No. 20-914

IN THE

Supreme Court of the United States

TNT CRANE & RIGGING, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE SPECIALIZED CARRIERS & RIGGING ASSOCIATION IN SUPPORT OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*

The Specialized Carriers & Rigging Association ("SC&RA" or "Association") respectfully submits this *amicus curiae* brief in support of the petition for certiorari filed by TNT Crane & Rigging, Inc. ("TNT").[1] The arguments set forth herein were unanimously approved on January 4, 2021, by the SC&RA Crane and Rigging Group Governing Committee.

After reasonable investigation, the SC&RA believes that no officer or director or member of the Association who voted in favor of filing this brief, nor any attorney associated with any such officer, director or committee member in any law or corporate firm, represents a party to this litigation.

The SC&RA is a seventy-four-year-old association with over 1,400 member companies in 46 nations, whose interests primarily lie in the crane, rigging, and specialized transportation industries. The SC&RA

1. Pursuant to Sup. Ct. R. 37.6, SC&RA states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a direct monetary contribution intended to fund the preparation or submission of this brief. No person other than SC&RA made a monetary contribution to its preparation and submission. TNT is a paying member of SC&RA but only SC&RA determined and paid for the preparation of this submission.

Pursuant to Sup. Ct. R. 37.2(a), SC&RA states that all of the parties have consented in writing to the filing of the brief. Further, the counsel of record for all parties received notice of SC&RA's intention to file an amicus curiae brief at least 10 days prior to the due date for the amicus curiae brief as extended by Sup. Ct. R. 30.1.

hosts four national annual events and, in the course of those events and otherwise, provides education, safety resources, reference tools, and advocacy on behalf of the industries it represents. The SC&RA and its members are intimately involved with matters impacting the crane industry, including federal and state regulatory issues, and provide "the voice" of the industry. The SC&RA's "Crane & Rigging Group" has multiple ongoing task forces and includes the following committees: Safety Education and Training Committee; Tower Crane Committee; Governing Committee; Labor Committee; and Nominating Committee.

Especially relevant here, a representative from the SC&RA was one of the 23 persons who served on the Cranes and Derricks Negotiated Rulemaking Advisory Committee ("C-DAC" or "the Committee") that developed the OSHA Cranes and Derricks in Construction Standards, known as "Subpart CC" or, for purposes of this brief, "the 2010 Crane Standards." *See* 29 C.F.R. § 1926 Subpart CC. In addition, the responsibilities of the many different entities that may be present on a crane site are often the subject of presentations at SC&RA conferences, webinars, and other communications with members. The fact that so many different entities may be involved with a single lift makes the crane industry unique – and largely distinguishable from other trades and industries. Furthermore, the crane industry, unlike most other construction trades, has its own OSHA Construction Standards Subpart and detailed standards addressing seemingly everything "A" to "Z" on a crane site.

II. SUMMARY OF THE ARGUMENT

The 2010 Crane Standards, specifically, 29 C.F.R. § 1926.1402(b) and (c)(1), clearly state – on their face – that the "controlling entity" (not a crane rental company) is responsible for the ground conditions on a crane site. Yet, in the underlying matter, the Occupational Safety and Health Review Commission ("the Review Commission") allowed a crane rental company, TNT, to be found in violation of the ground conditions standard. The case now before this Court is one in which there was no dispute regarding who the controlling entity was – it was not TNT, the crane rental company. For that reason, the underlying Review Commission decision is contrary to the plain text of the OSHA ground conditions standard and, if not reversed, provides dangerous and harmful precedent to the industry inasmuch as it undercuts the well-defined roles and responsibilities for which the 2010 Crane Standards were specifically created to clarify.

The OSHA rulemaking process often spans many years and involves hundreds of hours of careful deliberation – something no less true for the 2010 Crane Standards, a process that took from start to finish over 15 years. The OSHA rulemaking process for Subpart CC took well over eight years (2002-2010), with additional rule amendments occurring thereafter (2010-2018). Although the OSHA standards themselves are sufficiently clear to show the Review Commission decision is incorrect to the extent it seeks to hold a crane rental company liable as a "controlling entity" (and, by extension, responsible for ground conditions), numerous comments set forth in the lengthy 273-page final OSHA rule in the Federal Register confirm the intended meaning of the final OSHA standard.

See Cranes and Derricks in Construction; Final Rule, 75 Fed. Reg. 47905-48177.

III. ARGUMENT

A. The 2010 Crane Standards Expressly Define the Roles/Responsibilities of Multiple Entities and Persons Involved in a Crane Lift.

The crane industry is unlike many other industries because the multiple roles and responsibilities of those associated with a crane lift are identified and well-defined in not only the OSHA standards, but also in consensus standards that have existed for decades, years before OSHA was created with the Occupational Safety and Health Act of 1970. An understanding of these roles and responsibilities, coupled with the realities of a crane job, are essential to understand why the issue in dispute is of critical importance to the industry.

The crane industry has enjoyed a long history of focus and attention, among other things by virtue of a continuous, evolving set of consensus standards and regulations. In 1916, over 100 years ago, an ASME Committee on the Protection of Industrial Workers presented an 8-page Code of Safety Standards for Cranes at the annual meeting of the ASME.

More recently, in 2018, ASME released its updated "Mobile and Locomotive Cranes" B30.5 standards. *See* ASME B30.5-2018. Those standards identify the following entities/persons in a crane lift and each's discrete (and oftentimes exclusive) roles/responsibilities before, during, and after a crane lift: "Crane Owner," "Crane User,"

"Site Supervisor," "Lift Director," "Crane Operator," and "Rigger." With respect to ground conditions, the ASME B30.5 standards declare that the responsibilities of the Site Supervisor (not the Crane Operator or Crane Owner) "shall" include "ensuring that the area for the crane is adequately prepared" including, among other things, "levelness, surface conditions, support capacity, … excavations, slopes, underground utilities, [and] subsurface construction." (*See* ASME B30.5-3.1.3.2.1, "Site Supervisor"). Notably, "[t]he operator shall not be responsible for hazards or conditions that are not under his direct control and that adversely affect the lift operations." (*See* ASME B30.5-3.1.3.3, "Responsibilities of Crane Operators"). The B30.5 standards have been developed and updated over the years by committees of subject matter experts. These experts have a deep level of expertise, commitment, and knowledge in the industry.

Similarly, the 2010 OSHA Crane Standards expressly allocate responsibilities among multiple persons and entities on a crane site. OSHA carefully defines "ground conditions" as "the ability of the ground to support the equipment (including slope, compaction, and firmness)." 29 C.F.R. § 1926.1402(a)(1). This definition exclusively focuses on the ground's ability to support the crane and does not focus on the means, methods, or manner in which the crane may be set up itself. Section 1926.1402(b) sets forth the general ground conditions rule and sections 1926.1402(c)-(d) allocate the responsibly for complying with the rule to the controlling entity (and others if it is determined there is no controlling entity). In no instance is the responsibility for ground conditions given to the crane rental company.

The pertinent sections are as follows:

1926.1402(b)

The equipment must not be assembled or used unless ground conditions are firm, drained, and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment are met. The requirement for the ground to be drained does not apply to marshes/wetlands.

1926.1402(c)

The controlling entity must:

1926.1402(c)(1)

Ensure that ground preparations necessary to meet the requirements in paragraph (b) of this section are provided.

1926.1402(c)(2)

Inform the user of the equipment and the operator of the location of hazards beneath the equipment set-up area (such as voids, tanks, utilities) if those hazards are identified in documents (such as site drawings, as-built drawings, and soil analyses) that are in the possession of the controlling entity (whether at the site or off-site) or the hazards are otherwise known to that controlling entity.

> 1926.1402(d)
>
> If there is no controlling entity for the project, the requirement in paragraph (c)(1) of this section must be met by the employer that has authority at the site to make or arrange for ground preparations needed to meet paragraph (b) of this section.
>
> 1926.1402(e)
>
> If the A/D director or the operator determines that ground conditions do not meet the requirements in paragraph (b) of this section, that person's employer must have a discussion with the controlling entity regarding the ground preparations that are needed so that, with the use of suitable supporting materials/devices (if necessary), the requirements in paragraph (b) of this section can be met.

Multiple hazards may exist at a crane site in connection with crane operations, including below the ground hazards, at ground hazards, and above ground hazards. The OSHA ground conditions standard speaks to below-ground hazards. The plain meaning of the definition of ground conditions – in conjunction with 1926.1402(c) – dictates that the controlling entity is the entity responsible for any such potential hazards. Section 1926.1402(b) identifies a particular hazard and, in general terms, indicates that such hazard must not exist. Sections 1926.1402(c)-(d), on the other hand, state which entities on a crane site are responsible for the hazards. None of these sections place an affirmative responsibility on the crane rental company and/or its operator as the entity

responsible for ground conditions. This is especially true in a case such as the underlying matter in which there was no refuting that a controlling entity was on site.

B. The Review Commission Decision Negates the Plain Text of the OSHA Ground Conditions Standard and Seeks to Hold Crane Rental Companies Responsible for Conditions Over Which They Have Minimal, if Any, Ability to Control and Were Never Directed to Control.

In the instant matter, there is no refuting that there was a general contractor on site and that the general contractor squarely fit within the definition of a "controlling entity." *See* 29 C.F.R. § 1926.1401 (defining "controlling entity" as "an employer that is a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project -- its planning, quality and completion."). Under no stretch of the imagination can a crane rental company such as TNT be deemed a controlling entity. Indeed, as the Fifth Circuit's decision stated, the facts are not in dispute – TNT was a crane rental subcontractor that subcontracted with the general contractor.

In addition to the unambiguous text of the OSHA ground conditions standard, the final OSHA rule for Subpart CC reveals the thought process underlying the final standard. As succinctly stated in the final rule, section 1926.1402 "places responsibility for ensuring that the ground conditions are adequate on the controlling entity." Cranes and Derricks in Construction, 75 Fed. Reg. 47906, 47912 (Aug. 9, 2010). Furthermore, the

Committee identified a problem in holding the crane rental company responsible for ground conditions – that being – "Equipment is commonly brought on site by a subcontractor, who typically has neither control over ground conditions nor knowledge of hidden hazards." *Id.* at 47931. Acknowledging that "crane tip-over incidents caused by inadequate ground conditions are a significant cause of injuries and fatalities," and in view of the "hidden nature of these hazards," the Committee declared that section 1926.1402(c)(1) "requires the controlling entity to ensure that ground preparations necessary to meet the requirements in paragraph (b) of this section are provided." *Id.* at 47932-47933.

The following comments in the final OSHA rule further illustrate and underscore why the controlling entity and not the crane rental company (such as TNT in the instant matter) may be subject to a violation of section 1926.1402(b):

> The Committee determined that it is necessary to specify who will have ground condition responsibility because in many instances the parties are unable to agree on who will have (or has) that contractual responsibility, with the result that often no one corrects inadequate ground conditions.
>
> **In the Committee's view, the crane user and operator typically do not have the equipment or authority to make such preparations. In contrast, the controlling entity, due to its control of the worksite, has the requisite authority and is in the best position to arrange for adequate ground conditions.**

Id. at 47933 (emphasis added).

* * * * *

> To permit a controlling entity to divest itself of its ground condition responsibilities would unduly fragment responsibility for ground conditions, thus defeating one of the goals of the section.

Id. at 47935.

C. The Underlying Decision Will Cause Uncertainty, Confusion, and a Prohibitive Increase in Costs to Crane Rental Companies.

The SC&RA requests that this Court grant certiorari as fundamental notions of reasonableness and fairness require a reversal of the underlying decision. Consistent with the purpose of the negotiated rulemaking process, the 2010 OSHA Crane Standards were developed by a committee comprised of members representing the interests of those stakeholders expected to be significantly affected by the rule. SC&RA members were included on that committee as subject matter experts. Accordingly, the goal of the negotiated rulemaking process was – and will always remain – to develop a rule representing a consensus of all of the interests. The underlying Review Commission decision, however, negates the careful deliberation and consensus that was reached and, what is more, if left undisturbed will expose crane rental companies to liability in instances in which such companies are ill-equipped or positioned to identify any such latent ground condition hazards.

In a majority of construction personal injury actions, the determination of liability focuses on the elements of a negligence cause of action. The prevailing law in state tort actions is that an OSHA violation may be deemed "some evidence" of negligence. If crane rental companies are now exposed to OSHA violations for conditions of which they almost invariably have no notice or control, they will be subject to a new standard of care that unfairly puts the focus on an entity (the crane rental company) situated in the worst – not best – position to identity the condition. Crane rental companies are, in basic terms, equipment rental companies. They usually know nothing about a particular job or project until they are called upon and asked to supply one or more of their cranes (either with or without an operator). If a crane operator is included as a part of the rental agreement, it is unlikely the operator will have had any prior involvement with the project, including any pre-construction site communications and assessments, site-specific hazard identification and analysis, or the benefit of what has been learned by other contractors who have been onsite beforehand.

Furthermore, it is critical to keep in mind that the ground conditions standard – based on the definition of ground conditions – is primarily focused on sub-surface conditions, *i.e.*, conditions that cannot be visually observed by an operator. As a result, the crane rental company and operator are in no position to identify these subsurface hazards and – consistent with what the OSHA rule declares – must rely upon the controlling entity. The crane rental company and its operator do not show up to a job site with the expectation that they are responsible for determining the sub-surface conditions. They do not necessarily have the resources to make

such a determination or the economy of scale to afford the tools to make such a determination. Soil studies and assessments on subsurface conditions are items taken into consideration well before the crane comes on site. That is not something that the crane rental company has been retained to assess.

The reason for making the controlling entity, not the crane company, responsible for ground conditions is consistent with allocating responsibility for a potential safety hazard to the entity best positioned to address/abate that hazard. In this instance, that entity is/was the controlling entity. Critically, the final OSHA rule notes that under the old standard, no one entity would be responsible and therefore it was unclear who, if anyone, would address insufficient ground conditions. 75 Fed. Reg. at 47933, 47934.

If allowed to stand, this vast shift of responsibility placed onto the crane rental company could adversely affect the ability to obtain or afford liability insurance coverage. This transfer of increased responsibility means an increased risk of being subject to suit and possibly being held liable. That in turn naturally increases general liability insurance costs to those in the crane rental industry due to the need to report such claims to their insurance carriers. This could also change the landscape of negotiations with contractors now requiring rental company contracts contain a provision making the crane rental company assume responsibility for ground conditions in conformity with the interpretation of the OSHA standard. Such a contractual term increases possible loss transfers onto the crane rental company. Knowing that ground conditions are the responsibility of

the rental company also gives the contractor leverage to demand in a contract additional insured status on the crane rental company's general liability insurance policy, which in turn increases the risk of claims and thus increases the cost of obtaining coverage. Thus, these increased costs, including the possibility of OSHA penalties, can financially shake and in turn harm the crane rental industry.

IV. CONCLUSION

Simply stated, the underlying Review Commission decision cannot be reconciled with the clear and unambiguous text of the OSHA ground conditions standard, which places the responsibility for such hazards on the controlling entity, not a crane rental company such as TNT. Furthermore, if the underlying decision is allowed to stand, an entirely new responsibility for ground conditions will be thrust upon crane rental companies – a responsibility contrary to decades of well-established, well-reasoned allocations of responsibility among the many entities involved in a crane lift. What is more, unlike controlling entities, which are well situated to identify and remedy any ground condition hazards, crane rental companies often get called to a site to perform a very discrete scope of work and are not positioned or equipped to fulfill such a role. The importance of this case goes well beyond that of TNT. SC&RA members and all contractors in the crane rental industry are adversely affected by the Review Commission's decision. Thus, it is respectfully requested that the Supreme Court review the underlying decision.

Respectfully submitted

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