

We incorporate the Notice of Withdrawal into this Order and we set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Notice of Withdrawal. This is the final order of the Commission.

Date: April 27, 2001

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/s/

Thomasina V. Rogers
Chairman

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/s/

Ross Eisenbrey
Commissioner

SECRETARY OF LABOR,
Complainant,

v.

ABF FREIGHT SYSTEM, INC.,
Respondent,

and

TEAMSTERS LOCAL UNION NO. 988, :
Authorized Employee :
Representative.* :

OSHRC Docket No. 00-0737

APPEARANCES:

For the Complainant:

Brian A. Duncan, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Matthew S. Pape, Esq., Christopher C. Antone, Esq., Jackson Lewis Schnitzler & Krupman, Dallas, Texas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the “Act”).

Respondent, ABF Freight System, Inc. (ABF), at all times relevant to this action maintained a place of business at 5880 Kelly St., Houston, Texas, where it was engaged in trucking. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 13-27, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of ABF’s Houston work site. As a result of that inspection, ABF received citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest ABF brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 29, 2000, a hearing was held in Houston, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

* The affected employees’ union was inadvertently omitted from the caption of the opinion originally mailed to the parties on October 26, 2000.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1910.178(m)(7): Wheel(s) were not blocked to prevent movement of trailer(s) during loading and unloading while the trailer is not coupled to a truck.

(a) South Dock, Where employees were using power industrial trucks to load trailers.

The cited standard provides:

(m) *Truck operations*. . . (7) Brakes shall be set and wheel blocks shall be in place to prevent movement of trucks, trailers, or railroad cars while loading or unloading. Fixed jacks may be necessary to support a semitrailer during loading or unloading when the trailer is not coupled to a tractor. The flooring of trucks, trailers, and railroad cars shall be checked for breaks and weakness before they are driven onto.

Facts

On January 13, 2000, OSHA Compliance Officer (CO) Sanford Theirgood inspected ABF's Houston work site (Tr. 35). Theirgood observed ABF employees using forklifts to load and unload trailers parked at a loading dock (Tr. 37; Exh. C-3). The wheels of the cited trailers were neither chocked nor blocked (Tr. 35-36; Exh. C-4, C-5).

At the hearing ABF stipulated to facts as recited by CO Theirgood (Tr. 6, 8, 19).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Respondent stipulates that ABF is engaged in truck operations, and that OSHA has jurisdiction to regulate the cited activity (Tr. 51). As noted above, ABF stipulates that the conditions set forth in the citation existed as stated therein. Respondent defends on the sole ground that the cited conditions do not constitute a hazard. At the hearing ABF made an offer of proof, maintaining that, if permitted, it would introduce testimony and documentary evidence showing that technological improvements in spring-powered parking brakes eliminate the possibility of unintended trailer movement during loading and unloading and, therefore, the need to chock truck trailers (Tr. 5, 7, 11, 29, 32, 47-53; Respondent's Brief at p. 2). ABF maintains that because there were no employees exposed to a hazard, it was not in violation of the standard. ABF further argues that, should a violation be found, it must be classified as *de minimis*.

The Violation. Respondent's defense was rejected at the hearing. It is well settled that most occupational safety and health standards include requirements or prohibitions that by their terms *must*

be observed whenever specified conditions, practices or procedures are encountered. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978). Where an employer questions the necessity of a standard, it may either challenge the standard through the rule making process, or apply for a variance pursuant to section 6(d) of the Act. *Carabetta Enterprises, Inc.*, 15 BNA OSHC 1429, 1991-93 CCH OSHD ¶29,543 (No. 89-2007, 1992). The employer may *not* use the adjudicatory process to challenge the wisdom of a required safety measure. *See, Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985).

In a recent decision, the Commission once again held that it cannot decline to enforce an OSHA standard merely because an employer believes the standard imposes an unnecessary requirement. *Trinity Industries Inc. (Trinity)*, 15 BNA OSHC 1579, 1992 CCH OSHD ¶30,338 (Nos. 88-1545, 88-1547, 1992). In *Trinity* the employer's believed that its own precautions rendered the cited OSHA standard redundant. The Commission specifically held that the employer's belief did not excuse it from complying with the mandatory OSHA requirement. The Commission further stated that if the employer wanted relief from its obligations under the standard in question, it should have applied for a variance. *Id.* at 1588.

Respondent maintains that it would have been futile to apply for a variance in this case, stating that OSHA would never have granted a variance as Respondent was fully capable of complying with the cited standard (Respondent's Brief at p. 8). This argument is not persuasive.

While it is true that under §6(a)(6) an employer may apply for a temporary variance based on its inability to comply, §6(d) codified at 29 CFR 1905.11, states that an employer may also apply for a permanent variance where;

. . .the conditions, practices, means, methods, operations, or processes used. . . would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought.

Respondent itself submitted a March 30, 2000 OSHA memorandum, that shows OSHA is already investigating the efficacy of spring loaded air parking brakes on tractor trailers. Such memoranda suggest that OSHA might well be receptive to an application for variance. Moreover, under Commission precedent an employer may not be required to abate a violation while a variance application is pending. *See, Deemer Steel Casting Company*, 5 BNA OSHC 1157 (No. 13,686 1977) *Ensign Electric Division, Harvey Hubbell, Inc.*, 1973-74 CCH OSHD ¶18,261 (No. 7638, 1974). Under the circumstances, this judge cannot find that application for a variance would have been either futile or inappropriate.

The Secretary has set forth a *prima facie* case in this matter. ABF has not raised a recognized defense to the citation, and the citation will be affirmed.

De minimis. This judge finds that in these circumstances, a *de minimis* finding is inappropriate. Where a violation is found to be *de minimis*, no abatement order is entered. Thus, the *de minimis* classification may have the effect of overriding the Secretary's rule making responsibility. *St. Joe Resources Co.*, 13 BNA OSHC 2193, 1987-90 CCH OSHD (No. 81-2267, 1989).

Respondent relies upon *Phoenix Roofing, Inc. (Phoenix)*, 874 F.2d 1027 (5th Cir 1989), which it claims supports its position. The ruling in *Phoenix*, however, affected a single temporary construction project, which was long completed by the time the *Phoenix* decision was issued. A *de minimis* finding in *this* case could affect trucking operations nationwide, setting a precedent which would, as noted above, eviscerate the Secretary's ability to enforce the regulation at §1910.178(m)(7). This judge believes that a decision with such far reaching results should not be reached without the benefit of the notice and comment provision provided for in the Act.

An employer's request for a §6(d) variance must be accompanied by the employer's certification that his employees have been apprised of the application.¹ Action on the request for a variance includes publication in the FEDERAL REGISTER, including an invitation to interested persons to submit data, views and arguments, and informing affected employers, employees and State agencies of any right to request a hearing in the matter. *See*, 29 CFR 1905.14. This judge believes that neither ABF nor the trucking industry in general should be relieved of their duty to provide the protections set forth in the applicable OSHA regulations without first affording affected employees the opportunity to be heard.

ABF's contention that the cited violation be classified as *de minimis* is rejected.

Penalty

CO Thiergood testified, without contradiction, that if a trailer was to move during loading, employees could be thrown from, or crushed by a forklift (Tr. 36). Employees struck by a moving trailer could also be seriously injured (Tr. 36). It is clear that should an accident occur, employees could sustain serious injuries.

The parties stipulated that the proposed penalty of \$3,150.00 was reasonable should the violation be deemed "serious," and that amount will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §29 CFR 1910.178(m)(7) is AFFIRMED, and a penalty of \$3,150.00 is ASSESSED.

/s/

James H. Barkley

¹ A variance application would be the appropriate forum for ABF to submit the agency memoranda and decisions from California and Oregon which address the efficacy of spring brakes, and which are included as Exhibits 1 through 5 as part of ABF's offer of proof.

Judge, OSHRC

Dated: November 28, 2000

