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

SECRETARY OF LABOR, Complainant, v. NATIONAL ENGINEERING AND CONTRACTING COMPANY, Respondent, L.I.U. OF N.A., LOCAL 265, I.U.O.E., LOCAL 18, Authorized Employee Representatives.	OSHRC Docket No. 94-2787

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

At issue is whether Administrative Law Judge Paul L. Brady erred in ruling that the Commission is without jurisdiction to entertain the affirmative defense of vindictive prosecution and in reducing the classification of citation 2, item 1 from willful to serious. For the reasons that follow, we find that the Commission has jurisdiction to entertain the affirmative defense of vindictive prosecution, but find that Respondent has failed to establish

that defense here. We also find that the judge erred in reducing the classification of citation 2 item 1. We affirm the citation item as willful and assess the proposed penalty of $70,000.

I. Background

National Engineering and Contracting Company ("National") is headquartered in Strongsville, Ohio and performs road work projects in Ohio and neighboring states. It was the general contractor under a contract with the Ohio Department of Transportation to build a sound wall alongside a six mile stretch of Interstate 71 near Cincinnati. During the evening, concrete traffic control barriers were placed along the berm line of the highway to provide a barrier between the live traffic and the sound wall construction. The concrete barriers came in 10 and 12 foot lengths and estimates of their weight ranged from 3,700 pounds up to two tons.

On the evening of August 16, 1994, National was placing a short section of concrete barriers towards an exit ramp with a 22-ton flatbed truck with a Manitex 2200 series crane boom mounted behind the truck's cab. National had planned to move roughly three loads of concrete barriers that night (the equivalent of approximately 250 to 300 feet of barriers).[1] The 22-ton truck could carry up to eight concrete barriers on its bed and had outriggers towards the front of the truck bed and stabilizers at the rear.

At least six National employees were involved in placing the barriers. Employee Lloyd Lee's job was to shine a flashlight between the concrete barriers so that the other workers could line them up and connect them together. The barriers were being placed from the passenger side of the truck. William Sanders, a laborer, climbed up into the cab to move the truck to place the last barrier left on the bed. The outriggers, which were lifted in preparation for the move forward, could have been put down if the boom truck was moved 10 feet further forward. However, someone (the record is unclear as to whom) said that the truck was fine where it was, so Sanders did not move the truck. At that point, both outriggers were up and the rear stabilizers were down but not extended as required by the manufacturer's manual. Crane Operator Mark

[1]National used different types of equipment to move the concrete barriers depending on how many barriers were to be set in one evening. For placing long sections of barriers, National would use a large flatbed trailer to deliver the concrete barriers, and an excavator, backhoe or crane to position them.

Foster decided to go ahead and position the last concrete barrier from the boom truck's bed onto the road.[2] The boom truck flipped to its side when Foster was setting the last barrier. Employee Lloyd Lee was caught between the concrete barrier and boom truck and was killed. Crane Operator Foster suffered a severe hematoma and was off work for sixteen weeks.[3]

Following an inspection, OSHA cited National for one willful and five serious violations of the Act. The serious violations are not at issue. Willful Citation 2, Item 1, alleged a violation of 29 C.F.R. § 1926.550(b)(2), or in the alternative 29 C.F.R. § 1926.550(a)(1), for National's failure to extend and set the outriggers and stabilizers on the boom truck as specified by the manufacturer. National contested the citations and proposed penalties. At the hearing, National attempted to introduce evidence on the affirmative defense of vindictive prosecution that it had raised in its Answer. The Secretary objected to its introduction[4] and the judge ruled that he was without jurisdiction to entertain the affirmative defense. However, the judge permitted National to make a proffer of its evidence on the vindictive prosecution issue, comprised of testimony, affidavits and exhibits.[5] In its Post-Hearing Brief, National asked the judge to reconsider his ruling but he declined to do so in his decision.

The judge found that National had violated section 1926.550(b)(2) because it was undisputed that "the load exceeded the crane's rated load without outriggers and that all the

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[2]Foster testified as follows:

> A. I had set three barrier[s] already. I knew from running the machine that I could set four, but with them being ten-foot long, I knew I had [to] pick the right, front outrigger up to get it into place.
> Q. In other words, the right, front outrigger, the one on the passenger's side was sitting where you would have placed the next concrete barrier?
> A. Yes, ma'am. So, I picked it up to get it out of the way.

[3]Night Superintendent Andrew Seeger testified that another laborer had "a little shoulder problem" as a result of the accident.

[4]The Secretary now agrees that the Commission can entertain an affirmative defense of vindictive prosecution.

[5]National has not requested that the record be reopened to receive additional evidence on its vindictive prosecution defense. Instead, it claims that the evidence submitted has "established its defense in the case."

outriggers should have been extended." The judge rejected National's unpreventable employee misconduct defense, finding that National failed to show what work rule Foster violated by performing the lifts without the outriggers extended, and that National "permitted lifts to be made with the outriggers undeployed." The judge held that it was not a willful violation, although he found that "[i]t is a close question." He found that "the evidence failed to show a 'heightened awareness' of the illegality of making the lifts without extending all the outriggers or a conscious disregard or plain indifference to employee safety." The judge affirmed the violation as serious and assessed a penalty of $10,000, although the statutory maximum for a serious violation is $7,000. *See* Section 17(a) of the Act, amended by Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 3101 (1990).

II. Vindictive Prosecution

Vindictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Although there is no uniform test for proving that a prosecution was vindictive, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right.[6] If governmental misconduct is found, the court can dismiss the vindictively

[6]The two circuits to which this case may be appealed formulate the vindictive prosecution defense differently. In the Sixth Circuit, the claimant must show: (1) exercise of a protected right; (2) the prosecutor's "stake" in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the plaintiff for exercise of the protected right. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 296 (1996). The District of Columbia Circuit has stated that there are two ways in which prosecutorial vindictiveness may be shown: (1) actual vindictiveness as shown through objective evidence that a prosecutor acted in order to punish a respondent for standing on his legal rights; (2) a presumption of vindictiveness demonstrated by facts that indicate a "realistic likelihood" of vindictiveness. If established, the government then must show objective evidence justifying the prosecution. If the government provides such evidence, respondent must show that the evidence is pretextual and that actual vindictiveness occurred. If the government does not provide such evidence, then vindictive prosecution must be found. *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

motivated charge or the entire action. *United States v. Meyer*, 810 F.2d 1242, 1249 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

National's claim of vindictive prosecution is based on a number of factors. First among them is its claim that officials both in the Charleston, West Virginia and Columbus, Ohio OSHA offices either testified, stated in depositions, or told witnesses that National was a "bad actor" and that OSHA would "play hardball" with National and was going to "get them." National also claims that OSHA's Columbus Area Office withdrew all citations and proposed penalties in Docket No. 92-2085 after National discovered through the compliance officer's deposition that the agency allegedly had an improper motivation for pursuing the inspection.[7] National also relies on its request for a warrant in Docket Nos. 93-0512, 93-0513, 93-0582 and 93-0583, which the OSHA Charleston, West Virginia office issued in connection with an inspection of a worksite of National and it subsidiary, Tri-State Construction Company, in Goldtown, West Virginia.[8] National also points to OSHA's maintenance of a computerized history database that "listed National Engineering as having violated multiple standards and as having been assessed multiple penalties when, in fact, various citations had been withdrawn by the Secretary or otherwise vacated by the Commission." It notes that the Cincinnati Area Office had a printout from this database showing an erroneous history of National's violations of the Act and penalties which it paid and that it was included in the file reviewed by Cincinnati Area Director William Murphy. National also relies on the quick issuance of the citations in this case, eight days after the investigation was started, on the testimony from the compliance officer that felt he was under pressure to get the citations out, and on the hand-delivery of the citations.

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[7]National claims that at the deposition, the compliance officer admitted that he had been told by his superiors that National was a "bad actor" and that he was told to "get them."

[8]On review, National at first suggests that the Secretary withdrew the Goldtown citations against it and its subsidiary Tri State Construction Company because of what discovery revealed about OSHA's alleged improper motives. It later modified this assertion to the question, "[w]ere these citations and proposed penalties withdrawn because of a discovery dispute, or because the Secretary did not want additional facts of her vindictiveness coming to the surface?"

We conclude that National has failed to make the threshold showing required to establish vindictive prosecution. Although National appears to receive a good deal of attention from OSHA, it has not identified any protected right it exercised that caused the Secretary to initiate this inspection or prosecution, or to cite the violation before us as willful. National fails to show that the Secretary's request for a warrant during the 1992 inspection in Goldtown, West Virginia, has any connection to this case. "The mere fact that this prosecution followed the exercise of certain procedural rights in other, unrelated cases is insufficient to raise the appearance of vindictiveness." *United States v. Robison*, 644 F.2d 1270 (9th Cir. 1981). National's prior history of challenging OSHA's inspections and citations does not alone grant it immunity from being cited by OSHA. *Cf. United States v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989) ("the mere filing of a lawsuit against an agency of the federal government does not give anyone a license to break the law and insist that any ensuing prosecution be quashed as retaliatory"). The alleged statements and actions by OSHA representatives that National claims demonstrate the Secretary's animus to it, even if true, are insufficient by themselves to support a finding of vindictive prosecution. In addition to evidence of animus or retaliatory motive, National must produce evidence tending to show that it would not have been cited absent that motive.[9] *See United States v. Benson*, 941 F.2d 598, 612 (7th Cir. 1991) (prosecutor's calling defendant a "common criminal" is not enough to require further discovery concerning vindictive prosecution; "[a]lso undercutting any claim that the prosecution resulted from [the prosecutor's] pique is the fact that Benson has not shown that it is unusual for the government to prosecute people who avoid paying taxes on over $100,000"). While it is possible to raise a legitimate question of vindictive prosecution based on the exercise of a protected right in another litigation, vindictive prosecution will not be presumed if the prosecution would have taken place

[9]National also claims that the Cincinnati area director wanted "to blacken National Engineering in the eyes of the public." It cites to a videotape of a local Cincinnati television broadcast of the National Engineering accident where the area director is interviewed about National's conduct and the area director refers to what National calls the "false history" of its past violations and provides the interviewer with that information. However, this alleged animus, with nothing more, is insufficient to prove a vindictive prosecution.

regardless of the exercise of a protected right in the other litigation. *See United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir. 1989) (case remanded for discovery on "narrow issue of whether the EEOC, acting on an improper motive, induced the Department of Justice to institute a prosecution that would not otherwise have been undertaken").

Even if we were to assume that National had shown that an exercise of a protected right preceded the inspection, or that the proffered facts present a "realistic likelihood" of vindictiveness, *see Meyer*, we find no basis to conclude that the Secretary's prosecution of National in this case was unreasonable. OSHA's decision to prosecute here appears to be based upon the normal factors ordinarily considered in determining what course to pursue. *See United States v. DeMichael*, 692 F.2d 1059, 1062 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983); *see also United States v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989), *cert. denied*, 493 U.S. 995 (1989) (no vindictive prosecution when prosecutor's decision to prosecute is based on usual determinative factors). The OSHA inspection in this case was conducted as a result of a fatality that occurred at National's worksite. The willful designation and the proposed penalty were based reasonably on evidence OSHA developed from its investigation. We find no evidence of influence from external factors.[10]

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[10]The reasons Compliance Officer Collier gave at the hearing for why he and his supervisor, James Washam, recommended a willful violation were as follows:

> We felt the employer knew of the existence of the hazard through warnings on the crane, warnings on the operating manual, warnings in their Spotlight on Safety program, the Company's awareness of OSHA standards and ANSI standards. Also the operator's concern. The operator had to our knowledge expressed a concern over using this piece of equipment because he had a concern about its stability. He didn't feel that it was a stable piece of equipment to be used this way.

The Secretary cites to a passage in the "Spotlight on Safety" employee handbook that both management and employees received at least since 1993 that states on p. 11 under the heading "CRANES - HOISTS - ELEVATORS - CONVEYORS" as follows: "2. Outriggers must be fully extended before lifting with cranes or hoists." However, the record shows that with some equipment other than the boom truck, such as the Grove crane, outriggers do not need to be

(continued...)

III. Citation 2, Item 1

A.

In willful citation 2, item 1, the Secretary alleged that National violated 29 C.F.R. § 1926.550(b)(2)[11] and, in the alternative, 29 C.F.R. § 1926.550(a)(1)[12] for using the boom truck "to lift concrete barriers on the site without the outriggers and stabilizers extended and set as specified by the manufacturer." The judge affirmed a serious violation of section 1926.550(b)(2) and did not discuss the alternate pleading. National first argues that the judge erred in reducing the classification from willful to serious because the standard the judge relied on, 29 C.F.R. § 1926.550(b)(2), which cites to ANSI B30.5-1968, is inapplicable to the cited boom truck so that "there could be no violation, willful or otherwise."[13] National

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[10](...continued)
employed to perform some lifts.

[11]The standard provides:

> **§ 1926.550 Cranes and derricks.**
> . . . .
> (b) *Crawler, locomotive, and truck cranes.*
> . . . .
> (2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes. . . .

Section 5-3.2.3 of ANSI B30.5-1968 provides:

> i. Outriggers shall be used when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane.

[12]The standard provides:

> **§ 1926.550 Cranes and derricks.**
> (a) *General requirements*. (1) The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. . . .

[13]Section 5-0.1 of ANSI B30.5-1968 describes the scope of ANSI B 30.5-1968 as follows:

> Volume B30.5 applies to . . . cranes . . . which are basically powered by internal

(continued...)

acknowledges that this argument was not presented before the judge.[14] Under Commission Rule 92(c), 29 C.F.R. § 2200.92(c),[15] we do not normally review an issue if it was not argued before the judge and the opposing party did not have the opportunity to litigate it. *See, e.g., Trico Technologies Corp.*, 17 BNA OSHC 1497, 1503-04, 1996 CCH OSHD ¶ 31,009, pp. 43,224-5

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[13](...continued)

> combustion engines or electric motors and which utilize drums and ropes . . . . *Supplements covering full hydraulic cranes and side boom cranes will be developed at a later date.*

(emphasis added). National claims that "[h]ydraulic boom trucks, like the Manitex 2284 [the crane at issue], were only first developed in the 1970's" and "were not even in existence at the time that ANSI B30.5 was approved in 1968." It asserts that ANSI B30.5-1982, approved in 1982, would include the cited boom truck because that ANSI standard no longer excludes hydraulic cranes from its coverage.

[14]National acknowledges that this issue was not briefed below but it argues that nevertheless, the Commission should address this issue, citing to F.R.C.P. 12(h)(3) and *Van Dunser v. Aronoff*, 915 F.2d 1071, 1074 (6th Cir. 1990). However, these cites only require that federal courts permit any party to challenge the existence of subject-matter jurisdiction at any time in the proceedings. The issue of whether the Secretary established that the cited standard applies is not related to the Commission's having subject-matter jurisdiction in this case. National claims that it "expressly preserved the issue in its First Defense that the Secretary failed to state a claim for relief under the standard." National's "First Defense" in its answer only states that "[t]he Complaint fails to state a claim upon which relief may be granted." It is unclear how the vague "First Defense" could have "expressly preserved" this issue.

[15]Commission Rule 92(c), 29 C.F.R. 2200.92(c), provides:

> **§ 2200.92 Review by the Commission.**
>
> . . . .
>
> (c) *Issues not raised before Judge*. The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

(No. 91-0110, 1996); *Seyforth Roofing Co.*, 16 BNA OSHC 2031, 2033, 1993-95 CCH OSHD ¶ 30,599, p. 42,380 (No. 90-0086, 1994); *Peavey Co.*, 16 BNA OSHC 2022, 2025 n.6, 1993-95 CCH OSHD ¶ 30,572, p.42,323 n.6 (No. 89-2836, 1994).

Here, however, the standard the Secretary cited in the alternative also requires National's compliance with the manufacturer's specifications, but does not exclude "full hydraulic cranes" from its scope.[16] National has known of the alternative standard since the original citation, and did not object to the evidence presented by the Secretary to prove a violation of both standards. On review, National does not dispute that its operation of the boom truck did not comply with the manufacturer's specifications as shown by the operator's manual. Accordingly, because the citation alleged a violation of section 1926.550(a)(1), which clearly applies to the cited boom truck, we need not address the applicability of section 1926.550(b)(2).

B.

A willful violation is one which is committed with "intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Conie Construction Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42, 089 (No. 92-0264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995). "It is differentiated from other types of violations by a 'heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.'" *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated).

The critical provision that National failed to comply with is the clear command in the manufacturer's manual to have all outriggers and stabilizers fully deployed whenever the boom is used. The manufacturer's operating manual prohibits operation of the boom with the truck's

[16]Because we find that the alternate pleading is more applicable, we do not reach the issue of whether section 1926.550(b)(2) covers the cited boom truck.

outriggers retracted and requires that the stabilizers be fully extended prior to operating the boom.[17] In addition, there are two separate warnings posted on the truck itself.[18]

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[17]The operating manual for the boom truck specifically requires as follows:

> -For 2200 Series, fully extend stabilizer boxes. Do not operate with boxes partially extended.
> . . . .
> **Setting the Outriggers and Stabilizers**
> 1. All crane operations shall be performed with the outriggers and the stabilizers extended on a firm foundation so the crane is level.
>
> On the 2200 Series, the stabilizer boxes shall be fully extended.
> **Crane operations with outriggers or stabilizers retracted is prohibited**. (emphasis original)
> . . . .
> **DANGER: Exceeding jib ratings or failing to comply with jib operating conditions and restrictions given on Capacity Chart will result in structural damage to crane components, collapse of crane, or tipping.**
>
> **Read all instructions on Capacity Chart before handling any load with jib.**
>
> **Do not attempt to erect jib until outriggers and stabilizers are properly set. Do not retract outriggers and stabilizers until jib is stored and boom is lowered onto boom rest.**

[18]One posted warning stated:

> DANGER
> YOU MUST NOT OPERATE THIS CRANE UNLESS:
> . . . .
> 2. YOU KNOW AND FOLLOW THE SAFETY AND OPERATING RECOMMENDATIONS CONTAINED IN THE MANUFACTURER'S MANUALS, YOUR EMPLOYER'S WORK RULES AND APPLICABLE GOVERNMENT REGULATIONS.

The other posted warning stated:

> CAUTION
> . . . .
> DO NOT USE THIS EQUIPMENT EXCEPT ON SOLID, LEVEL SURFACE WITH OUTRIGGERS PROPERLY EXTENDED . . . .

(continued...)

In finding the violation to be serious and not willful, Judge Brady concluded that the ANSI standard referred to by the standard "does not mandate that outriggers be used for every lift, only that they be used 'when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane." We find that the judge erred because the manufacturer prohibits any lifts by the cited crane without outriggers and stabilizers extended. National's Night Superintendent Andrew Seeger acknowledged that the boom truck did not have a load chart for its operation without outriggers and stabilizers extended, and that the only lift chart it had was for when the outriggers and stabilizers were extended. Therefore, any use of the boom truck without all the outriggers extended would "exceed the rated load" for the crane. Not only did Foster attempt to lift without all the outriggers extended, he made lifts on several occasions without *any* of the outriggers extended.

Based on our review of the record, we conclude that the Secretary has established that National was plainly indifferent to employee safety.[19] Despite the prohibitions in the manual and warnings posted on the crane explicitly requiring that the outriggers be extended prior to using the boom, National's policy was to perform lifts regardless of whether the outriggers or stabilizers could be extended.[20] Crane Operator Foster himself had previously set the concrete

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[18](...continued)

> BEFORE OPERATING THIS CRANE, REFER TO MAXIMUM LOAD (CAPACITY) CHART ON CRANE FOR OPERATING (LOAD) LIMITATIONS.

[19]The Secretary claims that "[t]he OSHA regulations and the incorporated ANSI standard were known to [National] as a corporate entity both because the Ohio Department of Transportation contract for the I-71 project stipulated that the contractor must comply with OSHA regulations." We do not find that this is enough to support a conscious disregard of sections 1926.550(b)(2) or (a)(1), and the record does not show that National actually knew of the cited standards.

[20]Compliance officer Collier summarized National's policy as follows:

> The policy as related to me by Mr. Seeger and Mr. Ruf was that they use all the outriggers and stabilizers fully extended to set when they can, but when there is a physical barrier, when there is a problem for one reason or another [,] if there is [a] problem and they cannot do it, then they set or use them as they can with as many as they can use that aren't obstructed.

barriers off the side of the truck in the same manner that caused the accident, with the boom truck's front outriggers in and the back stabilizers down but not extended, "four or five other times on that project."[21] Foster testified that Foreman Ruf was present at those times,[22] and Foster was never told by anyone in National's management not to operate the boom truck in that manner. Night Superintendent Seeger testified that they would use the boom truck on "more than two or three" occasions in locations where it was not possible to put down the front outriggers and the back stabilizers in moving concrete barriers with a boom truck. Foreman Ruf also testified that they would use the outriggers and stabilizers if possible.[23] Both Ruf and

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[21]Although National claims that "[o]n no occasion, however, did Mr. Foster or any other operator make a pick in the manner Mr. Foster did the night of the accident; i.e., make a pick from the side of the boom truck where the outrigger supporting that side had been retracted," the testimony shows otherwise:

Q I had previously asked you if you had ever operated a boom truck this way before, and you indicated that there were four or five times?
A. Yes.
Q. Now, you were referring to the boom truck that you operated that night; were you not?
A. Yes, ma'am. As well as --
Q. And that was in moving concrete traffic barriers?
A. Yes, ma'am.
Q. And was that in setting barriers over the side of the truck?
A. Yes, ma'am.

[22]Foster's testimony is unrebutted. Foreman Ruf testified as follows:
Q. Now, have you ever seen an operator prior to August 16, 1994, make a pick without the outrigger out on the side he was making the pick from?
A. Do you mean on the load side?
Q. Yes, on the load side.
A. It's possible I can't think of any one that comes to mind.
Q. But you have seen that?
A. No, I'm not saying that. I'm saying it's possible. We have picked off the rear before.

[23]Ruf testified as follows:
Q. All right, now, at what times in moving the concrete barriers were the front outriggers and/or the back stabilizers not fully extended? What situations was that condition present?

(continued...)

employee William Sanders testified that in situations where there was not enough room, the boom was used without the front outriggers and rear stabilizers fully extended. Crane Operator Foster testified that the normal procedure was to fully extend the outriggers and stabilizers "when you have room." National's Safety Director William Bunner testified that the boom truck's operation manual does not need to be followed because the manufacturer's requirement stated in the Manitex operator's manual is only a "general limitation." Bunner claimed that "[t]he manufacturer's operations manual does not speak to each event that normally occurs on a construction project, nor does it address all the acceptable safety practices that may be used that experts have identified for years." However, National did not introduce evidence to show that "experts" would agree that the cited boom truck could ever be used without the outriggers and stabilizers extended.[24] The Secretary's expert witness, mobile crane instructor Donald Frantz, testified that the boom truck's manufacturer's specifications are that lifts can be performed only with the outriggers fully deployed and the stabilizers extended and down. The record demonstrates that had the truck been moved forward 10 feet, the concrete barrier could have been put in place with the truck's outriggers and stabilizers fully extended. We can only conclude that National's failure to comply establishes plain indifference. *See Morrison-Knudsen*

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[23](...continued)

A. If we have live traffic on one side and an obstruction like a barrier wall or something like that to keep it from coming down the other side, but the back ones are always down.
Q. But not necessarily fully extended?
A. No, not necessarily.

[24]Other pieces of equipment at the site, such as the Grove crane, had lift charts that permitted them under certain circumstances to perform lifts without using their outriggers. However, the cited boom truck only had a lift chart for performing lifts with the outriggers and stabilizers extended. Bunner noted that National had in February, 1995 a seminar on cranes covering "rule of thumb applications to operations," where the instructor allegedly stated that the use of cranes without all outriggers down as long as they are down on the "strong side of the rig" is acceptable. However, there is no evidence that the seminar addressed the use of boom trucks, where the manufacturer requires all outriggers and stabilizers fully extended, as opposed to such devices as the Grove crane, which in some circumstances permits lifts to be conducted without outriggers down.

Co./Yonkers Contracting Co., 16 BNA OSHC 1105, 1123, 1993-95 CCH OSHD ¶ 30,048, pp.41,280-81 (No. 88-572, 1993) (willfulness can be established by a showing that "an employer harbored a 'state of mind . . . such that, if he were informed of the [applicable standard], he would not care'"), *citing Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987). *See also Williams Enterprises Inc.*, 13 BNA OSHC 1249, 1257-8, 1986-87 CCH OSHD ¶ 27,893, p. 36,590 (No. 85-355, 1987) (owner's continued preference for violative practice instead of what the standard requires shows indifference).

IV. Penalty

Having found the violation to be willful, we must now assess a penalty. The Secretary proposed a penalty of $70,000. Although National was advised in the Briefing Notice "that when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty also is subject to review," it did not address the proposed penalty amount on review. In assessing penalties, the Commission gives due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and his history of previous violations. Section 17(j) of the Act, 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. Generally, gravity is the principal factor in assessing a penalty. *Trinity Indus., Inc.*,15 BNA OSHC 1481, 1483, 1991-93 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a violation depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p.41,033 (No. 87-2059, 1993). The gravity here is severe because the violation directly resulted in the death of one employee and the serious injury to another. At least four other employees were working around the boom truck when it flipped to its side, and were exposed to the hazard as the barriers were being placed. National did not take any precautions against injury. National's disregard for the safety of its employees entitles it to no credit for good faith. National operated the boom truck without regard for whether or not the outriggers should be extended despite warnings against such operations posted on the truck itself. National is a large employer, with 456 employees, and National has a history of

violations.[25] In our view, none of the 17(j) factors would support mitigating the penalty and accordingly we assess the maximum penalty of $70,000.

V. Order

We affirm citation 2, item 1 as a willful violation of 29 C.F.R. § 1926.550(a)(1) and assess a penalty of $70,000.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: September 30, 1997

[25]As part of its proffer for its vindictive prosecution defense, National submitted a computer printout which allegedly contained numerous erroneous entries. However, National does not dispute that some of the entries are valid.