UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.

MAHER TERMINALS, INC.
Respondent,

I.L.A.,
Authorized Employee
Representative.

OSHRC DOCKET
NO. 93-0508

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 17, 1994. The decision of the Judge will become a final order of the Commission on December 19, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 7, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

DOCKET NO. 93-0508

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Date: November 17, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0508

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

M. Patrick McCloskey, Esquire
James M. Kenny, Esquire
Kenny & Stearns
26 Broadway
New York, NY 10004 1882

Joseph Leoanrd, Safety Director
International Longshoremen's
Association - Local 1233
17 Battery Place
New York, NY 10004 1261

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00109038646:02

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR, Complainant	:	
v.	:	Docket 93-0508
MAHER TERMINALS, INC., Respondent	:	
and	:	
I.L.A. Authorized Employee Representative.	:	

APPEARANCES

William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York

James M. Kinny, Esq.
M. Patrick McClosky, Esq.
Kenny & Stearns
Newark, New Jersey

For Complainant

For Respondent

Joseph Leonard
Safety Director
I.L.A.
New York, New York

For Intervenor

BEFORE: ADMINISTRATIVE LAW JUDGE JOHN H FRYE, III

DECISION AND ORDER

I. INTRODUCTION

As a result of an accident investigation by a representative of the Occupational Safety and Health Administration (hereinafter OSHA) at respondent's marine terminal facility, respondent was issued one serious citation alleging three violations of the Occupational Safety and Health Act (hereinafter the Act) and a notification of proposed penalty in the total amount of $12,150 for the alleged violations. Respondent timely contested the citation and proposed penalty. The Secretary thereafter filed his complaint in which he withdrew item 1 of the citation and, accordingly, reduced the total proposed penalty to $7,650 for Items 2 and 3. Respondent answered, and these contested matters were the subject of a hearing on September 21, 1993.

II. BACKGROUND

Respondent operates a marine terminal at Port Elizabeth, New Jersey, where it is engaged in the loading and unloading of ocean-going vessels (Tr. 15-17). On Sunday, November 15, 1992, a "gang" of respondent's employees were engaged in the unloading of a ship (Tr. 126). The gang foreman, or "hatch boss," was Jasper Gore (Tr. 22, 68). Shortly before 11:00 a.m., a cargo container was off-loaded and placed on the dock (Tr. 25). A shipping flat was then off-loaded and was placed on top of the container so that it could be removed from the area with a straddle carrier (Tr. 25). Several wooden four-by-fours were nailed to the shipping flat, however, and had to be removed before the flat could be moved (Tr. 25).

A member of the gang, Curtis Braswell,[1] took it upon himself to obtain one of respondent's forklift trucks which he drove to the area of the off-loaded container for purpose of dislodging the four-by-fours from the shipping flat (Tr. 25-26, 41-42). When Braswell returned with the forklift, Jasper Gore stepped onto the blades and directed Braswell to elevate him to the top of the container so that Gore could remove the four-by-fours (Tr. 26). Braswell elevated Gore to a height of 9 to 10 feet above ground, whereupon Gore removed the four-by-fours from the shipping flat and rode the blades of the forklift back down to ground level (Tr. 26, 111, 136).

A second shipping flat was off-loaded a short time later which also had wooden four-by-fours nailed to it (Tr. 25-26, 110-111). Gore again directed Braswell to elevate him on the blades of the forklift so that he (Gore) could remove the four-by-fours (Tr. 26, 110). As Braswell elevated Gore on the blades of the forklift, the left blade apparently became caught on either the underside of the flat or on the container itself (Tr. 26-27, 110-111). As the blade pulled free, the blade separated from the forklift and was propelled up in the air (Tr. 26-27, 52, 100-111). Gore fell to the ground (Tr. 26-27) and died as a result of the injuries he sustained in the fall (Tr. 124-25).

---

[1]Mr. Braswell was the first witness for the Secretary. Respondent questions his credibility, noting that on direct he denied having received any training from Maher with regard to the safe operation of the forklift and having attended safety meetings prior to November 15, 1992 (Tr. 28). These denials were shown to be incorrect on cross-examination (See Exhibit R-1; Tr. 35, 36). Both Mr. Braswell and Mr. Gore were shown to have attended a meeting in which they were shown slides depicting the proper way in which to ride on forklift blades, i.e., with the use of a manlift basket (Tr. 184), and to have received a copy of the Maher "Dockside Personnel Safety Manual" (Exhibit R-2; Tr. 39). While Respondent has demonstrated that Mr. Braswell's testimony was in error on the specific points discussed above, his testimony regarding the circumstances of the accident and the condition of the forklift from which Mr. Gore fell has not been contradicted, but is corroborated by the accounts of others. In this latter regard, I find Mr. Braswell's testimony to be reliable.

III. DISCUSSION

A. CITATION 1, ITEM 2: ALLEGED VIOLATION OF 29 CFR § 1917.43(c)(5) - FAILURE TO MAINTAIN FORKLIFT TRUCK IN SAFE WORKING ORDER.

Following the accident, the forklift truck was examined by Braswell, by the Port Authority Police who impounded it, and by OSHA Compliance Officer William DuComb[2] who was dispatched by his office the next day, Monday, November 16, to investigate the incident (Tr. 59-60, 124-26, 131-32). The forklift blade was normally held in a channel on the truck apparently by two "lips" (Tr. 52, 59-60, 130-32, 202-03). One of the lips was "sheared right off" according to Braswell, and Braswell, the police, and DuComb observed that the area around the lip was rusted (Tr. 52, 60, 130-32). Based on the rust condition around the lip, Mr. DuComb concluded that the lip had been missing prior to the accident (Tr. 130). Braswell similarly concluded that the lip "did not break off [at the time of the accident]" (Tr. 52). Braswell was not aware of any defects on the forklift truck prior to the accident (Tr. 32, 50).[3]

---

[2]Respondent attacks Mr. DuComb's credibility on a number of grounds. These include that his field notes 1. did not mention a broken fork lift blade as a contributing cause to the accident, 2. did not mention the unavailability of manlift baskets, and 3. found that Respondent's training program was not adequate despite the fact that he had been told that it included instruction on the use of manlift baskets. None of these charges seriously impugn Mr. DuComb's credibility.

[3]The Secretary also presented the testimony of gang member Wade Foster who was operating a crane on November 15 and did not observe Gore's accident (Tr. 70-72). Foster testified that after the accident occurred he came down to the dock, examined the forklift (Tr. 78-79), and recognized that it was the one that he had been operating on the dock earlier in the week (Tr. 79). Foster stated that the left blade had a tendency to "drop right off" (Tr. 81) and "came off three times in less than ten minutes" (Tr. 81). Foster stated that he reported this defect to the stevedore on duty (Tr. 81) and was instructed to park the forklift by a bathroom (Tr. 81). Foster indicated that he was not instructed to place any sign on the forklift stating that it was out of service (Tr. 81-82) and that he observed the same forklift in use later in the week prior to Gore's accident (Tr. 80).

The difficulty with Mr. Foster's testimony, as Respondent points out, is that made no mention of the defective blade on the forklift in his November 19, 1992, statement to OSHA (Tr. 86). Further, he claimed at the hearing to have discovered the defective blade sometime around the 12th or 13th of November, 1992, (continued...)

Respondent's employees called as witnesses by the Secretary, Braswell and Charles Edwards,[4] testified that they were not aware of any regular maintenance of forklift trucks at the facility (Tr. 32, 115). However, Respondent introduced the maintenance records for the forklift involved in the accident, #8083, which indicate that it was serviced four times in the four months preceding the accident (Exhibit R-6).[5] Respondent also produced a Purchase Requisition (Exhibit R-7) showing that new blades were ordered for #8083 on August 14 and were picked up on September 1 (Tr. 170). The maintenance records indicate that the blades were not replaced until November 20, five days after the accident.[6] Respondent argues that the lack of any notation in the maintenance records prior to November 20 indicates that no defects in the blades were observed on earlier servicings (Respondent's brief, p.6). However, the last servicing was done on September 28, over a month and a half prior to the accident, so that the defect could well have come into existence after that time.

Respondent maintains that the Secretary failed to prove that the forklift blade was defective at the time of the accident. First, Respondent attacks claim that the area from

---

[3](...continued)
a mere week before he gave his statement to OSHA (Tr. 99). It seems highly unlikely that Mr. Foster would have neglected to inform Mr. DuComb of this significant information when he was interviewed by the latter and gave his statement. Therefore, I find that it is not credible, and do not rely on it. This result makes moot Respondent's argument with respect to the Secretary's failure to disclose Mr. Foster's statements in response to discovery. See Respondent's brief, pp. 16-18.

[4]Respondent attacks Mr. Edwards credibility for the same reasons advance with respect to Mr. Braswell. See Respondent's brief, pp. 26-27; footnote 1. As in the case of Mr. Braswell, the fact that Mr. Edwards may have been mistaken with regard to training received does not affect his credibility with respect to other matters.

[5]The dates and items serviced were: 7/14 - "[preventive maintenance], check rollers;" 8/24 -"lites, horn, hyd fitting, grease mast, knobs;" 9/24 - "filters;" and 9/28 - "replace tires."

[6]Exhibit R-6. The November 20 record indicates "Instructions/Remarks: Replace blades/inspect carriage check mast rollers/chains."

which the lip had broken was rusted. In support of his claim of rust, the Secretary relies on the testimony of Messrs. Braswell and DuComb both of whom observed that the area around the lip was rusted (Tr. 52, 60, 130-32). In addition, Mr. DuComb relied on information to the same effect obtained from the Port Authority Police and reflected in their report (Tr. 130-32, 156-57).

Respondent points out that the Secretary did not offer the police report into evidence at the hearing even though he could have done so given the document's classification as a business record, and that Mr. DuComb, despite the fact that he had a camera, failed to record this condition in a photograph, a deviation from his usual procedure (Tr. 153). Respondent argues that Mr. DuComb's inaction can only be explained by his determination that the rust was either not significant or not present.

Both Mr. DuComb and Mr. Braswell testified that the rust was present. Respondent has given no compelling reason to doubt their testimony. While the police report was not offered, it was available and used by Respondent's counsel to cross examine Mr. DuComb, who paraphrased the reference to the rusted area around the missing lip (Tr. 156-57). This corroborates Mr. Braswell's observation that the rust was present immediately after the accident. In these circumstances, the lack of a photograph does not cast sufficient doubt on the veracity of these witnesses to reject their testimony on this point.

Respondent also argues that the Secretary failed to prove the significance, if any, of the rusted condition, which Mr. DuComb relied on in concluding that the lip had been missing prior to the accident (Tr. 130). Respondent believes that the Secretary should have offered expert testimony on how quickly the rust could have formed if he is to sustain his

burden of showing that the lip was missing from the blade before the accident. Respondent would place too heavy a burden on the Secretary. Given that the rust was present shortly following the accident, it is reasonable to assume that the lip was missing prior to the accident.[7]

Respondent also argues that any damage to the blade was more probably caused during the events immediately preceding Mr. Gore's death,[8] pointing out that prior to the accident the forklift functioned properly, elevating Mr. Gore on the blades immediately prior to the accident without incident. Only when the blade was subjected to the stress of being caught on a container or flat did it break loose from its mounting.[9] Thus, Respondent infers that the blade was not defective but rather became disengaged from the forklift as a result of the exertion of force immediately prior to the accident. However, the Compliance Officer's uncontradicted testimony was that the broken lip "... would permit the blade to come off ..." (Tr. 133). In light of this fact and the fact that the blade was rusted in the area where the lip had been, the inference that the lip was missing prior to the accident and its absence permitted the blade to disengage when caught on the container or flat is more compelling. I so find.

---

[7]*Cf. Secretary v. A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (Rev. Com. 1994), where the Commission rejected respondent's argument that the Secretary had not shown that it had constructive notice of a cut electrical cord because the Secretary did not show that the cut had existed for a sufficient period of time during which it could be observed: "The CO testified that he did not believe that the cut had occurred recently because there was discoloration on the inner lining of the cord and the cut did not otherwise look like one that had happened recently."

[8]Respondent asserts that the Secretary's witnesses admitted this at the hearing, citing Tr. 54, 110. The transcript does not support this assertion.

[9]Mr. Braswell stated: "[i]t became so much pressure on that blade from that flat, it slipped out from under the flat, and it just flew up in the air." (Tr. 54.)

Because the dropping of a blade from a forklift could cause serious injury to anyone in the vicinity (Tr. 133), this finding leads to the conclusion that the forklift was not "... maintained in safe working order."[10] The question remains whether Respondent knew or reasonably should have known of this condition. The forklifts are routinely stored on the stringpiece, an outside area on the dock, where the mechanics refuel them. Mr. DuComb's uncontradicted testimony was that a defect in a blade of a forklift could be easily observed on visual inspection or by pushing the blade (Tr. 130-31). I find that the defect in the left blade of forklift #8083 should have been revealed to Respondent by just such an inspection conducted incident to refueling. The Secretary has established that Respondent committed a serious violation of § 1917.43(c)(5).

B. ALLEGED VIOLATION OF 29 CFR § 1917.43(E)(6) - ELEVATING EMPLOYEE STANDING ON THE FORKLIFT BLADES WITHOUT USING LIFTING PLATFORM

Curtis Braswell testified that he has observed the practice of elevating personnel on the blades of a forklift truck both on the docks and in the hold of ships, and had elevated personnel himself prior to the day of Gore's accident (Tr. 29). Charles Edwards had also observed this practice "every once in a while" and had himself been elevated on the blades of a forklift (Tr. 112). Braswell also testified that man-baskets are not always available when they are needed (Tr. 38, 57-58). Braswell testified that at the time of Gore's accident, "there

[10] 29 C.F.R. § 1917.43(c)(5).

was not a man-basket in the area that I knew of" (Tr. 57-58).[11]

Respondent's employees testified that management representatives had to be aware of the practice of elevating personnel on the blades of forklifts by virtue of their presence on the docks (Tr. 30-31, 113).[12] Respondent's manager of corporate safety, Joseph Farley, had no company record of anyone ever being disciplined for riding the blades of a forklift (Tr. 213).

Respondent argues that the Secretary bears the burden of proof with respect to every element of an alleged violation of the Act, citing *Pennsylvania Power & Light Company v. Secretary,* 737 F.2d 350, 11 BNA OSHC 1985 (3rd Cir. 1984).[13] Respondent notes that it raised the defense of unforeseeable employee misconduct. Respondent urges that, should the Secretary allege the inadequacy of Respondent's safety programs in rebuttal, the burden of proof is clearly on the Secretary to prove that the programs are in fact inadequate.

The Secretary points out that, in the context of alleged violations committed by supervisory personnel, the Review Commission has held:

> In order to establish a violation of section 5(a)(2) of the Act, the Secretary must prove, among other things, that the cited employer either knew or could,

---

[11]Respondent attacks the Secretary for failing to disclose that there was a photograph of a manlift basket in the investigative file. See Respondent's brief, pp. 18-20. Although the Secretary never alleged that the absence of such baskets was relevant to the charges brought, Respondent somehow elevates this failure into an assertion that it "... was prejudiced at the hearing due to the 'surprise' charge of unavailable manlift baskets." Respondent's brief, p. 20. The presence or absence of manlift baskets is not relevant to this citation. Respondent suffered no prejudice on this account.

[12]The management personnel on the dock were identified as the superintendent, the stevedore and the gang foreman (Tr. 34-35). When multiple gangs are involved in unloading a ship, there may be two superintendents and two stevedores present (Tr. 69-70).

[13]Respondent also relies on *Secretary v. Connecticut Light & Power Company*, 13 BNA OSHC 2214 (Rev. Com. 1989). This case involved an alleged violation of § 5(a)(1) of the Act. Therefore its holding is not applicable here.

> with the exercise of reasonable diligence, have known of the presence of the violative conditions. Generally, the actions and knowledge of supervisory employees are imputed to the employer and the employer is responsible for violations committed by their supervisors. Accordingly, the Secretary establishes a prima facie showing of knowledge by proving, as he did in this case, that a supervisory employee was responsible for the violation. However, the employer can rebut this showing by affirmatively demonstrating that the supervisory employee's conduct could not have been prevented. In particular, the employer must establish that it effectively communicated work rules to employees and that its rules were effectively enforced through supervision adequate to detect failures to comply with rules and discipline sufficient to discourage violations [citations omitted].

Secretary v. H.E. Wiese, Inc. and Industrial Electrical Construction Co., BNA 10 OSHC 1499, 1505 (R.C. 1982), *affirmed sub nom., Donovan v. H.E. Wiese, Inc.*, 705 F.2d 449 (5th Cir. 1983).[14] Consequently, the Secretary takes the position that Gore's knowledge and actions on November 15 are presumptively imputed to the Respondent, and a prima facie violation of the cited standard has been established.

The Secretary, noting *Pennsylvania Power & Light Co. v. OSHRC, supra*, acknowledges that several courts disagree with the Review Commission with respect to the allocation of the burden of proof regarding the unforeseeable employee misconduct defense. The Secretary maintains that, even under the Respondent's view, he still prevails.[15]

---

[14]The Secretary also cites *Secretary v. Pride Oil Well Service*, BNA 15 OSHC 1809 (R.C. 1992); *Secretary v. Tampa Shipyards, Inc., supra; Secretary v. Consolidated Freightways Corp.*, BNA 15 OSHC 1317 (R.C. 1991).

[15]First, he argues that the testimony from Respondent's employees established that the practice of riding forklift blades was prevalent on the dock, and that management officials were aware of the practice. Accordingly, he believes Respondent had knowledge of these activities through other management officials.

Second, he points out that there is no evidence that any safety rule regarding the unsafe practice was enforced, and argues that this compels a finding that Respondent's safety program was inadequate and that the violation on November 15 was foreseeable and preventable. He believes that, under either view of the allocation of the risk of nonpersuasion, employer knowledge has been established.

The Secretary views the evidence too favorably. While Messrs. Braswell and Edwards testified that the practice occurred, when pressed neither stated that it was prevalent, and neither specifically connected (continued...)

Both the Secretary and the Respondent read the *Pennsylvania Power & Light* holding too expansively. In that case, the court pointed out that it was addressing a standard which was general in nature. In that circumstance, the court did not believe "... that the mere inability of PP&L to anticipate precisely the Secretary's interpretation of [the standard] should scuttle the company's claim that [an employee's] death could not have been foreseen and prevented through the exercise of reasonable diligence."[16] In that circumstance, it held that the Secretary bore the risk of nonpersuasion with respect to the foreseeability of the supervisor's misconduct.

In *Pennsylvania Power & Light*, the general nature of the standard meant that, despite a reasonable approach to its enforcement by the employer, the possibility existed that a supervisor could nonetheless take action which resulted in an accident which the standard was designed to prevent. It seems clear that the court was concerned that the Secretary must show not simply that a supervisor had been involved in the conduct leading to the accident, but also that the employer should have anticipated that the supervisor might act as he did. Accepting the supervisor's participation as sufficient by itself to show employer knowledge requires an employer, when implementing a general standard, to anticipate every possible situation which might result in an accident, no matter how bizarre that situation might be. Consequently, the court required the Secretary to show more than the participation of the supervisor in order to show that the employer knew of the conduct, or

---

[15](...continued)
supervisory personnel to it other than to say that they were present on the dock in the usual course of the workday. Thus the prevalence of the practice and the Respondent's constructive or actual knowledge of it is questionable.

[16]11 BNA OSHC at 1990.

in the exercise of reasonable diligence should have anticipated it.

Here, the employer is not faced with the difficulty of anticipating OSHA's interpretation of a general standard. The standard in this case is specific. It states:

> Employees may be elevated by forklift trucks only when a platform is secured to the lifting carriage or forks.[17]

Indeed, it is hard to imagine how the standard could be more specific in prohibiting the conduct in which the supervisor, Mr. Gore, engaged. In this circumstance, it is both reasonable and in accord with *Pennsylvania Power & Light* to place the risk of nonpersuasion on the Respondent.

Respondent failed to establish that it had taken steps to effectively communicate and enforce its work rule implementing this standard and that Mr. Gore's actions were unforeseeable and idiosyncratic. Respondent established that the gang bosses, including Mr. Gore, attended monthly meetings held to troubleshoot potential safety problems and generally review safety performance at Maher, although the minutes of those meetings introduced in evidence do not reflect that the subject of riding forklift blades was discussed (Tr. 188, 195; Exhibit R-13). Additionally, Respondent established that on May 18, 1992, approximately six months prior to the accident, Mr. Gore attended a safety meeting with the rest of his gang where slides illustrated the proper use of a manlift basket to go aloft (See Exhibit 1; Tr. 183-85).[18]

---

[17]29 C.F.R. § 1917.43(e)(6). The standard goes on to provide specifications for the lifting platform.

[18]The Compliance Officer agreed on cross-examination that Respondent's employees, including Jasper Gore, were instructed to use manlift baskets when lifting individuals by means of a forklift (Tr. 147-148).

In its brief, Respondent attacks the Secretary for failing to disclose in response to discovery that he was asserting that the lack of employee training was an element of its claim. Respondent asserts that the Secretary introduced evidence on the lack of employee training which was a surprise and unfairly prejudicial (continued...)

At the same meeting, Respondent's "Dockside Personnel Safety Manual" was distributed, read, and illustrated with slides (Tr. 182). While Respondent takes the position that the manual clearly proscribes the practice of riding on the blades without the utilization of a manlift basket, it does not go that far. Rather, it states the procedure to be followed when utilizing a manlift basket.[19] Indeed, while the Manual states many specific prohibitions (such as Section 1, ¶ 8: "When portable ladders are used, they shall be held or secured to prevent movement"), there is no prohibition on riding the blades of a forklift contained in the Manual.

Respondent asserts that its policy of utilizing manlift baskets while riding on forklift blades was enforced, pointing to a May 6, 1992, letter reprimanding a gang boss (See Exhibit R-12; Tr. 193). However, this letter did not concern the practice of riding the forklift blades, but rather an injury received when an employee "... slipped climbing down from a straddle ...." The letter pointed out that a man lift basket should have been used.

Respondent failed to meet its burden of persuasion with respect to its unforeseeable employee misconduct defense. There is no evidence that Respondent communicated or

---

[18](...continued)
in light of the discovery response. See Respondent's brief, pp.15-16; Tr. 62-65.

Respondent's position is not well taken. First, as pointed out by the Secretary's counsel at the hearing, the interrogatory asked whether the Secretary asserted a lack of training as a part of his claim. He did not so claim at the hearing, but sought to introduce evidence as to training to refute Respondent's defense of unforeseeable employee misconduct. Second, I have found as a fact that Respondent's employees received the instruction which Respondent claims they did, so that, in any event, Respondent is not prejudiced.

[19]The Manual states in pertinent part:

> Forklifts and manlift baskets - check that forklift operates properly and that manlift baskets are chained to the forklift. Ensure front safety chain is used after entering the basket.

See Respondent's exhibit 2, Section Three, Page One.

enforced a work rule to supervisors and/or employees prohibiting the practice of riding forklift blades. I conclude that the Secretary has shown a serious violation of § 1917.43(e)(6) which is properly chargeable to the Respondent.

C. APPROPRIATE PENALTIES

With respect to Item 2 of the Citation, Mr. DuComb testified that he derived a penalty of $3500 from the OSHA Field Operations Manual based on the exposure of employees to the condition and the seriousness of any resulting injury should an accident occur. He reduced this figure by ten percent because of the Respondent's favorable history, but gave no credit for good faith, because he believed that Respondent did not have an effective safety program, or size, because Respondent has more than 250 employees. This yielded a net penalty of $3150. Mr. DuComb derived a penalty of $5000 for Item 3, the highest level for a serious violation. He applied the same adjustment, ten percent for history, and computed a final penalty of $4500. Respondent did not attack Mr. DuComb's penalty calculations either at the hearing or in his brief. They are assessed.

IV. CONCLUSIONS OF LAW

A. Respondent utilizes and/or processes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside the State of New Jersey and is therefore engaged in business affecting commerce and is subject to the requirements of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(5).

B. Respondent is an employer within the meaning of the Act and is therefore

subject to its requirements.

C. Respondent was in serious violation of the terms of 29 C.F.R. § 1917.43(c)(5). A penalty of $3150.00 for Citation 1, Item 2, is appropriate.

D. Respondent was in serious violation of the terms of 29 C.F.R. § 1917.43(e)(6). A of penalty of $4500.00 for Citation 1, item 3, is appropriate.

IV ORDER

Citation 1, Items 2 and 3 are affirmed as serious violations of the Act. A total penalty of $7650.00 is assessed.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated: NOV - 6 1995
Washington, D.C.