
Secretary of Labor,
Complainant,

v.

Eagle Food Centers, Inc.,
Respondent.

OSHRC Docket No. **98-0543**

Appearances:

Helen Schuitmaker, Esq.
U. S. Department of Labor
Office of the Solicitor
Chicago, Illinois
For Complainant

Brent I. Clark, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
Chicago, Illinois
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Eagle Food Centers Inc. (Eagle), a food distribution company, contests a serious citation issued to it on March 6, 1998. The citation followed a fatal accident at its distribution warehouse on January 29, 1998. Occupational Safety and Health Administration (OSHA) Compliance Officer Dennis Springhart conducted the investigation from January 29 through February 26, 1998.

The citation states that Eagle violated § 1910.178(n)(4) when "operators of powered industrial trucks were not required to slow down and sound the horn when approaching the east doorway to the freezer department." This was required, the Secretary asserts, because the east doorway was a location where "vision was obstructed." Eagle denies the existence of anything which constitutes an obstruction of the operator's vision at the east doorway. In addition, Eagle asserts the affirmative defense of unpreventable employee misconduct.

A hearing was held in this matter in Rock Island, Illinois. The parties have submitted post-hearing briefs. For the reasons set out below, Eagle's position is correct that the vision at the east doorway was not obstructed within the meaning of the standard.

Background

Eagle maintains a large food distribution warehouse in Milan, Illinois. The facility has both a perishable food section and a "grocery" nonperishable section. The perishable section contains four departments: the dairy, meat, produce, and freezer departments (Tr. 705). The freezer department is a large refrigerated room used to prevent food spoilage. The layout of the department contains storage racks, aisles, and cross aisles. The freezer department is adjacent on the east side to the dock, which is also a large room with truck bays at one end. The dock area is not refrigerated (Exh. C-8; Tr. 620).

Approximately two years before OSHA's investigation, Eagle installed a vertical panel plastic door between the refrigerated freezer department and the dock (the east freezer door), as well as at other locations in the facility. The plastic material was relatively clear, and employees could see through it. The east door opening was 8 feet wide and 9 feet long. A red heatlight was installed at the top of the door to help prevent the formation of floor ice on the freezer side of the doorway (Tr. 301-302). The heatlight cast a slight shade of red at the top of the door (Exh. R-65, p. 10-13, 15; Tr. 484). Eagle did not clean the plastic panels for the two years. By that time, employees described the panels as "cloudy" and "pretty dirty" (Tr. 41, 108).

The plastic door was constructed of four panels which split between the middle two. Pedestrians regularly passed through the plastic door by separating the two middle panels by hand and walking through the gap. However, the plastic door operated automatically with the panels moving to the side and folding like bifold doors whenever one of Eagle's powered trucks depressed a magnetic trip mechanism embedded in the concrete floor. For the east freezer door, the mechanism tripped 15 feet from the door to the freezer and 8 feet from the door into the dock. The door automatically closed after a lapse of 5 to 6 seconds (Tr. 303, 475, 510). When closed, the two middle plastic panels overlapped each other for 16 inches at the center of the door (Exh. R-66).¹ The overlap provided a loose seal between the two centermost plastic panels. The overlap further clouded visibility since employees looked through two plastic strips rather than one (Exhs. C-9, R-40).

¹ Since the Secretary did not report an objection to inclusion of the sketch into the record post hearing, and since the measurements appear to be correct, the sketch with measurements appended to the deposition of Steven James Biddle (Exh. R-65) is accepted into evidence as respondent's exhibit, R-66.

Operators of motorized vehicles passed through the door 50 to 100 times per shift, approaching from either side of the door (Tr. 73, 540). Only one motorized vehicle passed through the door at a time. As Eagle's long-term employee, Steven Lingafelter explained the process (Tr. 537-538):

Alls I can say is it's just like a one-lane bridge going down a road. If somebody is on that bridge before you, you wait your turn to cross it There's an electronic device on the floor that the machine -- when the machine runs over it, it opens up real quick. I mean, it pops wide open. And, then, as you go through the door, it shuts. . . . And it shuts a lot slower than it opens.

Pedestrians were expected to step out of the way when motorized vehicles approached (Tr 622).

Among other types of powered equipment, Eagle utilized a motorized "pallet jack" to take goods from the stacks to the trucks at the loading docks and an older vehicle, a "highlift," to stock the storage stacks (Tr. 475, 503). While operators of both types of vehicle stood to operate the machines, the pallet jack operator was particularly exposed standing at the front on the machine's apron-like platform.

During the night shift of January 29, 1998, highlift operator Rick Jones approached the east plastic doorway from the dock at the same time that pallet jack operator James Ackerson arrived at the doorway from the freezer side. Both were experienced truck operators. When Jones tripped the east door, the operators were 4 to 5 feet apart and saw each other at the same moment. Within seconds, Jones turned the highlift hard to the right, and Ackerson jumped off his pallet jack and ran to his left. Tragically, the highlift hit Mr. Ackerson and pinned him against the pole located 2 feet inside of the freezer department (Tr. 40, 95, 301). He was transported to the hospital but died shortly afterwards as a result of his injuries.

Argument

The Secretary asserts that Eagle failed to require its highlift and pallet jack drivers to slow down and sound a horn at the freezer department's automatic east doorway in violation of §1910.178(n)(4). The standard requires:

Traveling. (4) The driver shall be required to slow down and sound the horn at cross aisles and other locations *where vision is obstructed*. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing. (Emphasis added)

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) employees access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation.

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994).

The parties primarily dispute whether the Secretary established the first element of her burden of proof, application of the standard.² The standard applies to Eagle's operation of powered industrial trucks *if* the east plastic doorway was a "location *where vision is obstructed*." The threshold issue is the definition of "is obstructed." The standard does not define the term.

The Secretary's Position

In her brief, the Secretary clarified her position to assert that the only part of the plastic door she considered to "obstruct vision" on January 29 - 30 was the 16-inch overlap along the center of the closed door. Further, the Secretary does not contend that the panel overlap always obstructed vision, but only that it did so when the panels were as dirty as they were on those dates. The Secretary defines the word "obstruct" as (Webster's Dictionary, ed. 1953): "to come in the way of, to impede, retard, as clouds obstruct light; to cut off the sight of an object" (Tr. 439). The Secretary asserts that at the time of the accident the plastic door effectively "cut off the sight of" oncoming vehicles due to its dirty and cloudy condition.

Eagle's Position

Relying on *Georgia Pacific v. Occupational Safety and Health Review Com'n.*, 25 F.3d 999 (11th Cir. 1994), Eagle argues that the word "obstructed" has been found to be unconstitutionally vague in the cited standard and that, in any event, the Secretary's definition of "obstructed" in this case is as defective as the one the Eleventh Circuit disapproved of in *Georgia Pacific*. Alternatively, Eagle contends that the whole vehicle could be seen as soon as the doors

² Although Eagle contends that the Secretary failed to meet any of the four elements of her burden of proof, there can be little dispute as to the existence of the other three elements. Eagle's industrial truck operators did not regularly sound a horn at the east doorway, nor did operators "slow down" to the extent required by the standard, facts of which Eagle was well aware (Tr. 42, 89, 154, 529).

popped open and that some part of the vehicle, or presumably a pedestrian, was always visible to vehicle operators even while the doors were closed.

Analysis

Not void for vagueness

First to be considered is Eagle's argument that the standard is unconstitutionally vague. *Georgia Pacific* interpreted "obstructs" in the second sentence of § 1910.178(n)(4) in the context of trailing a load. In that case, Administrative Law Judge James Burroughs rejected Georgia Pacific's argument that the standard was impermissibly vague, since he considered the purpose of the standard to apply to protect the upright pedestrian from being hit by a forklift. He concluded that the forward view was not obstructed "if the [forklift] operator will at all times have a clear view of some part of an employee in an upright position," and finding that the operator did, he vacated the citation. 1991 OSAHRC Lexis 201, p. 19 (89-2806, 1991). Judge Burroughs stated his concern that if the Secretary interpreted "obstructs" to protect crouching pedestrians, forklifts would always be operated with loads trailing.

The Review Commission reversed. It recognized that "obstructs" should be interpreted within the context of the specific facts, such as "the size of the load, the speed at which the forklift is traveling, the number and positions of employees working in or near the aisles of the press area." *Georgia Pacific*, 16 BNA OSHC 1171, 1175 (1993). It defined "obstructs" in the second sentence of .178(n)(4) as follows (*Id.*):

"[O]bstructs" means that the load being carried forward blocks the operator's view such that it is reasonably foreseeable that the forklift operator could not see and could therefore hit employees working in the area, thus endangering employees that the standard seeks to protect.

The Commission concluded that it was reasonably foreseeable that Georgia Pacific's employees would crouch as well as stand in the way of forklift traffic and that the standard should be interpreted accordingly. It further concluded that the ALJ impermissibly challenged the wisdom of the standard when he gave weight to testimony of the relative dangers of trailing the load. It affirmed the violation.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the Commission and vacated the citation. The court determined that it was unreasonable to expect

an employer to anticipate the Secretary's varying interpretations of the word "obstructs" and, thus, that the standard was void for vagueness. Underlying the court's decision was its concern that the Secretary ignored the potential dangers inherent when forklifts always trail their loads. The court did not conclude that the standard would be unenforceably vague in all circumstances, but only those of the case.

A broad term is interpreted "in the light of the conduct to which it is being applied; and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *J.A. Jones*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993). While *Georgia Pacific* interpreted the second sentence of the standard, this case concerns the first sentence. In dictum, the Commission in *Georgia Pacific* defined "obstructs" in the first sentence as "*external* to the forklift and its load, such as columns, which would obstruct the operator's view. . ." 16 BNA OSHC 1177. Although the degree of transparency was disputed, the overlapped panel may be analogized to a semi-transparent column running down the middle of the door for 16 inches.

An employer might reasonably anticipate that the "see through" panels in a dusty warehouse would become opaque over time, unless they were cleaned, especially where the panels overlapped. Vision need not be completely blocked before it may be defined as "obstructed." The definition of the word is not strained by including conditions which impair vision sufficiently to affect safety. Based on the language and purpose of the standard and the physical conditions of the warehouse, over time grime and dust could be expected to block or to significantly impair an operator's vision through the door. Nor do the facts here result in the unanticipated consequences the Eleventh Circuit disapproved of in *Georgia Pacific*. As applied to the east plastic door, Eagle had fair notice of what the standard required of it. The standard is not impermissibly vague.

Quick Opening Door Can Present An Obstruction

Eagle next argues that automated doors cannot constitute an obstruction since operators unquestionably have a clear vision at the point the doors open and before they proceed through it. If the door actually constituted an obstruction, removing it only 8 to 15 feet before operators

drove through it would not resolve the problem. When asked how far Mr. Ackerson's vehicle was from his as the doors opened, Jones replied (Tr. 42):

I would say we were both within a couple of feet of it; three feet, maybe. Two to four feet, I guess, probably. I don't know, something of that nature. We were both moving at the time, so the distance was being covered gradually at that point because there is not but 6 feet or so, maybe eight, when you trip the mechanism, and we both literally met at the doorway. When the doors opened, it seemed to me that we were right at each other at that point.

Implicit in the standard is a recognition that operators must have a reasonable time within which to react to the sight of another vehicle or a pedestrian. If an operator cannot safely stop, it would do little good to be able to see the collision. Contrary to Eagle's argument, quick opening doors can "obstruct vision" within the meaning of the cited standard.

Condition of Plastic Door Did Not Obstruct Vision Within Meaning of the Standard

The remaining question is whether the physical condition of the overlapped panels actually obstructed vision on January 29-30, 1998. The term "obstructed" is examined in the factual circumstances of the cited area. The warehouse area was brightly lit. The highlift and pallet jack were large pieces of equipment, even when seen from a distance. They filled up half of the space of the doorway (Tr. 339). When approaching the east door from the freezer, operators proceeded down a long, straight aisle where the nearest cross-aisle was 40 feet from the door. From either side of the door, it "was a straight shot in" (Tr. 159). The physical layout afforded ample space to observe oncoming traffic.

The warehouse operation was fairly fast-paced, with vehicles and pedestrians continually passing through the doors to stock shelves, to pull orders, and to transport foodstuffs.³ At such a workplace, there would be no time to study the east door to see whether an image was present. Visibility must be sufficiently clear to permit operators quickly and easily to identify that a vehicle or a pedestrian was present on the other side of the door, even if the finer details of the images could not be recognized.

³ The Secretary suggested that a so-called "100% production memorandum" sped the employees' work in the freezer department. At the time of the inspection, however, Eagle had not implemented the policy or increased production requirements in that department (Tr. 188,227, 751).

As stated, employees described the door panels as dirty and cloudy (Tr. 41).⁴ They also described them as "foggy and discolored" (Tr. 162). "The doors were never in the condition that you couldn't see through them [but] you couldn't discern like facial features" (Tr. 217). Although the operators could "see images coming" (Tr. 137), the panels caused objects to appear somewhat "shadowy" (Tr. 224).

As employee Larry Fuller described looking through the east door at the time (Tr. 198):

You would know something is there. It would be clouded. I assumed it was a vehicle, a pallet jack. As I came up to the doors, you wouldn't actually know exactly what it was until the doors opened.

Witnesses' testimony and Springhart's videotape of the inspection were insufficient to establish that the overlapped portion of the panels was so cloudy that it impeded the operator's line of sight. The operators reported that they could see images of vehicles through the door. The testimony did not distinguish how the overlapped portion of the door may have affected their vision. Further, a careful review of Springhart's videotape revealed that pedestrians could be seen for some distance through the plastic door. (Unfortunately, Springhart did not videotape vehicles which had crossed the door.) Videotaping from the dock through the closed east door, a pedestrian could be clearly distinguished walking down an aisleway estimated to be 70 to 80 feet into the freezer department (Exh. C-9; Tr. 645-646). Also shown were individuals walking in the freezer area some 35 feet, and later 120 feet, through the east freezer door (Exh. C-9; Tr. 647). Likewise, pedestrians could be seen as one looked through the closed doors from the freezer to the dock. An operator's line of sight, even through the 16 inches of overlapped panel, was sufficiently clear to negate the contention that the east door "obstructed vision." Accordingly, the Secretary failed to establish that the standard applied to the east doorway. The citation is vacated.

⁴ How dirty the plastic door had become was evident after the accident when Eagle cleaned the panels of the east door. The improvement in visibility was dramatic, and the doors were then crystal clear. As Jones described the "very visible difference," "it was more like looking through a window than trying to see through the cloudiness of the doors" (Tr. 48, 224). However, the Secretary must show more than the fact that the operators' sight was needlessly diminished because Eagle failed to clean the door. She must establish that sight was obstructed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

It is, therefore, ORDERED that the alleged violation of § 1910.178(n)(4) is vacated.

NANCY J. SPIES
Judge

Date: January 28, 2000