

I. *Background*

G-P manufactures paper and wood products and has its principal office in Atlanta, Georgia. In the "press area" of the Talladega plywood manufacturing plant, on July 22, 1989, a forklift truck transporting a load of plywood that measured 54 inches high (carried about 6 inches off the ground), 51 inches deep, and 99 inches wide, accidentally struck and killed a G-P employee who was crouched down while painting the lower part of a column. The deceased employee, who did not regularly work in the press area, did touch-up painting at different locations around the plant.

The press area, which is located in the finishing and shipping departments, includes the intersection of two aisleways, one running past Presses No. 1 and No. 2 and the other running from the plant's rail car line to the stacking area. At each of the two presses, sheets of wood are compressed to form plywood measuring four feet by eight feet across and of varying thicknesses. The plywood sheets are then unloaded from the press onto platforms, or racks, awaiting removal by forklifts.

Once there are two loads, or "charges," of plywood from a press on a platform, a forklift driver loads the two charges, which together measure 54 inches high, onto the forklift, and, carrying the plywood about 6 inches off the floor, transports the double load to the stacking area. During an 8-hour shift, forklifts make approximately 70 trips from one or the other press to the stacking area. When carrying a load of plywood, the forklifts travel about 25 to 50 feet from the presses, turn left into the heavily traveled aisleway, and then proceed approximately 40 feet to the stacking area. A distance of approximately 50 feet separated press no. 1 and the column where the forklift made the left turn to go in the direction of the stacking area. At this turn, the forklift struck the crouched employee who was painting the column. The forklift at issue was a Caterpillar T-80D model, which is substantially the same as the other forklifts in the area.

II. *Testimony and Judge's Decision*

A. *Testimony of G-P Employees*

Donald Garrett, who was driving the forklift at the time of the accident, had operated forklifts in G-P's Press Area for about six years and had been a forklift driver for at least five years before that. He testified as to what he saw at the time as follows:

Q: Mr. Garrett, as the operator of that forklift [on July 22, 1989] carrying that [54-inch high] load [about 6 inches off the ground], in your opinion, was your forward view *obstructed by the load*?

A: Yeah, I guess it was.

(Emphasis added.) When Garrett was asked on cross-examination if his view was “partially obstructed or totally obstructed,” he answered “[p]artially” without further explanation of the extent of the obstruction being requested or given.

Garrett testified that “this accident was a terrible thing, but I still think it’s safer to go forward with it.” Garrett considered travel in reverse, or with the load trailing, to be less safe than going forward because he would have to look over his shoulder and thereby have a blind spot, and he would lose sight of the load and therefore lose assurance that he could make clearances. Although Garrett testified that he had been trained generally in how to operate a forklift, he answered in the negative when then asked if he had been trained in operating a forklift *in reverse*.

John D. Smith worked daily in the press area and was there on the day of the accident. His general job duties included assuring that the presses unloaded onto the racks properly. He testified that the double load at issue, measuring 54 inches high, was “one of the larger loads that we have,” and that for the larger size of plywood, only 1-1/2 loads are carried on the forklift. Based on his daily observations, he testified that it was unsafe to operate the forklifts in a forward manner there because it was “congested” with “lots of traffic,” “a lot of people,” and “the loads are high.”

Charles Jackson, Industrial Relations Manager and safety consultant at the Talladega plant, acknowledged that G-P has a rule, discussed in its training videotape in evidence, that the forklift is not to move until all persons are clear. He testified that he had “no idea” if it had been followed on the date of the accident. When asked what precautions G-P had taken to protect pedestrians, Jackson responded that all the forklifts have strobe lights on top and, consistent with the first sentence of the cited standard,¹ drivers are instructed to

¹The first sentence of section 1910.178(n)(4) provides:

The driver shall be required to slow down and sound the horn at cross aisles and other locations where vision is obstructed.

sound their horns when rounding blind corners. We note that there is no evidence in the record concerning the operation of the lights and horn on the particular forklift on the day of the accident. Jackson also testified that, later in the day on which the accident occurred, G-P instructed the forklift operators in the press area carrying the size of load at issue, 54 inches high, about 6 inches off the ground, to drive in reverse, with the load trailing.

B. Testimony by the Experts and the Compliance Officer

The issues in this case revolve around the phrase “obstructs forward view.” An expert witness for each party testified, as did the compliance officer, on their interpretations of this phrase, and exhibits were introduced into the record. A large portion of the expert testimony concerned hypothetical situations and opinion as to whether it was generally safer to travel with the load forward rather than trailing. As discussed *infra*, such testimony is not relevant to this case.

1. Secretary's Expert Witness and the Compliance Officer

Jimmy Lee Sloop, who had driven forklifts and managed forklift operators for many years, as well as developed forklift training programs for various companies, opined that the forklift driver under the cited conditions should have trailed the load because his forward view was obstructed by the load. After noting that Webster's dictionary defines “obstructs” as “blocks a path,” he testified that an operator's view is obstructed if the operator could not see what was 7 to 10 feet ahead, which is the distance that it would take a forklift truck to stop in one second when it is going 5 to 10 miles per hour. He stated that he recommends this unwritten rule in his oral instructional presentation to forklift drivers. Sloop, who did not visit the Talladega plant, based his opinions on the photographic exhibits and the line-of-sight diagram that was prepared by OSHA and entered into evidence.

William Powers, Jr., the compliance officer who conducted the investigation at the plant, testified that, based on his observations and photographs of the plant, he concluded that forklift operator Garrett should have trailed the load because his forward view was obstructed by the load. According to Powers, a forklift operator's view is obstructed if he or she could not see the floor ahead. More specifically, when the compliance officer, who was 6 feet tall, was sitting in the seat of the forklift during a demonstration at the plant, he could not see a person kneeling by the column from 14 feet away or less.

2. G-P's Expert Witness

G-P's expert witness was R. Kevin Smith, a registered professional engineer and engineering safety consultant. He visited the plant and operated the forklift, which he was told was the one involved in the accident, in the area where the accident occurred. He also took measurements and photographs to show the view of safety manager Jackson while he was in the operator's seat.² He testified that the operator's view of the crouching employee was not "obstructed" by the load because the cited OSHA standard, like its source standard, ANSI B-56.1-1969, *Safety Standard for Powered Industrial Trucks*,³ is "directed toward operators in looking out for pedestrians." He prepared a line of sight drawing to show that the operator's view of standing pedestrians was not obstructed. He opined that an operator's view is "obstructed" "if you have a blockage so large that you *can't see any part of a pedestrian*, then you'd better go in reverse." (Emphases added.) Acknowledging that the standard is not limited to his interpretation, he explained that his opinion was not based on any written material, but rather on (1) what he termed a "realistic design standpoint," (2) the fact that probably most employees in the area were pedestrians walking or otherwise upright, and (3) the need for "some kind of reasonableness" because not all situations can be covered, such as an employee bending down to tie his shoe behind the forklift.⁴ He testified that the key is to assure that pedestrians do not place themselves in high traffic areas.

C. Judge's Conclusions

At the hearing, the judge denied G-P's motion to dismiss, which G-P based on the alleged unenforceable vagueness of the standard. In his decision, the judge concluded that the Secretary had not met his burden of proving that the load "obstructs forward view"

²G-P's expert used Jackson, who was 5 feet 9 inches tall when standing, as his model because he was told that Garrett was about that height or maybe slightly taller. It was not established that Garrett's height while sitting, or the length of the trunk of his body, was the same as Jackson's.

³See 29 C.F.R. § 1910.189. ANSI B56.1-1969 was revised in 1975, but the section that corresponds to the standard here (section 604"D.") was not changed then or otherwise since 1969. G-P's expert has been a member of the ANSI B56.1 Committee since 1983.

⁴G-P's expert took issue with Sloop's 7- to 10-foot rule, noting that the standard load for rating forklifts is 48 inches, which by his computations would not satisfy Sloop's rule.

because, as G-P's expert testified, that can occur only when the load prevents the driver from seeing *any* part of "pedestrians walking or standing in an upright position." In addition, the judge discussed testimony that it was safer to travel with the load forward, and he concluded that "G-P clearly established that traveling forward with the [54-inch] load is safer than trailing the load."

D. *Issues on Review*

The first issue on review is whether, as G-P argues, the cited standard is unenforceably vague because the word "obstructs" is too general and fails to provide employers with fair notice of what the standard requires. The second issue is whether, as the Secretary contends, the judge erred in finding that in this case the Secretary had not established that the operator's view was obstructed by the load.⁵

III. *Whether the Standard Provides Fair Notice*

An employer generally cannot be held in violation of the Act if it fails to receive prior fair notice of the conduct required of it. *E.g.*, *Cardinal Industries*, 14 BNA OSHC 1008, 1011, 1987-90 CCH OSHD ¶ 28,510, p. 37,801 (No. 82-427, 1989), citing *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-39 (6th Cir. 1978). Neither section 1910.178(n) nor its source standard, ANSI B56.1-1969, *Safety Standard for Powered Industrial Trucks*, see *supra* note 3, defines the term "obstructs." The Secretary asserts that a load can render an operator's view "obstructed" if the operator cannot see employees in a bending, kneeling, or sitting position.

A. *G-P's Arguments*

G-P contends that the standard is unconstitutionally vague because it fails to provide employers with fair notice of what conduct the standard requires, citing, among other cases, *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). It asserts that there is no source, such as industry custom or practice, that would permit G-P to determine the definition of "obstruct." Nevertheless, G-P acknowledges that many OSHA standards are broad because the industry standards adopted by OSHA were merely advisory. G-P contends that, even if the standard at issue here is not unenforceably vague, the Secretary's admitted arbitrary application of the standard violates due process, citing *Kropp Forge Co.*

⁵G-P filed a motion for oral argument, which the Commission denied by its order of November 13, 1992.

v. Secretary, 657 F.2d 119, 122-23 (7th Cir. 1981) (OSHA cannot use enforcement action to define general hearing conservation standard); *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 675 (D.C. Cir. 1982) (OSHA cannot interpret regulations to mean what was intended but not adequately expressed). Finally, G-P contends that the vagueness and arbitrariness of the Secretary's application of the standard is shown by the divergent views expressed by the compliance officer's "see the floor in front" rule, Sloop's 7- to 10 feet ahead rule, and the Secretary's assertion on review that the operator's view is "obstructed" when employees kneeling, sitting, or bending over in front of a forklift cannot be seen because of the load. G-P contends that the last interpretation would require operators *always* to travel in reverse.

B. Discussion

The Commission evaluates an unconstitutional vagueness claim by viewing the words of the standard in context, not in isolation, and by judging the alleged vagueness not from the face of the standard, but from its application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991), cited in *CBI Services, Inc.*, 15 BNA OSHC 2046, 2048, 1992 CCH OSHD ¶ 29,924, p. 40,859 (No. 90-1719, 1992); *Cargill, Inc.*, 15 BNA OSHC 2149, 2152, 1993 CCH OSHD ¶ 29,941, p. 40,912 (No. 90-3191, 1993). To provide fair notice, standards are not required to be drafted with mathematical precision or impossible specificity. *Cargill, Inc.*, 15 BNA OSHC at 2152, 1993 CCH OSHD at p. 40,912; *Ormet*, 14 BNA OSHC at 2135, 1991 CCH OSHD at p. 39,200; *see Diebold, Inc. v. Marshall*, 585 F.2d at 1336; *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). Furthermore, a standard is not vague just because it requires the exercise of judgment to apply it. *Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30 (7th Cir. 1976); *Dravo Corp.*, 7 BNA OSHC 2095, 2098, 1980 CCH OSHD ¶ 24,158, p. 29,367 (No. 16317, 1980).

We must determine whether the meaning of the word "obstructs," as it is used in the cited standard, can reasonably be determined based on the language and purpose of the standard and the physical conditions to which it applies. *See Ormet*, 14 BNA OSHC at 2136, 1991 CCH OSHD at p. 39,200. The purpose of the standard is to prevent a forklift operator

from hitting an employee working in the path of a forklift when the operator cannot see the employee due to the size of the load being carried forward. The dictionary definitions of “obstruct” support this view. One dictionary defines “obstruct” as meaning “to block from sight; to be or come in the way of (a view, passage, etc.).” *Random House Dictionary* 995 (unabridged 1971). Another defines “obstruct” as “to cut off from sight: shut out.” *Webster’s Third New International Dictionary* 1559 (unabridged 1986). Based on the above, we conclude that, as used in the cited standard and applied to the physical conditions of G-P’s press area, “obstructs” means that the load being carried forward blocks the operator’s view such that it is reasonably foreseeable that the forklift operator could not see and could therefore hit employees working in the area, thus endangering employees that the standard seeks to protect.⁶ See *Ormet Corp.*, 14 BNA OSHC at 2136, 1991 CCH OSHD at p. 39,200 (“near” in 29 C.F.R. § 1910.179(n)(3)(xi) means “close enough to the path of travel that it is reasonably foreseeable that [employees] could be hit by the load [of a crane] if the load should fall”). See also *Cleveland Consolidated, Inc.* 13 BNA OSHC 1114, 1116-17, 1986-87 CCH OSHD ¶ 27,829, p. 36,428 (No. 84-696, 1987) (“proximity” in 29 C.F.R. § 1926.400(c)(1) defined by standard’s reference to proximity to electric power circuit such that employee may contact it in the course of work). We recognize that, in applying this definition, the results will vary depending on such factors as the size of the load, the speed at which the forklift is traveling, and the number and positions of employees working in or near the aisles of the press area. See *Ormet*, 14 BNA OSHC at 2136, 1991 CCH OSHD at p. 39,200.

G-P mentions that industry custom and practice may be referred to in determining the meaning of a vague term. However, there is no evidence in the record from either party on industry custom, and the Secretary is not required to introduce such evidence where a specific standard, such as section 1910.178(n), is at issue. See *Cleveland Consolidated*, 13

⁶By comparison, the types of standards that *have* been found unenforceably vague are quite different than the standard at issue here, for example: *Kropp Forge v. Secretary*, 657 F.2d at 122 (§ 1910.95(b)(3) required only “a continuing effective hearing conservation program shall be administered,” while the citation listed six rather specific testing, referral, and training considerations); and *Diamond Roofing v. OSHRC*, 528 F.2d at 648 (§ 1926.500(d)(1), requiring guardrails around “open-sided floors,” does not apply to open-sided roofs, based on various definitions and headings in that subpart).

BNA OSHC at 1117 n. 3, 1986-87 CCH OSHD at pp. 36,428-29 (because section 1926.400(c)(1) is a specific standard, not necessary to refer to industry practice for meaning of “proximity”).⁷

For the reasons above, we conclude that section 1910.178(n)(4) provides fair notice of what the standard requires. The next question is whether the Secretary has met his burden of proof.

IV. *Whether the Secretary Proved that the Operator's View Was Obstructed*

To establish a violation, the Secretary must prove, by a preponderance of the evidence, that the cited standard applies, employees were exposed to a hazard, the standard was violated, and employer had knowledge. *E.g., Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-90 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The only element at issue here is whether the standard was violated. To prove that the Secretary must establish that the forklift driver's forward view was “obstructed” by the load.

A. *Judge's Decision*

The judge found, relying on the testimony of G-P's expert, that the Secretary had not proven that the driver's view was obstructed. He found that, in order to establish a violation of this standard, the operator's view of “pedestrians,” defined by the judge as “employees working and walking in the area,” must be totally obstructed. The judge concluded that the testimony of G-P's expert should be accorded greater weight than Sloop's. He labelled Sloop's 10-foot rule as “arbitrary and without a reasonable basis.”⁸

The judge stated that the cited standard's requirement to trail the load when forward view is obstructed by the load is consistent with the requirement in 29 C.F.R. § 1910.178(n)(6) that the operator must “keep a clear view of the path of travel.” The judge further noted the first sentence (G-P was cited under the second sentence) of section

⁷In *Cleveland*, the Commission considered relevant precedent of the Eleventh Circuit. See 13 BNA OSHC at 1117 n.3, 1986-87 CCH OSHD at p. 36,428 n.3. Like *Cleveland*, this case may be appealed to the Eleventh Circuit because G-P's principal office is in Georgia and the cited condition is in Alabama.

⁸He particularly relied on a rather confusing interchange of hypothetical questions and answers that Sloop had with G-P's counsel concerning one's view while driving an automobile at 60 miles an hour.

1910.178(n)(4), see *supra* note 1, shows that the standard contemplates forward operation of the forklift even while the view is obstructed. He concluded:

If the pertinent provisions in this case were intended to apply to partial obstruction, it would appear that the standard would have referred to its applicability to partial or limited obstruction. In the absence of such limiting words, it must be assumed that the reference is to a total "obstructed view."

....

The words "obstructs forward view," as used in § 1910.178(n)(4) are directed toward protecting employees moving around in the area from being struck by a forklift. It is intended to apply to *pedestrians walking or standing in an upright position where the operator's view is totally obstructed of the person*. If the operator will at all times have a clear view of some part of an employee in an upright position, the operator can proceed in a forward direction. The line-of-sight drawings prepared by both parties clearly show that employees in an upright position in the press room or in the aiseways are always partially visible. The alleged violation is vacated.

(Emphases added). He stated, as G-P's expert opined, that it was necessary to have rules to keep employees working in the area out of the paths of forklifts. He also mentioned that G-P had a "good training program" for its forklift operators, which the compliance officer did not find deficient.

B. Discussion

We find that the Secretary's prima facie showing that the standard was violated was established by the testimony of forklift operator Garrett. As noted above, when Garrett was asked if his forward view were "obstructed by the load" on July 22, 1989, he replied, "Yeah, I guess it was." He later clarified that the obstruction was partial, but he did not waiver in his position that his view was obstructed by the load or ask for a definition of "obstruct" before answering those questions. While the issue before the Commission is not what caused the accident, but rather whether the cited OSHA standard was violated, the circumstances of an accident may provide probative, or even dispositive, evidence of whether a standard was violated. See, e.g., *Cleveland Consolidated, Inc.*, 13 BNA OSHC at 1116 n. 1, 1986-87 CCH OSHD at p. 36,427 n.1 and cases cited therein. Although Garrett's testimony is fairly minimal, it does establish a prima facie showing that the standard was violated. See *Regina Constr.*, 15 BNA OSHC 1044, 1049, 1991 CCH OSHD ¶ 29,354, p. 39,469 (No. 87-1309, 1991); see also *Astra Pharmaceutical Prods. v. OSHRC*, 681 F.2d 69, 73 n.9 (1st Cir.

1982). Moreover, there is other testimony pertinent to a finding that Garrett's view was obstructed.

The compliance officer and expert Sloop both testified that, in their opinions, based on the evidence, operator Garrett's view was obstructed on the day in question and he should have trailed the load.⁹ General support can be found in the testimony of John Smith, the employee who performed general duties in the press area, that it was one of the largest loads carried and that it was unsafe to go forward with it in that congested area.

G-P did not rebut Garrett's testimony that his view was obstructed by the load, albeit partially, thereby permitting the Secretary to prove his case by a preponderance of the evidence despite his fairly minimal showing. *See Regina Constr.*, 15 BNA OSHC at 1049, 1991 CCH OSHD at p. 39,469. Instead, it introduced considerable testimony about the general hazards of traveling in reverse with the load trailing and studies done by G-P's expert Smith and G-P's safety manager Jackson, which theorized about operators in general and their lines of sight. This evidence was not related to the specific circumstance at issue, that being operator Garrett's view on the day in question.

The judge's reliance on the "upright pedestrian" interpretation of G-P's expert is misplaced, because, first of all, that expert himself admitted that section 1910.178(n)(4) does not limit application to his interpretation of "obstructed." Moreover, as the Secretary notes, the standard does not mention the word "pedestrian," much less define the term or draw a distinction between standing pedestrians and pedestrians in some other attitude such as crouching, kneeling, or sitting. *See Daniel Constr.*, 10 BNA OSHC 1549, 1554, 1982 CCH

⁹These factual circumstances are all that are at issue here. The answers that Sloop and the compliance officer gave to hypothetical questions are of no significance to the issue at hand. As the Commission stated in *Dravo*, 7 BNA OSHC at 2098 n. 10, 1980 CCH OSHD at p. 29,367 n.10:

There can be no assurance that two people, even those with expertise, always will agree on the application of a standard that cannot be applied with mathematical precision. Individual views necessarily influence a person's judgment. Thus, it is not surprising that the Secretary's witnesses did not agree on the application of the ventilation standard to a few spaces hypothesized by Dravo's counsel at the hearing. Nor is the disagreement grounds for concluding that the ventilation standard is vague. The relevant inquiry is whether reasonable persons would agree as to the application of the ventilation standard to the circumstances of this case. As noted previously, there was no disagreement among the Secretary's witnesses as to this issue.

OSHD ¶ 26,027, p. 32,674 (No. 16265, 1982) (eye protection standard at 29 C.F.R. § 1926.102(a)(1) covers “employees”--does not distinguish between welders and welders’ assistants); and *R. Zoppo Co.*, 9 BNA OSHC 1392, 1395, 1981 CCH OSHD ¶ 25,230, p. 31,183 (No. 14884, 1981) (definition of term “magazine” in explosives standard at 29 C.F.R. § 1926.900(n) does not distinguish between permanent and temporary storage). Employees kneeling or crouching while performing a certain task will often be less mobile and therefore less able to get out of the truck’s path in a hurry. *Cf. Donovan v. A. Amorello & Sons*, 761 F.2d 61, 64 (1st Cir. 1985), *rev’g* 11 BNA OSHC 2044, 1984-85 CCH OSHD ¶ 26,940 (No. 79-4703, 1984) (29 C.F.R. § 1926.609(a)(9)(ii), requiring reverse signal alarm before moving earthmoving equipment in reverse where obstructed view to rear; “driver’s visibility is even more limited, of course, with respect to someone sitting or bending over his tools”). “Standards are intended to protect against injury resulting from an instance of inattention or bad judgment as well as from risks arising from the operation of a machine.” *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1593-94, 1992 CCH OSHD ¶ 29,662, p. 40,196 (No. 88-1545, 1992 (consolidated)).

Furthermore, the judge was mistaken in giving dispositive weight to the personal opinion of G-P’s expert regarding ANSI B56.1-1969, apparently at least in part on the basis of his membership on the ANSI B-56.1 subcommittee. G-P’s expert joined that subcommittee in 1984, which was 15 years after issuance of the 1969 ANSI B56.1, the source of the OSHA standard at issue here, which has not been changed since it was first promulgated. Also, he never stated that his opinion was in fact that of the subcommittee, but instead qualified it as his own opinion. *See Anoplate Corp.*, 12 BNA OSHC at 1678, 1683 n.6, 1986-87 CCH OSHD ¶ 27,519, p. 35,682 n.6 (No. 80-4109, 1986) (affidavit not probative of intent of drafters of ANSI Z9.1 (open-surface tanks) because affiant did not serve on source standard committee).

As the Secretary notes, just as the standard does not include the term “partially,” neither does it include the term “totally.” It appears that the judge’s reliance on the first sentence of section 1910.178(n)(4) is misplaced because, as the Secretary maintains, the obstructions referred to in the first sentence are *external* to the forklift and its load, such as

columns, which would obstruct the operator's view no matter whether travel was forward or in reverse, or whether *any* load was being carried.

Moreover, we find no basis for the reliance of G-P's expert on "a realistic design standpoint" and "the probability" that only walking pedestrians could be in the path of the forklift. He acknowledged that there would be "a problem" if someone enters the area in front of the truck "either kneeling or something." The cited situation does not involve an employee suddenly entering the operator's blind spot, for the forklift path at issue involved turning from one aisle into another, and the employee could be in place in the second aisle before the forklift turns the corner.¹⁰ G-P's argument that an operator would always be able to see part of a standing or walking pedestrian assumes the basis upon which their studies were done, that employees are all an "average height" of 5 feet 9 inches or taller and that pedestrians never have occasion to lower their heads to look down and decrease their vertical height.

Lastly, we note that, as the judge found, the evidence showed that G-P had a good training program in general for forklift operators. For example, Terry Williams, G-P millwright and local union president, testified that in the past he had provided on-the-job training for forklift operators on the night shift, and that included training on trailing the load as well as forward travel. However, operator Garrett testified that he had not been trained to travel in reverse. Garrett's testimony was not specifically rebutted by any of G-P's evidence. Therefore, we find that, with regard to this particular forklift operator, G-P's training of Garrett was questionable.

Based on the evidence noted above specific to the July 22, 1989, incident and the lack of direct rebuttal by G-P, we conclude that the Secretary established, by a preponderance of the evidence, that G-P violated the standard because forklift operator Garrett's view was obstructed by the forward load.

¹⁰Moreover, G-P's reliance on the opinion of one Commissioner in the split decision in *Carpenter Technology*, 12 BNA OSHC 1035, 1984-85 CCH OSHD ¶ 27,087 (No. 81-647, 1984) is misplaced because it has no precedential value, involved a different standard, and concerned obstructions that were primarily the structural parts of the forklift itself.

V. Judge's Other Finding

In its answer, G-P raised the affirmative defense that it would be a greater hazard for an operator to travel with this size of load trailing than to travel with it in a forward direction. The Commission has recognized that a cited employer can establish a greater hazard defense by showing: (1) the hazards created by compliance with the standard are greater than the hazards of noncompliance; (2) alternative means of protecting employees from the hazards are not available; and (3) a variance is not available or application for a variance is inappropriate. *E.g., Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225, 1991 CCH OSHD ¶ 29,442, p. 39,681 (No. 88-821, 1991); *see Walker Towing*, 14 BNA OSHC 2072, 2078 & n. 10, 1991 CCH OSHD ¶ 29,239, p. 39,161 & n. 10 (No. 87-1359, 1991).

After his rejection of the Secretary's assertion that the driver's view was obstructed within the meaning of the standard, the judge concluded that "G-P clearly established that traveling forward with the load is safer than trailing the load," noting that "employees were determined to be in a more hazardous position" if the load was trailed. Therefore, he essentially found that G-P had established the affirmative defense of greater hazard without discussing any of its specific elements.¹¹

We agree with the Secretary that G-P did not establish that to travel in reverse with this particular load trailing would be a greater hazard than to go forward with it. Even assuming that G-P established the first element,¹² G-P did not prove that it applied for a

¹¹In *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 188 & n.2 (D.C. Cir. 1989), the court applied the "now infamous 'duck test,' "

WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.

Under that test, the court determined that, in his effort to afford some equitable relief, the judge disposed of the case on a greater hazard theory without considering whether the specific elements of that defense had been established. As did the judge in *Williams*, the judge in this case also made what sounds like a greater hazard finding without discussing whether that affirmative defense's elements were proven.

¹²G-P presented considerable testimony and exhibits concerning its "studied determination," based on complaints received from forklift drivers in the press area regarding the post-accident rule, that trailing the load was more hazardous than going forward with it. Williams, G-P millwright and union president, testified that in his opinion, going forward with the load is safer because he can see better. He stated that the union itself has not taken a position on this issue. Testimony opposing that of G-P's witnesses included the
(continued...)

variance or that a variance application would have been inappropriate, nor did it establish that alternative means of protecting employees were not available.

Moreover, we note that the Secretary does not have the burden of proving that it is *safer* to operate a forklift in reverse with the load trailing when forward view is obstructed, because section 1910.178(n)(4) is a specific standard that presumes a hazard if its terms are not met. *See, e.g., Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1486, 1992 CCH OSHD ¶ 29,582, p. 40,037 (No. 88-2691, 1992).

The judge's statements that the Secretary's interpretation would lead to forklift operation that is neither "efficient" nor safe have very little, if any, bearing on the resolution of this case. Both G-P and the judge appear to exaggerate the difficulties in forklift operation allegedly posed by the standard. We note that safety manager Jackson testified that, at the time of the hearing, G-P had been trailing loads for nine months without any loss in production compared to when the loads were carried forward. Furthermore, G-P did not raise the affirmative defenses of infeasibility and unpreventable employee misconduct.

We conclude that the judge erred in essentially finding that G-P had proven the greater hazard defense. We note that his finding was not dispositive of the case.

VI. *Characterization and Penalty*

We characterize the violation as serious because there was a substantial probability that death or serious physical harm could result from the violative condition. See section 17(k) of the Act, 29 U.S.C. § 666(k).

The Secretary proposed a penalty of only \$480 for the violation, primarily in light of G-P's good faith efforts in assisting the compliance officer during the investigation and in instituting rules after the accident requiring forklift drivers of the size of load in question to travel in reverse. Having independently considered the factors in section 17(j) of the Act, 29 U.S.C. § 666(j), especially the good faith factor, we assess a penalty of \$480.

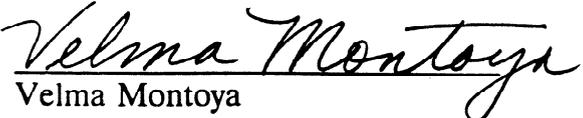
¹²(...continued)

Secretary's expert Sloop, who stated that there are no more dangers in trailing the load than in going forward because the forklift can be operated just as sharply either way.

It is so ordered.


Edwin G. Foulke, Jr.
Chairman


Donald G. Wiseman
Commissioner


Velma Montoya
Commissioner

Dated: April 27, 1993



UNITED STATES OF AMERICA
 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1825 K STREET NW
 4TH FLOOR
 WASHINGTON, DC 20006-1246

FAX:
 COM (202) 634-4008
 FTS (202) 634-4008

SECRETARY OF LABOR,

Complainant,

v.

GEORGIA-PACIFIC
 CORPORATION,

Respondent.

Docket No. 89-2806

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 27, 1993. **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.

Ray H. Darling, Jr.
 Executive Secretary

April 27, 1993
 Date

Docket No. 89-2806

NOTICE IS GIVEN TO THE FOLLOWING:

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

George Palmer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 201
2015 2nd Avenue North
Birmingham, AL 35203

Charles H. Morgan, Esquire
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

James D. Burroughs
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119



UNITED STATES OF AMERICA
 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1825 K STREET N.W.
 4TH FLOOR
 WASHINGTON D.C. 20006-1246

FAX
 COM (202) 634-4008
 FTS 634-4008

Secretary of Labor,
 Complainant,

v.

Georgia-Pacific Corporation,
 Respondent.

Docket No. 89-2806

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 10, 1991. The decision of the Judge will become a final order of the Commission on August 9, 1991 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 July 30, 1991 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.
 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) 634-7950.

July 10, 1991
 Date

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
 Executive Secretary

Docket No. 89-2806

NOTICE IS GIVEN TO THE FOLLOWING:

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

George Palmer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 201
2015 2nd Avenue North
Birmingham, AL 35203

Charles H. Morgan, Esquire
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

James D. Burroughs
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR,)
)
Complainant,)
)
v.) OSHRC Docket No. 89-2806
)
GEORGIA-PACIFIC CORPORATION,)
)
Respondent.)

APPEARANCES:

Cynthia Welch-Brown, Esquire, Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, on behalf of complainant

Robert H. Buckler, Esquire, and Charles H. Morgan, Esquire, Atlanta, Georgia, on behalf of respondent

DECISION AND ORDER

Burroughs, Judge: The Georgia-Pacific Corporation ("G-P"), a paper and wood products manufacturer based in Atlanta, Georgia, contests a serious citation emanating from an accident occurring at its Talladega, Alabama, facilities on July 22, 1989. Compliance Officer William Powers, Jr., conducted an investigation at G-P's facilities in Talladega, Alabama, on July 25, 1989. The accident involved the operation of a forklift truck transporting plywood within the plant. An employee was accidentally struck and killed.

As a result of the investigation, G-P was issued a citation on August 14, 1989, alleging a serious violation of § 1910.178(n)(4) in that:

[Its] industrial truck driver(s) were not required to travel with a load trailing whenever the load obstructed forward view.

G-P defends on two grounds: (1) the standard is unenforceably vague under the Fifth and Sixth Amendments of the Constitution, and (2) the load of plywood carried by the forklift was not so obstructive as to require the operator to travel with the load trailing.

The Talladega plant manufactures plywood which is transported within the facility by forklift trucks. The citation describes the area of the alleged violation as the "aisleway between number one press and skinner saw bins". This particular area includes an intersection at the end of the aisleway between the No. 1 and No. 2 presses and the areas marked "storage" and "specialty saw" (Jt. Ex. 1). The area around this intersection is referred to as the "press area" and is in the finishing and shipping departments of the Talladega facility.

There are two plywood presses in the press area. After sheets of wood are compressed to form the plywood, it is stacked on platforms to be removed by the forklifts. The platforms are located in the aisleway between the presses and the specialty saw (Jt. Ex. 1). After two loads or "charges" of

plywood from a press have accumulated, a forklift operator loads the two charges of plywood and carries them to the stacking area. There are a number of persons who work in the press area and are exposed to the forklifts (Tr. 10).

Approximately 70 trips are made by the forklifts from the presses to the stacking area during one eight-hour shift at the facility (Ex. R-2). Forklifts and pedestrians also travel extensively along the aisleway running from the stacking area to the rail car line (Ex. R-2). When carrying a load of plywood from the presses to the stacking area, the forklifts travel approximately 25 to 50 feet, depending upon which press the operators travel from, enter the heavily traveled aisleway running from the stacking area, and travel approximately 40 feet to the stacking area (Tr. 34, 39; Ex. R-2). G-P operates several forklifts in its facility, but all are substantially similar to each other. The particular forklift which is the subject of the citation at issue is a Caterpillar Model T-80D lift truck (Tr. 38).

The loads of plywood carried by the forklifts from the presses are of roughly uniform size. The presses produce plywood four feet by eight feet across and of varying thickness (Tr. 11, 46). The two "charges" which are picked up by a forklift from the press platform range from approximately 50 inches to 54 inches high (Tr. 14, 138). After the forklift operator loads the two "charges," the operator transports the load approximately six inches above the floor (Tr. 12, 25).

Subsequent to the accident and prior to the investigation, G-P instituted a rule requiring forklift operators who remove the plywood from the press area to the stacking area to travel with their load trailing (Tr. 43-44, 90-91). Shortly after the practice was instituted, the management of the Talladega facility began receiving complaints from the forklift operators and the union that trailing the load created a more hazardous environment than when traveling in a forward direction (Tr. 90-91). As a result of the complaints and G-P's own investigation regarding the safety of trailing the load, it decided to contest the citation. The investigation of the complaints convinced G-P that traveling in reverse in the press area with a load 54 inches in height was more dangerous than traveling in a forward direction (Tr. 90-94).

The particular load carried on July 22, 1989, for which respondent was cited was 54 inches high, 51 inches deep and 99 inches wide (Tr. 39; Ex. R-21). The load was being carried six inches above the floor in a forward direction from the presses to the stacking area (Tr. 12; Ex. R-21)¹.

The driver operating the forklift which was the subject of the citation is approximately 5 feet 9 inches tall (Tr. 135). An individual of that height sitting in the operator's seat of

1

Any further reference to the load hereinafter refers to the same measurements as those of the July 22, 1989, load, i.e., the plywood was carried at a total height of 60 inches.

the forklift in question has an eye level height of 73 inches (Ex. R-21). Under the circumstances, the forklift operator's forward view of a 5-foot 9-inch tall pedestrian could never be totally obstructed by a 60-inch high load (Tr. 83-84, 138, 159; Ex. R-9 thru 11, 14-21). Even when an average height pedestrian² (5 feet 9 inches) is standing directly in front of a 60-inch high load, a forklift operator can see at least nine inches of the pedestrian's body (Tr. 138; Ex. R-11, 20-21).

David Garrett, who was operating the forklift involved in the accident, when asked if his forward view was obstructed by the load, stated (Tr. 25): "Yeah, I guess it was" (Tr. 24-25). Garrett testified that prior to the accident on July 22, 1989, G-P had left the decision to the forklift operator to determine whether it was safer under the circumstances faced by the operator to travel forward or in reverse. Prior to the accident, he operated the forklift in a forward direction (Tr. 26). Garrett agrees with G-P that traveling forward with the load is safer than traveling in reverse.

Compliance Officer William W. Powers, Jr., testified that he believed it to be hazardous to operate the forklifts with the cited load in a forward direction; however, in explaining his decision, it was evident that Powers gave no consideration to the hazards of trailing the load (Tr. 42). He admitted on

2

The word "pedestrian" is used to refer to employees working and walking in the area.

cross-examination that he had no training in forklift operations, that he had never operated a forklift, and had made no study as to the specific traffic patterns of the press area (Tr. 46-47). When he arrived at the site, G-P was already trailing the load. The fact that G-P was trailing the load may have influenced his opinion since his recommendation was consistent with the practice G-P had already instituted (Tr. 43), but later determined to be more hazardous than proceeding in a forward direction.

Powers measured the size of the load transported by the forklift at the time of the accident and the forward line of sight of an operator of a forklift with the same load. Based on these measurements and his observations, he concluded it to be hazardous to travel forward in a forklift with the load (Tr. 38-40, 42). There is no evidence that, in reaching his conclusion, Powers took into consideration the difficulties of traveling in reverse. While opining that traveling forward with the load of that size is hazardous, Powers admitted he could make no determination as to what point a load becomes so large that it is hazardous to travel forward with the load (Tr. 50-51, 58). He acknowledged that his determination that the forklift operator had an "obstructed" view was a totally subjective determination (Tr. 51).

Jimmy Lee Sloop, an expert in the field of powered industrial truck operations (Tr. 64), testified that a forklift operator's forward view would be obstructed by a load 54 inches

high. Although tendered as an expert to testify regarding G-P's forklift operations and the alleged violation of § 1910.178(n)(4), Sloop acknowledged that he had never visited the Talladega facility nor made a request to visit the facility, had no idea of the amount of traffic in the press area, had no discussion with any employees who operate the forklifts in question, and had never operated a forklift with a 54-inch load carried six inches above the floor in a forward or rearward manner (Tr. 72-74).

G-P contends that a forklift carrying a load 54 inches in height and six inches above the floor does not present an "obstructed view" under § 1910.178(n)(4). In support of its position, G-P presented testimony from Charles J. Jackson, G-P's industrial relations manager at Talladega; Terry Williams, president of the local union; and R. Kevin Smith, a mechanical engineer and forklift safety expert.

Jackson has been employed for seven years as the industrial relations manager for the Talladega facility and is responsible for safety at the facility. His duties include preparing and interpreting safety rules and regulations for the plant (Tr. 87-88). After the accident of July 22, 1989, and subsequent to G-P voluntarily instituting a rule requiring forklift operators to travel in reverse in the press area when carrying a 54-inch load, Jackson, along with the plant manager and the supervisors of the forklift operators, began receiving complaints from the operators and the union that the new rule

created a more hazardous environment (Tr. 90-91). Jackson explained that the concern of the employees was that driving in reverse with such a load created a greater obstruction to their view than traveling forward (Tr. 106). As a result of the complaints, Jackson conducted a time and motion study of the forklift and pedestrian traffic in the press area of the facility (Tr. 91-92). He observed the press area for an entire eight-hour morning shift that was comparable to the other two shifts at the facility and recorded the pattern of the forklift and pedestrian traffic (Tr. 92).

Based upon his knowledge of safe operations and conduct in G-P's Talladega plant, discussions with the forklift operators, and the study of the work performed and the traffic patterns of the press area, he agreed with the operators that it was safer to operate a forklift in a forward direction when carrying a 54-inch load six inches above the floor (Tr. 93-94). He concurred with the operators' claim that their vision was limited when traveling in reverse, particularly their peripheral vision (Tr. 106). He based his concurrence on the time and motion study conducted by him (Tr. 93). His study showed that the operators had to back into a high traffic aisleway and when backing the load, the operators looked towards the turn in order to negotiate the corner (Tr. 91, 93). The majority of the traffic in this area, however, comes from the opposite direction; thus, the operator's view of a large

amount of traffic is obstructed when traveling in reverse (Tr. 91, 93).

The president of the union, Terry W. Williams, testified that he also believed it to be safer to travel forward in a forklift while carrying the load of plywood. Williams has been employed at the Talladega facility for almost fourteen years, was a forklift operator in the press area of the facility for approximately four months, and presently operates a forklift on an occasional basis (Tr. 112). According to Williams, he spoke to all but one of the forklift operators working in the press area and stated that they were unanimous in preferring the forward operation of the forklift in the press area when carrying the 54-inch load (Tr. 115-120). Williams further stated that, based on his personal experience, it is safer to operate a forklift with the load in a forward direction (Tr. 115).

Kevin Smith testified as an expert on behalf of G-P. Smith has extensive experience and education in the areas of mechanical engineering and safety and has particular expertise with regard to safety in the design and operation of powered industrial lift trucks. He has a Bachelor of Science degree in mechanical engineering from the Illinois Institute of Technology in Chicago and has completed the majority of course work required for a master's degree in mechanical engineering from that same institution (Tr. 124). He is a registered professional engineer and has been employed for nine years as a

mechanical engineering safety consultant by Triodyne, Inc., a mechanical engineering safety consulting firm specializing in design, testing and investigations relating to mechanical engineering safety (Tr. 121-122). His particular specialty is the safety of material handling equipment, including powered industrial lift trucks, cranes, conveyors and packaging machinery (Tr. 122).

Smith acts as a safety consultant to the Institute for Advanced Safety Studies, a non-profit corporation which conducts safety research for the National Institute of Occupational Safety and Health, the Federal government and private organizations (Tr. 123). Prior to becoming employed with Triodyne, Smith was employed for three years as a design and test engineer in the manufacture of forklift trucks for Allis-Chalmers Industrial Truck Division (Tr. 123). He belongs to the Illinois and National Societies of Professional Engineers, the American Society of Safety Engineers, and the American Society of Mechanical Engineers (Tr. 125). Smith presently serves on the American National Standards Institute B-56.1 subcommittee of the American Society of Mechanical Engineers and was invited to apply to become a member of this subcommittee because of his specialization and expertise in forklift safety (Tr. 125). The B-56.1 subcommittee writes the American National Safety Institute standard for lift trucks, ANSI B56.1-1969, and it is this standard upon which the OSHA

standard at issue, 29 C.F.R. § 1910.178(n)(4), is based (Tr. 125; see 29 C.F.R. § 1910.189).

In preparation for rendering an opinion on the issue in dispute, Smith visited the press area of the Talladega plant for approximately an hour and a half. He moved around the area to get a feel for the forklift operation (Tr. 127). Using a 54-inch height load raised six inches off the floor, he observed the operation from the eye level of the driver of the forklift (Tr. 128). He sat in the driver's seat and observed the area (Tr. 130) and drove the forklift with the load intact (Tr. 130, 139). He took the forklift to an open area outside and made a line-of-sight drawing (Tr. 134). The forklift and load used were the same as involved in the accident (Tr. 134). He measured the position of the operator from the seat of the forklift in relation to his forward view (Tr. 134). He reviewed ANSI Standard B-56.1 and OSHA standard § 1910.178(n)(4) and concluded that the operator's view was not obstructed (Tr. 142-143).

The parties disagree as to what constitutes an "obstructed view." Sloop indicated that an obstructed view exists whenever you cannot see the floor from the operator's seat within ten feet of the forklift (Tr. 66-68).³ Smith disputed the rule

3

Sloop defines an "obstructed view" as follows: "[I]f you cannot see what is in the immediate area, you have an obstructed view," and defined seeing the "immediate area" as being able to see the floor seven to ten feet in front of the forklift (Tr. 67-68, 71). He based the seven- to ten-foot rule

advocated by Sloop. He has not seen such a rule in writing and states that such a rule would be contradictory to the standard. According to Smith, the standard load used for rating forklifts is 48 inches. He expressed the opinion that a 48-inch load would not satisfy the requirement that the operator be able to see the floor within ten feet of the forklift. He computed the floor visibility for a 48-inch load to be 14 feet (Tr. 145-146).

Smith testified that § 1910.178(n)(4) was taken from the ANSI standard and that, in his opinion, the standard was directed to operators to look out for pedestrians (Tr. 150). If the concern is pedestrians, then the standard should be construed in a manner to accomplish its intent. If one considers the words "obstructs forward view" are directed toward insuring the safety of pedestrians, it seems clear that the standard is directed toward the total obstruction of vision of employees in the area. Smith supports this interpretation. He testified (Tr. 150, lines 8-10):

But the intent of the code is that, in my opinion, is if you have a blockage so large that you can't see any part of a pedestrian, then you'd better go in reverse.

The operators of the forklifts have some visibility of pedestrians in the area at all times. As reflected by the line-of-sight drawing prepared by Smith (Ex. R-21), the amount

on his apparent opinion that, given that the forklift travels five to ten miles per hour, in order to come to a complete stop within one second, the forklift travels seven to ten feet (Tr. 75-76).

of the body of the pedestrian that is visible at any given time may vary, but there is always some part that is visible. Stated in the converse, the operator's forward view will always be obstructed to some degree by the load, and the operator can never have a completely clear view of the path of travel. As a practical matter, the operator need only to have a clear vision of part of the body of a pedestrian to know his position.

Sloop's rule is arbitrary and without a reasonable basis. He admitted that there is nothing in any workplace standard which requires an unobstructed view of the floor within seven to ten feet of the vehicle, admitted that there is nothing in § 1910.178(n)(4) which defines an obstructed view, admitted that his rule is merely a verbal recommendation used by him in training drivers, admitted that such a rule would make the forward view of the driver of an automobile traveling 60 miles per hour to be obstructed and, significantly, admitted that his rule is an arbitrary one chosen by him (Tr. 74-76, 80-81, 86).

Smith's testimony must be given greater weight than Sloop's. Smith's testimony is based on a better investigative foundation which affords him the opportunity to base his opinions on first-hand perceptions. He visited the press area at the Talladega plant, observed the traffic floor in the area, made a number of measurements, observed a forklift with a 54-inch load, and sat in the operator's seat on the forklift and drove the forklift forward and in reverse with a 54-inch load carried six inches off the floor (Tr. 138-139). He prepared a

line-of-sight scale drawing of the forklift involved in the accident carrying a 54-inch load six inches off the floor (Ex. R-21; Tr. 121). His thorough investigation aligned with his participation in the ANSI standard and knowledge of the subject matter enhance the credibility of his testimony.

The applicability of the standard is triggered whenever "the load being carried obstructs forward view." The focus is on the words "obstructs forward view." It seems clear that the words "obstructs forward view," as used in the standard, were used to indicate their applicability when the operator does not have a clear view of the path of travel in the forward direction. This is consistent with § 1910.178(n)(6) which requires the driver to "keep a clear view of the path of travel." The standard also recognizes that there will be some obstruction encountered in forklift operations. The first sentence of § 1910.178(n)(4) states:

The driver shall be required to slow down and sound the horn at cross aisles and other locations where vision is obstructed.

The language of the first sentence of the standard is instructive. It obviously recognizes that forklifts will at sometimes be operated with obstructed vision. If the pertinent provisions in this case were intended to apply to partial obstruction, it would appear that the standard would have referred to its applicability to partial or limited obstruction. In the absence of such limiting words, it must be assumed that the reference is to a total "obstructed view."

Generally speaking, the word "obstruct," as used in § 1910.178(n)(4), is applicable to anything that comes in the way of or cuts off the sight of a person or object at the site. Cf. Hubbard Construction Company, 90 OSAHRC 5/D3, 14 BNA OSHC 1478, 1991 CCH OSHD § 28,788 (No. 89-888, 1991). An "obstructed view" exists whenever the operator does not have a clear and uninterrupted view of the forward path of the forklift. An obstruction can be strategically located and of such a size that it totally obliterates the operator's forward view or it can be limited and only partially obstruct the operator's view. There can be no argument over what is expected if a total obstruction of the forward view existed. A novice to the field of safety would comprehend the fact that one does not move forward without some view of what is in front.

The words "obstructs forward view," as used in § 1910.178(n)(4), are directed toward protecting employees moving around in the area from being struck by a forklift. It is intended to apply to pedestrians walking or standing in an upright position where the operator's view is totally obstructed of the person. If the operator will at all times have a clear view of some part of an employee in an upright position, the operator can proceed in a forward direction. The line-of-sight drawings prepared by both parties clearly show that employees in an upright position in the press room or in

the aisleways are always partially visible. The alleged violation is vacated.

The Secretary raises the issue of visibility of persons in a crouched position that could be totally obstructed, whereas they are only partially obstructed in a standing position. Smith makes it clear that the standard is aimed at people walking and that further limitations on the operator is not the way to protect persons in a crouched position. If someone wants to lay in front of a forklift and obstruct the operator's view, there is little that the operator can do about it (Tr. 150). If the forklift operator has the added burden of having to have visibility of crouched persons, the role of a forklift in handling materials would be quite limited. Most loads carried by forklifts would have some obstruction of vision of persons in crouched positions or hidden behind structures in the plant. The standard cannot be construed to specifically cover such persons and allow for the efficient utilization of the capacity of a forklift to handle a medium to large load. If the standard were applicable in such circumstances, there would be a possibility of a total obstruction everytime a load of any size were transported. This would mean that all loads would have to be trailed. Obviously, the standard never contemplated trailing all loads. Smith recognized the problem. He testified (Tr. 151):

- A. No. Because if I have to start now dealing with people who are possibly hidden behind things, structures in the plant, or are approaching very close to, say, the back of

the forklift and leaning down to tie their shoe -- which is a case that I was involved with -- right behind the forklift the man stopped to tie his shoe and then was backed over -- you cannot do anything with the forklift truck.

You are so limited. You have some limitations as to how much you can see. I can't place the operator 10 feet above the truck, which would give him a very good line of sight, but would be nonfunctional.

So, there has to be some kind of reasonableness involved. And we can't design as engineers designing a forklift or as an employer trying to keep people from being hit -- the way to handle that is not visibility, if they're going to be laying on the ground or getting up close or hiding behind obstructions. The key there is to get the pedestrians to make sure that they don't put themselves into these positions in a high traffic area. (Emphasis added)

The Secretary is superimposing factual situations under the ambit of the standard that it was not designed to protect. As pointed out by Smith, the crouched or hidden person situations can be alleviated or controlled by rules directed to the employees.

G-P has provided adequate means to protect its employees. There is no dispute over the fact that G-P has a good training program for the forklift operators. Powers noted no deficiencies in the program (Tr. 48). Operators receive extensive training in the safe operation of forklifts when they initially begin work with the company and on a regular basis thereafter. Trainees receive on-the-job training from an experienced operator (Tr. 88, 95).

A trainee may operate the forklift alone only after the experienced operator and the trainee's supervisor certify that the trainee is qualified to safely operate the forklift (Tr. 88). G-P also requires all employees to view annually a videotape of approximately twenty minutes regarding the safe operation of forklifts in a plywood plant (Ex. R-1; Tr. 88). It conducts safety committee meetings twice a month in which various safety rules and regulations are discussed and the results of these discussions are communicated to each employee by their shift representative (Tr. 89-90).

G-P has also made every effort to utilize mechanical devices to alert people on foot in the area as to the presence of forklifts. It uses strobe warning lights, installed on top of the forklift, to insure that pedestrians are aware of forklifts in their area (Tr. 90). It also requires operators to use their warning horns when rounding blind corners (Tr. 90).

The standard is also not directed toward fixed objects that might be in the path of travel and is not something on which the decision to go forward or trail should be determined. Smith explains this situation as follows (Tr. 151-152):

Q. Well, aside from pedestrians in positions other than standing, what about objects that may be in the path of travel? In your opinion, is that something to consider in making the decision as to whether to go forward or to trail?

- A. Well, sure. As with this truck, you can see that as long as you are in this case, this exact case, you could see to the ground all the way. When you first pulled out of the press, you could see any fixed object, such as a beam or a post. They don't move. You know that once you saw that post 50 feet ago that that post didn't move. It's still there. So, you can deal with fixed obstructions in the workplace. It's the moving ones that you want the visibility for.

In this case, there were supporting posts along the aisleway. The operator knows the posts are there in a line and extend to the ceiling. The posts are stationary, and the operator should have no doubt as to their location. Any employees in the area may be moving. The operator must know his location in traversing the area with the forklift. The operator cannot assume the employee is always at a fixed location nor can he assume there are no other persons in the area.

Although the load was not an "obstructed view" within the meaning of the term as used in § 1910.178(n)(4), G-P clearly established that traveling forward with the load is safer than trailing the load. It is to be commended for its investigation and desire to reverse the decision to trail since employees were determined to be in a more hazardous position. Smith was clear in his opinion that the safer way to operate the forklift with a load of 54 inches would be in a forward direction (Tr. 143). He stated his reasons for his opinion as follows (Tr. 143-144):

- A. Well, first of all, as long as you do have the forward visibility, you want to operate the forklift forward because that's the direction the operator is facing when he's operating the controls, and, therefore, has constant vigilance of, not only his load and the clearances, but he also happens to be facing in the direction of travel at the same time. So, he doesn't have to divide his time as he would travelling in reverse between checking clearances and looking over both shoulders -- trying to look over both shoulders. He'd have that 180-degree, or almost 180-degree view, forward all the time.

Secondly, the maneuverability of a forklift truck, because of the rear steering, is much greater when travelling forward than in reverse. Very similar situation as to when you parallel park your car, you back it in because you have then, in essence, rear steering there and it allows you to make turns around corners accurately. Whereas with a forklift truck, that's why they put the steering at the other end of the load. So that you're not swinging the load, trying to get it to clear; you'd be swinging the back end of the forklift.

Also, comparing the driving in the rear, where it is possible for an operator to turn sideways in the seat and put his head looking directly back and try to simulate the same view reverse as he has forward, he then compromises and puts a lot of strain from a human factor's viewpoint on himself on a regular basis. And, therefore, in reality they do not do that. They have to have their feet on the pedals; they have a clutch; they have a brake; they have an accelerator; the steering wheel; they have their controls that they will only really look over their shoulders.

And, in fact, in my watching the operations there, that, in fact, was exactly what was occurring. The operators were not turning completely around when travelling in reverse because of, in my opinion, the strain that it puts on a [sic] operator.

Therefore, your visibility, in essence, is cut down. And the cross-traffic that's occurring in this area is coming from an opposite direction than a [sic] operator would normally be looking. To make a turn from the press to the stacking area, the normal way would be to look over his right shoulder. He could look over his left shoulder and back again and back again, but then he's dividing his time up and therefore the hazard of having a collision is increased.

Smith's reasons for preferring that the operator go in a forward direction are logical and generally well recognized. The forklift is designed for forward direction and is better utilized and controlled in a forward direction. Powers and Sloop, though opining that the forward view of a forklift with a 54-inch load is obstructed, failed to compare the forward view of the forklift with the rear view and, therefore, had no basis to assert that it is safer to travel in reverse while trailing the load.

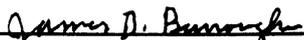
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED: That the alleged serious violation of §
1910.178(n)(4) and proposed penalty are vacated.



JAMES D. BURROUGHS
Judge

Date: July 2, 1991