

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant,)	
)	
v.)	
)	Docket Nos. 08-1104, 08-0533, 08-1195
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.;)	
and IMPERIAL DISTRIBUTION,)	
INC.,)	
)	
Respondents.)	
_____)	

RESPONDENTS' MOTION TO CONSOLIDATE

Pursuant 29 C.F.R. § 2200.9, Respondent Imperial-Savannah, L.P. (hereinafter “Imperial” and improperly captioned as Imperial Sugar Company and Imperial Distribution, Inc.) respectfully moves the Review Commission for an order consolidating the matters pending as Docket Nos. 08-1104, 08-0533, and 08-1195, showing the Commission the following:

1. Docket No. 08-1104 relates to Complainant’s citations issued on July 25, 2008 for Imperial’s Port Wentworth, Georgia facility. Docket No. 08-0533 relates to Complainant’s interim citations issued on March 21, 2008, for Imperial’s Gramercy, Louisiana facility. Docket No. 08-1195 relates to Complainant’s citations issued on July 25, 2008 for Imperial’s Gramercy, Louisiana facility.

2. Imperial’s Georgia and Louisiana facilities that are at issue in these cases are both cane sugar refineries that produce various types of sugar, including granulated sugar, brown sugar, and powdered sugar. Both facilities serve customers in the retail and manufacturing sectors.

3. The Commission’s Rules provide:

Cases may be consolidated on the motion of any party, on the Judge's own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act require.

29 C.F.R. § 2900.9.

4. Common questions of law underlie the citations issued for both facilities involved in these matters.

5. For example, in Docket No. 08-0533, OSHA cited Imperial's Louisiana facility for alleged inadequate control of sugar dust, primarily in sugar packaging areas; alleged inadequate dust collection equipment, primarily in sugar packaging areas; alleged inadequate fire protection; and alleged use of improper electrical equipment in areas classified as hazardous because of sugar dust, primarily sugar packaging areas. (*See* Compl. & Exs., Dkt. No. 08-0533.) Similarly, in Docket No. 08-1195, OSHA cited Imperial's Louisiana facility for alleged inadequate control of sugar dust, primarily in sugar packaging areas; alleged inadequate dust collection equipment, primarily in sugar packaging areas; alleged inadequate fire protection; alleged use of improper electrical equipment in areas classified as hazardous because of sugar dust, primarily sugar packaging areas; alleged inadequate fire protection and prevention measures; alleged inadequate emergency evacuation measures; and alleged inadequate fall protection. (*See* Compl. & Exs., Dkt. No. 08-1195.) Finally, in Docket No. 08-1104, OSHA cited Imperial's Georgia facility for alleged inadequate control of sugar dust, primarily in sugar packaging areas; alleged inadequate dust collection equipment, primarily in sugar packaging areas; alleged inadequate fire protection; and alleged use of improper electrical equipment in areas classified as hazardous because of sugar dust, primarily sugar packaging areas; alleged inadequate fire protection and prevention measures; alleged inadequate emergency evacuation measures, and alleged inadequate fall protection. (*See* Compl., Dkt. No. 08-1104, Exs. A-C.)

6. The bulk of the many citations issued by Complainant in these actions allege “egregious” “willful” violations of the following health and safety standards: OSHA’s general duty clause (§ 5(a)(1)); housekeeping (29 C.F.R. § 1910.22); and electrical classification (29 C.F.R. §§ 1910.307, 1910.178). (*See id.*; compare Compl. & Exs., Dkt. No. 08-0533 with Compl. & Exs., Dkt. No. 08-1195 and Compl., Dkt. No. 08-1104, Exs. A-C.) All of the citations issued under these standards are based on the alleged presence of hazardous levels of combustible sugar dust. Thus, the same legal standards and principles will apply to the determination of both the fact of the alleged violations and the characterization of the violations for both facilities. Moreover, Imperial’s defenses to the citations will be similar given the common facts and legal issues at both facilities.

7. Common questions of fact exist among these matters. Imperial expects that a number of fact and expert witnesses both for Complainant and Respondent will be the same for all matters.

8. Pursuant to 29 C.F.R. § 2900.9, the Commission has routinely consolidated cases involving common questions of fact or common questions of law. *See, e.g., Sec’y of Labor v. Marcella Nursing & Rehab. Ctr.*, 19 O.S.H. Cas. (BNA) 1509, at *1 & n.2 (O.S.H.R.C.A.L.J. 2001) (consolidating cases against three nursing homes that were subsidiaries of same parent company and that were cited for similar violations, centered on use of medical supplies, found in 4-month investigation of the three facilities); *Sec’y of Labor v. State Sheet Metal Co., Inc.*, 16 O.S.H. Cas. (BNA) 1155, at *1-*2, *4 (O.S.H.R.C. 1993) (consolidating cases involving investigations into respondent’s operations in two cities where “[t]he essential facts . . . are that both [facilities] were more than 25 feet high . . . and that no fall protection was being used at either site”); *Sec’y of Labor v. Amax Lead Co. of Mo.*, 12 O.S.H. Cas. (BNA) 1878, at *3-*4 &

n.1 (O.S.H.R.C. 1986) (consolidating cases against smelters in three different states for alleged violation of lead exposure standards at all three plants), *rev'd on other grounds, USWA v. Schuylkill Metals Corp.*, 828 F.2d 314 (5th Cir. 1987); *Sec'y of Labor v. Gen. Motors Corp. GM Parts Div.*, 11 O.S.H. Cas. (BNA) 2062, at *1-*2 & n.1 (O.S.H.R.C. 1984) (consolidating cases involving respondent's warehouses in Georgia and Massachusetts where similar work was done at both locations and citations concerned personal protective equipment violations at both plants), *aff'd*, 764 F.2d 32 (1st Cir. 1985). The cases at issue here involve common questions of both fact and law, as demonstrated above, and thus warrant consolidation under 29 C.F.R. § 2900.9.

9. Given the common factual and legal issues underlying these cases, it is no surprise that Complainant, itself, treated this matter as one investigation into Imperial's operations, particularly its sugar packaging operations. In its investigation, OSHA interviewed several corporate-level executives and managers whose responsibility covers both the Georgia and Louisiana facilities and many of whom do not work at either facility. Facts from these and other witnesses, therefore, will overlap and be relevant to litigation of the citations issued for both facilities.

10. Moreover, in the Complainant's public statements about the citations, Complainant presented the citations as a single set of allegations against Imperial, and combined the total penalties for the two inspections in order to announce that the combined total penalties represented "the third largest fine in the history of OSHA." OSHA Press Release, July 25, 2008 ("The Occupational Safety and Health Administration (OSHA) today issued citations proposing penalties totaling \$8,777,500 against the Imperial Sugar Co. and its two affiliates alleging violations at their plants in Port Wentworth, Ga., and Gramercy, La. . . . The proposed penalties

against Imperial Sugar represent the third largest fine in the history of OSHA.”) Thus, by its own admissions, OSHA acknowledges the common factual and legal issues involved in the citations upon which Complainant’s Complaints are based. These facts demonstrate that Complainant will not be prejudiced if these cases are consolidated for litigation purposes.

11. Imperial will be prejudiced and the resources of both parties and the Commission will be needlessly wasted if these matters are not consolidated. Without consolidation, identical discovery will be conducted multiple times, subjecting witnesses to numerous depositions covering identical topics, multiple document collection and production efforts, and duplicative and redundant litigation of the same issues. Further, given that many of the same legal issues are presented in the matters, consolidation will assist in the orderly disposition of the claims and defenses in the cases.

12. Undersigned counsel for Respondents consulted with Complainant’s counsel prior to filing this Motion and was informed that Complainant opposes the Motion.

Respectfully submitted this 26th day of January 2009.

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of the RESPONDENTS' MOTION TO CONSOLIDATE was electronically served on January 26, 2009 on the following parties:

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