

SECRETARY OF LABOR,

Complainant,

v.

ROYAL GORGE PUBLISHING

d/b/a DAILY RECORD,

Respondent.

OSHRC Docket No. 97-0748

APPEARANCES:

For the Complainant:

Elizabeth C. Lawrence, Esq., Office of the Solicitor, U.S. Department of Labor,
Kansas City, Missouri.

For the Respondent:

John L. Reiter, Mountain States Employers Council, Inc., Denver, Colorado.

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action under Section 10(c) of the Occupational Safety and Health Act of 1970 brought by the Secretary of Labor against Royal Gorge Publishing, d/b/a Daily Record to affirm one item of a serious citation, alleging that the company violated a regulation promulgated under the Act relating to a forklift truck. The matter arose after a compliance officer for the Occupational Safety and Health Administration inspected a worksite of the Respondent, concluded that it was in violation of the regulation and recommended that the citation be issued. The Respondent disagreed with the Agency's determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Denver, Colorado.

The citation describes the alleged infraction in the following terms:

Citation 1 Item 2 Type of Violation: SERIOUS

Powered industrial truck(s) with defect(s) or in any way unsafe had not been withdrawn from service until restored to safe operating condition(s):

a) At 701 S. 9th, Canon City, CO. (Royal Gorge Publishing): Employees did use forklifts which had obvious defects to move pallets of inserts.

in violation of the standard found at 29 C.F.R. §1910.178(p)(1) which provides:

(p) *Operation of the truck.* (1) If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

At the hearing the compliance officer testified that he examined one of Respondent's forklift trucks. As a result of his investigation he found the brakes to be in proper operating order. However, he noted that insulation on the electrical and hydraulic cables was damaged; that the insulation on the electrical cable connecting the motor to the battery was cut and copper wire was exposed; that black electrical tape was applied to nicks and cuts; that there were cuts in the outer lining of hydraulic lines; and that he believed there was a risk of explosion if gases accumulated in the battery.

Upon more detailed examination the officer agreed that his report made no mention of explosions or danger of shock hazards. He also found no lack of integrity to underlying hydraulic lines.

The Respondent's production superintendent testified that the first person using the forklift truck daily checked to make sure the vehicle was in proper working order. Another employee did weekly maintenance. In addition, the company has a contract with De Loss Industries, a forklift maintenance organization, which serviced the machine periodically and whenever needed. Indeed, the vehicle was serviced a few days before the inspection. Although the compliance officer noted gouges in the outer covering of hydraulic lines, the particular hoses were used only for optional accessory attachments. Other hoses actually provided hydraulic power, and therefore there was no hazard in that connection. Further, there was no problem with wire cables bringing current to the battery, and no leaks were observed.

Mr. John Harmon, the owner of the forklift maintenance company, testified that he has been in this field for about 35 years. He confirmed that his company serviced the forklift truck a few days before the inspection. The hoses were tested, and no ruptures were found. Their outer casting was made of hard plastic which protected the inner linings of the cables. Other hoses were also in good condition. The smaller set of wires carried approximately 24 volts in contrast to the 120 volts in the ordinary household. Wires which connected the controls contained no breaks. Battery gases could cause trouble if not filled with water, but the battery in the forklift truck was filled; as a result there were no gases formed and therefore arcing or sparking of cables was practically non-existent. Indeed, in all his experience he never heard of a battery exploding because wires touched or caused a spark. There was no structural damage to linings which protected the hydraulic hose. Some cuts were covered with tape, but they were insufficient to take the vehicle out of service.

The current matter parallels two other cases involving the same regulation. In Secretary of Labor v Airco, Inc., Carbon Division, OSHRC Docket No. 79-7185, 9 OSHC 1202, the Commission let stand an Administrative Law Judge's decision vacating a citation because there was no evidence that worn king pins rendered the forklift truck unsafe to operate. The employer's expert witness offered unrefuted testimony contrary to the compliance officer's testimony, but the latter had no expertise in maintenance and operation of powered industrial trucks.

Also in Secretary of Labor v Barwick Furniture, Ltd., OSHRC Docket No. 10440, 3 OSHC 1428, the Commission did not disturb an Administrative Law Judge's ruling vacating a citation, holding that failure to remove from service a forklift truck leaking hydraulic fluid did not constitute a violation of 29 C.F.R. §1910.178(p)(1) unless evidence established that a hydraulic leak rendered a forklift truck in need of repair, was defective or unsafe.

There thus appears to be a disagreement between the compliance officer and the owner of the company which serviced the forklift truck concerning their interpretation of findings concerning the vehicle's operating condition. In view of this variance, I am placing more reliance upon the views of the latter because he was engaged for 35 years in the specialty business while the compliance officer had only occasional opportunity to examine forklift trucks. Also, in the officer's initial reports there was no mention of a possible dangerous situation with respect to the machine. According to Mr. Harmon there was nothing to do in order to bring the forklift truck to a serviceable condition.

While there were nicks and cuts in some of the hoses and wiring, there appears nothing needed to be done to operate the vehicle safely. Accordingly the Respondent did not violate the regulation at 29 C.F.R. §1910.178(p)(1), and the citation is therefore VACATED.

Sidney J. Goldstein
Judge, OSHRC

Dated: