labeled, but, like I say, it came off. And, I had to run back and forth on the deck so I didn't have time to put it back on. The can was not in use." Approximately an hour and a half after Skube removed the label and placed it on the truck's dashboard, Henry arrived for the OSHA inspection (Tr. 293).

National points out that its employees were engaged in removing the concrete deck and chipping that day. These activities require no gas-powered equipment (Tr. 295). Skube stated that if gasoline had been required, he would have instructed his employees to use another container of gasoline on the truck that was properly labeled (Tr. 298).

"To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence." *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). The Secretary has established the elements of the violation of § 1926.59(f)(5). The standard applies to the container of gasoline, and National admits that the container was not properly labeled. Employees had access to the unlabeled container, since it was on the back of a pickup truck parked at the worksite. As a foreman, Skube's awareness that the label did not adhere to the container is imputed to National.

National argues that if a violation is found, it should be classified as "other" than serious, rather than serious, as the Secretary alleged. Such a finding would frustrate the intent of the standard at issue. Under § 17(k) of the Act, a violation of a standard is serious "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations,

or processes which have been adopted or are in use. . ." The standard in question presumes that a hazard exists if the standard's terms are not met. National makes a strong case that the unlabeled container of gasoline was unlikely to cause an accident. If an accident involving gasoline did occur, however, it would most likely result in a fire or explosion. "The accident itself need only be possible, not probable. The probability requirement in the statute of death or serious physical injury makes it unnecessary for the Government to show that actual injury did in fact occur." *Bethlehem Steel v. OSAHRC*, 607 F.2d 1069, 1073 (3d Cir. 1979). National's violation of the standard was serious.

National has established, however, that there were mitigating circumstances surrounding the violation. Skube attempted to label the container of gasoline, as required, but was thwarted by the incompatibility of the container's cold metal surface with the label's adhesive. It was not impossible for Skube to comply with the standard--he could have taken the time to get another label or to remove the unlabeled container from the truck--but his good faith attempt to comply with the standard merits some consideration. While this consideration does not affect the violation's classification, it can be reflected in the penalty.

The Secretary proposed a penalty for item 1 in the amount of $1,100. The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Although National employs 400 to 500 employees at its peak season, the company had less than 250 employees at the time of Henry's inspection (Tr. 219-220). The gravity of the violation is rather high, with likely injuries including first, second, and third degree burns and smoke inhalation (Tr. 216). National had a history of previous citations (Tr. 222).

Henry testified that National demonstrated good faith in its approach to safety: "[T]hey had a written safety program on the job site. They did have their hazardous communication program on the job site, they had the material safety data sheets, they had conducted safety meetings" (Tr. 221-222).

National has also demonstrated good faith with respect to its attitude concerning the labeling requirements of the cited standard and the action it took upon learning of the missing label. It is clear that National has a policy requiring labels whenever appropriate and that this policy is understood by its employees and usually followed (Tr. 290). The instance observed by Henry was, in this court's opinion, a rare occurrence occasioned by circumstances (the weather) over which National had little control. It further appears National's foreman took immediate steps to label the container upon being advised of this condition (Tr. 214).

Upon consideration of all relevant factors, it is determined that a penalty of $100 is appropriate and this amount will be assessed.

Item 2: Alleged Violation of § 1926.550(a)(14)(i)

National was also charged with a violation of § 1926.550(a)(14)(i), which provides:

> An accessible fire extinguisher of 5BC rating, or higher, shall be available at all operator stations or cabs of equipment.

Edward Ruthsatz was the operator of crane C-35, an all-terrain, 40-ton Grove crane, at the Main Avenue Bridge project (Tr. 143-144). During his inspection, Henry observed that crane C-35's cab was not equipped with a fire extinguisher (Tr. 223). National agrees that no fire extinguisher was present.

Ruthsatz testified that the weekend before Henry's inspection (which was Thanksgiving weekend), someone broke into the cab of his crane. Ruthsatz stated upon his return to work the following Monday, "Well, when I went to get in the machine and the handles were all greased. The grease gun was out of it, and some other things I had in it, you know, rags and stuff" (Tr. 165) that he inspected the cab but "never noticed whether the fire extinguisher was gone or there" (Tr. 167). No written report of the alleged break-in was made, and National's project superintendent, Edward Kersman, did not look into the matter (Tr. 102-103). National raises the implication that whoever broke into the cab of C-35 took the fire extinguisher. But it is not clear from Ruthsatz's testimony that there was a fire extinguisher in the cab before the alleged break-in (Tr. 178-179) (emphasis added):

Judge Salyers: All right, before the fire extinguisher was removed, it rested behind your head and up on the cab wall, or how was it affixed to the cab if it was affixed?

Ruthsatz: *Right now*, I've got [a] piece of number 9 wire bent and it was hung on there.

Judge Salyers: So, it was hanging on a piece of wire. Is that what you're saying?

Ruthsatz: *It is now.*

In his testimony, Ruthsatz appeared to be trying to avoid stating definitely that his crane's cab was equipped with a fire extinguisher before the Thanksgiving weekend. Ruthsatz repeatedly couched his replies in the present tense, testifying as to where the fire extinguisher was located *after* the December 3 inspection. This was apparent when he was being examined by National's counsel (Tr. 190):

Q.: Sir, I see the fire extinguisher in the cab on C-35 located in the same spot now [as] it was in December.[1]

Ruthsatz: I have it behind my head, like I told you.

Q.: Now it's hanging behind your head, is that correct?

Ruthsatz: Yes.

Q.: Where was it in December?

Ruthsatz: I really couldn't tell you.

National called Christopher Morely as a witness at the hearing. Morely is a truck driver for National (Tr. 306). His duties include fueling equipment on the site (Tr. 307). Morely testified that he refueled crane C-35 the Friday before the inspection (which would have been the day after Thanksgiving, and the day before the weekend during which the alleged break-in occurred). Morely stated that when he entered the crane's cab to check the fuel gauge, he saw a fire extinguisher "on the floor behind the seat" (Tr. 319). The

[1] From the context of the question, it appears that National's counsel meant "November" and not "December."

court expressed some surprise at Morely's recollection at the hearing (Tr. 320) and, upon further reflection, is skeptical of its accuracy. Ruthsatz, the crane's operator who was in the cab on a daily basis and who conducted daily inspections of the crane, could not authoritatively state that a fire extinguisher was in the cab prior to the inspection. Yet Morely, who entered the cab only to check the gas gauge, remembered with precision the day that he saw the fire extinguisher and its exact location. When asked if there was something special that made him note the fire extinguisher with such particularity, Morely replied, "No" (Tr. 320).

National contends that the Secretary has failed to show that the company had the requisite knowledge needed to establish a violation. National blames the absence of the fire extinguisher in the crane's cab on unpreventable employee misconduct on the part of Ruthsatz, since he failed to report the allegedly missing fire extinguisher to any supervisory personnel. Leaving aside for the moment the question of whether reasonable diligence required supervisory personnel to inspect any report of an alleged break-in, National's unpreventable employee misconduct defense must fail.

"In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule." *H. B. Zachry Company*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980); *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-531, 1991). National has a written work rule (#16), found on page 12 of its safety manual (Exh. R-1), that provides: " A fully charged fire extinguisher should be in the crane cab." Yet when Ruthsatz was asked if he was required to perform a daily check for a fire extinguisher, he shrugged his shoulders in reply (Tr. 164). National's work rule was not effectively communicated to Ruthsatz. Nor was it effectively enforced. If the fire extinguisher was taken over Thanksgiving weekend, then that means Ruthsatz failed to detect its absence for two days, in violation of National's work rule. Yet at the time of the hearing, almost six months after the OSHA inspection, Ruthsatz had not received any kind of disciplinary notices or verbal warnings for his failure to comply with National's work rule (Tr. 165).

National has failed to establish its defense of unpreventable employee misconduct and was, therefore, in violation of § 1926.550(a)(14)(i). The hazard of failing to have a fire extinguisher available in a crane's cab is obvious. If a fire occurs, the operator would have no readily available means of extinguishing the fire. This eventually could result in serious burns (Tr. 234). The risk of fire was exacerbated by the fact that Ruthsatz smoked in the cab and, by his own admission, occasionally flicked the ashes on the cab's floor (Tr. 186, 192). Given the fact that oily rags were strewn about the floor of the cab, the need for a fire extinguisher is obvious (Tr. 183-184). The violation was serious, and the Secretary's proposed penalty of $1,100 is appropriate.

Item 3: Alleged Violation of § 1926.601(b)(9)

National is charged with a serious violation of § 1926.601(b)(9), which provides:

> Seat belts and anchorages meeting the requirements of 49 CFR Part 571 (Department of Transportation, Federal Motor Vehicle Safety Standards) shall be installed in motor vehicles.

Crane C-35 was not equipped with seat belts (Tr. 156, 235). Ruthsatz testified that the crane had never had a seat belt and that there was no place in the crane's cab for a seat belt to be attached (Tr. 160).

National contends that the absence of seat belts in the crane violates no provision of the Act. The company argues that the cited standard, § 1926.601(b)(9), is inapplicable to cranes. Henry explained why he believed that the crane was covered by the standard: "[The crane] had wheels and a motor and it moves around" (Tr. 237).

Section 1926.601(a), captioned "Coverage," provides:

> Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic. The requirements of this section do not apply to equipment for which rules are prescribed in § 1926.602.

The caption of § 1926.602(c) reads: "Lifting and hauling equipment (other than equipment covered under Subpart N of this part)." Subpart N is entitled "Cranes, Derricks, Hoists, Elevators, and Conveyors." National argues that § 1926.601(a) exempts equipment covered in § 1926.602 from coverage by § 1926.601, and § 1926.602(c) exempts equipment

covered in Subpart N. Since cranes are covered by Subpart N, National reasons, then they cannot be covered by either § 1926.601 or § 1926.602.

A similar argument was raised in a 1975 case decided by Judge James D. Burroughs. In that case, the employer was cited under § 1926.601(b)(2)(ii), for failure to maintain brake lights on a crane. The employer argued that the crane was not a motor vehicle within the meaning of § 1926.601. Judge Burroughs agreed, stating in pertinent part on pages 11 and 12 of his decision:

> A look at certain provisions of § 1926.601 is convincing that the term "motor vehicles" was intended to apply to self-propelled vehicles designed for, intended to be used for, or actually used to transport persons and property over roads or highways. . . . It seems clear that special vehicles, such as mobile hydraulic cranes, were not intended to be covered by 29 CFR 1926.601.
>
> The mobile crane is primarily intended for use at construction sites. There are more efficient and less expensive means of transporting persons and property over public roads or highways. While the mobile crane is capable of moving under its own power from one job to another upon a highway, this factor should not be the determining criteria.

The Rust Engineering Company and Allegheny Industrial Electrical Company, Inc., 5 BNA OSHC 1183, 1975-76 CCH OSHD ¶ 19,994 (Nos. 12200 & 12201, 1975). *See* also *Kiewit Western Co.*, __ BNA OSHC __, 1992 CCH OSHD ¶ 29,862 (No. 91-2578, 1992).

Judge Burroughs' reasoning, while not binding, is persuasive in the present case. While the C-35 crane was capable of moving under its own power, using it for transportation purposes would have been eminently impractical. Ruthsatz testified that the crane's maximum speed was approximately 25 miles per hour (Tr. 181). The C-35 crane was not a motor vehicle within the meaning of § 1926.601. Therefore, § 1926.601(b)(9) is inapplicable to the cited condition, and this item will be vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

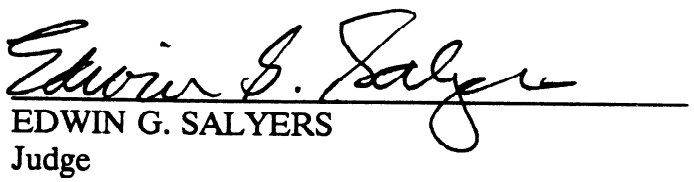
ORDER

Based upon the foregoing decision, it is ORDERED:

(1) Item 1, alleging a serious violation of § 1926.59(f)(5), is affirmed and a penalty of $100 is assessed.

(2) Item 2, alleging a serious violation of § 1926.550(a)(14)(i), is affirmed and a penalty of $1,100 is assessed.

(3) Item 3, alleging a serious violation of § 1926.601(b)(9), is vacated.



EDWIN G. SALYERS
Judge

Date: February 23, 1993