

Secretary of Labor,  
Complainant,

v.

Cooper/T. Smith Stevedoring Company,  
Inc.,

OSHRC Docket No. **00-1321**

## **APPEARANCES**

Joseph B. Lockett, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
Nashville, Tennessee  
For Complainant

Edward M. Hughes, Esq.  
Karsman, Brooks & Callaway, P. C.  
Savannah, Georgia  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

## **DECISION AND ORDER**

Cooper/T. Smith Stevedoring Co., Inc. (CTS), engages in cargo handling at a marine terminal in Memphis, Tennessee. As a result of an inspection by the Occupational Safety and Health Administration (OSHA), CTS received serious and “other” than serious citations on May 3, 2000. CTS timely contested the citations.

The hearing was held November 24, 2000, in Memphis Tennessee. The parties stipulated jurisdiction and coverage (Tr. 5).

During the hearing, the Secretary withdrew Citation No. 1, item 2a, alleged violation of 29 C.F.R. § 1917.151(g)(1) and reduced the proposed grouped penalty for items 2b and 2c, alleged violations of 29 C.F.R. §§ 1917.151(g)(1) and 1917.151(g)(4), to \$675. Also, the Secretary reduced the proposed penalty for Citation No. 1, item 3, alleged violation of 29 C.F.R. § 1917.156(b)(4)(i), to \$1,625 (Tr. 3-4, 59-60).

CTS withdrew its contest to Citation No. 1, items 2b, 2c and 3 as amended by the Secretary. CTS also withdrew its contest to Citation No. 2, item 1, alleged violation of 29 C.F.R. § 1917.11(a) (Tr. 3).

The parties’ settlement of Citation No. 1, items 2a, 2b, 2c, 3, and Citation No. 2, item 1, is approved and incorporated into this decision and order.

The issues remaining in dispute involve Citation No. 1, items 1a and 1b, alleged violations of 29 C.F.R. § 1917.43(b)(1) for failing to have prior written approval from the manufacturers of forklifts for CTS's installation of paper roll handler and long reach bale clamp attachments. Also, the data plates on the forklifts did not reflect the capacities and operations of the attachments. Items 1a and 1b propose a grouped penalty of \$2,250.

The parties filed post-hearing briefs. An amicus brief was filed in support of CTS's position by the National Maritime Safety Association (NMSA), a national association representing marine terminal operators. CTS argues that the attachments such as the paper roll handler and long reach bale clamp are not modifications affecting the capacity or safety of the forklifts as required by the standard. Manufacturers' prior approval and new data plates are, therefore, not required.

As more fully discussed, the alleged violations as identified in items 1a and 1b are vacated.

#### *The Inspection*

CTS is engaged in the business of marine cargo handling and has approximately 550 employees nation wide. In Memphis, Tennessee, CTS manages the cargo handling operations at a marine terminal owned by LITCO (Lash Intermodal Terminal Company). CTS employs 85 employees and operates two shifts at LITCO (Tr. 13-14, 60-61, 171-172).

The LITCO terminal consists of two large warehouses, a barge maintenance area and a canal. Barges are lifted out of the canal by a crane and placed inside a warehouse for cargo loading and unloading (Tr. 13-14). Forklifts are used to move the cargo. CTS has twenty-seven forklifts at LITCO; two 15,000-pound forklifts and twenty-five 9,000-pound forklifts (Tr. 177). CTS employs approximately twenty forklift operators during the day shift and twelve operators during the second shift (Tr. 199-200).

On February 16, 2000, OSHA compliance safety and health officer (CO) Herbert Snapp conducted a comprehensive safety and health inspection of the LITCO terminal (Tr. 15). During the inspection, CO Snapp observed two forklifts manufactured by Eagle Picher and Yale (Exhs. C-1, C-3; Tr. 17, 32). Although he did not see either forklift in operation, there is no dispute that the forklifts regularly operate (Tr. 31, 37, 65, 170-171).

The Eagle Picher forklift, located in the main warehouse, has a lift capacity of 15,000 pounds. It was purchased in 1998. During OSHA's inspection, the Eagle Picher forklift was equipped with a paper roll handler attachment (Exhs. C-1, R-8; Tr. 18, 160, 166). The paper roll handler attachment, manufactured by Auramo, is used to pick up rolls of paper for stacking or transportation. It has clamps that open and close on the paper roll (Tr. 19, 67). The clamps can also rotate (Tr. 180). The paper roll handler weighs 2,410 pounds and has a lift capacity of 9,250 pounds (Exh. R-3; Tr. 157, 159-160).

The Yale forklift, located in the Alcoa warehouse, has a rated capacity of 9,000 pounds. During the inspection, the Yale forklift was equipped with a long reach attachment (Exh. C-3; Tr. 32, 173-174). The long reach attachment is used to lift baled items, such as rubber or cloth, by clamps. The clamps are approximately 50 inches long (Tr. 32-33). The long reach attachment weighs 1,800 pounds and has a rated capacity of 6,500 pounds (Exh. R-4; Tr. 70, 161).

There are currently six long reach attachments and six paper roll handlers in use at LITCO (Tr. 169). There are two 15,000 pound forklifts such as the Eagle Picher which have a paper roll handler always attached. The long reach attachment only fits the Yale or similar 9,000 pound forklifts. Two 9,000-pound forklifts such as the Yale are always equipped with long reach attachments. When loading a barge, a long reach attachment is also installed on four other forklifts. It takes about 20 minutes to install a long reach attachment (Tr. 172-174).

The data plates on the Eagle Picher and Yale forklifts contain information on the model, its capacity and reach. According to the data plates, forks which came with the forklifts were installed (Tr. 26, 33, 98-99). The data plates did not reflect that a paper roll handler or long reach attachments were installed. There were separate data plates on the paper roll handler and long reach attachments showing their capacities (Exh. R-6; Tr. 29-30, 68, 180).

There is no dispute that the manufacturers of the Eagle Picher or Yale forklifts had not given prior written approval for the use of the paper roll handler and long reach attachments (Tr. 26-27, 33-34, 92). Other forklifts during OSHA's inspection had correct data plates (Tr. 40-41). Based on his inspection, CO Snapp recommended the serious citation.

After OSHA's inspection, CTS did obtain approval from the manufacturers of the Eagle Picher and Yale forklifts to use the paper roll handler and long reach attachments (Exhs. R-2, R-5; Tr. 102, 108, 157, 163-164)

### *Discussion*

The Secretary has the burden of proving a violation.

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

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that the marine terminal standards at Part 1917 are applicable to CTS's work at LITCO. Also, CTS does not dispute that it knew that the paper roll handler and long reach attachments were being used on its forklifts and that the forklifts were regularly operated to handle cargo (Tr. 170-171).

### ALLEGED VIOLATION

#### Items 1a and 1b - Alleged Serious Violations of § 1917.43(b)(1)

The citation alleges that the paper roll handler and long reach attachments did not have prior written approval from the manufacturers of the forklifts (item 1a). Also, the citation alleges that the information contained on the Eagle Picher and Yale forklifts' data plates did not reflect the use of the paper roll handler and long reach attachments (item 1b).

Section 1917.43(b)(1) provides:

After October 3, 1983, modifications, such as adding counterweights, that might affect the vehicle's capacity or safety shall not be performed without either the manufacturer's prior written approval or the written approval of a professional engineer experienced with the equipment who has consulted with the manufacturer, if available. Capacity, operation and maintenance instruction plates, tags or decals shall be changed to conform to the equipment as modified.

CTS agrees that the Eagle Picher and Yale forklifts are powered industrial trucks within § 1917.43 (Tr. 84). Also, CTS does not dispute that during OSHA's inspection, it did not have written approval from Eagle Picher and Yale to use the paper roll handler or the long reach

attachments. There is also no dispute that the data plates on the forklifts did not reflect the use of the attachments.

The Secretary agrees that the paper roll handler and long reach attachments are within the lifting capacities of the Eagle Picher and Yale forklifts (Tr. 68).

The issue in dispute is whether the paper roll handler and long reach attachments are “*modifications that might affect the vehicle’s capacity or safety*” as required by the standard and thus require prior written approval and changed data plates (Tr. 84).

The Secretary argues that the forklifts with front-end attachments such as the paper roll handler and long reach comprise the vehicle (Secretary’s Brief, p. 16-17). The attachments are securely fastened to the forklifts. The Secretary asserts that “modification” as used in § 1917.43(b)(1) should be interpreted broadly and include those attachments that “might” affect the capacity of the vehicle. With regard to the data plate, the Secretary argues that § 1917.43(b)(5) requires that the rated capacities of the forklift be visible to the operator. If the rated capacity of the attachment is only on the attachment, the capacity information may be missed by the forklift operator.

CTS argues<sup>1</sup> that unlike counterweights which are referenced in § 1917.43(b)(1), the paper roll handler and long reach are front-end attachments and not modifications. Front-end attachments merely do what the forklift was designed to do -- lift and transport cargo. As long as the attachments are within the lifting capacity of the forklift, CTS asserts that the front-end attachments do not affect the safety and capacity of the forklift.

The marine terminal standards at Part 1917 were promulgated in 1983 and are vertical standards which specifically apply to marine terminals in lieu of other OSHA standards. 48 Fed. Reg. 30886, at 30887-30888 (July 5, 1983). Amendments to Part 1917 have been adopted on several occasions since 1983. In 1996, OSHA’s amendments to Part 1917 were the result of a line-by-line review. 61 Fed. Reg. 9228 (March 7, 1996). Additional amendments were promulgated in 1997, 1998, 1999, and 2000. These amendments did not change § 1917.43(b)(1).

A safety standard such as § 1917.43(b)(1) is generally construed liberally to allow broad coverage in carrying out the congressional intent to provide safe and healthful working

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<sup>1</sup>CTS’s feasibility or greater hazard assertions were not raised in the sense of affirmative defenses but were raised to argue that a reasonable interpretation of the standard is consistent with CTS’s position (Resp. Brief, p. 8).

conditions. The standard must, however, give an employer fair notice of the conduct it prohibits or requires. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2205 (No. 87-2059, 1993). The standard's wording must be interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries, Inc.*, 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982). The words are to be viewed in context, not in isolation, and judged in light of its application to the facts of the case.

Front-end attachments such as a long reach or a paper roll handler which are undeniably within the lifting capacities of the Eagle Picher and Yale forklifts are not shown by the Secretary to affect the capacity of the forklifts as would adding counterweights. Written approval by the manufacturer or engineer is not required unless a modification is shown to affect the vehicle's capacity or safety.

Part 1917 does not define "modifications" except by the example of counterweights. Counterweights, unlike the paper roll handler and long reach attachments used by CTS, are added to the rear of the forklift for the purpose of increasing the lifting capacity of the forklift. Counterweights are functionally different from front-end attachments. By adding counterweights, various components of the forklift, such as wheels and the frame, may be affected. It may require changes in the forklift's hydraulics and steering (Tr. 217). In such circumstances, the standard is clear that prior written approval of the manufacturer is necessary.

Front-end attachments such as the long reach or paper roll handler, however, are designed to lift and transport cargo similar to the forks which typically come with the forklift. The various front-end attachments allow the forklift to lift and transport specific types of cargo. The use of an attachment such as the long reach and paper roll handler do no more to alter the structural or operational integrity of the forklift itself than does a load within the forklift's capacity.

The general industry standard applicable to powered industrial trucks such as forklifts, 29 C.F.R. § 1910.178(a)(4),<sup>2</sup> has language similar to § 1917.43(b)(1) except it specifically refers to "modifications and additions." There is also no reference to counterweights.

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<sup>2</sup>Section 1910.178(a)(4) for powered industrial trucks provides:  
Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval.  
Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

The general industry standards have been in existence since 1974, whereas the marine terminal standards were enacted in 1983. The failure to include “additions” in the requirements of § 1917.43(b)(1) and adding the reference to counterweights as an example indicates that the Secretary made a conscious decision to limit the definition of “modification” applicable to marine terminals. Where a term is carefully employed in one place and excluded in another, it should not be implied where excluded. *Diamond Roofing Co., Inc., v. OSHRC*, 528 F.2d 645, 648 (5th Cir. 1976). The fact that the differences exist in the language implies a knowing decision and an express purpose for the difference. Since front-end attachments are not functionally similar to counterweights, the use of an attachment within the capacity of the forklift is not a modification as intended by § 1917.43(b)(1).

Also, the general industry standard applicable to forklifts references “front-end attachments” at § 1910.178(a)(5)<sup>3</sup> and the marine terminal standard at § 1917.2<sup>4</sup> defining “front-end attachments” does not equate them to a modification affecting capacity or safety. The marine terminal standards omit the forklift labeling requirement for “front-end attachments” contained in § 1910.178(a)(5). Nor do the marine terminal standards incorporate those requirements by reference. It is arguable that the term “modification” in § 1910.178(a)(4) as applied to forklifts in general industry does not include “front-end attachments” within its meaning because the requirements for the latter are stated separately. If so, OSHA cannot apply a different meaning for use in § 1917.43. However, it is noted that at least one Administrative Law Judge has included an attachment (fork extensions) within the meaning of modification under the general industry standard, § 1910.178(a)(4). *See Caterpillar Tractor Company*, 1979 CCH OSHD ¶ 23,950 (No. 79-2301-E, 1979).

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<sup>3</sup> Section 1910.178(a)(5) provides:

If the truck is equipped with front-end attachments other than factory installed attachments, the user shall request that the truck be marked to identify the attachments and show the approximate weight of the truck and attachment combination at maximum elevation with load laterally centered.

<sup>4</sup> Section 1917.2 defines “front-end attachments” to mean:

“various devices, such as roll clamps, rotating and sideshifting carriages, magnets, rams, crane arms or booms, load stabilizers, scoops, buckets and dumping bins, attached to the load end for handling lifts as single or multiple units.”

In addition to not affecting the forklift's capacity, the Secretary failed to show the attachments affecting the forklift's safety. The Secretary contends that the use of an attachment that is within the capacity of the forklift affects safety because the forklift then does not have an accurate data plate (Tr. 9, 135). However, § 1917.43(b)(1) does not require a change in the data plate until a modification affecting capacity or safety is performed. The standard only requires the change in the data plates when a modification has been made that affects safety.

Modifications that do not potentially affect capacity or safety do not require prior approval or corrected data plates. Not all alterations to a forklift trigger § 1917.43(b)(1) and require a new data plate (Tr. 135). Ronald Signorino, a former manager of OSHA's Office of Maritime Standards, who developed the marine terminal standards, testified that § 1917.43(b)(1) was never intended to apply to a proper front-end attachment within the forklift's capacity (Tr. 213-214).

Even if the intention had been for the marine terminal standard to apply to a proper front-end attachment, the standard does not state that clearly and a finding of a violation is not appropriate. A regulation cannot be construed to mean what the agency intended but did not adequately express. *Id.* at 648.

The standard requires that modifications "that might affect the vehicle's capacity or safety" require prior manufacturer's approval. The Secretary failed to show that the long reach or the paper roll handler attachments used by CTS possibly affected the forklifts' capacity or safety. Both attachments were undeniably within the capacity of the forklifts.

Items 1a and 1b are vacated.

### **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) of the Federal Rules of Civil Procedure.

### **ORDER**

Based upon the foregoing decision, it is ORDERED:

Serious Citation No. 1:

1. Items 1a and 1b, alleged violation of § 1917.43(b)(1), are vacated and no penalty is assessed.
2. Items 2a, alleged violation of § 1917.151(g)(1), is withdrawn by the Secretary.
3. Item 2b, alleged violation of § 1917.151(g)(1), and item 2c, alleged violation of § 1917.151(g)(4), are affirmed and a grouped penalty of \$675 is assessed pursuant to the parties' settlement at hearing.
4. Item 3, alleged violation of § 1917.156(b)(4)(i), is affirmed and a penalty of \$1,625 is assessed pursuant to the parties' settlement at hearing.

Other Than Serious Citation No. 2

1. Item 1, alleged violation of § 1917.11(a), is affirmed and no penalty is assessed based upon CTS's withdrawal of contest.

/s/

KEN S. WELSCH  
Judge

Date: March 9, 2001

