UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SEA-JET TRUCKING CORP., Respondent, and UNITED AUTOMOBILE WORKERS, Authorized Employee Representative.	DOCKET NO. 96-0624

Appearances: For Complainant: Nancee Adams-Taylor, Esq. and Jane S. Brunner, Esq.,Office of the Solicitor, U. S. Department of Labor, New York, NY.; For Respondent: Michael Caffrey, Esq. And James Richter, Whitman, Breed, Abbott & Morgan, Newark, NJ.; and Peter Dooley, CIH, CSP, Authorized Employee Representative for the International Union, United Automobile Workers, Detroit, MI.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Sea-Jet Trucking, Corp., at all times relevant to this action maintained at a worksite at the 8 Franklin Street, Bloomfield, New Jersey, where it was engaged in the business of trucking. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

The record discloses that the subject worksite is an import-export warehouse which stores and ships items such as appliances and clothes. The record also discloses that a majority of the workforce at this worksite are non-English speaking people of Spanish origin. As the result of a referral received from the health department in October 1994, OSHA Senior Industrial Hygienist, Paula Dixon-Roderick ("IH") conducted an inspection of the worksite from November 30, 1994 through January 20, 1995. As the result of her inspection, on January 23, 1995, Respondent was issued two citations for twelve serious and five nonserious violations (Tr.16; Exh. C-2)[1]. These citations and their proposed penalties were contested by Respondent. However, in a Stipulation of Settlement signed March 13, 1995- OSHRC Docket No. 0468 - Respondent withdrew its notice of contest with respect to these citations. This Stipulation was filed with the Review Commission and

[1] The term "Tr" refers to the transcript of the hearing and "Exh" refers to Exhibits introduced into evidence at the hearing..

approved on April 4, 1995. The stipulated settlement became a final order by operation of law on May 8, 1995 (Exh. C-1). The terms of the stipulation provided, inter alia, that all violations would be abated by April 1, 1995 (Exh. C-2). The record disclosed that as of October 1995 OSHA had not received from Respondent an abatement letter, which verified the abatement of all violations per the stipulation. Accordingly, IH Dixon-Roderick was assigned to conduct a follow-up inspection (Tr. 18). She conducted her inspection from October 11, 1995 to April 1, 1996.

On October 11, 1995, IH Dixon-Roderick arrived at the subject worksite. She asked to speak to Eliseo Espindola (hereinafter "Mexico"), a supervisor whom she had met during her initial 1994 inspection. She explained to him that the purpose of her visit was to conduct a walk-around inspection for the purpose of verifying abatement (Tr. 36). At that time, there was only a skeleton crew present because of the Jewish Holiday, thus, she returned on October 13, and held a second opening conference with Mexico. Also present was the comptroller, Harold Pretter, who accompanied her during the walkaround (Tr. 25).[2] During this meeting Mr. Pretter presented her with an abatement letter dated September 10, 1995 (Tr. 37-38; Exh. C-6). Mr. Pretter explained that he had not forwarded the letter to OSHA because he had a few questions about its contents and had intended to call OSHA before forwarding it (Tr. 92). During the course of her reinspection, IH Dixon-Roderick took employee interviews on October 18, 1995 and December 8, 1995 (Exhs. C-5 & C-9).

As a result of this re-inspection, pursuant to Section 10(b) of the Act[3], on April 1, 1996, Respondent was issued a notification of failure to abate alleged violations and proposed additional penalties in the amount of $101,200.00.[4] By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on June 3 - 5, 1997. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

SECRETARY'S BURDEN OF PROOF

> Where . . there is no contest of the original citation and there is a re-inspection subsequent to the scheduled abatement date, Secretary's prima facie case of failure to abate is made upon showing that: (1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which respondent was originally cited . . . This prima facie case may

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[2] Mr. Pretter testified that he oversaw the entire operation, and different departments reported to him including warehousing. He was also involved in the health and safety aspects of the warehouse facility (Tr. 191).

[3] Section 10(b) of the Act, 29 U.S.C. 659(b), authorizes the issuance of FTA notices whenever "the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction".

[4] Respondent was also issued a serious citation and proposed penalty for violations of three safety and health standards. This citation was the subject of a stipulation of settlement reached June 3, 1997. The Stipulation of Settlement has been approved by the undersigned in an order signed September 16, 1997.

> be rebutted by a showing of actual abatement of the hazardous condition by prevention of employee exposure or correction of the physical condition. It may also be rebutted by showing that the condition for which respondent was originally cited was in fact non-violative of the Act where the original citation has become a final order of the Commission by operation of law. Other defenses may be available.

York Metal Finishing Co., 1 BNA OSHC 1655 (No. 245, 1974), *pet. for review dismi*ssed, No. 74-1554 (3d. Cir. 1974). See also *Advance Bronze Inc. V. Sec. Of Labor*, 917 F.2d 944 (6th Cir. 1990), 14 BNA OSHC 1857[employer's challenge to failure to abate notice must fail where it cannot show (1) the original violation was cited in error or; (2) the original violation was subsequently corrected].

The record unequivocally establishes that the original citation, the subject of OSHRC Docket No. 95-468 became a final order of the Review Commission as of May 8, 1995 (Exh. C-1 and C-2). Thus, that portion of the Secretary's prima facie case has been established.

IH DIXON-RODERICK'S PREPARED STATEMENTS OF EMPLOYEE INTERVIEWS

During IH Dixon-Roderick's 1994 inspection, she experienced some difficulty with interviewing employees because she was not fluent in Spanish. Thus on her reinspection, she was accompanied by IH Ivelisse Sanchez who was fluent in Spanish and acted as an interpreter during the interviews of employees (Tr. 94, 174)[5]. IH Dixon-Roderick's testimony reflects that she had prepared a script of very specific questions which IH Sanchez asked employee during the interviews (Tr. 138,94). IH Sanchez recorded notes of the employee responses (Tr. 138-141). She testified that these notes were not verbatim responses - she recorded the responses to the prepared questions but did not include additional information (Tr. 141-143). IH Dixon-Roderick testified she used IH Sanchez's notes in preparing her notes for the file (Tr. 94-95, 138-139, 141; Exh. C-5 and C-9). IH Dixon-Roderick testified that interviews were conducted on October 18 and December 8, 1995. She testified that she conducted interviews on two dates to "correct any doubts in her mind" about the accuracy of her findings, and she repeated many of the same questions during her second interview (Tr. 125). The questions concerned fire extinguisher training, carbon monoxide training, and material data sheet training (Tr. 391). When questioned about her development of her typewritten notes, she testified that if the responses during the second interview were consistent with the first interview she left interview she left the answer alone; however, if they differed she made such changes to the statements (Tr. 391).

The undersigned finds that IH Dixon-Roderick's approach to recording employee statements as one which ensured the most accurate recordation of her interviews with non-English speaking employees. The undersigned's review of the record indicates that the questions were simple and straightforward, and not intended to mislead the employees. Respondent has suggested that IH Dixon-Roderick's testimony with regard to a review of her notes was less than credible. (See Respondent's Brief p. 15, n. 10) The undersigned's review of the testimony of IH Dixon-Roderick and IH Sanchez indicates that IH Dixon-Roderick did all of the editing of the notes and that IH Sanchez only briefly reviewed the typed notes. Having observed their demeanor at trial, the

[5] IH Sanchez testified that she has acted as a translator in her capacity as an compliance officer on more than 30 occasions during the course of her inspections and approximately 20 times with respect to other cases in her office (Tr. 136-137). The undersigned finds that such experience qualified her for the task of translating in the instant manner.

undersigned finds no reason to find that their testimony was not credible. Additionally, the fact that the typed notes were not verbatim translations does not negate this finding. The testimony presented by IH Sanchez, as well as the testimony of Respondent's witnesses - in several instances, corroborated IH Dixon-Roderick's typewritten notes.

The undersigned also finds that these prepared statements are admissible pursuant to FRE 801(d)(2)(D), and that the interpreter's translation of these employee statement was valid. *See DCS Sanitation Management Inc. v. OSHRC,* 82 F.3d 812 (8th Cir., 1996)[17 BNA OSHC 1601] and cases cited therein.

DISCUSSION

Citation 1 Item 3e: Alleged Violation of 29 C.F.R. §1910.157(g)(1)

The standard provides:

> (g) Training and education. (1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

The Secretary's citation sets forth:

> Employees who were expected to use Kiddie portable fire extinguishers to fight incipient stage fires were not trained on the general principles of their safe use. Violation originally observed on or about 11/30/94. Violation observed on or about 10/18/95.

IH Dixon-Roderick testified that during the course of her first inspection, Benny Klein, a Vice-President with Respondent informed her that employees were expected to fight fires (Tr. 23-24). During the course of her second inspection, she was informed by a number of persons, both management and non-management employees, that supervisors, maintenance workers and forklift drivers were the employees designated to fight fires. She testified that Respondent's comptroller, Harold Pretter, and two supervisors, Ruben Veledda and Mexico provided her with this information (Tr. 24-24). Ruben informed her that he had received training on the fire extinguisher approximately three months prior to the reinspection, and that he was the only one who had been officially trained. Although he supervised packers, he had one forklift driver working for him (Tr. 178-179; Exhs. C-12 and C-13). Mexico informed her during her interview that since her first visit he had been involved in training forklift operators how to use fire extinguishers, and that he had trained every supervisor (Exh. C-14). She testified that she spoke to seven forklift drivers on October 18 and December 8, 1995. Her typed notes indicate that of the employees questioned about the fire extinguisher training, all except for one, informed her that they had not been trained in the use of fire extinguishers (Tr. 30-35, 113-114 ; Exhs. C-5, C-9 - Miguel Aurich, Trindad Torres, Francisco Vallejo, Eduardo Torres, Humberto Amigon, Porfirio Amigon). Her notes indicate that Anacleto Vergara informed her that he had been trained in the use of fire extinguishers 2-3 months prior to her visit. However, her notes also indicate that he was not able to demonstrate to IH Dixon-Roderick the use of a fire extinguisher (Exh. C-9).[6] All of these employees were forklift drivers employed at the time of her first inspection,

[6] Anacleto Vergara testified that Mexico had talked to him about the fire extinguisher "[b]efore the OSHA lady", i.e. October 1995 (Tr. 335). The undersigned finds that this statement

and had been in the employ of Respondent between five to seventeen years (Tr. 35). She also testified that she talked to one employee who had identified himself as a maintenance worker (but refused to give her his name). He informed her that he had not been provided with fire extinguisher training (Tr. 119-120).

Respondent has attempted to show that it had abated the condition. Respondent's September 10, 1995 letter indicated that employees who were expected to use fire extinguishers had been trained on their use (Tr. 37; Exh. C-6). Mr. Pretter testified that in response to the original citation, from April 1995 through May 1995, he and Mexico personally trained supervisors and maintenance personnel on how to use the fire extinguishers (Tr. 210; Exh. C-15). He stated he had spoken to most of the supervisors, mechanics and forklift operators, and Mexico would translate into Spanish whenever necessary (Tr. 211, 213). He also testified that Mexico had conducted an educational program for all forklift operators in 1989, when the fire extinguishers were originally mounted on the forklift trucks at the former warehouse in Brooklyn[7] (Tr. 214; Exh. C-15, p. 15). He testified that Humberto Amigon, who was hired after the move from Brooklyn, received this training when he was being trained on how to operate the forklift (Tr. 215). Mexico corroborated the fact that after IH Dixon-Roderick was at the worksite the first time, that he and Mr. Pretter provided the training. He testified that at first everyone was going to be trained, however "then along the line there was - ... only supervisors of high-low men ... supposed to be teached (sic) how to use the fire extinguishers."(Tr. 261). He testified that all maintenance workers were supposed to know all along how to use the fire extinguishers as a part of their job duties, and that the forklift drivers had been trained by him back in Brooklyn (Tr. 262-264).

Respondent called as witnesses some of the employees whom IH Dixon-Roderick interviewed.[8] Anacleto Vergara testified that he had received from Mexico when the warehouse was located in Brooklyn. Since that time Mexico talked to him about fire extinguishers on two occasions - once in 1995 before the reinspection[9], and again in 1996 (Tr. 335). Francisco Vallejo testified that

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does not prove that the training occurred prior to the April 1995 abatement date. Additionally, any training that occurred 2-3 months before the reinspection was beyond the abatement date.

[7] The undersigned notes that IH Dixon-Roderick's notes of Eduardo Torres' interview indicates that he did not receive this training at the present worksite as well as the Brooklyn worksite (C-5).

[8] Respondent argues in its Post-Trial Brief at p. 22 and Reply Brief at p.4 that the failure of the Secretary to call employee witnesses who were present and available at trial - Miguel Aurich and Eduardo Torres- gives fair rise to the inference that had they been called their testimony would have been unfavorable. Counsel for the complainant explained that the testimony of two of the employee witnesses who were present at trial would have been duplicative testimony of the testimony of IH Dixon-Roderick (Tr. 185). Additionally, the testimony of Respondent's employee witnesses in several instances supported the Complainant's case. See *infra.*

[9] During Anacleto Vergara's testimony, counsel for Respondent explained that the term "before the OSHA lady came" referred to the reinspection when she brought an interpreter with her,

he knew how to use a fire extinguisher and had been trained on the use of fire extinguishers in the 1980's by Ruben Colon, a maintenance supervisor. He testified that since that time no one else at Sea Jet has talked to him about how to operate the fire extinguisher (Tr. 353). He stated that no one had talked to him about the fire extinguisher mounted on the "high-low" which he drove, and when asked about the different types of fire extinguishers, he explained that Rubin had explained "a little bit " about the "red one" used for electrical fires (Tr. 354). Porfirio Amigon testified that Mexico had taught him about fire extinguishers two or three times since 1989. He believed that the most recent talk occurred in 1995 (Tr. 365). Humberto[10] Amigon testified that Mexico had shown him how to use a fire extinguisher on three occasions- most recently about seven to eight months ago (Tr. 373).[11]

OSHA's employee statements indicate that of the witnesses the Respondent called, only Anacleto Vergara informed IH Dixon-Roderick that he had been recently trained on fire extinguishers. Messrs. Vallejo, Humberto Amigon and Porifio Amigon were among the remainder of the employees interviewed who indicated to OSHA that they had not received any training. (Exhs. C-5 & C- 9). Accordingly, the undersigned is confronted with contradictory statements by these employees. The undersigned finds that IH Dixon-Roderick's testimony was corroborated by IH Sanchez. The undersigned having observed the demeanor of these employee witnesses and recognizing that they are still employed by Respondent finds that their trial testimony is not fully credible. (See Also Footnote 11). Furthermore, their trial testimony, as well as management's, does not establish that all affected employees had been trained on the fire extinguishers as of April 1995. Additionally, the undersigned finds that the April to May 1995 training was outside of the time originally set for abatement - April 1, 1995 (Exh. C-2). In view of the above the undersigned finds that a preponderance of the evidence establishes that the condition upon reinspection was identical to the one for which Respondent was originally cited and employee exposure to the condition continued after the abatement date of April 1, 1995. The undersigned also finds that Respondent has not rebutted the Complainant's prima facie case.

PENALTY

Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its

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i.e. October 1995 (Tr. 335).

[10] Spelled "Umberto" in C-5.

[11] The undersigned notes that when questioned about his interview with IH Dixon-Roderick, Humberto stated that he could not recall a number of questions. For example, he testified that he did not recall talking to her about fire extinguishers (Tr. 378, 381- 386). His inability to remember critical questions posed to him by OSHA and ability at trial to recall the training Mexico, his uncle gave him about the fire extinguisher training presents a credibility issue. Having his demeanor during his questioning, the undersigned finds a bias in favor of the Respondent present (See Tr. 386).

prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones, supra.*

The gravity based penalty for unabated violations is to be calculated on the basis of the facts noted upon reinspection. The record discloses that a low gravity based penalty , i.e., $1,500.00, was assessed because of the types of chemicals present in the facility at the time of the reinspection. IH Dixon-Roderick testified that the probability was low because there were no flammable only combustibles present, thus, it would have taken longer for a large fire to have develop. The severity of injury was also low because no flammable chemicals were being handled (Tr. 40, 77). The gravity based penalty was multiplied by 30 in light of the fact that the violation remained unabated 30 days beyond the original abatement date.[12] This penalty was adjusted by 25% to reflect the Respondent's size and partial abatement - the training which had been given to one of the supervisors - Mr. Ruben Vallate (Tr. 39-40; 180). No adjustment was made for history because the Respondent had a history of serious violations during the previous three-year period (Tr. 75-76, Exh. C-2). The undersigned finds the proposed penalty $27,000.00 appropriate in light of the aforementioned factors.

Citation 1 Item 4: Alleged Violation of 29 C.F.R. §1910.178(1)

The standard provides:

> (l) Operator training. Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.

The Secretary's citation sets forth:

> Employees who were required to drive TCM and Hyster forklift trucks were not trained on the safe operations of such trucks. Violation originally observed on or about 11/30/94. Violation observed on or about 10/18/95.

IH Dixon-Roderick testified that during her initial inspection she learned from Benny Klein that forklift drivers who were expected to drive forklift trucks had not been trained on the operation of said trucks (Tr. 41-42). During her reinspection, Mr. Pretter represented to her that the original violation had been abated -a company named Suburban Propane had conducted training. (Tr. 42; Exhibit C-6). However, IH Dixon-Roderick's investigation and employee interviews revealed that the company had never conducted such training (Tr. 42; Exhs. C-5, C-9). On October 18, 1995, Mr. Pretter admitted to her that he did not realize formal training had to be done for experienced drivers, and he gave her an invoice dated October 12, 1995, which revealed that a company named Industrial Forklifts would provide a training program to forklift drivers on October 21, 1995 (Tr. 44-45; Exhibit C-7). Furthermore, IH Dixon testified that during her reinspection, she observed several forklift operators engaged in unsafe operations of their trucks (Tr. 47-48). For example, she found that

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[12] Under Section 17(d) of the Act any employer who fails to correct a violation within the period permitted for its correction may be assessed penalties in the amount of $7,000.00 per day for each day during which such failure or violation continues.

Humberto Amigo had left a forklift running while he was out of view (Tr. 47, 390). Additionally, during her interviews the forklift drivers informed her that they had not been trained on the safe operation of forklifts (Tr. 41; Exhs. C-5, C-9). The undersigned's review of these statement reveals that one employee disclosed that he had been given a booklet on forklift training (Anacleto Vergara), and three employees verified that training had been given in November 1995 (Eduardo Torres, Humberto Amigon, and Porfirio Amigon). Their statements also indicated that prior to the training the forklifts were driven too fast, and there had also been a problem with overloading (Ex. C-5).

It is Respondent's position that at the time of the October 1995 reinspection, all of its forklift operators had been trained and were experienced drivers (Exh. C-15, p. 17). Mr. Pretter testified that in January 1995, in response to the original citation, he instructed Mexico to continue his ongoing informal training of employees who drove the forklift trucks (Tr. 194). He described this training as something similar to the instruction he gave when he walked through the warehouse, and saw an operator improperly operating a forklift truck. He testified that since January 23, 1995, he had seen Mexico and the forklift mechanic, Mr. Forbes, stop forklift drivers to correct improper operating procedures (Tr. 198-199). He also described how employees seeking to become forklift drives were trained on the job by forklift employees. Additionally, forklift driver applicants were given a driving test (Tr. 196-197, 201). He further testified that the forklift drivers interviewed by IH Dixon-Roderick had undergone the initial driving testing prior to being hired years ago and were accident-free (Tr. 201-206). He further testified that he had explained OSHA although there had been no formal classroom training with regard to forklift drivers, however, there had been continuous training since the date of hire of all forklift operators, and there had been no forklift accidents involving the employees she interviewed (Tr. 207-209).

Mexico corroborated the fact that every driver had received on- the- job instruction on the use of the forklift by experienced forklift drivers[13] (Tr. 286-287). He also testified that he did not provide any ongoing instruction to drivers until after the November 1995 classes. He did not make such observations and corrections because such observations were not part of his duties - he was in the maintenance department and was not allowed to get involved with warehouse employees (Tr. 296).

Respondent called as witnesses four of the employees whom IH Dixon-Roderick interviewed. Her interviews of these employees revealed that they had not received any training. At trial however, Anacleto Vergara testified that he had received forklift driving training prior to working for Respondent and that upon his employment with Respondent, his supervisor observed him being taught how to operate the forklift by another forklift operator. He also testified that Mexico had given him additional training since he worked with Respondent (Tr. 331-332). Francisco Vallejo, a forklift driver for 16 years, testified that a friend, who also worked at Sea-Jet, had taught him how to operate a forklift (Tr. 351). However he also testified that when he started driving the forklift the manager asked him if he knew how to drive a car and "[t]hat's it" (Tr. 356). He testified that when he started to drive the forklift he was not given any kind of test to determine whether he could drive it safely, and he had not been given any kind of safety instruction (Tr. 357). During his interview with OSHA he indicated that he had not received any training on the operation of a forklift and that there had been an accident a few months ago wherein a truck was overloaded and fell (Exh. C-5). Porfirio

[13] The terms "forklift" and "hi-low" are used interchangeably throughout the record.

Amigon testified that he had learned to drive a forklift from another forklift driver during the eighties. He then demonstrated his driving skills to the foreman prior to becoming a forklift driver (Tr. 363-364). He further testified that when he first started driving the forklift, he had not been given any kind of test that involved safety procedures (Tr. 369). Humberto Amigon testified that he had been taught how to drive the forklift by another forklift driver, and that prior to becoming a driver his driving had been observed over a two-week period by supervisor (Tr. 372-374).

The undersigned notes that the standard does not mandate that formal classroom training be conducted to meet the requirements of the standard. [See *Trinity Industries, Inc.*, 15 OSHC 1789 (No. 89-1791, 1992)(the Review Commission found that the employer's testing and evaluation along with its monitoring of employees sufficient to met the intent of the standard)]. However, the undersigned finds that the interview statements as well as the trial testimony of the employees establishes that all employees had not been trained in the safe operation of forklifts - a requirement of the standard. The employees' testimony establishes that some of the forklift drivers had received on the job training by experienced drivers and were observed by supervisors prior to becoming forklift drivers. However, the undersigned finds that the testimony of the employees established that this training varied with each driver, and said training depended upon what knowledge the experienced driver imparted to the trainee. Additionally, the employee testimony failed to establish Respondent's assertion that all forklift drivers had been trained on safe operating procedures and tested for safe operating procedures prior to becoming forklift operators. The undersigned also finds that the prepared OSHA statements are credible and assist in establishing the basis for IH Dixon-Roderick recommended citation.[14]

In view of the above the undersigned finds that a preponderance of the evidence establishes that the condition upon reinspection was identical to the one for which Respondent was originally cited and employee exposure to the condition continued after the abatement date of April 1, 1995. The undersigned also finds that Respondent has not rebutted the Complainant's prima facie case.

PENALTY

IH Dixon-Roderick testified that she assessed a low gravity for this violation. The probability was low because the forklift operators did not drive trucks for the entire eight hour shift. The severity was low because permanently disabling injuries were not expected (Tr. 76). The gravity based penalty, i.e. $1,500.00 was multiplied by 30 in light of the fact that the violation remained unabated 30 days beyond the original abatement date. She adjusted the gravity based penalty only for size - 20%. The record reveals there was no abatement of this violation, and Respondent had a history of serious violations during the previous three-year period (Tr. 75-76). The undersigned finds the proposed penalty $36,000.00 appropriate in light of the aforementioned factors.

Citation 1 Item 10: **Alleged Violation of 29 C.F.R. §1910.1200(e)(1)**

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[14] The interviews reveal that Trindad Torres answered "no", when asked if he knew the hazards of the forklift such as overloading and truck or driving the truck forward with a blocked view. He also indicated that there had been many near misses with the trucks. Eduardo Torres indicated that although he knew how to drive a forklift, he had no training on the safe use of the forklift. Additionally, Francisco Vallejo indicated that there had been an accident 3-4 months ago where in an overloaded truck fell (Exh. C-5).

The standard provides in pertinent part:

> (e) "Written hazard communication program." (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met.

The Secretary's citation sets forth:

> The employer did not develop and implement a written hazard communication program for employees exposed to hazardous chemicals including but not limited to carbon monoxide and propane. Violation originally observed on or about 11/30/94. Violation observed on or about 10/18/95.

IH Dixon-Roderick testified that during the course of her initial inspection Benny Klein informed her that employees came in contact with hazardous chemicals, i.e., hydraulic oils, propane, and carbon monoxide, and that Respondent did not have a Hazard Communication Program (Tr. 50). During the course of her second inspection, on October 13, 1995, Mr. Pretter initially informed her that Mexico was responsible for the program, and the abatement letter set forth that a program had been developed by Nick DiArchangel(Tr. 51, 56; Exh. C-6). She also testified that during the inspection Mexico furnished Material Safety Data Sheets for cleaners, propane and hydraulic oil (Tr. 51, 53, 55; Exh. C-8). However Mr. Pretter subsequently admitted that no written program existed. During the inspection, he gave her a program which he identified as a Hazard Communication Program, however, it was a Blood Pathogen Program. When she returned to the worksite on October 18, 1995, she presented Mr. Pretter with a model program which he filled out that day (Tr. 52-53). This model program was the only program which she received during her reinspection with respect to the abatement of the original violation.

Mr. Pretter testified that he did not have an understanding of what was expected to provide a written hazard communication program (Tr. 218, 234). He also acknowledged that between 1994 and 1995, he never asked OSHA for any clarification or any advice regarding the requirements of the standards (Tr. 234). Furthermore, the record reveals that the original citation specifically outlined what criteria had to met by referencing the applicable regulatory provisions (Exh. C-2). Accordingly, Respondent's failure to seek clarification from OSHA is inexcusable and presents no valid defense. Furthermore, the record demonstrates that Respondent did nothing as of April 1995 with respect to the abatement of this condition. The undersigned finds that the Complainant has demonstrated by a preponderance of the evidence that the condition upon reinspection remained the same and employee exposure to the condition cited in the original citation continued after the abatement date of April 1, 1995.

PENALTY

IH Dixon-Roderick testified concerning the gravity of the violation. She concluded that the severity of the violation was medium because employees were exposed to carbon monoxide a by-product of the propane used for the forklift trucks (Tr. 56, 78). She assessed a low probability because the Respondent had added three electric forklift trucks to its fleet which reduced the presence of carbon monoxide at the site(Tr. 78). She credited the gravity based penalty for size - 20%, and because this was a paperwork violation she did not apply the 30 day multiplier (Tr, 82). Again no

credit was give for good faith abatement or history. The undersigned finds that the proposed $1,200.00 penalty is appropriate in light of the aforementioned factors.

Citation 1 Item 12: Alleged Violation of 29 C.F.R.§1910.1200(h)

> The standard provides in pertinent part:
> (h) "Employee information and training." (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area.

The Secretary's citation sets forth:

> Employees did not receive information and training on chemicals such as hydraulic oil, propane and the by-product carbon monoxide. Violation originally observed on or about 11/30/94. Violation observed on or about 10/18/95.

IH Dixon Roderick testified that Mr. Pretter informed her that employees were required to use hydraulic oils and required to place propane tanks on forklift trucks (Tr. 58-59). IH Dixon-Roderick testified that she asked employees if they had been trained to recognize the health effects of carbon monoxide, which they referred to as "the gas"(Tr. 60-61; 100-109). The forklift drivers informed her that they had not received training on the carbon monoxide- the gas which is the by-product of propane (Tr. 59-60; Exhs. C-5, C-9). Several employees admitted to having received a paper from Mexico which they were to take home for their children to read because it was in English (Tr. 60; Exhs. C-5 & C-9). Although they were not able to articulate for her the hazards of carbon monoxide or what to do if they were exposed to carbon monoxide, they described to her symptoms from "the gas" (carbon monoxide) such as headaches, nausea, and eye irritation (Tr. 61, 82-89; Exhs. C-5, C-9). Mexico informed her that he had attempted to explain information about the health effects on carbon monoxide while explaining the material safety data sheets to employees, however, he had problems comprehending the information within them himself. Thus, he gave employees copies of the material data sheets and told them to take them home and have their children explain the information to them (Tr. 58, 131; Exh. C-14).

Mr. Pretter testified that in response to this citation item, he instructed Mexico to explain and distribute MSDS sheets on hydraulic oil, propane and by-product carbon monoxide (Tr. 216). He stated that he told Mexico to translate the information into Spanish for those employees who did not understand English (Tr. 218). Mexico testified that, in response to the original citations, Mr. Pretter instructed him to explain to the forklift drivers the Material Safety Data Sheets (Tr. 296). He was provided the MSDS for propane and hydraulic fluid. At that time they were also searching for one on carbon monoxide[15]. He made copies for the employees and "with the best of [his] knowledge went over the contents in Spanish (Tr. 298, 305). He acknowledged that there were some portions of the MSDS which he did not understand(Tr. 301-305). He further testified that he told them to take the MSDS home for their children to explain - probably better than him - what he could not explain (Tr. 305).

The testimony of the employees called by Respondent corroborated that Mexico had given

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[15] Mr. Pretter testified that in response to the original citations he learned that there was no MSDS for carbon monoxide because it is a by-product (Tr. 217, 231).

the forklift drivers a document written in English regarding propane - which they referred to as "gas" Tr. 297). Anacleto Vergara could not recall specifically when this occurred however he testified that it was after the OSHA lady came with the interpreter - October 1995(Tr. 337-338, 340). Francisco Vallejo testified that Mexico had given a paper on propane which was in English, and his son translated it to him (Tr. 355). He did not recall when it was given to him or who else was present. (Tr. 355). Porfirio Amigon testified that Mexico had given him a document about propane gas in 1994 or 1995. He testified the Mexico told him about the headaches and eye problems the gas could cause (Tr. 366). He also stated that he had received this information before he was questioned by OSHA (Tr. 370). Humberto Amigon also testified that Mexico had provided the forklift operators a piece of paper regarding the gas which he translated into Spanish. He stated that Mexico had explained the hazards of the gas, however, he did not recall if Mexico told him anything else (Tr. 375-376).[16]

The undersigned finds that the preponderance of evidence indicates that the condition upon reinspection was identical to the one for which Respondent was originally cited and employee exposure continued after the abatement date of April 1, 1995. The record discloses that the person put in charge of abating this condition did not train the employees as mandated by the standard. Mexico admittedly was not able to comprehend all of the information within the MSDS. He in turn asked employees to take them home for their children to read to them. Furthermore, the responses which employees provided IH Dixon-Roderick during her reinspection also clearly demonstrate their lack of understanding of what was in the MSDS they received.[17] Additionally, the testimony of the employee witnesses indicated that they were unaware of the severity of exposure, how to protect themselves from exposure, and the details of the hazard communication program (Tr. 336-338- Anacleto Vergara; 355- Francisco Vallejo; 366-367- Porfirio Amigon; 376- Humberto Amigon). The preponderance of evidence reveals that Respondent did not meet it's obligation to train employees under the standard.[18] Furthermore, the record indicates that the employer possessed no written material on carbon monoxide until January 1996. IH Dixon-Roderick faxed Respondent a copy of a Hazardous Substance Fact Sheet for carbon monoxide on January 12, 1996 (Tr. 233).

PENALTY

IH Dixon-Roderick testified that the severity of the violation was medium because of the physical effects employees who were exposed to the carbon monoxide had described to her (Tr. 82). She assessed a low probability because the Respondent had added three electric forklift trucks to its fleet. She credited the gravity based penalty for size- 20%. Again no credit was give for good faith abatement or history. A 30 day multiplier was applied because this violation had remained unabated 30 days past the original abatement date. The undersigned finds that the proposed $36,000.00 penalty

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[16] The undersigned finds that his testimony was dubious with regard to when this information was actually provided (Tr. 376, 382-386, 386-387).

[17] For example, Trindad Torres informed IH Dixon-Roderick that he was not sure of the health hazard of the gas, and even though he took the paper home his children did not read it to him and he could not understand it (See Exh. C-5 & C-9).

[18] *See also ARA Living Centers,* 15 BNA OSHC 1417 (No. 89-1894, 1991).

is appropriate in light of the aforementioned factors.

Citation 2 Item 2

> The standard provides:
>
> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

The Secretary's citation sets forth:

> The employer did not maintain an OSHA 200 log at the facility for 1995. A recordable injury occurred in 1995. Violation originally observed on or about 11/30/94. Violation observed on or about 10/18/95.

During the 1994 inspection IH Dixon-Roderick spoke to Mr. Benny Klein about the OSHA 200 log (Tr. 131). She testified that during her reinspection, Mr. Pretter did not provide her with an OSHA 200 log. When she asked Mexico if there had been any accidents at the site since the initial inspection, he informed her that there had not been any accidents (Tr. 62). However, when she interviewed employees she learned that there had been two accidents (Tr. 63; Exh. C-5). One of the injuries should have been recorded upon an OSHA 200 log - injuries incurred by an employee when a forklift truck radiator exploded in his face (Tr. 89). The employee had lost work days as a result of this accident. When confronted with this information, Mr. Pretter and Mexico recalled an accident which had been allegedly the fault of the employee (Tr. 63; Exh. C-14). She was presented with a copy of the workman's compensation record which recorded the accident. She believed that this form did not conform to the requirements mandated for the OSHA 200 log- it did not contain any information regarding the number of lost work days or restricted work duty days.

Mr. Pretter testified that as comptroller for Respondent it was his responsibility for keeping a record of injuries that occurred. He identified the worker's compensation form for the New Jersey Department of Labor, which contained information regarding the two injuries for 1995, as its equivalent OSHA 200 log (Tr. 222; Exh. R-2 & R-3). This form contained information regarding the date the employee last worked, and indicated whether the employee had returned to work as of the date the form had been prepared. The forms were dated (1) July 27, 1996 - date of the first injury, and (2)November 20, 1996 - 20 days after the second injury. Mr. Pretter acknowledged during cross-examination that subsequent to the date of the report there was no information which indicated whether the employee returned to work, or if upon his return to work, if there were any work restrictions (Tr. 240).

The undersigned finds that the condition upon reinspection remained the same and the condition cited in the original citation continued after the abatement date of April 1, 1995. The standard mandates that the employer's records be completed in the detail provided in the OSHA 200

as set forth in 29 C.F.R.§1904(a) . The standard permits the employer to maintain records on any form that supplies the same information as the OSHA 200. This form requires the recording of lost workdays-days away from work and the days of restricted work activity. The record reveals that the Respondent's workman's compensation for contained no specific information regarding the status of the employees' lost work days or restricted days. The workman's compensation form lacked information specifying the total number of lost work days and there was no information as to when and if the employee returned to work after the accident, and in what capacity, i.e., lost work days or restricted duty (Tr, 89, 239-241, Exh. R-3). The preponderance of evidence demonstrates that Respondent did not have the required OSHA 200 log in 1994, and continued not have it as of the date of reinspection. The undersigned also finds that Respondent has not rebutted the Complainant's prima facie case.

PENALTY

In light of the fact that this violation is a record keeping violation it is nonserious - no injuries are expected from noncompliance and the gravity factors are nonapplicable. IH Dixon-Roderick testified that in light of the fact the initial violation was assessed $0.00, the violation was assessed $1,000.00 for the failure to abate (Tr. 64-65). The undersigned finds that this penalty is appropriate to ensure prospective compliance with the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Citation 1, Item 3e , alleging a FTA violation of §1910.157(g)(1) is AFFIRMED with a penalty of $27,000.00.

Citation 1, Item 4, alleging a FTA violation of §1910.178(1), is AFFIRMED with a penalty of 36,000.00.

Citation 1, Item 10, alleging a FTA violation of §1910.1200(e)(1) is AFFIRMED with a penalty of $1,200.00.

Citation 1, Item 12, alleging a FTA violation of §1910.1200(h) is AFFIRMED with a penalty of $36,000.00

Citation 2, Item 2 alleging a FTA violation of §1904.2(a) is AFFIRMED with a penalty of $1,000.00.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.

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