



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant

v.

North American Crane & Rigging LLC,  
Respondent.

OSHRC Docket No. **20-1089**

Appearances:

Emily V. Wilkinson, Esq., and Nathan C. Henderson, Esq. U.S. Department of Labor, Office of the Solicitor, Boston, MA, for Complainant

Michael Rubin, Esq. and Stefan A. Borovina, Esq., GOLDBERG SEGALLA, LLP, for Respondent

JUDGE: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

North American Crane & Rigging, LLC, (NACR) contests a one-item Citation and Notification of Penalty issued by the Secretary on June 18, 2020, for allegedly failing to adequately protect employees from the swing radii of two cranes at a construction site in Plainville, Massachusetts. The Citation resulted from a programmed inspection at a multi-employer worksite conducted on February 27, 2020, by a Compliance Safety and Health Officer (CSHO) for the Occupational Safety and Health Administration.

The Citation alleges NACR violated, in two instances, 29 C.F.R. § 1926.1424(a)(2)(ii) by failing to prevent exposure of its employees to swing radius hazards because it did not adequately mark the boundaries of the hazardous areas. The Secretary proposes a penalty of \$6073 for this item.

NACR contests the Citation, arguing the Secretary failed to prove his case. In its *Amended Answer* filed on February 25, 2021, NACR also asserts the affirmative defenses of greater hazard and infeasibility of compliance with the cited standard.

The Court held a hearing via videoconference in this matter on April 20 and 21, 2021. The parties have filed post-hearing briefs. For the reasons that follow, the Court finds the

Secretary failed to establish a violation of the cited standard for either instance of the Citation. Accordingly, the Court **VACATES** Item 1 of the Citation.

### **JURISDICTION AND COVERAGE**

NACR timely contested the Citation. The parties agree the Commission has jurisdiction over this action and NACR is a covered employer under the Act (*Complaint*, ¶¶ I & III; *Answer*, ¶¶ I & III; Tr. 15-16). Based on the agreements and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational and Safety Act of 1970, 29 U.S.C. §§ 651-678 (Act), and NACR is a covered employer under § 3(5) of the Act.

### **STIPULATIONS**

The parties stipulate the following facts:

#### **A. General Background**

1. At all relevant times, and specifically on 02/27/2020, Respondent was a limited liability company registered in Massachusetts, which was engaged in construction-related activities, to include specifically the set-up, operation, and disassembly of cranes in connection with construction projects.

2. On 02/27/2020, Respondent was engaged in crane disassembly work at the job site located at 5 Commerce Boulevard, Plainville, MA 02762 (the “Job Site”).

3. On 02/27/2020, there were two cranes being operated by Respondent’s employees at the Job Site: (1) a Manitowoc M250 crane (the “Lattice Boom Crane”); and (2) a Grove TMS760E crane (the “Assist Crane”).

4. Respondent did not request a variance from the requirements of 29 C.F.R. § 1926.1424(a)(2)(ii) before beginning work at the Job Site on 02/27/2020.

5. Before work began at the Job Site on 02/27/2020, Respondent conducted a job hazard analysis for the disassembly of the Lattice Boom Crane.

6. On 02/27/2020, Respondent’s managers and employees present at the Job Site included: Avelino Mendonca (foreman); Gregory Albanese (crane operator); William Murphy (crane operator); Narith Pich (oiler); Kevin Doughty; and Nicholas Amore.

#### **B. The Lattice Boom Crane**

7. Respondent was disassembling the Lattice Boom Crane at the Job Site on 02/27/2020.

8. On 02/27/2020, Mr. Albanese worked as the operator of the Lattice Boom Crane.

9. On 02/27/2020, Mr. Pich worked as the oiler of the Lattice Boom Crane.

10. At various times on 02/27/2020, the superstructure of the Lattice Boom Crane rotated while the crane was being operated during the disassembly process.

11. On 02/27/2020, no barriers were in place to mark the boundaries of the swing radius of the Lattice Boom Crane's rotating superstructure.

12. On 02/27/2020, the Lattice Boom Crane's operator, Mr. Albanese, did not erect any barriers to mark the boundaries of the swing radius of the Lattice Boom Crane's rotating superstructure.

### **C. The Assist Crane**

13. On 02/27/2020, Respondent was operating the Assist Crane at the Job Site to disassemble the Lattice Boom Crane and to move disassembled lattice boom pieces onto trucks.

14. On 02/27/2020, Mr. Murphy worked as the operator of the Assist Crane.

15. At various times on 02/27/2020, the superstructure of the Assist Crane, including the counterweights, rotated while the crane was being operated.

16. On 02/27/2020, the outriggers of the Assist Crane were fully extended.

17. At the time when the CSHO conducted his initial walkaround on the Job Site on 02/27/2020, a rope with a sign reading "DANGER—SWING AREA—RESTRICTED" was hung between one set of the Assist Crane's outriggers.

18. At the time when the CSHO conducted his initial walkaround on the Job Site on 02/27/2020, a rope was hung between the other set of the Assist Crane's outriggers.

19. Later on 02/27/2020, Respondent added caution tape that extended from both sets of the Assist Crane's outriggers.

### **D. The Serious Citation and Proposed Penalty**

20. There is a substantial probability that death or serious physical harm could have resulted if an employee had been struck by a crane's rotating superstructure or pinched between the superstructure and another part of the equipment.

21. In assessing the appropriate penalty, OSHA alleges that it considered the gravity of the violation, the size of Respondent's business, Respondent's good faith, and Respondent's history of violations.

*(Joint Prehearing Statement, pp. 3-5)*

## WITNESS TESTIMONY

Four witnesses testified at the hearing: the CSHO, NACR CEO Louis Izzo, NACR foreman Avelino Mendonca, and NACR crane operator William Murphy. Their testimony is summarized below.

### *The CSHO*

On February 27, 2020, the CSHO began a programmed inspection at a multi-employer construction worksite in Plainville, Massachusetts. He took photographs and video from outside the construction site before he entered the site and presented his credentials (Tr. 89). After meeting with the general contractor, the CSHO held an opening conference with the subcontractors working on the site, including NACR representatives. That day, NACR employees were using a yellow Grove TMS760E crane (the yellow crane) to disassemble a red Manitowoc M250 lattice boom crane (the red crane) when the CSHO arrived at the worksite (Tr. 36-38). After the opening conference, the CSHO conducted a walk-through of the worksite and spoke with NACR foreman Avelino Mendonca (Tr. 38-39).

### The Red Crane

By the time the CSHO saw the red crane, NACR employees had partially disassembled it. They were working near the crane. The CSHO observed the red crane rotating “at one point” and saw the “swing radius wasn’t protected.” (Tr. 42) He videoed the red crane rotating approximately a quarter turn (Exh. J-20). The CSHO described the video as showing “the crane’s superstructure, with the counterweights rotating, and rotating towards the employees near the end of the crawler track.” (Tr. 43) He stated the NACR employees were “pretty close, but I couldn’t put a number on it.” (Tr. 43) The CSHO videoed the event because he believed he was “documenting a hazard” of the “unprotected swing radius,” because “the rotating superstructure and the counterweights could strike somebody, or it could get them caught between, in this case, the crawler tracks and the superstructure.” (Tr. 44)

The CSHO did not take measurements of the red crane to determine whether its superstructure extended over the body of vehicle, creating a swing radius hazard (Tr. 91, 99). He conceded on cross-examination that at the time of his inspection, the counterweights had been removed from the red crane and they could not present a struck-by hazard to employees (Tr. 93-95, 97). He stated the superstructure of the red crane extended past the crane’s track based on the photos he took and the specifications he reviewed (Tr. 99, 131). Exhibit J-32 is a photograph

taken by the CSHO of a specification page from the manual for the red crane. No measurements appear on the page (Tr. 101). He could not say whether the superstructure of the crane would extend past the end of the crane's crawler tracks or the back of the crane (Tr. 110).

#### The Yellow Crane

Unlike its treatment of the red crane, NACR had attempted to mark the area of the swing radius of the yellow crane, but the CSHO determined it was inadequately protected on both sides of the crane and truck (Tr. 47). NACR had fully extended two outriggers on the left side of the yellow crane and had strung a chain between the outriggers. Attached to the chain was a sign stating,

DANGER  
SWING  
AREA  
RESTRICTED

(Exh. J-7).

On the right side of the vehicle, NACR had fully extended the outriggers and had strung a rope between them to mark the swing radius. No warning sign was attached to the rope. The area to the right of the vehicle was a traffic lane for the construction site, and it was hemmed in by a sloped dirt hill (or berm) (Exh. J-16). The CSHO testified no NACR representative told him that marking the swing radius on the right side of the yellow crane would be unsafe, infeasible, or impossible during the inspection (Tr. 77).

Exhibits J-5 and J-6 are photographs showing the counterweights of the yellow crane extending beyond one of the two fully extended outriggers on the left side used as connection points for the chain meant to demarcate the swing radius (Tr. 50-51). The CSHO testified the photographs show that "the counterweights extended beyond the limited protection that was provided by that chain that was strung between the outriggers on each side of the crane, so the counterweight extended past that." (Tr. 47) He stated the space beyond the outriggers and attached chain "was also a hazard in that anybody working in that area could also get struck by the counterweight, or . . . conceivably get caught between the counterweights and chassis of the truck." (Tr. 47) He also looked at NACR's copy of the manual for the yellow crane, which contains a specifications page showing a diagram and dimensions of the crane (Tr. 48).

The CSHO suggested NACR could have extended the boundary with “some stanchions and rope . . . so that somebody couldn’t get into that area where they could get struck.” (Tr. 51) He stated the same extension could have been done on the other side of the yellow crane “so somebody can’t get in there and get caught between those counterweights and the truck chassis or just struck by the counterweights.” (Tr. 52)

As evidence of employee exposure to the hazard of being struck by the counterweights, the CSHO stated he had observed a bag placed on the chassis on the left side of the crane (Tr. 59, 79). The bag is visible in Exhibits J-5 and J-7.

The CSHO stated that counterweights are located on the side of the crane opposite the boom to prevent it from tipping over. If the boom rotates in one direction, the counterweights rotate in the opposite direction (Tr. 114-15). He agreed that if the NACR crane operator was not “hoisting from the right side of the crane; you wouldn’t expect that the counterweights would be on the other side of the crane (Tr. 117). Exhibit J-16 is a photograph showing a narrow area of compacted dirt to the right of the crane, bordered by a sloped dirt hill. When asked if he agreed that the counterweights would never be on the left side of the crane if the boom were hoisting on the right side, the CSHO responded that he “could imagine a scenario . . . where they might want to rotate the crane in order to get the counterweights on the other side. So, for example, if that area was relatively small, that flat compacted area, they might want to move the counterweight out of the way so that a vehicle could pass more easily.” (Tr. 118) He stated he could not recall if he observed or heard of this scenario actually occurring during his inspection (Tr. 118).

The CSHO denied that he had instructed the operator of the yellow crane to rotate the crane so that the counterweights were located on the left side, as shown in Exhibits J-5, J-6, and J-7. “I would not instruct somebody to rotate the superstructure in order for me to take a photograph or a measurement.” (Tr. 120) He stated it was possible he asked the operator to exit the cab of the vehicle: “I didn’t want to expose myself to a hazard, obviously, so I wanted to make sure that the thing wasn’t going to be operating while I’m trying to take a measurement.” (Tr. 60-61) He only measured the vertical distance from the bottom of the counterweight to the ground; he did not measure the horizontal extension of the counterweight beyond the outriggers. He stated he could determine that measurement “[f]rom looking at the crane specifications.” (Tr. 61)

Exhibit J-31 is a copy of the *Product Guide* for the yellow crane. Page 7 of the document shows a diagram with the dimensions of the crane. The CSHO testified the diagram indicates the swing radius of the superstructure with the counterweights is 13 feet, 5.5 inches, from the center of the vehicle. The fully extended outriggers are 10 feet from the center of the vehicle. Therefore, when both outriggers are fully extended on either side of the crane, the counterweights will extend 3 feet, 5.5 inches, beyond the outriggers (Exh. J-31, Bates p. 75; Tr. 61-3). The distance from the ground to the bottom of the counterweight was 5 feet, 7 inches (Exhs. J-11, J-12, J-13; Tr. 64-65).

NACR was using the yellow crane to move sections of the boom of the red crane onto a truck bed (Tr. 67). NACR employees were in the vicinity of both cranes. “They had to rig the pieces so they could be picked up by the crane and then they had one employee . . . guiding the sections of the boom onto the truck.” (Tr. 69) The CSHO observed NACR employees standing and walking on the side of the yellow crane where the counterweights were located. When asked the nearest distance the employees were to the counterweights, the CSHO responded, “Pretty close.” (Tr. 69) Exhibit J-25 is a still photograph from a video taken by the CSHO. It shows three employees in yellow vests walking near the cab of the yellow crane on its left side. The operator of the crane can be seen in the cab.

The CSHO stated that NACR extended the swing radius barriers for the cranes beyond the outriggers while he was onsite, using red caution tape. The areas protected were only between the outriggers on each side—the front and back ends of the chassis were still unprotected (Exh. J-10; Tr. 73).

NACR had completed a written job hazard analysis (JHA) for the construction site that identified the cranes’ swing radii as hazards (Tr. 78-79).

*Louis Izzo*

Louis Izzo has been the CEO of NACR since 2015. He is responsible for “the general day-to-day management of the operations, sales, and financials of the company.” (Tr. 136) Izzo is also a licensed crane operator (Tr. 271). NACR employs a safety director, but Izzo is responsible for imposing disciplinary action on employees for safety infractions. NACR has a written safety program, provides safety training, and conducts field safety inspections (Tr. 137-38). NACR employees prepare Job Hazard Analyses (JHA) for each worksite (Exh. J-36; Tr. 140). Izzo described how NACR uses a JHA:

It's basically to analyze the type of work that's going on and then we will apply to that scope of work, everything from safety regulations to best practices to manufacturer procedures to make sure that we've identified whatever hazards might be encountered on that job, and then identify and implement the mitigations to try to prevent those.

(Tr. 142)

Izzo and NACR employees in the Lift Planning Group wrote the JHA for the work performed by NACR at the Plainville worksite on February 27, 2020. Izzo testified they designed the disassembly procedure so that no lifting would be performed on the right side of the yellow crane, as shown in the photograph admitted as Exhibit J-16. "We planned that as a roadway between the crane and that berm you see on the right side of the frame, to be a roadway for our tractor trailers to get closer access to the superstructure, both the upper and lower works of the red crane. So that was the primary route for cranes to access the large red crane." (Tr. 296) Izzo stated the boundary marking on the right side could not be extended farther because they would "basically block the roadway. You're going to make it impossible for the traffic to get where it needs to go and complete the job they were sent there to do." (Tr. 304)

NACR provided the JHA to its field staff at the worksite, including foreman Avelino Mendonca, who used it as the basis for pre-task analysis and onsite briefing of employees involved in the crane work (Tr. 143-45). Izzo was not at the Plainville construction site the day of the OSHA inspection (Tr. 162).

Izzo testified he was familiar with the red crane and was aware that, with the counterweights removed, the superstructure of the crane does not extend beyond its tracks.

It does not extend beyond the tracks. . . . Basically, that's from the dismantle procedure, and also, just again, being a part of these for many times and part of being able to plan these is knowing the dimensions of these components and what goes where at what time. So, at this stage of the dismantle, the house has been dismantled to such a point where there is no external swing radius of the crane.

(Tr. 284)

Referring to Exhibit J-32, which is a photograph of a diagram from the red crane's user manual that the CSHO consulted, Izzo stated,

That's an illustrative drawing that doesn't actually depict any point in the assembly or dismantle process. That's basically an educational tool really or an orienting tool to teach you what some of the key terminology is going to be about this crane's superstructure basically as you read about those procedures in the following pages of that book. . . . The picture we see in J-32 never actually happens in reality. The picture in J-32 is manipulated so that all of the



components that you would need to know the technical names of can be highlighted on this page to basically label all of them.

(Tr. 285-86)

*Avelino Mendonca*

Avelino Mendonca has worked as a foreman for NACR for five years. He is certified in rigging and signaling, and he has completed OSHA's 10-hour construction safety course. He is not licensed as a crane operator (Tr. 175-76).

On February 27, 2020, NACR's task was to disassemble the red crane (Tr. 180). The operator of the red crane crawled it to the disassembly area. "[W]hen you crawl, the crane will be parallel with the track. It never swings. . . . When you crawl, you keep your crane parallel with the tracks and you crawl down to where you're going to do the disassemble." (Tr. 213) The crane operator lowered the boom to the ground and NACR employees broke it down into six sections. The superstructure of the red crane did not rotate during this process (Tr. 216, 218). After the NACR employees broke down the boom, they removed the counterweights from the superstructure of the red crane. Mendonca confirmed that "at no point, anytime, this red crane was in the disassembly area, did it ever rotate with those counterweights on back." (Tr. 225) After the counterweights were removed, Mendonca testified, the superstructure of the crane did not extend over the crane's track. "[I]t's flush with the track. . . . I mean, I was there, I could, you could see, you're standing there, the rig's standing, you could see it's clearly flush with the track." (Tr. 229)

NACR employees had removed the counterweights of the red crane and taken apart its boom sections by the time the CSHO arrived onsite. NACR employees were in the process of attaching the red boom sections, one by one, to the hoist of the yellow crane. The yellow crane would swing the boom sections, located towards its left front, over to a truck bed, located to the left of the crane, and land them (Exh. J-28; Tr. 200). An NACR employee would disconnect the sections from the yellow crane's hoist (Tr. 181-85). No boom sections were located on the right side of the crane (Tr. 253). The counterweights of the yellow crane remained on the right side of the crane during the performance of the NACR employees' assigned task (Tr. 254).

Exhibit J-6 is a photograph showing the counterweights of the yellow crane on the left side of the crane. The counterweights clearly extend beyond the chain barrier set up between the outriggers. Mendonca testified the counterweights were on the left side of the crane in this instance only because the CSHO instructed NACR to rotate them to that side.

Q.: Do you recall when [Exhibit J-6 and other photos] were taken by the inspector where they depict the counterweights over the left-sided outriggers?

Mendonca: Yeah, that's the only thing that the pictures were intended. But that was just for a picture.

Q.: Well, that was what I was going to ask. Other than the time photos were taken with the counterweights over the left-sided outriggers, at any time on February 27, 2020, did you ever see the counterweights over the left-sided outriggers as it's depicted in J-6?

Mendonca: No.

Q.: Did you ever observe the crane hoisting anything to the right of the crane?

Mendonca: No.

Q.: And did you ever, at any time other than when these photographs were taken, such as J-6, did you see the boom over the right side of the crane?

Mendonca: No.

(Tr. 256)

Mendonca testified there was no reason related to the work NACR was performing that day to rotate the counterweights to the left side of the crane.

Q.: Generally speaking, how would the trucks take away the boom pieces?

Mendonca: They would back up to the side of the crane. . . . They'd always be on the left-hand side of the crane or sometimes in the back. But most of it was on the left-hand side of the crane.

Q.: Okay. And was there a reason for that?

Mendonca: Yes. All the work was being done on the left-hand side of the crane. There was no work being done on the right side. There was just no room over there to do anything because of the berm.

Q.: Okay. And when you say, "the berm," that was on the right side of the crane, is that right?

Mendonca: That's correct.

(Tr. 258)

The counterweights of the yellow crane rotated from the rear of the crane to the right of the crane and back as this work was performed. Mendonca stated the counterweights of the yellow crane extended beyond the outriggers on the right side (Tr. 201-02).

Mendonca completed a JHA form for the disassembly of the red crane on February 27, 2020 (Exh. J-36; Tr. 186-87). He held a safety briefing with the NACR employees and reminded

them to avoid the swing radius of the counterweights of cranes. “[W]e say when a crane’s swinging, don’t be inside that area.” (Tr. 187-88) The crane operator is responsible for marking the swing radius of the crane with caution tape (Tr. 188).

Mendonca testified NACR employees added red caution tape to the outriggers to extend the swing radius barrier “because the OSHA guy told us to put it up.” (Tr. 204) He did not inform the CSHO that it was infeasible to protect the swing radius of the yellow crane on the right side because the CSHO “never asked.” (Tr. 204)

NACR employees did not set up swing radius barriers for the red crane because “there’s no overhang swing once the counterweights come off. . . . Nobody put [a barrier] up because we weren’t moving the crane.” (Tr. 205) Mendonca believed the red crane did not require a swing radius barrier because “there was no swing. . . . [T]he crane’s structure never went over the tracks or car body. It never goes past that. Once . . . you take that counterweight off, that crane has no swing.” (Tr. 210-11)

*William Murphy*

William Murphy is a crane operator employed by NACR. He operated the yellow crane on February 27, 2020, at the Plainville construction site (Tr. 328-29, 332). Murphy stated he hoisted loads exclusively on the left side of the crane that day. “I never picked up or hoisted anything from that [right] side.” (Tr. 341)

Murphy stated he was operating the crane when the CSHO arrived at the worksite. He testified that when he saw the CSHO, “I swung the crane over to the back, locked everything out and came out, and he was speaking to me.” (Tr. 337) Murphy was shown Exhibit J-6, which depicts the counterweights of the yellow crane extending beyond the safety barrier erected by NACR on left side of the crane. NACR’s counsel asked him why the counterweights were on that side of the crane if he hoisted boom sections from only the left side.

Q.: Do you know how the counterweights got to be positioned over the left-sided outrigger as they're depicted in this photo?

Murphy: I believe, when the inspector came, he wanted to take some photos, so he had me swing over.

Q.: Okay. What do you mean? When you say, "swing over," what do you mean?

Murphy: Swing over to the opposite side of the work area.

(Tr. 347)

Murphy stated he was not sitting in the cab of the yellow crane at the time the CSHO took the photographs showing the counterweights on the left side (Tr. 348).

### THE CITATION

Item 1 of the Citation alleges:

28 CFR 1926.1424(a)(2)(ii): To prevent employees from entering hazard areas, the employer did not erect and maintain control lines, warning lines, railings or similar barriers to mark the boundaries of the hazard areas and/or did not train each employee to understand what these markings signify.

Location: East side of job site.

The employer did not ensure that the swing radius around cranes were adequately protected.<sup>1</sup>

Instance A: The swing radius around the assist crane was inadequately protected.

Instance B: The swing radius around the crane being disassembled was unprotected.

#### *The Secretary's Burden of Proof*

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co., Inc.*, No. 90-1747, 1994 WL 682922, at \*6 (OSHRC Dec. 5, 1994).

#### *The Cited Standard*

The cited standard, § 1926.1424(a)(2)(ii), provides:

To prevent employees from entering these hazard areas, the employer must . . . [e]rect and maintain control lines, warning lines, railings, or similar barriers to mark the boundaries of the hazard areas.

*Exception:* When the employer can demonstrate that it is neither feasible to erect such barriers on the ground nor on the equipment, the hazard areas must be clearly marked by a combination of warning signs (such as "Danger--Swing/Crush Zone") and high visibility markings on the equipment that identify the hazard areas. In addition, the employer must train each employee to understand what these markings signify.

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<sup>1</sup> At the hearing, the Court granted the Secretary's motion to amend the Citation to correct a typographical error in the alleged violation description (AVD) (Tr. 16-17).

## ANALYSIS

### *(1) The Cited Standard Applies*

Section 1926.1424 (*Work area control*) is found in Subpart CC (*Cranes and Derricks in Construction*) of Part 1926 (*Safety and Health Regulations for Construction*). The *Scope* section of Subpart CC, § 1926.1400(a), provides the standard “applies to power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load.”

There is no dispute that the red and yellow cranes at issue in this proceeding constitute power-operated equipment that could hoist, lower, and horizontally move suspended loads. NACR argues, however, that the cited standard does not apply to its cranes at the Plainville construction site on February 27, 2020, because the standard is limited in scope to cranes “when used in construction,” and the cranes were not used to construct anything that day. NACR contends,

[T]he disassembly activities conducted on site were conducted in an area that was separate and distinct from any prior construction activities that had been performed. The area where the entire dismantling event occurred was a dedicated portion of the site. . . . Since the instant crane disassembly operations were not conducted “in” (but only “after”) any construction activities, the cited standard cannot apply to the underlying facts of this matter.

(NACR’s *Brief*, pp. 22-23)

The *Definitions* section of Subpart CC disproves NACR’s argument. Section 1926.1401 provides the following definitions, indicating the Subpart considers assembly and disassembly of cranes to be construction activities:

*Assembly/Disassembly* means the assembly and/or disassembly of equipment covered under this standard. With regard to tower cranes, “erecting and climbing” replaces the term “assembly,” and “dismantling” replaces the term “disassembly.” Regardless of whether the crane is initially erected to its full height or is climbed in stages, the process of increasing the height of the crane is an erection process.

*Assist crane* means a crane used to assist in assembling or disassembling a crane.

Subpart CC regards assembly and disassembly of cranes used on construction sites to be part of the construction process. This is borne out by the five standards in Subpart CC that specifically address, in detail, the assembly and disassembly procedures for cranes.<sup>2</sup>

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<sup>2</sup> The standards are: §§ 1926.1403 (*Assembly/Disassembly—selection of manufacturer or employer procedures*); 1926.1404 (*Assembly/Disassembly—general requirements (applies to all assembly and disassembly operations)*); 1926.1405 (*Disassembly—additional requirements for dismantling of booms and jibs (applies to both the use of*

Furthermore, NACR stipulated prior to the hearing that it was engaged in construction-related activity at the time of the OSHA inspection: “At all relevant times, and specifically on 02/27/2020, Respondent was a limited liability company registered in Massachusetts, which was engaged in construction-related activities, to include specifically the set-up, operation, and disassembly of cranes in connection with construction projects.” (*Joint Prehearing Statement*, p. 3, ¶ 1)

The Court determines § 1926.1424(a)(2) applies to the cited conditions.<sup>3</sup>

### ***(2) Compliance with the Terms of the Cited Standard***

The cited subparagraph of the work area control standard, § 1926.1424(a)(2)(ii), is intertwined with the subparagraph immediately preceding it, § 1926.1424(a)(1), and the two must be read together to grasp the requirements for compliance with either of them. Each subparagraph imposes requirements on the Secretary and the employer, respectively, not usually found in standards promulgated under § 5(a)(2) of the Act.

Sections 1926.1424(a)(1) and (2), in their entirety, provide:

#### **§ 1926.1424 Work area control**

(a) *Swing radius hazards.*

(1) The requirements in paragraph (a)(2) of this section apply where there are accessible areas in which the equipment’s rotating superstructure (whether permanently or temporarily mounted) poses a reasonably foreseeable risk of:

- (i) Striking and injuring an employee; or
- (ii) Pinching/crushing an employee against another part of the equipment or another object.

(2) To prevent employees from entering these hazard areas, the employer must:

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*manufacturer procedures and employer procedures*); 1926.1406 (*Assembly/Disassembly—employer procedures—general requirements*), and 1926.1407 (*Power line safety (up to 350kV)—assembly and disassembly*).

<sup>3</sup> NACR advances an additional argument regarding the applicability of § 1926.1424(a)(2)(ii) to the cited conditions. Section 1926.1424(a)(1) provides that the cited standard applies where the crane's rotating superstructure “poses a reasonably foreseeable risk of” striking or pinching/crushing an employee. NACR argues the Secretary failed to establish that a reasonably foreseeable risk of employee exposure to swing radius hazards existed the day of the OSHA inspection. Therefore, NACR contends, the cited standard does not apply. The Court considers this argument to be more apposite to the proof elements of compliance and employee access to the hazard and will address it in the following sections of this decision.

(i) Train each employee assigned to work on or near the equipment (“authorized personnel”) in how to recognize struck-by and pinch/crush hazard areas posed by the rotating superstructure.

(ii) Erect and maintain control lines, warning lines, railings or similar barriers to mark the boundaries of the hazard areas.

*Exception:* When the employer can demonstrate that it is neither feasible to erect such barriers on the ground nor on the equipment, the hazard areas must be clearly marked by a combination of warning signs (such as “Danger—Swing/Crush Zone”) and high visibility markings on the equipment that identify the hazard areas. In addition, the employer must train each employee to understand what these markings signify.

Section 1926.1424(a)(1) states that the requirements of the work area control standard apply in situations only where a crane’s rotating superstructure “poses a reasonably foreseeable risk of” injuring an employee. Generally, an OSHA standard presumes a hazard and the Secretary is not required to establish one exists as part of his burden of proof. When, however, a standard specifies it applies only when a foreseeable risk of injury is present, as does § 1926.1424(a)(1), the Secretary must establish the additional requirement of foreseeability of risk to employees.

Section 1926.1424(a)(2)(ii) imposes an additional requirement on employers who assert the defense of infeasibility of compliance. Generally, to establish the infeasibility defense, an employer must establish that:

(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection.” *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874, 1993-95 CCH OSHD If 30,485, p. 42,109-10 (No. 91-1167, 1994).

*Altor, Inc.*, No. 99-0958, 2011 WL 33135, at \*13 (OSHRC Apr. 26, 2011), *aff’d*, 498 Fed. Appx. 145 (3<sup>rd</sup> Cir. 2012).

The cited standard here specifies that the alternative protective measure must take the form of the employer clearly marking the hazard areas “by a combination of warning signs (such as “Danger—Swing/Crush Zone”) and high visibility markings on the equipment that identify the hazard areas. In addition, the employer must train each employee to understand what these markings signify.

### Instance B: The Red Crane

Instance B of the Citation alleges, “The swing radius around the crane being disassembled was unprotected.” It is undisputed NACR did not mark the boundaries of the swing radius of the red crane (Tr. 42, 204-05). NACR does not assert the infeasibility defense for this instance.

The Secretary argues NACR admitted it violated the cited standard when it stipulated the following:

10. At various times on 02/27/2020, the superstructure of the Lattice Boom Crane rotated while the crane was being operated during the disassembly process.
11. On 02/27/2020, no barriers were in place to mark the boundaries of the swing radius of the Lattice Boom Crane’s rotating superstructure.
12. On 02/27/2020, the Lattice Boom Crane’s operator, Mr. Albanese, did not erect any barriers to mark the boundaries of the swing radius of the Lattice Boom Crane’s rotating superstructure.

*(Joint Prehearing Statement, p. 4)*

For the Secretary, the fact NACR concedes its crane operator rotated the superstructure of the red crane while its swing radius was unmarked is sufficient to establish noncompliance with the standard. As evidence of the additional requirement set out in § 1926.1424(a)(1) (that he establish the existence of accessible areas where the crane’s rotating superstructure could strike or crush an employee), the Secretary points to Exhibit J-9, a photograph taken from the video admitted as Exhibit J-20, showing that “[t]wo of Respondent’s employees . . . stood at the end of the crane’s crawler tracks as the superstructure rotated.” (Secretary’s Brief, p. 11) The Secretary argues, “[I]t is undisputed that the superstructure was rotating while two employees stood within mere feet of it. . . . Accordingly, there was a reasonably foreseeable risk that an employee could have been struck by the superstructure or pinched between the superstructure and another part of the red Lattice Boom Crane.” (Secretary’s Brief, p. 12)

The Court disagrees. The testimony of foreman Mendonca establishes that at all times when the superstructure rotated on February 27, 2020, no counterweights were attached, and its swing radius did not extend beyond the body of the vehicle. No swing radius hazard existed.

Mendonca testified that the day of the OSHA inspection, the red crane operator crawled the crane to the assembly area with the boom forward. At the disassembly area, NACR employees removed the boom sections, during which time the superstructure of the red crane



remained facing forward and parallel with the crawler tracks (Tr. 222-23). NACR employees then plugged a remote control device into the red crane and used it to drop the counterweights from the superstructure. Use of the remote control device temporarily disables the crane's operating system so that, according to Mendonca, "[N]obody would go in and hit the, have an accident, you know, so everything gets controlled by that remote. So, it wouldn't swing out." (Tr. 225) Mendonca testified that the red crane never rotated in the disassembly area until the counterweights had been dropped from the superstructure (Tr. 225-27).

The CSHO described Exhibit J-20 as showing "the crane's superstructure, *with the counterweights rotating*, and rotating towards the employees near the end of the crawler track." (Tr. 43) (emphasis added) He did not realize until he was cross-examined that the counterweights of the red crane had been removed at the time he recorded the video (Exhibit J-20; Tr. 93-95, 97). The CSHO took no measurements of the red crane (Tr. 91, 99). He stated the two NACR employees were "pretty close" to the end of the crane's crawler track, but he "couldn't put a number to it." (Tr. 43) The page of the crane manual that he testified he consulted to determine that the crane's superstructure extended past the crane's track does not provide dimensions of the crane (Exh. J-32; Tr. 99, 101, 131).

The CSHO's testimony on cross-examination demonstrates he had no quantitative data to back up his claim that the crane's superstructure, without counterweights, posed a reasonably foreseeable risk of striking employees standing at one end of the crawler track. NACR's counsel, referring to Exhibits J-9 (the photo) and J-20 (the video), questioned the CSHO regarding the end of the superstructure marked with the number "1250" in white paint.

Q.: Do you know if the crane rotated in the direction, that was observed rotating in the video, if that 1250, or this side of the crane, we'll say the butt of the upper works, would extend past the end of the tracks where the two workers were on the right part of the photo?

CSHO: I don't know that from the top of my head.

Q.: Okay, and do you know if the crane had rotated the other way, if the butt of the crane where it says 1250 would extend beyond the back of the track from the other side where that one worker is to the left of the photo?

CSHO: I don't know that.

Q.: Okay, and would you agree that if the butt of the red crawler crane did not extend past the outer point of the tracks, that that would not be a hazard to workers who were standing where they're standing, as depicted in J-9? . . . If the 1250, which is shown on the back of the red super structure, upper works, if that

was parallel to the tracks and did not extend past the tracks, would you agree there was no swing radius hazard to the workers standing in the photo on the right, Exhibit J-9?

CSHO: Well, if what you -- in your scenario, if they stayed where they were and didn't move, they wouldn't be struck by it.

(Tr. 110-11)

The CSHO's testimony, in which he is unclear on whether the crane's superstructure extended beyond the tracks of the vehicle, contrasts with the certainty of the testimony of Izzo, who was familiar with the red crane at issue, and Mendonca, who was onsite and oversaw the disassembly of the red crane on February 27, 2020.

Izzo testified,

[The red crane] does not extend beyond the tracks. . . . [A]t this stage of the dismantle, the house has been dismantled to such a point where there is no external swing radius of the crane.

(Tr. 284)

Mendonca stated that "at no point, anytime, this red crane was in the disassembly area, did it ever rotate with those counterweights on back." (Tr. 225) After the counterweights were removed, Mendonca testified, the superstructure of the crane did not extend over the crane's track. "[I]t's flush with the track. . . . I mean, I was there, I could, you could see, you're standing there, the rig's standing, you could see it's clearly flush with the track." (Tr. 229)

The Secretary has failed to adduce any probative evidence establishing that a swing radius hazard existed when the superstructure of the red crane rotated in the disassembly area on February 27, 2020. Exhibits J-20 and J-9 show the CSHO was mistaken when he claimed the counterweights were intact and created a struck-by or crushing/pinching hazard when he videoed the rotation of the crane's superstructure. The Secretary did not produce measurements showing any part of the superstructure extended beyond the body of the crane vehicle, and it is not possible to determine from the angle of the video in Exhibit J-20 whether the superstructure overhangs the vehicle body at any point.

The Court concludes the Secretary did not prove NACR failed to comply with the requirements of § 1926.1424(a)(2)(ii) during disassembly of the red crane. He has failed to establish a violation with regard to Instance B of the Citation.

### Instance A: Left Side of the Yellow Crane

In contrast to the lack of evidence regarding a swing radius hazard for the red crane, the Secretary has adduced unambiguous evidence the counterweights of the yellow crane extended approximately 3 feet beyond the marked boundary of the swing radius on the left side of the yellow crane. The parties stipulate the following:

15. At various times on 02/27/2020, the superstructure of the Assist Crane, including the counterweights, rotated while the crane was being operated.

16. On 02/27/2020, the outriggers of the Assist Crane were fully extended.

17. At the time when the CSHO conducted his initial walkaround on the Job Site on 02/27/2020, a rope with a sign reading “DANGER—SWING AREA—RESTRICTED” was hung between one set of the Assist Crane’s outriggers.

*(Joint Prehearing Statement, p. 4)*

Page 7 of the yellow crane’s manual (Exhibit J-31) shows a diagram with the dimensions of the crane. The swing radius of the superstructure with the counterweights is 13 feet, 5.5 inches, from the center of the vehicle. The fully extended outriggers are 10 feet from the center of the vehicle. Therefore, when both outriggers are fully extended on either side of the crane, the counterweights will extend 3 feet, 5.5 inches, beyond the outriggers (Exh. J-31, Bates p. 75; Tr. 61-3). The distance from the ground to the bottom of the counterweight was 5 feet, 7 inches (Exhs. J-11, J-12, J-13; Tr. 64-65).

Exhibit J-6 is a photograph showing the counterweights extending almost their full length beyond the outriggers and suspended chain. It is undisputed that the chain and attached sign on the left side did not mark the boundaries of the swing radius of the counterweights. The issue is whether the counterweights posed a reasonably foreseeable risk of striking or crushing/pinching employees on the left side of the yellow crane.

Izzo testified that he and the Lift Planning Group planned the disassembly of the red crane so that all lifting and landing of the red crane’s boom sections would take place on the left side of the yellow crane. The counterweights would, therefore, be on the right side of the yellow crane as its boom hoisted the red crane’s boom sections.

Looking at Exhibit J-16, a photograph showing the right side of the yellow crane, Izzo stated, “We planned that [area] as a roadway between the crane and that berm you see on the right side of the frame, to be a roadway for our tractor trailers to get closer access to the

superstructure, both the upper and lower works of the red crane. So that was the primary route for cranes to access the large red crane.” (Tr. 296),

William Murphy, the operator of the yellow crane, confirmed that the right side of the yellow crane was used as a roadway. “[A]ll the work was to the left side.” (Tr. 340) When Murphy was shown a photograph of the area to the right of the yellow crane (Exhibit J-16), he stated, “That was the right side of the crane where we weren't doing -- that was a roadway for the trucks to get in and out. . . . I never picked up or hoisted anything from that side.” (Tr. 340-41)

Mendonca and Murphy both testified confidently that the CSHO was able to photograph the counterweights of the yellow crane located on the crane’s left side only because he instructed Murphy to rotate the superstructure to that location (Tr. 256, 347-48). The CSHO denied doing so, but his recollection of the inspection was less certain than that of the NACR employees.

Q.: And what, if anything, did you ask the crane operator to do so you could get those photos?

CSHO: I may have asked to make sure that the crane operator was not operating the crane, that he got out of the cab, I don't recall that a hundred percent clearly, but it's possible that I did that, because didn't want to expose myself to a hazard, obviously, so I wanted to make sure that that thing wasn't going to be operating while I'm trying to take a measurement.

(Tr. 60-61)

Mendonca and Murphy are matter-of-fact in their recounting of the CSHO’s instruction to rotate the yellow crane, and they each phrase their testimony as an account of an event that actually happened. Mendonca stated the location of the counterweights on the left side of the yellow crane as shown in Exhibit J-6 “was just for a picture,” (Tr. 256) and Murphy testified, “I believe, when the inspector came he wanted me to swing over. . . . Swing over to the opposite side of the work area.” (Tr. 347)

In contrast, the CSHO framed his responses to questions about Exhibit J-6 in terms of what he would have done, or what he expected would have happened, while also stating he did not recall how the counterweights came to be on the left side of the yellow crane.

Q.: [D]id you ever speak with anyone before you took this photo marked J-6 from North American Crane?

CSHO: Yeah, I previously testified, I don't have a specific recollection, but I would, I believe I would have told them, hey, look it, I'm going to take some measurements, either I want you out of the crane or that crane can't operate while I'm taking these measurements. So, I would expect that there was a conversation about that.

Q.: Okay; and that's just based on how things usually work, but as you're sitting here today, you don't remember any specific conversations that were had; right?

CSHO: I don't recall.

Q.: So, you wouldn't recall, for example, if you had asked the operator to swing the counterweights to the left side of the crane?

CSHO: I would not instruct somebody to rotate the super structure in order for me to take a photograph or a measurement.

(Tr. 119-20)

Based on the respective demeanors of the witnesses, the Court finds Mendonca and Murphy to be more credible on this point than the CSHO. Mendonca and Murphy have specific memories that there was no reason for the boom of the yellow crane to be on the right side (causing the counterweights to be on the left side) and that the CSHO instructed Murphy to rotate the superstructure to position the counterweights on the left side. The CSHO, on the other hand, was vague in his recollection of the inspection and spoke in terms of what he would have done or what might have happened, and not what he actually recalled. The Court finds the CSHO directed Murphy to rotate the superstructure of the yellow crane to position the counterweights over the outriggers on the left side.

Furthermore, the photographic and video exhibits, as well as the CSHO's testimony, bear out NACR's central argument that there was no reason for the counterweights to be positioned on the left side of the yellow crane. It is undisputed that the boom sections of the red crane were positioned to the left of the yellow crane, from where they were hoisted and landed on a flatbed truck, also parked on the left side of the yellow crane (Exhs. J-20, J-24, J-25, J-28, J-30). The CSHO acknowledged the logic of NACR's contention that the counterweights would not have been located on the left side of the yellow crane as NACR employees performed their assigned task.

Q.: [W]ould you agree if there were no hoisting operations to the right side of the outriggers, that means the boom would never be in the direction of the right side of the outriggers for purposes of any hoisting operations; would you agree with that?

CSHO: I would agree that if they weren't hoisting from the right side of the crane, you wouldn't expect that the counterweights would be on the other side of the crane.

Q.: So, if there was no hoisting in this area, you wouldn't expect the counterweights to be on the other side, because the counterweights are always on the other side; right?

CSHO: That's correct.

Q.: So, just to drive the point home, if you have the crane, it's operating the boom over the left side, a crane like this Grove mobile crane, the boom's operating over the left side, the counterweights would be over the right side behind it; right?

CSHO: Yeah, that's correct.

Q.: And if the crane was never operating on one side, it means the counterweights would never be on the other side, right?

CSHO: Well, I think -- I think there wouldn't be a readily apparent reason why that would be true.

(Tr. 117-18)

The CSHO posited one situation that he thought might explain the counterweights being on the left side of the yellow crane.

CSHO: I could envision a scenario, though, where they might want to move, they might want to rotate the crane in order to get the counterweights on the other side. So, for example, if that area was relatively small, that flat compacted area, they might want to move the counterweight out of the way so that a vehicle could pass more easily.

Q Right; do you know if that ever happens, did you ever see that happened on February 27, 2020?

CSHO: I don't recall for sure.

(Tr. 118)

The Court does not find the CSHO's testimony persuasive on this point. He stated he does not recall if he observed an occurrence of this situation, and there is no evidence in the record that such an event happened. Furthermore, if NACR were required to move the counterweights so vehicles could pass unimpeded on the right side of the yellow crane, there would be no need to swing the crane 180° so that the counterweights were positioned directly above the front outrigger on the left side. The crane operator could rotate the superstructure a quarter turn so that the counterweights were positioned to either the front or the back of the crane vehicle, where the swing radius does not extend past the body of the vehicle.

The Secretary has established the chain NACR suspended between the outriggers on the left side of the yellow crane was inadequate to mark the boundary of the swing radius on that side. He has failed, however, to meet the requirement set out in § 1926.1424(a)(1) to show the rotating superstructure of the yellow crane posed a reasonably foreseeable risk of striking or pinching/crushing an employee in an accessible area on the left side. NACR planned the

disassembly of the red crane so that all of the hoisting, swinging, and landing would be performed on the left side of the yellow crane. All witnesses who testified about this issue, including the CSHO, agreed NACR's work assignment that day required the counterweights to remain on the right side of the crane, where they posed no struck-by or pinching/crushing hazards to employees on the left side of the crane.

NACR planned the disassembly of the red crane so that the left side of the yellow crane would not be a zone of danger. Based on the work plan, it was not reasonably foreseeable (or predictable) that an OSHA CSHO would instruct the operator of the yellow crane to swing the counterweights to the left side of the crane so he could document that the counterweights extended past the boundary marker on that side.

In determining employee access to the hazard, "the 'inquiry is not simply into whether exposure is theoretically possible,' but whether it is reasonably predictable 'either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *Id.* at 1818-19. "The zone of danger is 'that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.'" *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008) (citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

*Gate Precast Co.*, No. 15-1347, 2020 WL 2141954, at \*2 (OSHRC April 28, 2020).

Here, the only time the left side of the yellow crane became a zone of danger was when Murphy rotated the counterweights to that side after the CSHO instructed him to do so. Murphy testified he exited the crane after he had repositioned the counterweights. There is no evidence NACR employees were in the zone of danger during this time. They had no operational necessity for approaching the zone of danger since work was halted while the CSHO photographed the counterweights on the left side of the crane. The superstructure of the yellow crane could not rotate because Murphy had exited the cab of the crane. The video and photographs cited by the Secretary as showing employee exposure to the zone of danger (Exhs. J-23, J-24, J-25) were taken when the counterweights were on the right side of the yellow crane, as established by the boom of the yellow crane visible on the left side.

The Court determines the Secretary did not prove NACR violated § 1926.1424(a)(2) with regard to the left side of the yellow crane. The counterweights of the crane, which represented the swing radius hazard, remained on the right side while NACR employees worked on the left side.

### Instance A: Right Side of the Yellow Crane

On February 27, 2020, NACR crane operator Murphy rotated the yellow crane's counterweights on the right side of the crane to perform most of the hoisting and landing of the red crane's boom sections on the left side. It is undisputed that when the counterweights rotated on the right side of the yellow crane, they extended beyond the rope that NACR suspended between the outriggers on that side.

NACR asserts the affirmative defenses of greater hazard and infeasibility. In its brief, however, it appears NACR intends those defenses to relate only to the red crane and the left side of the yellow crane, but not to the right side of the yellow crane. For example, NACR argues,

Extending the caution tape outwards from the outriggers, farther away from the Assist crane superstructure, thereby creating a wider perimeter around the center of the Assist crane, would have placed the caution tape . . . in close proximity if not directly in the path of the multiple sections of lattice boom from the red Barnhart crane and the tractor-trailers. Since multiple sections of the lattice boom were moved into position, one-by-one, the caution tape (or any other barrier used) extending outwards from the outriggers would need to have been taken down and then put right back up again (for every single section of Barnhart crane boom).

Any process of repeatedly taking down and putting back up the caution tape in the area of the yellow Assist crane would have caused employees to position themselves in the swing radius hazard area many more times than they otherwise could have and/or would have been. This would have increased any potential hazard, not decreased the hazard. Notably, there was a sign hanging from a chain hanging between the outriggers of the assist crane warning workers about the swing radius hazard. This sign, along with the workers' training, including situational awareness in performing such disassembly operations, provided sufficient protection from swing radius hazards and was a safer measure than extending any caution tape from the yellow Assist crane's outriggers.

(NACR's Brief, p. 23-24)

In any event, NACR failed to meet the requirements of either defense.<sup>4</sup>

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<sup>4</sup>To establish a defense of greater hazard, an employer must prove that:

(1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting employees from the hazards are not available, and (3) a variance is not available or application for a variance is inappropriate. *See Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1022–23, 1991 CCH OSHD ¶ 29,313, pp. 39,356–39,357 (No. 86–521, 1991). These three elements are now well-established in court precedent. *Id.* at n. 3 (listing cases). An employer's proof of the unavailability or inappropriateness of a variance is particularly important. *E.g., PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 895 (1st Cir.1981).

*Seibel Mod. Mfg. & Welding Corp.*, No. 88-821, 1991 WL 166592, at \*8 (OSHRC Aug. 9, 1991).



The Court finds that with regard to the right side of the yellow crane, the Secretary has established NACR failed to comply with the terms of the cited standard by failing to mark the boundaries of the swing radius of the counterweights.

### ***(3) Employee Access to the Hazard***

Section 1926.1424(a)(1) provides that the cited standard, § 1916.1424(a)(2)(ii), applies only “where there are accessible areas in which the equipment’s rotating superstructure . . . poses a reasonably foreseeable risk of” striking or pinching/crushing employees. This requirement touches on all elements of the Secretary’s burden of proof: applicability, compliance, employee access, and employer knowledge. The Court will address it here because, at this point in the decision, the right side of the yellow crane is the only area still at issue as potentially presenting a swing radius hazard.

The Secretary must establish the swing radius of the crane’s rotating superstructure (in this case, the attached counterweights) created a zone of danger to which employees had access. The zone of danger “is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.” *RGM Constr. Co.*, No. 91-2107, 1995 WL 242609, at \*5 (OSHRC Apr. 24, 1995). Employee access to the danger is established by showing that “during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces,

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Here, NACR’s defense fails because it did not file a variance or adduce any evidence that application for a variance is inappropriate (“Respondent did not request a variance from the requirements of 29 C.F.R. § 1926.1424(a)(2)(ii) before beginning work at the Job Site on 02/27/2020.” (*Joint Prehearing Statement*, p. 3, ¶ 4)). NACR makes no mention in its brief of the “particularly important” third element of unavailability or inappropriateness of a variance.

As noted, proof of infeasibility requires the employer to establish that:

- (1) [T]he means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection.

*Altor, Inc.*, 2011 WL 33135, at \*13.

In addition, § 1926.1424(a)(2)(ii) requires an employer asserting the infeasibility defense to clearly mark the hazard areas “by a combination of warning signs (such as “Danger—Swing/Crush Zone”) and high visibility markings on the equipment that identify the hazard areas.”

NACR did not post a warning sign on the right side of the yellow crane and there is no evidence it placed high visibility markings on the equipment that identified the swing radius of the counterweights. Its infeasibility defense also fails.

employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger.” *Id.*

The Secretary has adduced no evidence that it was reasonably predictable or reasonably foreseeable that NACR’s employees would be in the zone of danger due to assigned work duties, personal comfort activities, or normal ingress-egress to and from their assigned workplaces. Most of the instances the Secretary cites for employees allegedly being in the zone of danger of the yellow crane relate to the left side of the crane. The Court determined in the previous section that it was not reasonably foreseeable that the CSHO would instruct the crane operator to position the counterweights on the left side of the crane.

Regarding the right side of the yellow crane, the Secretary asserts the CSHO “observed employees standing in the zone of danger on the opposite side of the crane, where the counterweights were located while the yellow Assist Crane hoisted the lattice boom pieces onto trailers.” (Secretary’s Brief, p. 15) The Secretary cites the following transcript pages and exhibits in support of that statement:

Q.: Could you just describe for us, this area of the job site that's depicted in Exhibit J-16?

CSHO: [I]t's the far side of the crane and it's looking at the two outriggers extending from the chassis, so again, it's the opposite side from the building.

Q.: And did you see any employees in this area while you were on the job site?

CSHO: Yes.

(Tr. 67)

Exhibit J-16 is a photograph of the right side of the crane. No employees or other people appear in the photograph.

Q.: And did you observe any employees standing or walking on the counterweight side of the yellow assist crane?

CSHO: Yes.

...

Q.: What is the closest distance that you observed a North American Crane employee get to the yellow assist crane while you were on the site?

CSHO: Pretty close.

(Tr. 69)

Exhibit J-28 is the photograph that the Secretary refers to in his brief as evidence employees were in the zone of danger on the left side of the yellow crane. The CSHO took the photograph far enough from the yellow crane to encompass a large area of the construction site, including part of the wall to the left, the flatbed truck on which Murphy was landing the red boom sections, both the red and yellow cranes, and another flatbed truck parked behind the yellow crane. Somewhere between the back of the yellow crane and the front of the flatbed truck are two employees. The flatbed truck obstructs the view of most of the employees' bodies. Only the white hard hat of the employee on the right is visible. It is possible to see the left shoulder area and the hard hat of the employee on the left.<sup>5</sup>

It is impossible to determine whether the two employees were in the zone of danger of the crane's counterweights from Exhibit J-28. The photograph is blurry, the employees are mostly obscured from view, and the angle from which the photograph was taken is not conducive to estimating distances. The Court finds that Exhibit J-28 and the vague testimony of the CSHO that he observed employees on the right side of the crane and they were "pretty close" to the crane lack probative value. The CSHO neither measured the distance from the swing radius of the yellow crane to the location where the employees were standing nor offered an estimate of the distance.

NACR has already established its employees had no assigned work duties on the right side of the yellow crane—the disassembly was designed so that all assigned work was performed on the left side of the crane. There was no testimony or evidence indicating NACR's employees used the right side of the crane to travel for personal comfort activities or to walk to and from their assigned workplaces. It is undisputed the right side of the yellow crane was used as a narrow single traffic lane, and it was bounded on its right by a berm and fence. Looking at Exhibit J-16, Izzo described the area.

[I]mmediately to the right of the outriggers you see that active roadway we've been talking about where the trucks just constantly [go] back and forth, back and forth. And then, further to the right, you see the dirt berm, you know, that slope, which is not accessible or usable in any way.

(Tr. 301-02)

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<sup>5</sup> The hard hat of a third employee is visible at the right edge of the photograph, several feet behind the other two employees. The Court examined the Exhibit J-28 with the aid of magnification.

The Secretary has failed to establish NACR's employees had actual access to the zone of danger on the yellow crane's right side or that access was reasonably predictable or foreseeable based on the employees' assigned work activities, personal comfort activities, or ingress/egress routes. The Court finds the Secretary has not proved the element of employee access with regard to the right side of the yellow crane.

Item 1 of the Citation is vacated.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

#### **ORDER**

Based on the foregoing decision, it is hereby **ORDERED**:

Item 1, alleging a serious violation of § 1926.1424(a)(2)(ii), is **VACATED**, and no penalty is assessed.

**SO ORDERED.**

**Dated: August 6, 2021**  
Atlanta, GA

/s/  
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Sharon D. Calhoun  
Administrative Law Judge, OSHRC