

SECRETARY OF LABOR,
Complainant,
v.
EMPIRE COMPANY, INC.,
Respondent.

OSHRC Docket No. 93-1861

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

This case arose following an inspection of a Puerto Rico-based maintenance and repair facility operated by Empire Company, Inc. (“Empire”) by a representative of the Occupational Safety and Health Administration, (“OSHA”) of the United States Department of Labor. Puerto Rico operates under a state occupational safety and health plan pursuant to section 18, 29 U.S.C. § 667, of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). OSHA, however, has retained jurisdiction over maritime and longshoring issues, which are expressly excluded from coverage under the state plan. 29 C.F.R. § 1952.382. The sole issue before us is whether the facility in question falls under the

scope of the marine terminal standards.¹ Review Commission Chief Administrative Law Judge Irving Sommer found that Empire's facility was in fact subject to the marine terminal standards. We affirm the ruling of the judge.

I. Facts

Empire's facility is located in close proximity to the Ponce, Puerto Rico, municipal marine terminal. The Empire building itself is located approximately one-half mile inland from the Ponce wharf and berthing locations, next to the administrative offices of a stevedoring company, Luis Ayala Colon ("LAC"). Situated between the wharf and Empire's premises is a railroad car unloading facility operated by CHEMEX Corporation. Railroad cars are transferred from barges to railroad tracks at the wharf, then transported to the CHEMEX unloading facility.

Empire's activities include the maintenance, repair, and rental of equipment. The company does not, however, move materials or cargo from vessel to shore or shore to vessel. Empire's client list includes nonmaritime-customers, although the bulk of its work is maritime related. For example, approximately 80% of the finger lifts (used to lift and move heavy loads, such as palates) that Empire rents are to clients in the maritime industry, and to LAC in particular. Approximately 85% of the chassis and 100% of the containers that Empire repairs are for clients within the maritime industry. Empire also provides diesel fuel to LAC and the City of Ponce, which operates a crane in the municipal terminal.

At the time of the inspection, Empire employees were repairing two finger lifts and performing welding and other repair work on two chassis. The compliance officer also observed containers stored on the site. He testified that Carlos Baerga, Empire's manager, told him that LAC was using the land for storage. Also located on the site were LAC trucks used for picking up containers.

¹The parties stipulated at the hearing that should Part 1917 be found applicable, "the citation would be affirmed with modified penalties, except for item 4 of citation 2, which the Secretary withdrew in [her] complaint."

II. Discussion

OSHA's jurisdiction to issue citations to Empire depends on whether 29 C.F.R. Part 1917 applies to Empire's workplace. Section 1917.1 "Scope and applicability" provides, in pertinent part, that Part 1917 applies to:

employment within a marine terminal as defined in 1917.2(u), including the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal or into or out of any land carrier, holding or consolidation area, or any other activity within and associated with the overall operation and functions of the terminal, such as the use and routine maintenance of facilities and equipment.

The crucial factor in determining the applicability of the marine terminal standard here involves analyzing whether the location falls under the definition of a "marine terminal as defined in section 1917.2(u)." The latter section defines a marine terminal as:

wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures associated with the primary movements of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidation and loading or delivery of waterborne shipments and passengers, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas having their own docking facilities and located at a marine terminal nor does the term include storage facilities directly associated with those production or manufacturing areas.

29 C.F.R. § 1917.2(u).

In the Secretary's view, a marine terminal includes "not only the primary areas where cargo handling takes place but also all 'adjacent storage or contiguous areas and structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures . . . including areas devoted to the maintenance of the terminal or equipment.'" Under this reading, a contiguous area is considered a marine terminal without regard to whether it is associated with the primary movement of cargo or materials from vessel to shore or shore to vessel. In contrast, Empire suggests that the regulation

requires that adjacent storage, contiguous areas, and structures all be associated with the primary movement of cargo in order to be considered marine terminals.

In ascertaining the meaning of a regulation, we first examine the language of the standard, and if necessary, the available legislative history. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1574, 1993-95 CCH OSHD ¶ 30,345, pp. 41,837-38 (No. 91-237, 1994) (citing *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)). If the text and structure of the standard or the pertinent legislative history do not make plain the meaning, we must examine the Secretary's stated interpretation of the regulation. *Id.* Her interpretation must be given effect, provided such interpretation is "reasonable." *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991).

In this case, the language of the standard does not make clear under what circumstances a contiguous area may be considered a marine terminal. The parties have not cited us to any pertinent regulatory history that provides guidance. We turn, therefore, to the Secretary's construction of section 1917.2(u) that areas contiguous to wharves, bulkheads, quays, piers, docks and other berthing locations may be considered marine terminals without regard to the primary movement of cargo. We find that the Secretary's interpretation, while not the only plausible reading, cannot be held to be unreasonable.²

²Both the Secretary and Empire presented testimony as to the meaning of the standard. The witness testifying on behalf of Empire was intimately involved in the promulgation of the standard, while the witness for the Secretary presented testimony concerning the current interpretation of the regulation. The judge discredited the testimony of Empire's witness as "ambivalent and self contradictory" and inconsistent with the "facts of record" and the "terms of the scope and definition provisions of Part 1917." In contrast, the judge found the testimony of the Secretary's witness to be "more persuasive and entitled to greater weight." We see no reason to disturb the judge's conclusions.

Both parties also presented limited written evidence which proved inconclusive in clarifying the meaning of the standard. Neither submission provided assistance as to the definition of the terms "marine terminal" or "contiguous."

This leaves the question of whether Empire's workplace can be considered an adjacent storage or contiguous area. A close examination of the record indicates insufficient evidence to support a holding that Empire is an adjacent storage area. The Secretary briefly argues that Empire should be considered an adjacent storage area, based in part on the asserted storage operations of CHEMEX Corporation, which is located in close proximity to Empire, and on the compliance officer's testimony that he observed containers stored on the site. However, Empire maintains in its reply brief that any containers or chassis in the area were present for the purpose of rehabilitation or maintenance, rather than storage, and we find no reason to question that assertion.

The term "contiguous" is not defined within the regulation. The administrative law judge defined the term to mean "adjacent," "nearby" and "not distant" or "relatively near," and found that Empire's facility was a marine terminal because it is "adjacent to other areas, including storage areas, associated with the handling of marine cargo." He concluded that Empire's facility was "part of a single, overall facility which comes within the definition of a marine terminal." We agree with the judge.

Empire points out that contiguous can mean "being in actual contact, touching, sharing an edge or boundary." However, the term also can encompass things that are "nearby, close, not distant," contrary to Empire's claim that things must be "in actual contact" or "touching" to be contiguous. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1986). We, therefore, find that "contiguous," as used in section 1917.2(u), can mean "nearby."

Applying this definition to the facts, we find that Empire's facility and work locations are a marine terminal. Empire's facility is located approximately one-half mile from the wharf area. All of the property between Empire and the wharf is devoted to maritime activities. The CHEMEX facility receives railroad cars that are transferred from barges to railroad tracks at the wharf. The other shoreward facilities are the wharves themselves.

There are no intervening work operations or structures unrelated to marine terminal activities. We, therefore, find that Empire falls under the scope of Part 1917.

III. Order

The Commission affirms the judge's decision holding that Empire falls within the scope of the marine terminal standards in 29 C.F.R. Part 1917. Accordingly, as the parties stipulated we:

- (1) Affirm Citation 1, items 1, 2 and 3 and assess a penalty of \$600 for item 1 and \$750 for items 2 and 3 (as amended to one single item).
- (2) Affirm Citation 2, item 1 and assess a penalty of \$150.
- (3) Affirm the assessment of no penalty for Citation 2, items 2, 3, 5 and 6.
- (4) Vacate Citation 2, item 4.

/s/
Stuart E. Weisberg
Chairman

/s/
Velma Montoya
Commissioner

/s/
Daniel Guttman
Commissioner

Dated: February 10, 1997