

# RAILCAR FALL PROTECTION: WHAT OSHA REQUIRES FROM GRAIN ELEVATOR OPERATORS



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- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
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- Conducts safety training & compliance counseling

# Agenda



Rolling Stock Fall Protection  
OSHA Enforcement History

OSHA's Current Enforcement Posture

Walking-Working Surfaces  
(Notice of Proposed Rulemaking)

Recommended Practices

# History of Rolling Stock Fall Protection

General  
Industry Fall  
Protection  
Standard

The 1996  
"Miles Memo"

*FGIS Citations  
and a New  
Enforcement  
Philosophy*

*Sec'y of Labor  
v. Erickson  
Air-Crane*

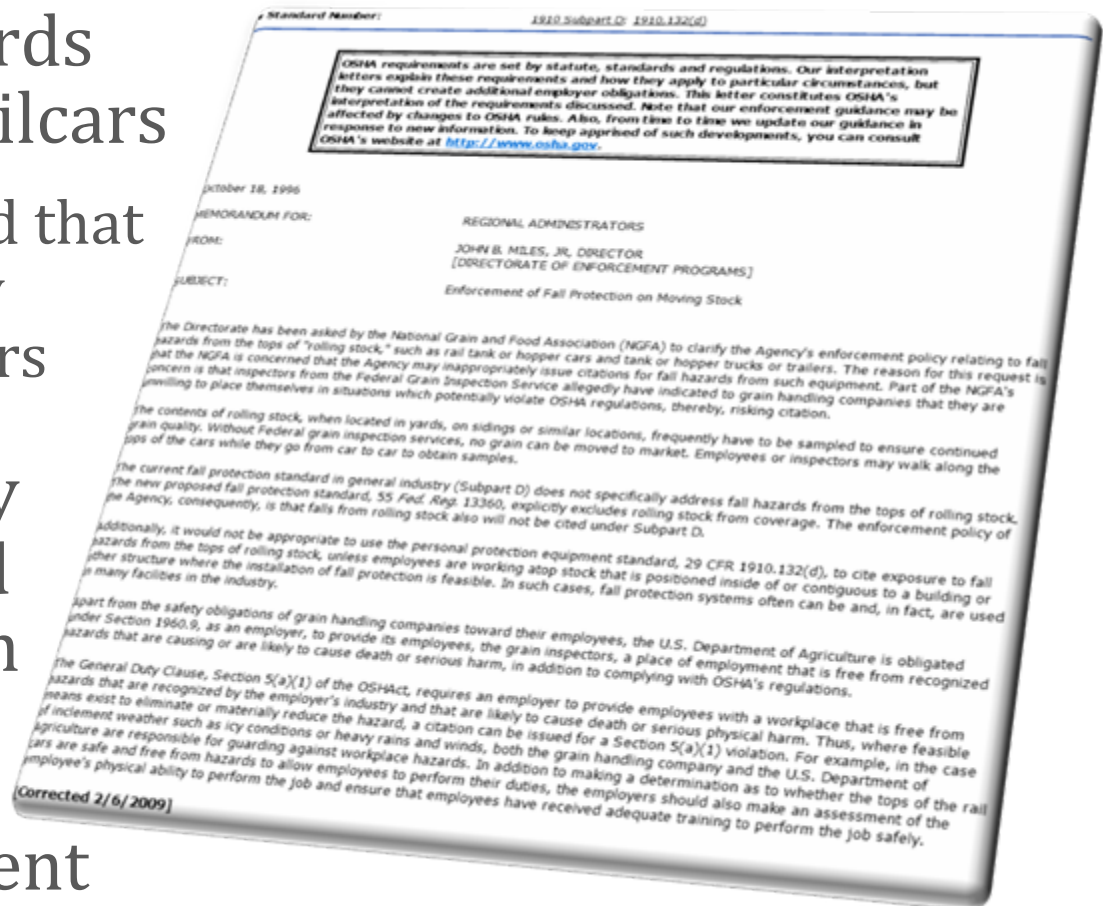
# Fall Protection

- Employees must tie-off or be protected by guard rails when working at heights above 4 feet
- Fall protection for work on top of Rolling Stock is NOT addressed in:
  - Walking-working surfaces general industry standard (Subpart D); or
  - The PPE Standard (29 CFR § 1910.132(d))



# The 1996 “Miles Memo”

- NGFA requested clarification of OSHA’s enforcement policy re: fall hazards from work atop railcars
  - Industry concerned that OSHA was wrongly citing grain handlers
- OSHA and industry leaders met to find a practical solution
- OSHA issued an internal enforcement memo to its Regional Administrators



# The Miles Memo

## Subpart D

- Does not explicitly address falls from rolling stock
- A *proposed* fall protection standard at that time explicitly excluded rolling stock from coverage

## PPE

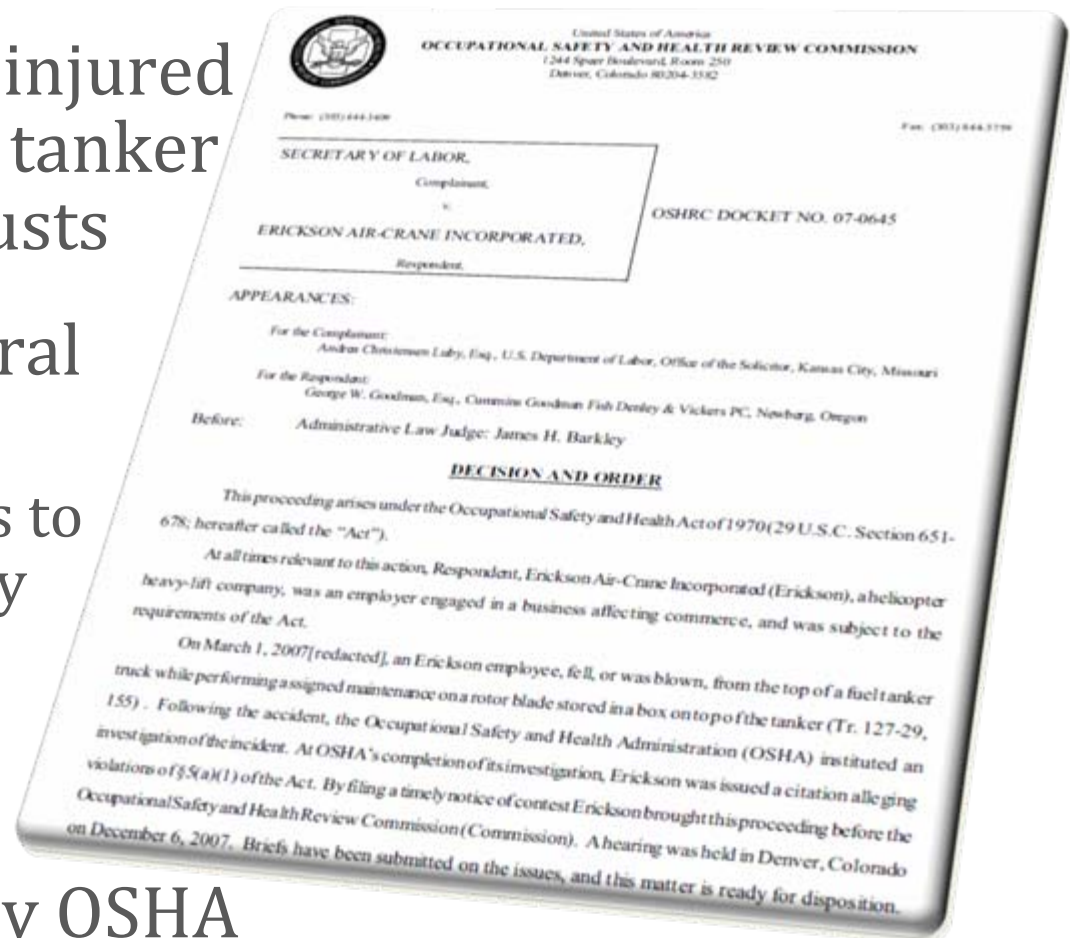
- Inappropriate to use 1910.132(d) to cite exposures to fall hazards on top of rolling stock
- *Unless* employees working atop stock positioned inside of or contiguous to a building/structure and installation is feasible

## General Duty Clause

- Citation may be issued under § 5(a)(1) where *feasible* means exist to eliminate or materially reduce the fall hazards
- The abatement examples listed in the memo do not include the use PPE

# *Erickson Air-Crane – ALJ Decision*

- Case did not involve the grain industry
- Employee seriously injured after he fell 10' off a tanker truck due to wind gusts
- OSHA issued a General Duty Clause citation
  - “expos[ed] employees to fall hazards when they were working on top of fuel tanker trucks”
- The ALJ affirmed the citation issued by OSHA





# *Erickson Air-Crane Case*

## **Secretary of Labor's Position:**

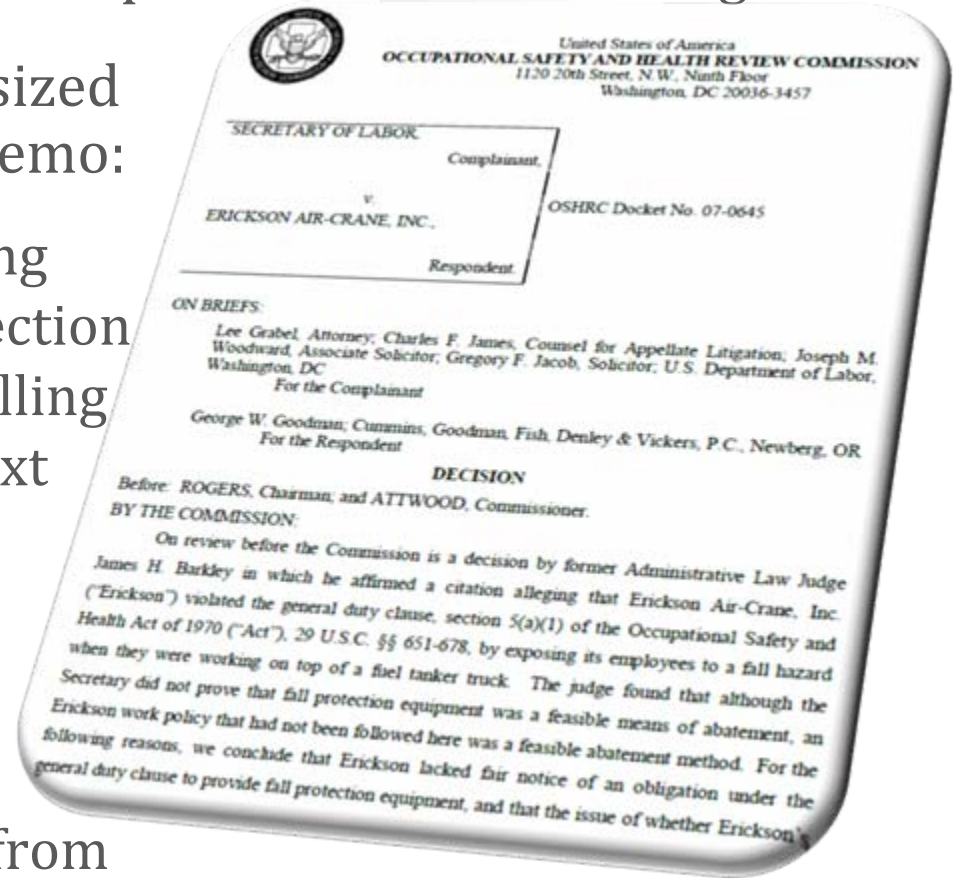
- Miles Memo reference to rolling stock positioned inside or contiguous to building where installation of fall protection is feasible put employer on notice that it had to provide fall protection
  - The tanker had brackets to hold a helicopter blade box in place, which could also secure fall protection equipment
- Employer should have realized that, so equipped, its tanker was essentially located inside of or contiguous to a structure that could support fall protection equipment

## **Employer's Position:**

- Based on guidance from Miles Memo, it lacked notice that fall protection was required; and
- It cannot be held in violation of the OSH Act if it failed to receive prior notice of the conduct required of it

## *Erickson Air-Crane* - OSHRC Decision

- OSHRC found that the Miles Memo *did* put employers on notice of a duty to use fall protection or provide related training
- But, the Commission emphasized 2 elements from the Miles Memo:
  - Broad exemption of all rolling stock from OSHA's fall protection requirements (except for rolling stock located inside of or next to a building); and
  - Under the GDC, OSHA only requires administrative controls to reduce fall hazards, which are distinct from the fall protection equipment sought by the Secretary



## *Erickson Air-Crane Decision*

“[T]he policy described in the [Miles Memo] regarding the enforcement of subpart D, the PPE standard, and the general duty clause as applied to tanker trucks [or railcars] that are not adjacent to a building or structure is consistent – **the use of fall protection equipment is not considered feasible and thus, are not required under any one of these provisions.**”

## *Erickson Air-Crane Decision*

- The *Erickson Air-Cane* decision reinforced that the Miles Memo:
  - Remains OSHA's binding and official interpretation of the law as it relates to fall protection on top of rolling stock; and
  - Applies to circumstances beyond just grain inspectors who have to inspect railcars down track
- The fact that some OSHA Area Offices continue issuing citations contrary to the Miles Memo does NOT change the law

# OSHA's Enforcement Agenda

- Despite *Erickson*, some OSHA Area Offices still issue citations contrary to the Miles Memo
  - Adherence to the Miles Memo varies between each area office, region, and administration
    - Some only issue citations inside loading areas contiguous to the elevator
    - Others issue citations outside the loading zone



## FGIS Citation

- July 2011: OSHA cited USDA's FGIS for lack of fall protection on top of railcar
  - FGIS performing grain inspection services at grain facility in Texas
  - FGIS employees allegedly did not :
    - Conduct proper “hazard assessments” before working on top of rail cars; and
    - Receive adequate training in how to use PPE while on car
  - Citation based on employee interview

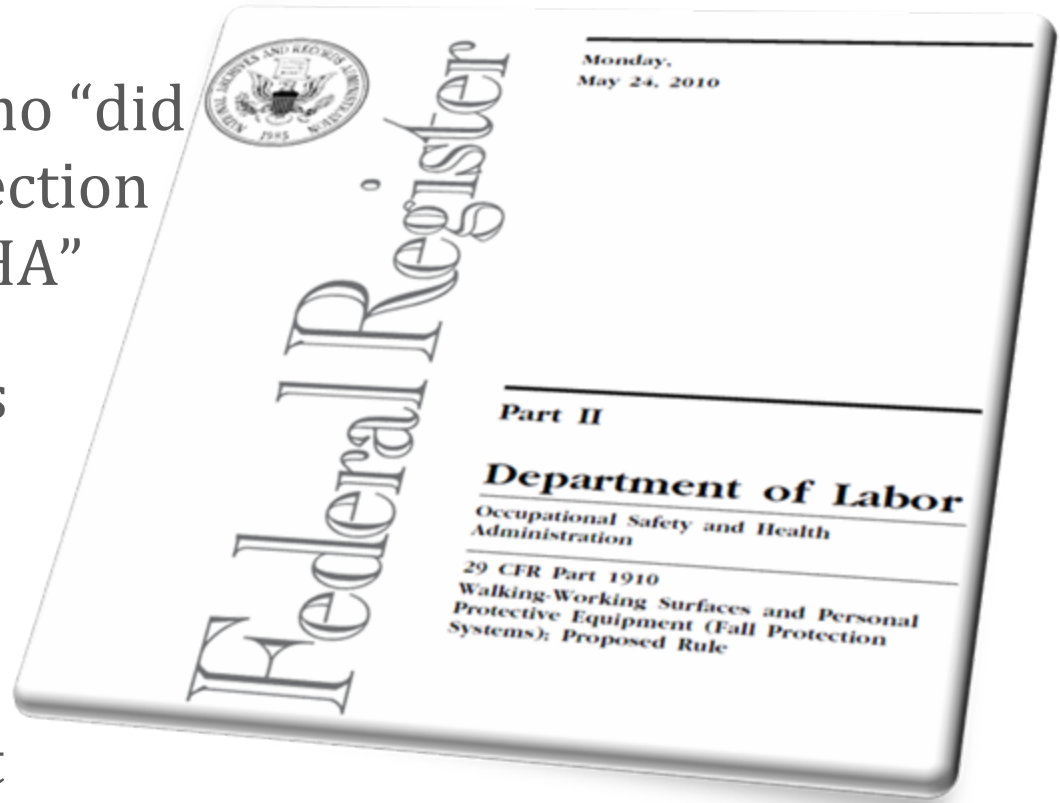


## OSHA – FGIS Settlement

- OSHA withdraw rolling stock fall protection citation but kept PPE training citations
- FGIS has agreed to:
  - Review and modify its rolling stock fall protection training programs;
  - Develop “scenarios” that include different types of facilities, equipment, and operations to determine if fall protection is feasible; and
  - Revised employee directive due to be completed by the end of this year (2013)

# NPRM Walking-Working Surfaces

- May 24, 2010: OSHA published NPRM to revise the Walking Working Surfaces Standard
- NPRM: The Miles Memo “did not result in clear direction to the public or to OSHA”
- Not included on DOL's 2013 Fall Regulatory Agenda (i.e., it is not coming soon)
- OSHA also indicated it would propose separate rolling stock fall protection rule





# NPRM Walking-Working Surfaces

1990

- OSHA proposed new “scope and application” provision to Subpart D
- Standard as revised would “not apply to surfaces that are an integral part of self-propelled, motorized mobile equipment...”

2003

- OSHA raised issue of fall protection on rolling stock in separate Federal Register notice
- Received numerous comments supporting and opposing inclusion of specific requirements for rolling stock fall protection

2010

- Seeks additional information and evidence to determine whether there is a need to propose specific requirements for rolling stock fall protection
- Seeks additional information about what employers are presently doing and the feasibility and cost concerns associated with rolling stock fall protection

## **NPRM Questions re: Rolling Stock Fall Protection**

1. In your establishment or industry, how many or what percentage of employees working on top of rolling stock are exposed to fall hazards?
2. How are these employees protected from fall hazards while working on such equipment?
3. If employee training on the recognition of fall hazards is provided in your workplace, describe the nature and frequency of the training.
4. If fall protection equipment is used, please provide detailed information on the types and costs of the fall protection used on rolling stock and please explain how it is used.
5. If fall protection equipment is not used, please explain what technological and/or economic obstacles to such use may be involved.
6. Are there alternative means to protect employees from fall hazards while working on rolling stock? Please explain.
7. What is your safety experience w/ fall hazards on/from rolling stock?
8. Should OSHA exclude rolling stock from coverage under subpart D?

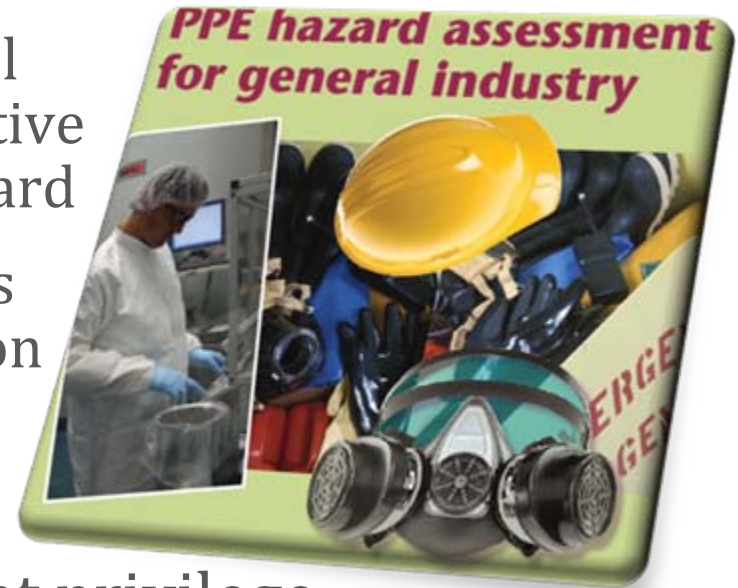
# Recommended Practices

- ❑ Perform all railcar work under fall protection if feasible
- ❑ If not feasible, provide fall protection for work on railcars located next to the elevator
- ❑ For work on railcars away from the elevator, implement a set of administrative controls, such as:
  - Blue-flag / isolate tracks to ensure cars are not moved with workers on top
  - Employees are prohibited from working on top of railcars in inclement weather (snow/ice/high winds)
  - Train employees on proper ways to climb on to cars (i.e., three-points of contact without carrying anything)
  - Require all work to be done from the railcar's catwalk



# Recommended Practices

- ❑ If you cannot perform all work under a fall protection system, **document** a PPE Hazard Assessment that:
  - Recognizes the fall hazard for work on top of railcars;
  - Explains the facility's railcar fall protection policy & administrative controls to address the fall hazard
  - Explains where/why/when it is not feasible to use fall protection
- ❑ Consider having a feasibility analysis performed under the protection of the attorney-client privilege
- ❑ Train and enforce by discipline
- ❑ Be prepared to challenge citations



# QUESTIONS?

## **Railcar Fall Protection Enforcement What OSHA Requires From Elevator Railyard Operators**

*Presented by Eric J. Conn, OSHA Practice Group Head, Epstein Becker & Green, P.C.*



Photo courtesy of Fall Protection Systems, Inc.