

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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6 CHIEF ADMINISTRATIVE OFFICER
7 OF THE OCCUPATIONAL SAFETY AND
8 HEALTH ENFORCEMENT SECTION,
9 DIVISION OF INDUSTRIAL RELATIONS
10 OF THE DEPARTMENT OF BUSINESS AND
11 INDUSTRY,

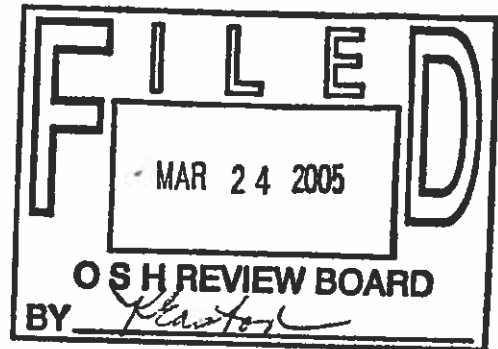
Docket No. RNO 04-1309

Complainant,

vs.

12 SIERRA CHEMICAL CO.,

13 Respondent.



14 DECISION

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY**
16 **AND HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of
17 March 2005, in furtherance of notice duly provided according to law,
18 ROB KIRKMAN, ESQ. and STEVEN SMITH, ESQ. co-counsel appearing on
19 behalf of the **Chief Administrative Officer of the Occupational**
20 **Safety and Health Enforcement Section, Division of Industrial**
21 **Relations (OSHES)**, and MR. GARY CUMMINGS, Regulatory Safety and
22 Compliance Manager, appearing on behalf of respondent, **SIERRA**
23 **CHEMICAL, CO.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
24 **BOARD** finds as follows:

25 Jurisdiction in this matter has been conferred in accordance
26 with Nevada Revised Statute 618.315.

27 The complaint filed by OSHES sets forth allegations of
28 violations of Nevada Revised Statutes as referenced in Exhibit "A,"

1 attached thereto. Notwithstanding the items set forth in Exhibit
2 "A," only one citation item is actually subject of contest, namely
3 Citation 1, Item 2.

4 Citation 1, Item 2 charges a violation of 29 CFR 1910.176(f).
5 The complainant alleges that on or about September 2004, the
6 respondent employer failed to protect exposed employees from the
7 hazards of rolling rail cars. The violation was classified as
8 "serious." The proposed penalty for the alleged violation is in the
9 amount of THREE THOUSAND DOLLARS (\$3,000.00).

10 Counsel for the Chief Administrative Officer presented
11 testimony and evidence with regard to the alleged violations.
12 Safety and Health Representative (SHR) Brian Staples testified that
13 on or about September 13, 2004 he conducted a comprehensive
14 inspection at the work site of the respondent located in Sparks,
15 Nevada. While conducting the inspection at a railway spur on the
16 respondent's premises, SHR Staples observed two employees walking
17 between rail cars. The SHR further noted approximately 12 wheel
18 chocks laying on the ground; and on closer observation found that
19 some rail cars were not blocked or "chocked" to prevent movement.
20 Mr. Staples testified that he also observed an employee of
21 respondent offloading a rail car and noted that the wheels were
22 indeed properly chocked.

23 The SHR contacted the facility's manager, Mr. Lopez, who
24 accompanied the SHR throughout the inspection of the premises. Mr.
25 Staples inquired as to the status of the unchocked cars,
26 specifically as to whether they were being loaded, unloaded, subject
27 of braking devices, and the company policy of blocking or chocking
28 the wheels of all rail cars on the premises. Mr. Lopez responded to

1 Mr. Staples that only rail cars being unloaded or "worked" were in
2 fact chocked; that he had no information on the internal brake
3 system of the rail cars, nor any responsibility for same; and that
4 it was company policy not to chock any cars unless they were being
5 unloaded or subject of work. Complainant's photographic Exhibits 2
6 and 3 were admitted in evidence without objection depicting chocks
7 on the ground and rail cars.

8 SHR Staples testified that he reviewed the standard operating
9 procedures of respondent and noted a company rule requiring all rail
10 cars to be chocked and brakes set during unloading procedures. He
11 testified that he observed no rule with regard to unloaded cars or
12 loaded cars, no requirements with regard to verifying the setting of
13 handbrakes on the rail cars, and no information or preventive
14 measures with regard to employees moving or walking behind or in
15 front of railway cars whether chocked or unchocked.

16 SHR Staples testified in response to cross-examination
17 conducted by Mr. Gary Cummings. Mr. Staples observed blue flags
18 attached to a locked gate at the respondent's railway spur which he
19 understood to be the established signal between the railroad and
20 respondent to prevent train entry or motorized movement of any rail
21 cars. He observed outside the gate and from a distance, a switching
22 device and what appeared to be a derail device which would cause a
23 derailment of any moving train or cars entering the spur area while
24 the blue flags were in place and the derailment device active.

25 On redirect examination Mr. Staples testified that he observed
26 loaded cars mixed with unloaded cars on the same track at
27 respondent's spur. Mr. Staples interviewed and identified the two
28 employees he observed walking between the rail cars as employees of

1 respondent.

2 Mr. Staples testified that the cited standard was applicable
3 to the facts as opposed to other standards for the subject industry.
4 He also testified that accidental movement of railway cars affixed
5 with wheels, which he interpreted as "rolling cars or stock," could
6 occur from a variety of causes. Without any movement restrictions
7 in place, moving rail cars could cause serious injury or death to
8 exposed employees. He further testified that the internal handbrake
9 of a rail car, even if set, is only designed to stop approximately
10 11% of the movement of a railway car. Mr. Staples stated that even
11 had rail car brakes been confirmed as set, it would not constitute
12 protection from the potential hazard exposure he observed to the
13 employees of respondent. Mr. Staples testified that under general
14 safety guidelines persons are never permitted to cross rail way
15 tracks within 50 feet of a rail car because of the danger of
16 movement.

17 Mr. Staples classified the hazard as serious due to the
18 potential for serious injury or death from an approximate 2,000
19 pound rail car striking or passing over the limb or body of an
20 employee. He stated that rail cars could potentially move on their
21 own due to vibration, earthquake, or other unknown or accidental
22 causes, even though an engine is not permitted to enter a spur due
23 to the blue flag signal and a derail device.

24 Respondent presented testimony and evidence in defense to the
25 alleged violation. Mr. Gary Cummings, the respondent safety
26 representative, was also sworn as a witness. He provided
27 testimonial evidence of respondent's position to deny the citation
28 and proposed penalty. Mr. Cummings testified that the cited

1 standard is not applicable to the facts observed because the subject
2 rail cars were not "rolling" or "being worked" and thus not required
3 to be blocked or chocked. The company policy requires all loaded
4 cars be blocked, and posted with blue flags; any cars "being worked"
5 principally involving unloading, require the internal brakes be set
6 and wheels chocked. He further testified that after a car is
7 unloaded, the chocks are removed because the standard and company
8 policy does not require anything further. Mr. Cummings testified as
9 to the differences between derail and chocking devices. He
10 explained that derail devices prevent a moving train from entering
11 the spur when blue flags are posted by causing derailment; but that
12 chocking devices are not designed to derail a train or rail car but
13 only to prevent rail car movement.

14 Counsel for complainant conducted cross-examination of Mr.
15 Cummings. He confirmed the company position that rail car
16 handbrakes are set by the railroad when they are brought into the
17 spur and therefore no review or check of that process is conducted
18 by the respondent or its employees. He testified that he has no
19 information as to whether railroad cars could move due to an
20 earthquake or vibration if left unblocked or unchocked. He stated
21 that the derail device is located approximately 50 yards from the
22 company spur work area. Mr. Cummings also testified that employees
23 do not cross between rail cars unless they are responsible for
24 setting chocks. He said there is no reason for other employees to
25 cross between the cars unless they are chocking because unloading
26 does not require such personnel movement.

27 Mr. Cummings introduced respondent's Exhibit A which comprised
28 a one page copy of six photographs depicting the spur site, the

1 switch, and rail cars with blue flags posted.

2 In further cross-examination Mr. Cummings testified he could
3 not explain why two employees were seen crossing behind rail cars as
4 observed by the SHR but could not controvert that observation.
5 Finally Mr. Cummings reiterated there was no specific standard
6 applicable to chocking of rail cars unless being worked, therefore
7 no violation occurred.

8 Complainant recalled SHR Staples on rebuttal to testify as to
9 his interpretation of the cited standard. Mr. Staples testified
10 that any railway car with wheels is a "rolling car" and chocking is
11 a recognized safety practice to protect employees from any
12 accidental or other railway car movement.

13 On recross-examination by the respondent and board members,
14 Mr. Staples testified that 29 CFR 1910.111.13, as referenced in Mr.
15 Cummings testimony, was not a correct standard for the violative
16 facts because of its applicability to the loading or unloading
17 processes. He testified that he cited respondent under 29 CFR
18 1910.176(f) because he observed actual exposure to employees of
19 respondent crossing railway tracks between cars and confirmed those
20 employees were not engaged in loading or unloading nor were they in
21 the process of setting any blocks or chocks on the car wheels to
22 prevent movement. He testified that if respondent's position is to
23 be generally accepted, then the employees observed crossing between
24 rail cars would be completely unprotected from the observed hazard
25 potential at the work site. He stated that any emphasis on the term
26 "rolling cars" in the standard is to "rolling stock" or any rail car
27 equipped with wheels which is capable of rolling and not to a car
28 that is actually rolling underway.

1 At the conclusion of the hearing, complainant and respondent
2 presented closing arguments.

3 The complainant argued that the sworn testimonial evidence of
4 SHR Staples established that two employees of the respondent
5 employer crossed between rail cars which were not blocked or chocked
6 to prevent accidental or other movement exposing them to the
7 potential hazard for serious injury or death. The observed exposure
8 was not controverted or even explained. No safety rules were found
9 to protect against such employee exposure. Mr. Staples identified
10 the two subject employees during his interview as those of
11 respondent. Counsel argued that respondent's position that only
12 rail cars being unloaded need to be blocked was untenable because a
13 rail car with wheels is capable of "rolling" and that is what the
14 standard intended to protect employees exposed to the potential
15 hazard of accidental or other movement and the serious injury that
16 could reasonably result from a railway car passing over a body
17 member or the entire person of an employee. Counsel argued that
18 without chocking or blocking rail cars affixed with wheels located
19 on the respondent's spur, the employees observed and any other
20 employees crossing between the cars are exposed to a potential
21 movement hazard.

22 The respondent in closing argument reiterated the company
23 position that the cited standard was inapplicable to the facts and
24 that same only applied to the blocking or chocking of railway cars
25 being worked - unloaded.

26 In reviewing the testimonial evidence, exhibits, and arguments
27 of counsel, the board must measure same against the elements
28 required to establish a violation under Occupational Safety & Health

1 Law based upon the statutory burden of proof and competence of the
2 evidence.

3 In all proceedings commenced by the filing of
4 a notice of contest, the burden of proof
5 rests with the Administrator. (NAC
6 618.788(1)).

7 To prove a violation of a standard, the
8 Secretary must establish (1) the
9 applicability of the standard, (2) the
10 existence of noncomplying conditions, (3)
11 employee exposure or access, and (4) that the
12 employer knew or with the exercise of
13 reasonable diligence could have known of the
14 violative condition. See Belger Cartage
15 Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC
16 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373
17 (No. 76-1948, 1979); Harvey Workover, Inc.,
18 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90,
19 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-
20 1408, 1979).

21 All facts forming the basis of a complaint
22 must be proved by a preponderance of the
23 evidence. See Armor Elevator Co., 1 OSHC
24 1409, 1973-1974 OSHD ¶16,958 (1973).

25 A respondent may rebut allegations by showing:

- 26 1. That the standard was inapplicable to
27 the situation at issue;
- 28 2. That the situation was in compliance; or
lack of access to a hazard. See, Anning-
Johnson Co., 4 OSHC 1193, 1975-1976 OSHD
¶ 20,690 (1976).

29 The sworn testimony of SHR Staples was credible and
30 uncontroverted as to the observed hazard exposure at the work site.
31 Two employees of respondent were observed crossing between railway
32 cars which were not blocked or chocked. The employees identified
33 themselves as those of respondent. Employer knowledge of the
34 potential for exposure was established by Mr. Cummings' testimony
35 that it is indeed company policy not to chock cars unless they are
36 being "worked." There was no legally competent evidence or

1 testimony to controvert Mr. Staples as to Mr. Lopez' advice that he
2 had no information on the setting of the rail car handbrakes or
3 company policy to check the brakes even though same might not be
4 sufficient to stop substantial movement of a rail car. Accordingly
5 there was no evidence of alternate compliance.

6 Respondent presented no competent evidence that the employees
7 observed by Mr. Staples crossing between the unchocked cars were in
8 violation of a company policy or engaged in installation of blocking
9 or chocking devices. Indeed Mr. Cummings was very forthright,
10 stating the company position that no specific OSHA standard required
11 the blocking or chocking of rail cars which were not "being worked."

12 The complainant met its burden of proof to prove violation of
13 the specific duty standard by establishing (1) the standard applies
14 to the facts, (2) non-complying conditions, (3) employee exposure
15 or access, and (4) employer knowledge of the violative condition.
16 Supra, at page 8.

17 The board finds that the cited standard, 29 CFR 1910.176(f)
18 applies to the facts; and that employees were observed crossing
19 between railway rolling stock which was not blocked. The proximity
20 of the employees to railway cars crossing between unblocked or
21 unchocked rolling stock created exposure to a potential hazard of
22 serious injury or death should accidental or other movement of the
23 rail cars occur. To find exposure to a hazard, complainant must
24 establish employee exposure directly or access to the potential
25 hazard constructively. Hazard exposure to employees was observed
26 with no explanation or defense by respondent as to their purpose in
27 crossing the tracks or any rules to protect the said employees from
28 the hazard potential.

1 Based upon the above and foregoing findings, the board
2 concludes as a matter of law that the alleged violation occurred and
3 the penalty proposed is confirmed. To conclude otherwise would
4 require a nullity of not only the spirit and intent of Occupational
5 Safety and Health Law but the cited specific standard promulgated
6 for the subject industry. If the board determines that no specific
7 standard protects the employees of respondent from the potential
8 hazards of unblocked rolling stock accidentally or otherwise moving
9 while employees cross or have unrestricted access to cross between
10 rail cars, then clearly permissive exposure to serious injury or
11 death would be sanctioned. This board has no alternative but to
12 apply a reasonable interpretive meaning of the standard. Railway
13 cars are rolling cars or rolling stock. If employees are not
14 prevented from or protected while crossing between rail cars then
15 they are exposed to a potential hazard identified for protection in
16 29 CFR 1910.176(f).

17 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND**
18 **HEALTH REVIEW BOARD** that violation of Nevada Revised Statutes did
19 occur as to Citation 1, Item 2, 29 CFR 190.176(f). The violation
20 charged is confirmed and the proposed penalty in the amount of **THREE**
21 **THOUSAND DOLLARS (\$3,000.00)** approved.

22 The Board directs counsel for the complainant, **CHIEF**
23 **ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH**
24 **ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS**, to submit
25 proposed Findings of Fact and Conclusions of Law to the **NEVADA**
26 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on
27 opposing counsel within twenty (20) days from date of decision.
28 After five (5) days time for filing any objection, the final

