IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TNT CRANE & RIGGING, INC.,

Petitioner,

No. _____

v.

OSHRC No. 16-1587

MARTIN WALSH,
Secretary of Labor,

Respondent.

PETITION FOR REVIEW

TNT Crane & Rigging, Inc. ("TNT"), by counsel, hereby petitions the Court pursuant to 29 U.S.C. § 660 for review of a final order of the Occupational Safety and Health Review Commission ("Commission") in OSHRC Docket No. 16-1587. Administrative Law Judge Brian A. Duncan issued a Decision and Order in favor of TNT on September 14, 2018, finding that the cited regulations did not apply to the work performed by TNT. (**Exhibit A**.) After Respondent filed a Petition for Discretionary Review with the Commission under 29 C.F.R. § 2200.91, on March 27, 2020, the Commission reversed, finding that the regulations did apply to TNT's work, and remanded the case to Judge Duncan for further consideration. (**Exhibit B**.) On October 2, 2020, Judge Duncan issued a Decision and Order on Remand, again finding in favor of TNT. (**Exhibit C**.) Respondent again filed a Petition for Discretionary Review with the Commission, and the Commission, by Decision dated June 2, 2022, again reversed Judge Duncan and affirmed the citations issued to TNT by Respondent. (**Exhibit D**.) The Commission's June 2, 2022 Decision constitutes an appealable Final Order under 29 U.S.C. § 660.

TNT seeks review of all aspects of the Commission's two Decisions, including all rulings contained in both of Judge Duncan's Decision and Order.

Respectfully submitted this 20th day of July, 2022.

TNT CRANE & RIGGING, INC.
By Counsel

By: /s/ *Travis W. Vance*

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CERTIFICATE OF SERVICE

I certify that on July 20, 2022, I served a copy of the foregoing Petition for Review upon counsel for Respondent, Martin J. Walsh, Secretary of Labor, by U.S. Mail and Federal Express next-day delivery as follows:

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 16-1587
TNT CRANE & RIGGING, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on the date below. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION MUST FILE A PETITION FOR REVIEW WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §660; Fed. R. App. P. 15.

FOR THE COMMISSION,

Dated: June 2, 2022

John X. Cerveny
Executive Secretary

DOCKET NO. 16-1587

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. TNT CRANE & RIGGING, INC. Respondent.	OSHRC Docket No. 16-1587

ON BRIEFS:

Brian A. Broecker, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Elena S. Goldstein, Deputy Solicitor; Kate O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Pamela D. Williams, Esq.; Travis W. Vance, Esq.; Fisher & Phillips LLP, Charlotte, NC and Houston, TX
For the Respondent

DECISION

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

TNT Crane & Rigging, Inc. is a crane service provider based in Houston, Texas. In May of 2016, a TNT employee suffered serious injuries when part of a crane being disassembled by a TNT crew in Georgetown, Texas, contacted a power line. The Occupational Safety and Health Administration conducted an inspection and issued TNT a serious citation alleging two violations

of the Cranes and Derricks in Construction Standard, 29 C.F.R. § 1926.1400, with a proposed penalty of $24,942.[1]

Administrative Law Judge Brian A. Duncan vacated both citation items on the grounds that the cited provisions did not apply to the disassembly work being performed by TNT's crew. On review, the Commission reversed the judge's decision, finding that the cited standards were applicable, and remanded for the judge to address the remaining issues in the case. *TNT Crane & Rigging, Inc.*, No. 16-1587, 2020 WL 1657789 (OSHRC March 27, 2020). On remand, the judge again vacated both citation items, finding that the Secretary failed to establish TNT had knowledge of the alleged violative conditions. For the reasons discussed below, we reverse the judge and affirm both citation items.

BACKGROUND

On the day of the incident, two TNT employees, a spotter/rigger (SR1) and a crane operator, had finished a week-long project installing new antennas on a communications tower. The employees used a Grove GMK all-terrain 275-ton mobile crane to perform this work. With the project complete, their next task was to disassemble the crane for transport.

To assist with the crane's disassembly, TNT sent two additional employees—a second spotter/rigger (SR2) and a driver/rigger—to the worksite. All four employees met to discuss a plan for "breaking the crane down" and loading it onto a semi-truck trailer. The crew's responsibilities under the plan were as follows: the crane operator would operate the crane; SR2 would spot for the crane operator and hold the load line; the driver/rigger would drive the truck that the boom would lay on; and SR1 would spot for the driver/rigger while guiding the truck forward. During the disassembly process, the crane operator had to lower the boom onto the trailer's flatbed with the assistance of the other crew members, so that the boom's extensions could be removed. When it came time to lower the boom, SR2 held a metal connector, known as a "beckett," at the end of the load line so that the line would stay taut during the boom's descent.

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[1] Item 1 alleges a violation of 29 C.F.R. § 1926.1407(b)(3) for exposing employees to the hazard of electrical shock by failing to use at least one of the measures required to prevent encroachment or contact with the power lines while disassembling the crane. Item 2 alleges a violation of 29 C.F.R. § 1926.1407(d) for placing "[p]art of a crane/derrick, load line, or load (including rigging and lifting accessories) whether partially or fully assembled, . . . closer than the minimum approach distance under Table A (see 1926.1408) to a power line."

As the crane operator lowered the boom, the load line held by SR2 contacted a 14,400-volt power line, electrocuting SR2. SR2 was hospitalized with severe burns and other serious injuries.

I. DISCUSSION

To prove a violation, "the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Here, the Secretary alleges violations of § 1926.1407(b)(3) (Item 1) and § 1926.1407(d) (Item 2), two provisions located in a section of the construction crane standard entitled "Power line safety (up to 350kV) – assembly and disassembly."

As noted, we have already determined that these provisions apply to the work at issue. *TNT Crane*, No. 16-1587, at 11, 2020 WL 1657789, at *8. On remand, the judge addressed the remaining elements of the Secretary's burden of proof and vacated both citation items. The judge found that the Secretary established both noncompliance and exposure, but failed to establish that TNT had knowledge of the violative conditions. The only issue on review is whether the judge erred in finding that knowledge was not proven.

A. Knowledge

To establish knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). It is well established under Commission precedent that the knowledge of a supervisor can be imputed to the employer. *See, e.g., Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (supervisor's knowledge is imputable to employer), *aff'd*, 535 F. App'x 386 (5th Cir. 2013) (unpublished); *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (applying agency law's long-standing principle that corporation is charged with knowledge of its agents), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

Here, the judge found that the crane operator was TNT's supervisor at the Georgetown worksite and that the alleged violative conditions stemmed solely from his misconduct because he created the disassembly plan and operated the crane that contacted the power line.[2] As a result,

[2] TNT argues on review, as it did before the judge, that the crane operator was not a supervisor, because he lacked the power to hire, fire, or discipline employees. TNT, however, also concedes

the judge concluded that under the Fifth Circuit's decision in *W. G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006), the Secretary was required to establish that the supervisor's misconduct was foreseeable before the supervisor's knowledge of his own misconduct could be imputed to TNT.[3] In *Yates*, the court held that "a supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *Yates*, 459 F.3d at 608-09 (emphasis in original). According to the judge, the Secretary failed to show that TNT's safety policies, training program, or audit and disciplinary program were deficient, and therefore the supervisor's misconduct was not foreseeable.

On review, the Secretary argues that the judge erred in applying *Yates* because all of the crew members were engaged in the violative conduct at issue under each citation item and therefore it is the supervisor's actual knowledge of the entire crew's misconduct that is imputed to TNT. In response, TNT defends the judge's ruling and claims that even if the entire crew was found to be engaged in the violative conduct, "it was [the supervisor's] misconduct . . . which undergirded his crew's actions."

We agree with the Secretary. As to Item 1, there is no dispute that the TNT crew disassembled the crane without a required protective measure in place to prevent encroachment. Contrary to the judge's finding, the violative conduct occurred once the crew collectively began their disassembly work without such a measure in place—it was not the supervisor's plan for the work (which was in fact developed by the crew as a whole) or his operation of the crane. Indeed, the cited standard requires that the encroachment prevention measure be in place *before* disassembly begins.

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that this issue is not before the Commission. We note that the record shows the crane operator, who himself testified that he was the onsite supervisor, was responsible for ensuring worksite safety and assessing the crew's understanding of work plans and practices.

[3] The Fifth Circuit is a relevant circuit here, as both the worksite and TNT's headquarters are in Texas, which is within the geographical area of the Fifth Circuit. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

Likewise, Item 2 involves the crew's collective failure to maintain the required Table A clearance during the disassembly process. The driver/rigger testified that he had to "back the trailer right up to the back of the crane" but made clear that maintaining the required clearance was a team effort: "[A]s the boom came down, *we* were going to drive the truck forward and lay the boom down on top of the trailer so *we* could work directly off the trailer." And in positioning the truck, the driver/rigger testified that SR1 assisted by serving as spotter because "*we* [were] literally . . . driving at the power line with a trailer behind *us*."[4] Thus, contrary to the judge's finding, the violative conduct was not limited to the supervisor's operation of the crane.

In short, both alleged violations rest on the work activities the entire crew collectively engaged in on the day of the incident. Indeed, the crew conducted a job safety analysis (JSA) together and then met as a group to discuss the disassembly plan before starting their work, the execution of which required all of them to participate. During the JSA, two of the crew members expressed concerns with the plan, but after being reassured by the other two crew members that the crane had been assembled without incident in the same location, they agreed to proceed.

Because we find that TNT's entire crew collectively engaged in the violative conduct alleged in each citation item, the supervisor's knowledge of the other crew members' conduct is imputed to TNT without a showing of foreseeability. This is consistent not only with Commission precedent but also that of the Fifth Circuit. In *Angel Bros. Enter., Ltd. v. U.S. Dep't of Labor*, 18 F.4th 827, 832 (5th Cir. 2021), the Fifth Circuit recently rejected the very same argument TNT makes here about its supervisor's role in the crew's violative conduct and affirmed the Commission's decision to decline extending *Yates* to a situation involving a foreman who directed a subordinate to work in an unprotected excavation:

> Angel Brothers' argument—that a supervisor's knowledge cannot be imputed to the employer when the supervisor authorizes, or takes some other active role in, a

[4] We note that the cited provision only permits "a dedicated spotter who is in continuous contact with the equipment operator." 29 C.F.R. § 1926.1407(b)(3)(i). Here, the record shows that unlike SR1, SR2 did not qualify as a "dedicated spotter" under the crane standard's definition of that term because his sole responsibility was not to "watch the separation between the power line and the equipment, load line and load (including rigging and lifting accessories)"—he was also responsible for maintaining tension on the load line. 29 C.F.R. § 1926.1401 ("To be considered a dedicated spotter, the requirements of § 1926.1428 (Signal person qualifications) must be met and [the spotter's] sole responsibility is to watch the separation between the power line and the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator that the applicable minimum approach distance is not breached.").

> subordinate's safety violation—finds no support in *Yates*, agency principles, or in other caselaw. Ordinary imputation principles thus apply. [The] [f]oreman[]'s knowledge of the crew member's safety violation is attributable to Angel Brothers.

Angel Bros. Enter., Ltd., No. 16-0940, 2020 WL 4514841 (OSHRC July 28, 2020). As the court explained, whether a supervisor engages in misconduct alongside a subordinate or authorizes a subordinate to engage in misconduct, "both of those scenarios involve a subordinate's violation of safety rules so 'it is reasonable to charge the employer with the supervisor's knowledge' of the subordinate's misconduct." *Angel Bros.*, 18 F.4th at 833 (citing *Yates*, 459 F.3d at 607 (citation omitted)). Accordingly, under both Fifth Circuit and Commission precedent, the supervisor's actual knowledge of the crew's violative conduct is imputable to TNT without a foreseeability showing. We therefore conclude the Secretary has met his burden of proving knowledge and thus all the necessary elements of both violations.

A. Unpreventable Employee Misconduct (UEM)

As it did before the judge, TNT argues on review that both violations were the result of unpreventable employee misconduct. To establish this affirmative defense, an employer is required to show that it: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered."[5] *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). For the following reasons, we conclude that TNT has failed to establish the affirmative defense.[6]

Item 1

To prove a UEM defense, the employer must establish it had a work rule that effectively implemented the requirements of the standard. *Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No.

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[5] The judge did not reach the UEM defense since he vacated both violations. Nonetheless, his foreseeability analysis, as well as the parties' discussions of foreseeability on review, closely tracks an analysis of the UEM defense, though the burden of proof falls on TNT, not the Secretary. *See Calpine Corp.*, No. 11-1734, 2018 WL 1778958, at *9 (OSHRC Apr. 6, 2018) (employer carries evidentiary burden for UEM affirmative defense), *aff'd*, 744 F. App'x 879 (5th Cir. 2019) (unpublished).

[6] On review, the Secretary claims that the company's UEM defense must fail because the entire crew was engaged in the misconduct and TNT only alleged the defense as to its supervisor. We disagree with the Secretary's characterization of TNT's argument. Although the company focuses on its supervisor's operation of the crane as the misconduct at issue, it does not limit its defense to his conduct alone.

91-1613, 1994); *see also Mosser Constr. Co.*, 15 BNA OSHC 1408, 1415 (No. 89–1027, 1991) (work rule inadequate because it was not "clear enough or broad enough to eliminate employee exposure" to the specific violative conditions); *Archer-W. Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) (work rule inadequate because "even if the employee had complied," it would not "eliminate the [cited] hazard"), *aff'd*, 978 F.3d 744 (D.C. Cir. 1992).

We find that TNT failed to establish it had work rules that sufficiently addressed the requirements of § 1926.1407(b)(3).[7] In Section 13 ("Cranes") of TNT's safety policy, a work rule addressing "Electrical Hazards and Warnings (1926.1411)"[8] states:

> **For lines rated 50kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.**
>
> . . .
>
> If it is determined that any part of the equipment, load line or load could get closer than 20 feet to a power line then at least one of the following measures must be taken: 1) Ensure the power lines have been de-energized and visibly grounded, 2) Ensure no part of the equipment, load line or load gets closer than 20 feet to the power line, or 3) Determine the line's voltage and minimum approach distance permitted.

(Emphasis in original). Although this rule's requirements share some similarities with § 1926.1407, notably absent are the specific requirements of the cited provision, § 1926.1407(b)(3), which expressly mandate that an employer implement an encroachment prevention measure prior to crane disassembly to ensure that the 20-foot distance from the power line is maintained when any part of the crane or equipment could potentially breach that distance.

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[7] Under paragraph (3) of § 1926.1407(b)—titled "*Preventing encroachment/electrocution*"—the employer must implement one of five "additional measures" and is required to select **a** "measure . . . from th[e] list [that is] effective in preventing encroachment." 29 C.F.R. § 1926.1407(b)(3). The five measures are: (1) use of a dedicated spotter who is in continuous contact with the equipment operator (with four listed requirements for the spotter); (2) a proximity alarm set to give the operator sufficient warning to prevent encroachment; (3) a device that automatically warns the operator when to stop movement, such as a range control warning device, that is set to give the operator sufficient warning to prevent encroachment; (4) a device that automatically limits range of movement, set to prevent encroachment; and (5) an elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings. *Id.* § 1926.1407(b)(3)(i)-(v).

[8] As the Secretary points out, TNT's rule also references a different OSHA provision, which by its terms, governs "equipment traveling under or near a power line on a construction site with no load." 29 C.F.R. § 1926.1411(a). For both Items 1 and 2, however, we rest our analysis of TNT's UEM defense primarily on the substance of the company's rules and how they compare in that regard to the cited provisions.

Contrary to TNT's work rule, the cited standard does not permit reliance on an employer's general plan or intent to maintain the 20-foot distance without an affirmative, specific measure in place before starting disassembly to prevent encroachment.

Section 13 of TNT's safety policy mentions only one of the cited provision's numerous encroachment prevention measures, stating that "[i]f necessary a spotter will be designated to monitor the approach distance and alert [the] Operator if that distance becomes compromised." But as the Secretary points out, nowhere does the policy identify when a spotter is "necessary" or otherwise required. No other prevention measure required by the standard is mentioned in the policy. Under these circumstances, we find that TNT's work rule does not sufficiently address the requirements of § 1926.1407(b)(3) and therefore, the company has not proven the first element of its UEM defense. *See Lukens Steel Co.*, 10 BNA OSHC 1115, 1125 n.25 (No. 76-1053, 1981) (employer cannot prove UEM defense where it lacked specific work rule governing cited conduct). Accordingly, we conclude that the defense has not been established for Item 1.[9]

Item 2

We find that TNT has shown it had work rules to address the requirements of § 1926.1407(d)[10] and adequately communicated those rules to its employees, but failed to prove it sufficiently monitored for compliance with those rules and effectively enforced them when violations were discovered. Regarding the company's work rules, Section 23 ("Electrical Safety") of its safety policy, under the heading of "Working Near Power Lines (unqualified employees only)," states: "**For lines rated 50kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.**" (Emphasis in original). Section 23 also provides: "If it is determined that any part of the equipment, load line or load could get closer than 20 feet to a

[9] We note that even if TNT had work rules sufficient to address the provision cited under Item 1, its UEM defense would nonetheless fail for the same reasons explained below with respect to Item 2—TNT has not proven that it adequately monitored for safety violations and effectively enforced its rules.

[10] Section 1926.1407(d) requires:

> *Assembly/disassembly inside Table A clearance prohibited.* No part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, is allowed closer than the minimum approach distance under Table A (*see* § 1926.1408) to a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line.

power line then at least one of the following measures must be taken: Ensure no part of the equipment, load line or load gets closer than 20 feet to the power line . . . ." And Section 23 contains the relevant Table A referenced in § 1926.1407 that sets forth the minimum clearance distance for varying voltage ranges. Further, Section 1 ("General Safety") of TNT's policy, under the heading of "Working Around Cranes and Other Heavy Equipment," states: "All equipment, cranes and booms are to be kept a minimum of at least ten (10) feet from energized power lines." In short, these work rules set forth the minimum approach distance (MAD) that cranes and related equipment must maintain from power lines.[11] Therefore, we find that TNT had adequate work rules to address the cited standard's requirements.[12] *Cf. Calpine Corp.*, No. 11-1734, 2018 WL 1778958, at *8 (OSHRC Apr. 6, 2018) (work rule requiring use of personal fall protection at heights greater than four feet "is not equivalent" to cited standard, which requires either railings or an attendant at a temporary floor opening on the platform) (citation omitted), *aff'd*, 774 F. App'x 879, 884 (5th Cir. 2019) (unpublished).

In addition, we find that TNT adequately communicated these work rules to its employees. According to testimony from TNT's vice president of health, safety, and environment (VP), the company's safety program, which includes information pertaining to power line safety, is communicated to all employees engaged in field operations. For new hires, TNT uses a safety orientation script that covers power line safety, including maintaining an appropriate distance between a crane and power lines.[13] At orientation, employees are also provided with the

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[11] Given our reliance on Section 23, as well as Section 1, of TNT's safety policy as the basis for our finding, we need not address the Secretary's contention that TNT cannot also rely on its work rule in Section 13 because that rule ("All equipment is to be operated so the minimum approach distance is maintained from exposed energized lines and equipment.") is not specific to crane disassembly. We note, however, that Section 13 contains the same language found in Section 23, as discussed above, pertaining to the minimum clearance distance, as well as Table A.

[12] The Secretary argues that TNT's work rules are deficient because they provide "no guidance to employees on *how* to assemble or disassemble cranes in a way that would ensure that they did not inadvertently breach the MAD[.]" But § 1926.1407(d) contains no such guidance or instruction, requiring only that the MAD be maintained.

[13] The safety orientation script states:

> Cranes, derricks, and winch trucks must be operated with extreme caution when near power lines. Assume all wires are hot. All power lines must be flagged or barricaded where there is a danger of contact by mobile equipment. Lines that can be reached accidentally must be de-energized or otherwise made safe before any work is done. Never operate equipment closer than 10 feet to a power line of 220

company's safety manuals. Both a TNT branch manager and the driver/rigger at the Georgetown worksite testified that TNT provides employees with specific training on power line safety.[14]

Furthermore, the company's VP explained that TNT's branch divisions hold regular safety meetings, with the Marshall and San Antonio branches that the crew came from meeting three times a week, on varying topics including power line safety and clearance distances. Work crews conduct JSAs before starting a job to identify specific hazards on the worksite, as well as steps to mitigate or eliminate those hazards, just as the crew did here for the Georgetown project. As for the company's crane operators, TNT's safety manager testified that all crane operators receive training related to power line safety during their on-boarding process. Therefore, we find that TNT has shown it sufficiently trained its employees on power line safety. *Compare PAR Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1628 (No. 99-1520, 2004) ("[E]mployers cannot count on employees' common sense, experience, and training by former employers or a union to preclude the need for specific instructions."), *with Floyd S. Pike Elec. Contractor, Inc.*, 6 BNA OSHC 1675, 1678 (No. 3069, 1978) (finding adequate communication where the employer "issue[d] an employee manual to each of its employees," and the foreman attended a safety meeting two weeks before the violations).

In terms of monitoring for safety compliance, TNT admits that it did not audit or inspect the Georgetown worksite, but claims that the judge, in analyzing foreseeability as part of the Secretary's burden to prove knowledge, correctly found this was insignificant considering evidence showing that the company "deploys branch managers, project managers, and safety professionals to conduct surprise and planned audits of various worksites." As evidence of its monitoring efforts, TNT points to its inspection forms, which include a safety checklist with one item addressing power lines, from four safety audits it conducted in May 2016 at other worksites.

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volts or more. Voltages greater than 50,000 volts require more distance. No equipment shall be operated over the top of power lines.

[14] In rebuttal, the Secretary points to the supervisor's testimony that TNT never trained him on power line safety as evidence that TNT failed to adequately communicate its work rules to employees. But the supervisor, who had twenty-three years of experience as a crane operator, later acknowledged that he had received "training relating to working around power lines" from the Houston Area Safety Council during his employment with TNT and had worked safely around power lines "many times" before the incident. And when asked if he knew it was TNT's policy to stay at least 20 feet away from a power line, he confirmed that he was aware of that policy. Therefore, we find the Secretary has failed to rebut TNT's evidence on training.

In response, the Secretary argues that TNT failed to establish it conducted audits with sufficient regularity to reasonably ensure compliance with power line safety rules.

We agree with the Secretary. According to TNT's VP, it is the company's practice not to send a supervisor to remote worksite locations, like the one in Georgetown, because its employees are hired and trained to work with "limited supervision," though the VP clarified that "doesn't mean absent from supervision." Further, the VP could not identify how frequently worksite audits occurred, particularly how often remote worksites were inspected, stating simply "I can't tell you the number at this time." Likewise, the Georgetown driver/rigger testified that field safety audits occur "all the time," but he never identified the frequency or location of such audits. While the inspection forms TNT submitted into evidence show that the company conducted at least four audits over the course of a month at other worksites, the record lacks any context for whether that in fact reflects the frequency with which monitoring was performed. Also, none of the four audits involved work near overhead power lines and the record does not show whether any of those audits occurred at a remote worksite like the one at issue here. *See Sw. Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000) (employer had a safety program and conducted worksite visits, but audits were inadequate where there was no evidence that either the program or the worksite visits pertained to enforcing the cited provision), *aff'd*, 277 F. 3d 1374 (5th Cir. 2001).

Finally, absent sufficient evidence to evaluate the frequency of the company's audits, we disagree with the judge that TNT's failure to audit its Georgetown worksite was reasonable. The installation project was scheduled to take a few days but had stretched out to a week due to rainy weather, which made the crew's work, including the crane disassembly, more challenging. It is troubling that none of TNT's safety professionals visited the worksite to inspect or verify that the crew was working safely, particularly given TNT's claim that neither the crane operator nor any other onsite employee served as a supervisor at the worksite.

In sum, TNT has failed to provide the evidence necessary to evaluate the adequacy of its auditing program, such as the frequency with which audits occurred at each worksite and whether remote worksites, like the one at issue here, were ever audited at all. Therefore, we find that TNT failed to show it took adequate steps to discover violations of its work rules. *See Manganas Painting Co.*, 21 BNA OSHC at 1998 (finding monitoring inadequate where supervisors "could have seen" employees "work[ing] without respiratory protection in plain view"); *see also Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997) ("Establishing adequate procedures

for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards . . . . It is not enough that an employer has developed an exemplary safety program on paper," because "the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program.") (citation omitted).

Finally, as to enforcement, TNT submitted into evidence its written progressive discipline policy and eight disciplinary actions it took in response to violations of company rules, including its termination of the supervisor at the Georgetown worksite. The Secretary claims that none of these disciplinary actions pertain to crane safety or the work rules TNT claims applied here, but we find the supervisor's termination is clearly one such action. *See Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline."), *aff'd*, 106 F.3d 401 (6th Cir. 1997); *cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012) (evidence of prior discipline for fall protection violations established effective enforcement despite employer's decision to forego discipline for fall protection violations at issue in citation). TNT administered the remaining disciplinary actions in the record in 2015 and early 2016 to other employees not at issue here, and none of them relate to power line safety.

Thus, other than the disciplinary action taken against the supervisor, TNT has not shown that it ever previously disciplined an employee for violating its power line safety rules. As a large crane-industry employer with more than 250 employees and numerous offices, we find it highly unlikely that no TNT employee had ever previously violated these rules. *See Angel Bros.*, 18 F.4th at 832 (rejecting "statistically implausible claim that although OSHA found violations during 80% of its five inspections, the company committed no safety violations the other 6,000 or so times it performed excavations"). Moreover, the fact that TNT's supervisor, as well as the rest of the crew, were collectively involved in the violative conduct is evidence of lax enforcement and attention to crane safety near power lines. *See Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999) (enforcement ineffective where all employees were involved in violation, despite evidence of post-inspection suspension and eventual termination); *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) ("Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule."), *aff'd*, 149 F.3d 1183 (6th Cir. 1998); *Floyd S. Pike Elec.*

Contractor, Inc. v. OSHRC, 576 F.2d 72, 77 (5th Cir. 1978) ("[T]he fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax."). Therefore, we find that TNT failed to establish it enforced its work rules effectively when violations were discovered. *See Cooper/T. Smith Corp. d/b/a Blakeley Boatworks, Inc.*, No. 16-1533, 2020 WL 1692541, at *2-3 (OSHRC Apr. 1, 2020) (finding ineffective enforcement where evidence was lacking as to whether employer had sufficiently enforced its progressive disciplinary policy, despite employer's submission of ten disciplinary records not relevant to the cited conduct). For all these reasons, we reject TNT's UEM defense for both Item 1 and Item 2.

Accordingly, we reverse the judge, affirm Serious Citation 1, Item 1 and Item 2, and assess the $24,942 total proposed penalty.[15]

SO ORDERED.

Cynthia L. Attwood
Chairman

Amanda Wood Laihow
Commissioner

Dated: JUN 02 2022

[15] The Secretary proposed a penalty of $12,471 for each citation item and characterized both items as serious. *See* 29 U.S.C. § 666(k) (violation characterized as serious when there is "substantial probability that death or serious physical harm could result" from the hazardous condition at issue). TNT does not dispute the characterization or the proposed penalty amounts on review. Therefore, we affirm both items as serious and assess the total proposed penalty. *See, e.g., KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where neither were in dispute).

United States Court of Appeals

FIFTH CIRCUIT
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July 20, 2022

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No. 22-60399 TNT Crane & Rigging v. OSHC
Agency No. 16-1587

Dear Mr. Cerveny, Ms. Nanda, and Mr. Thompson,

You are served with the following document(s) under Fed. R. App. P. 15:

Petition for Review.

Special Guidance for Filing the Administrative Record: Pursuant to 5th Cir. R. 25.2, Electronic Case Filing (ECF) is mandatory for all counsel. Agencies responsible for filing the administrative record with this court are requested to electronically file the record via CM/ECF using one or more of the following events as appropriate:

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Electronic records must meet the requirements listed below. Records that do not comply with these requirements will be rejected.

- Max file size 20 megabytes per upload.
- Where multiple uploads are needed, describe subsequent files as "Volume 2", "Volume 3", etc.
- Individual documents should remain intact within the same file/upload, when possible.
- Supplemental records must contain the supplemental documents only. No documents contained within the original record should be duplicated.

Electronic records are automatically paginated for the benefit of counsel and the court and provide an accurate means of citing to the record in briefs. A copy of the paginated electronic record is provided to all counsel at the time of filing via a Notice of Docket Activity (NDA). Upon receipt, counsel should save a copy of the paginated record to their local computer.

Agencies unable to provide the administrative record via docketing in CM/ECF may instead provide a copy of the record on a flash drive or CD which we will use to upload and paginate the record.

If the agency intends to file a certified list in lieu of the administrative record, it is required to be filed electronically. Paper filings will not be accepted. See Fed. R. App. P. 16 and 17 as to the composition and time for the filing of the record.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

Counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see Fed. R. App. P. and 5th Cir. R. 12. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from our docket.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing,

ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Whitney M. Jett, Deputy Clerk
504-310-7772

Enclosure(s)

cc w/encl:
Mr. Brian Alan Broecker
Mr. Charles Franklin James
Ms. Heather Renee Phillips
Mr. Travis Wayne Vance

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 22-60399

TNT Crane & Rigging, Incorporated,

Petitioner

v.

Occupational Safety and Health Review Commission; Martin Walsh, Secretary, U.S. Department of Labor,

Respondents