

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Austin Industrial Specialty Services, LP,

Respondent.

OSHRC Docket No. **11-2555**

Appearances:

Sheryl L. Vieyra, Esquire, Madeleine T. Le, Esquire, and Virginia E. Fritchey, Esquire  
U. S. Department of Labor, Office of the Solicitor  
Dallas, Texas  
For Complainant

Steven R. McCown, Esquire and Russell R. Zimmerer, Esquire  
Littler Mendelson, P.C.  
Dallas, Texas  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq* (“the Act”). *See* Complaint at I, Second Amended Answer at I and Tr. 42.

Austin Industrial Specialty Services, LP (“Respondent” or “Austin”) is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *See* Complaint at I, Second Amended Answer at I and Tr. 42.

***Background***

Lubrizol operates a chemical plant in Deer Park, Texas where it adds chemicals to lubricants to make various products. The site is one of the largest, if not the largest producer of lubricant additives in the world (Tr. 543). The facility covers nearly 200 acres and includes

multiple processing units using batch and continuous processes, maintenance, rail car loading and unloading and truck loading facilities, pipelines and administrative buildings (Tr. 541-542). The facility is capable of making up to 700 different products and several hundred different chemicals are transported to the facility in tank cars (Tr. 543, 572). The cars run on tracks labeled the A/B track and the East/West track (Tr. 152, 255, 275). After a railcar unloads a shipment of chemicals, it must be cleaned before being returned to service to be reloaded (Tr. 71).

Austin is a subcontractor for Lubrizol, where it has approximately 166 employees (Tr. 541). These employees perform a variety of services, including maintenance, capital work, warehouse work and railcar washing (Tr. 453, 542). Only five employees perform railcar tank cleaning services (Tr. 541). In four months, Austin employees are exposed to approximately 200 different chemicals when cleaning railcars (Exh. R-23).

At the time of the citation, James Ashford was the crew's supervisor and general foreman. Joseph Boyd was the lead man (Tr. 59, 102). At the beginning of each shift the crew held a daily toolbox meeting (Tr. 52). At the meeting, either Ashford or Boyd reviewed the tank car wash record, which listed the tank cars to be washed that day, and the job safety checklist ("JSC") (Tr. 50, 52, 55, 59; Exhs. C-1, C-2).

The tank car wash records reviewed at the toolbox meetings were prepared by Lubrizol (Tr. 50). For each car listed on the tank car wash record, rather than providing a name, Lubrizol provided a coded number identifying the last chemical transported in that car (Tr. 61). To learn the identity of the chemical code, an employee had to go to a control room located adjacent to either the A/B track or East/West track (Tr. 275). The Material Data Safety Sheets ("MSDS") for the chemicals were maintained on computers and in binders in the control rooms (Tr. 185, 203, 274-275, 281-282). The computers could only be operated by or in the presence of a Lubrizol employee (Tr. 279-281).

Each railcar has a manway which is bolted shut. The manway must be opened to clean the car. Washing and rinsing are done through the manway (Tr. 98). The manways are usually opened by a Lubrizol operator (Tr. 99). Once opened, the Lubrizol operator tests the air. They then put hoses and other cleaning equipment in the manway (Tr. 99). Sometimes, an Austin employee opens the manway. When opened by an Austin employee, it is done before a supervisor (Tr. 102). When cleaning a railcar, Austin employees are required to wear a personal

hydrogen sulfide (“H<sub>2</sub>S”) monitor which is designed to warn them when they are exposed to excessive levels of the contaminant (Tr. 125, 151). After the manway is opened, an Austin employee conducts a “spit test.” This involves an Austin employee leaning into the manway and spitting into it. Shining a flashlight into the railcar, the employee observes the conduct of the spittle. If the spittle moves, it means the remaining product is thin, like water and that the car doesn’t need a lot of steam to clean it. However, if the product is thick, the spittle will not move and a lot of steam will be required (Tr. 106, 158).

With hoses attached and drains opened, the railcar is washed out. After the car is washed, air is blown into the car from the manway to cool the tank. An air horn is placed at the bottom to pull the heat out (Tr. 118-119, 240). A Lubrizol operator comes and conducts a “sniff” test (Tr. 102, 120, 241). This involves using equipment to test the environment of the railcar (Tr. 102, 509). If the Lubrizol operator is satisfied that there is no chemical exposure, a confined space entry permit is issued (Tr. 120, 123, 241, 267). An Austin employee then enters the railcar and blows air to ensure that the car is clean and dry (Tr. 120). A black bag is kept in a locker on each track for use in confined space rescue. The bag contains five minutes of oxygen, a horn, safety vest, sign, a mask and wristlets (Tr. 132, 165). Throughout this process, Austin employees do not wear any respiratory protection (Tr. 117).

On February 23, 2011, Austin washers Jaime David Godines and Terry Wilson were working on a railcar on the East/West line. Wilson went to disconnect a hose at the bottom of the car to allow the car to be rinsed from the top. After looking into the tank to perform the spit test, Godines yelled down to Wilson that the tank had gaskets in it (Tr. 152-155, 157). Gaskets occasionally fall into the tanks (Tr. 156). Usually, they are retrieved by either rinsing the tank or by taking a gasket rod and fishing it out (Tr. 156-157). This time, however, when Wilson finished his work on the bottom and came up to help Godines, he found that Godines had dropped a ladder into the tank and was going into it to retrieve the gaskets. Wilson went to the top of the railcar and grabbed the ladder to help Godines climb back up. When Godines started back up, Wilson turned and moved out of the way so Godines would have space to get out of the tank. When Wilson turned and looked back, Godines was gone, having fallen back into the tank (Tr. 157-159). Wilson testified that things happened so fast, he didn’t have time to holler at Godines not to enter the tank. He just ran over to help Godines exit (Tr. 161-162).

An autopsy revealed that Godines was overcome by hydrogen sulfide fumes (Tr. 576;

Exh. R-4). Wilson testified that, not only had a confined space permit not been issued, but also they had not even begun to wash the railcar (Tr. 161). Also, Godines was not wearing his H<sub>2</sub>S monitor (Tr. 258, 644).

During the rescue, the H<sub>2</sub>S monitor of Lubrizol employee, Mr. Luna, went off while he was looking into the manway. Also, at the time of the rescue, Lubrizol employee, Danny Hansen, lowered an industrial H<sub>2</sub>S monitor into the tank. It read “OR,” indicating that the H<sub>2</sub>S levels exceeded the maximum concentration detectable by the monitor, which was 499 parts per million (“ppm”) (Tr. 233).

In response to the accident, an inspection of the worksite was conducted by David Waters, a Compliance Safety and Health Officer (“compliance officer”) of the Occupational Safety and Health Administration. The inspection resulted in the issuance of one citation alleging several serious violations of OSHA standards directed at protection from chemical contaminants.

Respondent filed a timely notice of contest to the citation. A hearing was held in Houston, Texas, from February 20-22, 2013. Both parties filed their briefs, and this matter is now ready for disposition.

Before addressing the alleged violations directly, Respondent raises certain preliminary matters that require resolution.

### ***Voluntary Protection Program***

To foster cooperation between OSHA and employers, OSHA, implemented a Voluntary Protection Program (VPP). “This partnership [between OSHA and employers] enables the Agency to remove participants from programmed inspection lists, allowing OSHA to focus its inspection resources on establishments in greater need of agency oversight and intervention.” (Exh. R-2).

The program contains several levels of membership, of which the Star Program is the highest. According to OSHA Instruction CSP 03-01-003, “[t]he Star Program recognizes the safety and health excellence of worksites where employees are successfully protected from fatality, injury, and illness by the implementation of comprehensive and effective workplace safety and health management systems. These worksites are self-sufficient in identifying and controlling workplace hazards.” (Exh. R-2).

Austin is a member of the Star Program at the Lubrizol facility (Tr. 421, 428; Exh. R-1). The certification was received in 2007 (Tr. 421). The Star approval was based on the “site’s VPP Application, documentation reviewed onsite, interviews with employees, annual evaluations, and site walk-throughs of the facility.” (Exh. R-1).

Austin Health, Safety and Environmental Director, Mike Morris participated in the VPP site review. He was at the opening and closing conferences and otherwise participated in the VPP program (Tr. 419). Respondent asserts that the un rebutted evidence establishes that each and every Austin policy, program, evaluation and/or procedure at issue in this case was approved by OSHA as being exemplary after an exhaustive assessment by OSHA’s VPP Review team (Tr. 444-470). In granting Star Approval, OSHA stated:

Elements of the VPP Review: The OSHA VPP Review team has examined each of the required elements of the site’s safety and health program, and in accordance with their application, found them to be consistent with the high quality of the VPP participants. All VPP requirements are met and all OSHA standards are appropriately covered;”

(Exh. R-1).

Based on the VPP evaluation, and its obtaining of Star Approval status, Austin argues that the Secretary is estopped from now asserting deficiencies in its safety program that were covered by the VPP evaluation. Also, because of VPP approval of its practices and procedures, it claims it lacked fair notice that any element of those practices or procedures was deficient under the OSHA standards.

Asserting estoppel, Austin cites to *Miami Indus, Inc.* 15 BNA OSHC 1258, 1261-62 (No. 88-671, 1991), *aff’d in part, set aside in part*, 983 F.2d 1067 (6<sup>th</sup> Cir. 1993)(Table), 15 BNA OSHC 2025 (6<sup>th</sup> Cir. dec. 1993). In that case, the Secretary cited the employer for improper machine guards. Miami did not contest the citation, but wrote to OSHA seeking guidance on how to construct satisfactory guards. Based on OSHA’s response, Miami installed guards which it believed addressed OSHA’s concerns. After the company described to OSHA the guards it installed, OSHA replied that the guards were satisfactory. Subsequently, OSHA conducted seven inspections of the Miami plant. The guards were never cited. However, in an inspection conducted in 1987, following an accident where an employee’s finger got caught in a roller, OSHA issued a citation alleging that the guards were inadequate. The Commission vacated the item based on equitable estoppel and a lack of fair notice. Addressing equitable estoppel the

Commission noted that the mere acquiescence by the Government in the actions by the private party or the failure of Government agents to act or to respond to the private party will not create an estoppel against the Government. To establish equitable estoppel, the Commission found that some misrepresentation or concealment of material fact is required. It pointed out that it is not necessary that the government actually intended to mislead the other party. Rather, an active misrepresentation or concealment of a material fact is sufficient. The Commission stated that estoppel is available where the wrongful conduct will result in an injustice to the party claiming estoppel, and imposition of estoppel would not unduly damage the public interest. It concluded that, given the 10 year pattern by OSHA, Miami was justified in believing that its machine guards were compliant.

However, on appeal to the Sixth Circuit, the Commission's finding of estoppel was specifically reversed. The court stated that equitable estoppel is not available against the government absent a showing of affirmative misconduct. Moreover, "[a]n oral representation, or even an understanding about the adequacy of the guard, is not enough to satisfy the affirmative misconduct required to constitute estoppel against the government. 983 F.2d 1067, 1992 WL 393590\*4. Here, at best, Austin can establish an understanding of the adequacy of its processes and procedures. There is no evidence of anything that can remotely be considered affirmative misconduct. Accordingly, its assertion of estoppel is rejected.

Respondent's assertion of a lack of fair notice, while requiring a closer examination, also ultimately fails.

In *Fluor Daniel v. OSHRC*, 295 F.3d 1232 (11<sup>th</sup> Cir. 2002), the employer was a contract employer at a General Electric plant. An earlier OSHA compliance inspection and two subsequent reviews were conducted pursuant to GE's participation in the VPP program. Fluor asserted that the failure of OSHA to point out any problem with an alleged lack of appropriate respirators deprived it of fair notice that the lack of respirators constituted a violation. Rejecting the defense, the Eleventh Circuit observed that:

[E]ven if Fluor Daniel could show that OSHA inspectors considered and failed to issue a citation for the lack of respirators in the resin plant during the 1991 inspection or the VPP visits, the company would still not be able to prevail in the absence of any *affirmative* approval of the lack of respirators. Fluor Daniel makes no claim that any OSHA officials expressly said that respirators were unnecessary, and mere silence by OSHA inspectors is not enough to support a company's claim that it was lulled into violating a regulation. As the Commission recognized, it is

well established by both the Commission and the courts that OSHA's failure to cite an employer during a past inspection does not, standing alone, constitute a lack of fair notice.”

295 F.3d at 1238 (emphasis in original).

The court concluded that:

Absolutely nothing in the record shows that resin plant emergency respirators were discussed at either visit, and Fluor Daniel itself points only to Bowden's broad testimony that he told the inspectors that Fluor Daniel had a respiratory protection program in place. As with the 1991 inspection, Fluor Daniel identifies no evidence indicating that OSHA inspectors said or did anything at any time that would have induced the company to believe that it did not need to provide emergency respirators to the resin plant employees. Without such evidence, we cannot disturb the Commission's determination that Fluor Daniel was not misled by past inspections.

295 F.3d at 1238.

Relevant to *Fluor*, OSHA's description of the VPP program by OSHA is highly instructive. In OSHA Instruction CSP 03-01-003 Effective Date April 18, 2008(Subject Voluntary Protection Programs (VPP): Policies and Procedures Manual) (Exh. R-2) OSHA sets out the procedures for consideration in the VPP program. Describing the nature and scope of the walkthrough stage of the VPP evaluation, the Instruction states:

1. Scope. The onsite evaluation team must walk through the worksite to understand the type of work performed and to gain a sense of overall work conditions. An orientation tour is conducted with the entire onsite evaluation team on the first day of the onsite evaluation. The remainder of the onsite evaluation must include a walkthrough of the entire worksite, *unless the size of the worksite or nature of the process does not allow for it, in which case a representative sampling of all major operating areas and supporting activities must be covered.*

(emphasis added)

By its own terms, OSHA recognizes that in a large facility, the walkthrough during a VPP inspection is representative, not comprehensive. Here, the Lubrizol facility covered nearly 200 acres and involved a myriad of activities. There is no evidence that, rather than constituting a representative evaluation, the VPP evaluation included a review of every individual workstation or procedure. As the Secretary notes in her brief, the railcar cleaning crew begins its shift at 4 a.m. (Tr. 124). It is highly unlikely that the VPP team appeared on the site to begin its evaluation

early enough to actually observe the processes and procedures at the beginning of the tank cleaning process.

Respondent cites *Miami* and *Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 430 (5<sup>th</sup> Cir. 2001)<sup>1</sup> in support of its contention that it lacked fair notice. In *Miami*, both the Commission and the Sixth Circuit agreed to vacate the citation on the grounds that Miami was entitled to rely on OSHA's reply to its specific inquiries regarding the sufficiency of its guards. The Commission found that OSHA's response to those specific inquiries misled the employer into believing that the Secretary considered its guards to be sufficient.

In *Trinity Marine*, OSHA cited the company for violating a regulation by using wood-framed electrical plug-in boxes in a shipyard. OSHA withdrew the citation, but then cited the company again for the same violation eight years later. Because OSHA "at least implicitly approved the use of the boxes" by filing, considering, and then withdrawing the earlier citation, the Fifth Circuit determined that the company had a valid claim that it lacked fair notice that it could be cited for an identical violation years later. The Court noted that:

This court can imagine that a compliance inspector could enter Trinity's workplace, for example, and determine that some number of the wood-framed plug-in boxes had deteriorated or were broken open and therefore were not in proper operating condition for the wet environment and justifiably cite the transgression. From the photos in the record, some of the boxes appeared to be in such a condition. That is not, however, what OSHA did. Instead, it cited the boxes as being a *per se* violation because unpainted wood is not waterproof. That may be a reasonable interpretation of § 1910.305(e). Because OSHA at least implicitly approved the use of the boxes in similar conditions, under which it would reasonably expect a shipyard to continue operating, such an interpretation now is not a consistent application of the interpretation applied earlier. On that basis, the Secretary's position, now, that Trinity should be cited for using the boxes, and the use of a punitive citation to initially publish such an interpretation, is unreasonable.

275 F.3d at 431.

The cases are readily distinguishable from the instant situation. In both *Trinity Marine* and *Miami*, the Secretary cited specific devices that it earlier approved. Both cases involved what could be termed "static" conditions, relating to devices that, absent deterioration or alteration, remain the same from day to day. This matter, on the other hand, involves what could

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<sup>1</sup> Austin points out that *Trinity Marine* was decided by the Fifth Circuit and that this case arose in the Fifth Circuit.



be termed “dynamic” conditions. They rely on human involvement that can vary from person to person and from one work situation to another. In such a “dynamic” situation, after reviewing the documentation and interviewing the employees, the Secretary may approve a safety process or procedure. However, the ultimate test of whether that process or procedure is compliant with the OSHA regulations is in its daily implementation, which can vary greatly depending on the strictness of the supervisor and the behavior of the employees. In such situations, the employer may have affirmative defenses available to it, i.e. employee or supervisory misconduct. However, unless the evidence establishes that the Secretary actually observed and approved the specific conduct it now finds violative, the employer cannot prevail on the asserted lack of fair notice.

Here, Austin asserts that the Secretary generally approved practices and procedures it now asserts were inadequate. However, the record does not support a finding that the Secretary approved those practices and processes specific to how they were implemented for railcar cleaning. For example, at the hearing, Respondent focused on Citation 1, Item 1, which alleged a violation of 29 C.F.R. 1910.134(d)(1)(iii) which requires the employer to identify and evaluate the respiratory hazards at the tank car washing area. The VPP evaluation asks: “Has the site been at least minimally effective at identifying and documenting the common safety and health hazards associated with the site, such as those found in OSHA regulations, building standards, etc., and for which existing controls are well known?” (Exh. R-2). The evaluation concludes “yes” based on interviews, observation and document review. At the hearing the following exchange took place between me and Austin safety director, Mike Morris:

JUDGE SIMKO: Do you think---do you know, yourself, whether the VPP evaluation concerned the maintenance or the tank car washing?

THE WITNESS: This review included the whole facility of each area that Austin worked or Austin provided for Lubrizol at that time. The review included all of that.

JUDGE SIMKO: How do you know that?

THE WITNESS: Well, I think it’s written down there. The scope of the audits should be in here. I think I’ve seen it.

JUDGE SIMKO: So you’re basing it on the scope of the audit in this report?

THE WITNESS: Yes, sir. And on the opening conference is where they talk about the scope and what they're going to do and...

JUDGE SIMKO: Did they talk about the tank wash facility?

THE WITNESS: I don't remember. That's been a long time ago.

(Tr. 453-454).

This is hardly the quality of evidence that establishes reliance on an assertion by the Secretary that Austin properly identified and evaluated the respiratory hazards at the tank car washing area.

Finally, the Secretary made it clear that participation in the VPP program does not immunize an employer from OSHA enforcement activities that may lead to citations. Describing the VPP program OSHA states that while removed from programmed inspections:

OSHA continues to investigate valid employee safety and health complaints, fatalities, catastrophes, and other significant events at VPP participant sites.

(Exh. R-2).

Accordingly, I find that Austin failed to establish that its participation in the VPP program, and its having attained Star Approval status, demonstrates that it was deprived of fair notice of the existence of the alleged violative condition.

Respondent's failure to establish that the Secretary was estopped from issuing the citation or that Austin lacked fair notice that the cited practices and procedures were violative does not mean that its participation in the VPP program is irrelevant. Austin's participation in the VPP program and its attaining of Star status is a relevant consideration when determining the employer's good-faith attitude toward its safety and health obligation.<sup>2</sup>

#### *Section 4(b)(1) Preemption*

Austin argues that OSHA does not apply to its worksite because, under Section 4(b)(1) of the Act, jurisdiction over the sited worksite has been exercised by the FRA ("Federal Railroad Administration) under the FRSA ("Federal Railroad Safety Act") and the LIA ("Locomotive Inspection Act").

Section 4(b)(1) of the Act, 29 U.S.C. § 653(a(1), states:

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<sup>2</sup> I note that the Secretary did not grant Austin any credit for good-faith when arriving at her proposed penalties.

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Respondent relies heavily on *Kurns v. Railroad Friction Products Corp.*, 132 S.Ct. 1261 (2012) where the Court was required to determine whether petitioners' state-law tort claims for defective design and failure to warn were preempted by the LIA, 49 U.S.C. § 2071 *et seq.* The purpose of the LIA "is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." Austin points out that the Court in *Kurns* reaffirmed principles set out in its earlier decision in *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605 (1926). In *Napier*, the Court held that in enacting the LIA, Congress "manifest[ed] the intention to occupy the entire field of regulating locomotive equipment." 132 S.Ct at 1267. Austin concludes that because Federal standards were promulgated under the LIA addressing safety and health issues relating to railways, railcars and their appurtenances and because the regulations directly, clearly, and substantially conflict with OSHA, the conflicting provisions of the OSH Act are preempted by the LIA.

What Respondent fails to point out, however, is that both *Kurns* and *Napier* involved the authority of the *states* to regulate or allow causes of action where Federal law has stepped in and occupied the field. Neither *Kurns* nor *Napier* involves the relationship between competing Federal agencies. The relationship between Federal and state law is, at heart, a Constitutional matter. In contrast, the relationship between competing Federal agencies is a statutory matter. Therefore, neither case is controlling when determining the interrelationship between Federal agencies and they shed no light on whether OSHA is preempted under Section 4(b)(1) of the Act.

Austin further argues that the FRA issued a statement indicating that aspects of the railroad industry fall under its exclusive jurisdiction, thereby displacing applicable OSHA regulations. *See* 43 Fed. Reg 10583-10590 (1978). Discussing authority granted to the FRA under the FRSA, the Fifth Circuit stated that "[t]he FRA policy statement provides that certain areas are not subject to OSHA regulations, and that it is not necessary that the FRA implement specific regulations for these areas; an assertion of authority in a policy statement is sufficient to displace OSHA regulations." *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5<sup>th</sup> Cir. 1984). Furthermore, in *Consolidated Rail Corp.*, 10 BNA OSHC 1577 (No. 79-1277, 1982),

the Review Commission found that the FRA's policy statement was an exercise of statutory authority under Section 4(b)(1) of the Act, preempting OSHA jurisdiction. Specifically the Commission found:

In issuing the policy statement, the FRA exercised its statutory authority over the cited working conditions, which concern the 'movement of rolling stock through repair shops' and 'the guarding of open pits . . . in repair facilities' in the railroad industry. Such an exercise preempts OSHA from enforcing its standards with respect to working conditions to which the FRA has said OSHA standards should not apply.

Furthermore the Commission noted that the FRA:

[A]rticulated a formal position that certain working conditions in the railroad industry should go unregulated. The statement appeared in the Federal Register and represents the informed judgment of the FRA on the subject of railroad safety. As such, we believe that the policy statement satisfies the requirements of section 4(b)(1) of the Act.

1982 WL 22612\*4.

I am not persuaded. Central to both *Velasquez* and *Consolidated Rail*, OSHA was found preempted by Section 4(b)(1) where the FRA asserted jurisdiction over specific areas of railroad safety. Unless the agency makes it clear that it is exercising its authority over an entire industry or segment of an industry, the 4(b)(1) exemption will apply only to those aspects of the industry over which the agency has exercised its jurisdiction. *Compare Dillingham Tug & Barge Corp.* 10 BNA OSHC 1859 (No. 77-4143, 1982) (Coast Guard issuance of extensive safety and health regulations applicable to all vessels operating on navigable waters preempted OSHA jurisdiction over such vessels) with *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5<sup>th</sup> Cir. 1984)(Agency preemption of OSHA applies only to conditions in the operating environment over which the FRA has actually exercised its statutory authority to regulate employee safety and health).

The Federal Register document referenced by Austin is a policy statement titled "Railroad Occupational Safety and Health Standards; Termination." In it the FRA recognized that under the authority of FRSA and other statutes, it had proposed safety standards that would apply to certain enumerated railroad workplaces, properties, facilities, structures and equipment. However, written comments led the FRA to re-examine the concept of adopting a comprehensive code of standards for the railroad industry paralleling the existing OSHA regulations. The FRA

found that:

While the FRA is vested with broad authority in all areas of railroad safety, including those of an occupational nature, we believe it is important to determine the extent to which that authority can and should be exercised in order to assure an effective and coherent overall railroad safety program.

43 Fed. Reg. at 10584.

The FRA concluded that it had a special expertise in traditional areas of railroad safety which makes it uniquely qualified to play the primary role in efforts to assure safe employment.

We, therefore, believe that the FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, *the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace.* Rather, we believe that the proper role for the FRA in the area of occupational safety in the immediate future is one that will concentrate our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.

43 Fed. Reg. at 10585 (emphasis added).

The FRA then stated that it:

[H]as decided to focus its resources and energies for the immediate future on the safety of railroad operations. As used herein, “railroad operations” refers to the movement of equipment over the rails. The term “safety” includes health-related aspects of railroad safety to the extent such considerations are integrally related to operational safety hazards or measures taken to abate such hazards. The term “safety of railroad operations,” then, relates to the conditions and procedures necessary to achieve the safe movement of equipment over the rails. For instance, the safety of railroad operations requires that track forces engaged in laying or repairing welded rail observe certain procedures impacting on the final condition of the track and assure that geometric and other standards are met (see 49 CFR Part 213). Similarly, proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations. On the other hand, most hazards related to the handling of welding apparatus are non-operational concerns.

43 Fed. Reg. at 10585.

Moreover,

If FRA were to address all occupational safety and health issues which arise in the railroad yards, shops, and associated offices, the agency would be forced to develop a staff and field capability which, to an extent, would duplicate the capability already possessed by OSHA. In view of this situation, FRA recognizes that OSHA currently is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by FRA in the interest of controlling predominant operational hazards.

43 Fed. Reg at 10587.

The FRA surveyed the various subparts, including those containing standards cited in this case, Subparts I (Protective Equipment)(item 1) and Z (Toxic and Hazardous Substances)(items 2-3). On Subpart I, the FRA stated that:

OSHA regulations concerning personal protective equipment apply according to their terms, except to the extent the general requirements might be read to require protective equipment responsive to hazards growing out of railroad operations. For instance, OSHA could not prescribe attire designed for mandatory use of an employee while involved in uncoupling cars or operating a locomotive.

Therefore, the FRA made it clear was that OSHA may not require the use of PPE that “may tend to aggravate such hazards by obscuring vision or muffling the noise of approaching trains.” (43 Fed. Reg at 10588). These are not relevant concerns in this matter.

Turning to Subpart Z, the FRA stated that:

The OSHA regulations apply according to their terms, except with respect to the shipment or transportation of hazardous materials, which is controlled by the Department of Transportation Hazardous Materials Regulations, and the regulation of air contaminants in locomotive cab and caboose environments.

43 Fed. Reg at 10589.

As plainly stated by the FRA, OSHA “is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by FRA in the interest of controlling predominant operational hazards.” 43 Fed. Reg. at 10587. Austin’s railcar cleaning procedures were clearly not integrally related to the operation of a railroad. Rather, the cleaning of the railcars was, at best, incidental to the rail operations, and more resembled “working conditions which, although located within the railroad

industry, are in fact similar to those of any industrial workplace” which it recognized as best left to OSHA. *See* 43 Fed. Reg. at 10585.

The FRA has plainly stated that, under circumstances such as those here, it chose not to exercise its authority to regulate employee safety and health. Rather, it explicitly conceded authority over the class of conditions cited in this matter to OSHA. Accordingly, I find that OSHA had jurisdiction over the cited operations at the Lubrizol facility and was not preempted by Section 4(b)(1) of the Act.

#### *The Alleged Violations*

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Respondent stipulated that, subject to its arguments regarding the VPP and section 4(b)(1), the cited standards are applicable (Tr. 568-569). Therefore, for each citation, the issues are whether the Secretary met her burden of establishing that (a) the employer failed to comply with the terms of that standard; (b) employees had access to the hazard covered by the standard; and (c) the employer had actual or constructive knowledge of the violation.

#### **Citation No. 1, Item 1**

Citation No. 1, Item 1 alleges violation of 29 C.F.R. 1910.134(d)(1)(iii) in that:

(a) The employer does not identify and evaluate the workplace to obtain a reasonable estimate of employee exposures to respiratory hazards. At the Deer Park, Lubrizol facility, Austin Industrial Specialty Service employees open manways of rail cars which contain unknown concentrations of hydrogen sulfide. On or about February 23, 2011, at railroad track E/W the employer did not conduct an assessment to determine the potential concentrations of hydrogen sulfide which existed in railcar GATX 19654.

(b) The employer does not identify and evaluate the workplace to obtain a reasonable estimate of employee exposures to respiratory hazards. At the Deer Park, Lubrizol facility, Austin Industrial Specialty Service employees open manways of rail cars which contain unknown concentrations of toxic chemicals such as but not limited to hydrogen sulfide, hydrogen chloride, and sulphur dioxide.

The employer does not conduct an assessment of these chemicals to determine a reasonable estimate of the potential concentrations of toxic gases and vapors which exist in railcars; which is necessary to determine the respiratory protection required.

(c) The employer does not identify and evaluate the workplace to obtain a reasonable estimate of employee exposure to respiratory hazards. At the Deer Park, Lubrizol facility, Austin Industrial Specialty Service employees unbolt the hatch or dome-cover of a rail car man-way. The rail car contains unknown concentrations of toxic chemicals such as but not limited to hydrogen sulfide, hydrogen chloride, and sulphur dioxide. The employer does not conduct an assessment of these chemicals to determine a reasonable estimate of the potential concentrations of toxic gases and vapors which exist when unbolting the hatch or dome-cover of the railcars; which is necessary to determine the respiratory protection required.

The cited standard provides:

The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH. [immediately dangerous to life and health].

The Secretary proposed a penalty of \$7,000.00 for this alleged violation.

The evidence establishes that Austin failed to comply with the cited standard. On a daily basis, Austin's tank cleaning crew performed cleaning services on railcars that were used to transport or store numerous chemicals and sometimes had leftover chemical products in them (Tr. 641; Exhs. R-22, R-23). Part of the regular routine involved performing the "spit test" which required employees to spit into the opened manway to determine the degree of cleaning required (Tr. 105-107). They also placed blowers inside the opened manways to increase the movement of air through the cars (Tr. 118-119, 240) Approximately 5% of the time Austin crewmembers opened the manway on the tank cars (Tr. 236-237). Nonetheless, Austin did not identify and evaluate the respiratory hazards at the tank car washing area, including a reasonable estimate of employee exposures to respiratory hazards and an identification of the contaminant's chemical state and physical form (Tr. 395-397, 404, 557). Austin health and safety director Mike Morris did not know if Lubrizol tested the environment when they opened up the railcars (Tr. 407, 555).



Austin employee, Terry Wilson testified that there is a hazard when a manway is opened (Tr. 114). On occasion, he could smell fumes when around the tank cars, but he didn't know what he smelled (Tr. 114, 239). Lubrizol placed external H<sub>2</sub>S monitors around the area. However, Mike Morris testified that he had no personal knowledge regarding the placement of those monitors or their distance from the railcars. He did not know if they were operational on the date of the accident (Tr. 351-353).

Morris also testified that he was unsure if anyone at Austin audited the tank car washing facilities for hazards (Tr. 297). He testified that Austin conducted no sampling or testing to obtain data showing the levels of employee exposure to contaminants while performing their tasks on the tank cars (Tr. 396). In his view, it was sufficient that the rail cleaners wore H<sub>2</sub>S monitors that would sound when employees were exposed to hazardous levels of H<sub>2</sub>S. The personal monitors were designed to go off when H<sub>2</sub>S levels reach 10 parts per million (ppm). (Tr. 402-403). Under Table Z-2, the permissible exposure limit for H<sub>2</sub>S is 20 ppm. Employees were trained to leave the area when the monitors went off, which happened on occasion (Tr. 224-226). Mr. Godines was not wearing his monitor at the time of the accident (Tr. 258).

Respondent maintains that the use of monitors designed to set off alarms when it detected high levels of H<sub>2</sub>S was sufficient to satisfy the requirement of the standard. It points out that employees were trained to evacuate the area whenever the monitor alarm sounded (Tr. 225-226). Respondent also argues that the hazards were assessed by information contained in the Job Safety Analysis (JSA) and Job Safety Checklist (JSC).<sup>3</sup>

The argument is without merit.

The cited standard requires that the employer's evaluation "include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form." None of this necessary information is provided by external monitors that only sound when dangerous levels of H<sub>2</sub>S are detected. *Turner Industries Group, LLC*, 23 BNA OSHC 2267, 2011 WL 7678663 \*11 (No. 10-2001, 2012)(ALJ). Furthermore, neither the JSA nor the JSC provide the necessary information. Under the heading *Scope*, the JSA makes clear that:

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<sup>3</sup> The JSA (Exh. C-9) lists tasks, potential hazards and how to abate those hazards (Tr. 169). They are not used at toolbox meetings, but were kept on the tracks for employees to read at any time (Tr. 170). The JSCs are used at toolbox meetings are used for planning purposes and to review the activities employees are to perform that day (Tr. 52, 336-337; Exh. C-2).

This data sheet is intended only to serve as a guide to anticipate, recognize and control hazards and quality infractions associated with Tank Car Cleaning @ Lubrizol. The data sheet *does not cover all potential hazards* while performing this task. *It is designed to use as a guide* and to take away things that might be missed or over looked.

(Exh. C-9)(emphasis added).

Similarly, the JSC is a simple checklist with various safety procedures to be checked off before beginning operations. The checklist asks if “operations monitored the tank for Oxygen levels and LEL? Is H<sub>2</sub>S present in the rail car tank?” That does not, in and of itself, constitute an evaluation of respiratory hazards as required by the standard. Also, while it asks for conditions in the railcar, it does not address conditions on top of the railcar which is the concern of the item.

To evaluate the respiratory hazard requires an evaluation based on air monitoring. *Shaw Global Energy Services, Inc.*, 2010 WL 8917839 \*6, *aff'd in part* 23 BNA OSHC 2015 (No. 09-0555, 2010)(addressing other items).

An employer’s respiratory hazard evaluation must include a reasonable estimate of employee exposure to the hazard, the toxicity and concentration of the hazardous material, and the amount of oxygen present. Where the employer cannot identify or reasonably estimate the employee exposure, the employer must consider the atmosphere IDLH [immediately deadly to life and health] and select a respirator accordingly.

*Ibid.*

Also, fatal to Respondent’s assertion, the evidence establishes that H<sub>2</sub>S was only one of a myriad of chemicals that could be in a tank car. The citation specifically stated that Austin failed to monitor for other chemicals besides H<sub>2</sub>S. Indeed, H<sub>2</sub>S was a by-product of one of those chemicals, olefin sulfide, and constitutes only .1% of that chemical (Tr. 612). Monitoring the area for dangerous levels of H<sub>2</sub>S did nothing to evaluate the area for employee exposure to these other chemicals. The evidence establishes that Austin failed to conduct the required monitoring and failed to make a reasonable estimate of employee exposures to respiratory hazards and an identification of the contaminant’s chemical state and physical form.

Austin argues that the citation alleged a failure to conduct the required monitoring when employees opened the manways. However, Austin employees opened the manways only 5% of the time (Tr. 237). Respondent further asserts there is no evidence demonstrating that any Austin employee opened a manway within six months of the issuance of the citation. Therefore,

Austin submits the citation is barred by the six-month statute of limitations set forth in section 9(c) of the Act, 29 U.S.C. § 658(c). I do not agree.

An uncorrected violation may be cited six months from the time the Secretary discovers, or reasonably should have discovered, the facts necessary to issue a citation. *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136 (No. 87-1195, 1993). The evidence clearly establishes that, as part of their regular and continuing duties, Austin employees were required to work by recently opened manways and that 5% of the time those manways were opened by Austin personnel. Respondent's obligation to evaluate the respiratory hazards began the first time employees were exposed and continued as long as they were in a position to be called upon to be exposed to the hazard. It is of no moment that the evidence failed to pinpoint a date that the manway was last opened by an Austin employee. Section 9(c) of the Act does not come into play where the employee access to the condition providing the basis for the citation occurred within six months of the citation's issuance. *Central of Georgia R.R.*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977), *aff'd* 576 F.2d 620 (5<sup>th</sup> Cir. 1978); *Cranesville Block Company/Clark Division*, 2010 WL 8741948 (No. 08-0316 and 08-0317, 2010)(ALJ) *aff'd in part, vacated in part* 23 BNA OSHC 1977 (R.C. 2012). Here, while the evidence does not establish when Austin employees last opened a manway, it is clear that Austin might be called upon to open the manway on a railcar at any time. Testimony of former Austin employee Virgil Little established that it was not unusual for Austin employees to open manways (Tr. 186-187). Therefore, Austin was under a continuing obligation to have processes and procedures in place to evaluate the respiratory hazards to which employees would be exposed. Respondent did not have such processes and procedures in place.

Additionally, although the citation specifically mentioned only the opening of manways, the gravamen of the violation was not so limited. At the beginning of the hearing, the Secretary set forth the parameters of Citation 1, Item 1:

[t]he issues deal with is Austin's failure in Item No. 1 to assess the respiratory hazards in and around the tank. Around the tank.

These gentlemen are on top of the tanks, opening the lid to the tanks, looking in the tanks and doing their washing and so forth from above the tank and below the tank where they're disconnecting drains and hoses and so forth.

And it's our contention that these team members, these Austin employees were exposed and potentially exposed to the hazardous chemicals when they were working around the tank, on top of the tank and under the tank.

(Tr. 30-31).

Critically, Respondent did not raise any objection to the Secretary's description of the scope of the item. At the hearing, the parties tried, not only the hazards involved in opening the manways, but also the hazards encountered by the employees' regular routine which required them to attach blowers in the manways and spit into the manways and observe the movement of the spittle by looking into the manway with a flashlight. Respondent was fully aware of the allegation and the parties fully litigated issues involving hazards caused by employee exposure to contaminants emanating from the manway, regardless of the precise nature of the task being performed (*e.g.* Tr. 88, 98-100, 106-107, 114-115, 117-118, 148, 239-241, 297, 396, 407, 547, 577-578). Therefore, whether the respiratory hazards at issue occurred, not only during the opening of the manways, but also during the regular and continuing procedures employed by the Austin cleaners, was tried with the implied consent of the parties. If issues not raised by the pleadings are tried by the express or implied consent of the parties, those issues are treated as raised in the pleadings. Fed. R. Civ. P. 15(b)(2); *see also* 29 U.S.C. § 661(g) (Federal Rules of Civil Procedure applicable to Commission proceedings unless Commission adopts different rule). *KS Energy Services, Inc.*, 22 BNA OSHC 1261, 1263 (No. 06-1416, 2008).

It is well established that citations are to be liberally construed and easily amended, for they are drafted by non-legal personnel, required to act with dispatch. *General Dynamics, Land System Division*, 15 BNA OSHC 1275, 1279 (No. 83-1293, 1991). To inflexibly hold the Secretary to a narrow construction of the language of a citation would unduly cripple enforcement of the Act. *Dow Chemical*, 801 F.2d 926, 930 (7<sup>th</sup> Cir. 1986); *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170 (D.C. Cir., 1984). As the D.C. Circuit stated in the seminal case *Brennan v. National Realty Company*, 489 F.2d 1257, 1264, "As long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue [footnote omitted]."

The record shows that Austin had fair notice of the nature of the Secretary's Complaint. I therefore find that Citation No. 1, Item 1 alleged that Austin failed to identify and evaluate the workplace to obtain a reasonable estimate of employee exposures to respiratory hazards while employees performed tasks while working on the Lubrizol railcars. The Secretary established Austin failed to comply with the terms of the standard.

### Exposure

Five Austin employees worked on top of the railcars on shifts lasting from 4:00 A.M. to 12:30 P.M. (Tr. 124, 629). Their jobs included opening the manways, conducting spit tests, and installing blowers through the manway. It was also common for gaskets to fall into a tank. When that happened, the crew member would try to retrieve it by using a “fishing pole” through the manway, or by rinsing it out of the car (Tr. 156-157). When asked if he was exposed to any hazards when standing on top of the cars while opening the manway, crew member Terry Wilson testified: “Well, yes. There’s a hazard when we open it, like you could get a whiff of it, of the fumes coming out of the tank.” (Tr. 114). He stated that this did not happen on every car, but depended on how much chemical product was left in the tank car (Tr. 115). On occasion, there was so much product remaining in the tank cars that Austin crew members would have to return the car to Lubrizol (Tr. 148, 241).

This evidence demonstrates that Austin employees were exposed to the hazard posed by Respondent’s failure to obtain a reasonable estimate of employee respiratory hazards, as required by the cited standard.

### Knowledge

Austin’s Health, Safety and Environmental Director, Mike Morris testified that he was aware that it was Respondent’s duty to identify and evaluate the respiratory hazards (Tr. 547). Supervisor Ashford testified that, when they receive the list of cars to wash from Lubrizol, he is aware that they contain potentially hazardous chemicals (Tr. 251). As company officials, their knowledge is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff’d*, 19 F.3d 643 (3rd Cir. 1994). Therefore, the evidence establishes that Austin had knowledge of the hazards.

### Characterization

The Secretary alleges that the violation was serious. Under section 17(k) of the Act, a violation is “serious” if there is “a substantial probability that death or serious physical harm could result from a condition which exists...” 29 U.S.C. § 666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984).

The Compliance Officer noted that an employee died from H<sub>2</sub>S exposure (Tr. 628). However, the fatality was not the result to exposure to respiratory hazards while working at the top of the railcar. Rather, the fatality occurred after the employee actually entered the tank to retrieve the dropped gaskets. While providing the catalyst for the inspection, Mr. Godines entrance into the tank is not the subject of the citation and represents a far different hazard than working on top of the tank. Nonetheless, it does demonstrate the potential hazards involved in exposure to H<sub>2</sub>S.

The hazard implicit in exposure to H<sub>2</sub>S led Respondent to provide monitors that would go off at high concentrations (Tr. 224-226, 553). Although, the rail crew could come into contact with as many as 200 chemicals (Tr. 617), they were provided only with an H<sub>2</sub>S monitor. The failure to adequately evaluate the respiratory hazards to employees working on top of the tank was likely to cause death or serious physical harm (Tr. 627). The violation was serious.

#### Penalty

The Secretary proposed a penalty of \$7,000.00. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *J. A. Jones Construction Company*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Compliance Officer testified that the gravity of the violation was high and that the violation could result in death. With five employees working an eight-hour shift daily, the duration of exposure was high (Tr. 629). Respondent has a total of 6,000 employees and was not given any credit for being a small employer (Tr. 630). The Compliance Officer testified that, due to the high gravity of the violation, no credit was given for good-faith. Also, because of a history of prior violations, no credit was given for history (Tr. 630-631).

I take issue with the Secretary's refusal to grant Austin credit for good-faith. One of the criteria to determine a company's good faith is its commitment to employee safety. *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd without published opinion*, No. 01-60417 (6<sup>th</sup> Cir. 2002). Respondent's commitment to safety is demonstrated both by its

participation in the OSHA VPP program and its obtaining a Star Approval rating. On that basis, I find that a 10% credit for good faith is warranted. Accordingly, I find that a penalty of \$6,300.00 is appropriate.

**Citation No. 1, Items 2a and 2b**

In Item 2a, the Secretary alleges that Austin committed a serious violation of 29 C.F.R. § 1910.1000(b)(2) on the grounds that:

The employer does not ensure that employee exposures to hydrogen sulfide, does not exceed the permissible exposure limit of 20 ppm listed in Table Z-2. On February 23, 2011, an employee entered a rail car, GATX 19654 and was overexposed to hydrogen sulfide.

The cited standard provides:

An employee's exposure to a substance listed in Table Z-2 shall not exceed at any time during an 8-hour shift the acceptable ceiling concentration limit given for the substance in the table, except for a time period, and up to a concentration not exceeding the maximum duration and concentration allowed in the column under "acceptable maximum peak above the acceptable ceiling concentration for an 8-hour shift."

In Item 2b, the Secretary alleges that Austin committed a serious violation of 29 C.F.R. § 1910.1000(e) on the grounds that:

The employer has not determined the feasibility of administrative and engineering controls to keep the exposure of employees to hydrogen sulfide within the limits prescribed in this section when cleaning the inside of rail tank cars. The employer also has not implemented the use of protective equipment or other technical or protective measures to keep the exposure of employees to hydrogen sulfide within the limits prescribed in this section when cleaning the inside of rail tank cars.

The cited standard provides:

To achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with 1910.134.

The items broadly allege that Austin failed to ensure that employee exposure to H<sub>2</sub>S did not exceed permissible levels. The items also specifically refer to the incident where Mr. Godines entered the railcar and was exposed to H<sub>2</sub>S. In her brief, the Secretary further argues that the citation related both to employees working on the cars and to Mr. Godines overexposure when he entered the car. At the hearing, however, I specifically asked the Secretary's attorney, Mr. Bernstein, if we were trying the fatality. Mr. Bernstein plainly answered "No, we are not." (Tr. 28). He continued:

So to answer Your Honor's question, this case is not about this individual's entry into this confined space. We did not cite them for any violations of any confined space program or any confined space permitting, program. There's no confined space related issues.

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So this is not about the confined space entry. Ultimately, the gentleman wound up in the confined space. The facts are actually not crystal clear about how he wound up in the tank. Perhaps they will be elucidated throughout the trial.

Either way, we are not -- OSHA is not alleging that Austin violated any confined space issues, specifically with regard to the fatality.

(Tr. 30-31).

This sentiment was repeated by the Compliance Officer (Tr. 642).

Contrary to the Secretary's statement at the hearing, in her brief, she now argues that Respondent violated the standards by failing to ensure that Mr. Godines was not exposed to impermissible limits of hydrogen sulfide when he entered the tank car. The Secretary cannot have it both ways. If she intended to cite Austin for violations arising from Mr. Godines' entry into the tank, there were specific confined space standards that should have been cited<sup>4</sup>. Whatever reason the Secretary chose to not cite Austin for confined space violations,<sup>5</sup> she cannot cite Austin for the incident by going through the "back door" and citing a standard of more general applicability. 29 C.F.R. § 1910.5(c)(1).<sup>6</sup>

Aside from the entry of Mr. Godines into the railcar, there is no evidence that Austin

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<sup>4</sup> See e.g. 29 C.F.R. § 1910.146(c)(ii) and its component subparts.

<sup>5</sup> I note that Austin raises as an affirmative defense, that Mr. Godines' entry into the confined space was an incident of unpreventable employee misconduct. Because I find that Mr. Godines' entry into the tank is not properly before this Court, I need not and do not address the merits of Austin's affirmative defense.

<sup>6</sup> The confined space standards raise issues not addressed by the express or implied consent of the parties. Therefore, it would not be appropriate at this stage to amend the citation to allege a violation of any of the confined space standards. *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2130 (No. 80-5868, 1984).



employees were exposed to impermissible levels of H<sub>2</sub>S while engaged in the tasks associated with cleaning the railcars.

In her brief, the Secretary asserts that “Respondent’s standard practice of opening the manway also increased the likelihood of overexposure to hazardous hydrogen sulfide fumes.” (Secretary’s Brief at 21). Absent supporting evidence, the Secretary’s assertion is only speculation.

To protect employees from the hazard of impermissible levels of H<sub>2</sub>S, Austin provided H<sub>2</sub>S monitors to the tank cleaning crew (Tr. 125, 238-239, 336-237). The alarm on the monitors would sound when the levels of H<sub>2</sub>S reach 10 ppm, which is below the 20 ppm permissible exposure limit listed in Table Z-2. When the monitor went off the employees were trained to leave the area (Tr. 225, 553-554). While the alarm on the monitors would occasionally sound, indicating a level of 10 ppm had been reached, the Secretary introduced no evidence to establish that the levels of H<sub>2</sub>S ever exceeded 20 ppm.

The Secretary points out that, during the rescue, the personal monitor of rescuer Don Luna went off when he looked into the manway (Tr. 233). It read “OL” for overload, which meant that the personal monitor exceeded the maximum level of detection, which was 199 ppm (Tr. 636). However, the record does not indicate how far Mr. Luna descended when looking into the manway during the rescue operation (Tr. 648, 659). The monitor of supervisor Ashford also sounded during the rescue when he attached a blower to the bottom of the tank (Tr. 258). After the accident, another Lubrizol employee lowered an industrial H<sub>2</sub>S meter into the tank. H<sub>2</sub>S levels inside the tank were 499 ppm, the maximum detectable by that monitor (Tr. 233; Exh. R-22). However, the H<sub>2</sub>S levels inside the tank are not at issue.

Based on the readings during the rescue, the Secretary concludes that Wilson was overexposed to H<sub>2</sub>S when he stood right over the manway while holding the ladder for Mr. Godines. However, had Wilson been exposed to levels of H<sub>2</sub>S in excess of 10 ppm, his monitor would have sounded. Yet, there is no evidence that Terry Wilson’s monitor went off. The record fails to suggest why Luna’s monitor went off while leaning into the manway to perform a rescue, while the monitor of Wilson did not go off, despite his being right by the manway. The logical conclusion is that, being a rescue operation, Luna descended a substantial distance into the tank where H<sub>2</sub>S levels were high. Similarly, although Ashford’s monitor went off when he was working at the bottom of the tank, Wilson was working in that area disconnecting hoses just

before Godines entered the tank and his monitor did not sound (Tr. 153).

On June 15, 2011, the Secretary tried to recreate the accident by having Lubrizol bring a railcar filled with olefin sulfide (Tr. 588). When the relief valve was opened, the levels of H<sub>2</sub>S reached 90 ppm. However, Austin rail cleaners never opened these relief valves (Tr. 654). In the breathing zone, the level of H<sub>2</sub>S was only 3 ppm (Tr. 591; Exh. R-21). Below the manway, levels were at, but did not exceed, 20 ppm<sup>7</sup> (Tr. 598).

Having failed to establish that employees were exposed to levels of H<sub>2</sub>S above the limits of the standard, Citation No. 1, Items 2a and 2b are vacated.

### **Citation No. 1, Item 3a**

In Citation 1, Item 3a, the Secretary alleges that Austin violated the standard at 29 C.F.R. § 1200(g)(8) on the grounds that:

The employer does not maintain in the workplace copies of the required material safety data sheets (MSDS) for each hazardous chemical and ensure that they are readily accessible to employees when they are in their work area. At Lubrizol-Deer Park Plant, employees are exposed to numerous chemicals (approximately 200 chemicals in a three month period) such as but not limited to olefin sulfides, acrylate ether, lauryl methacrylate, poly-isobutylene, alkybenzene sulfonic acid, methocrylate copolymer, polyolefin anhydride, diphenylamine-2, zinc alkyldithiophosphate-3, alkylated phenol, aryl phosphate, toluene, phenol-3, p-dodecylphenol, phosphoric acid esthers, alkenyl amine, ethoxlated amine, calcium sulonate, alkyl titanate, and 2-ethyl hexanol when cleaning railcars and the MSDS for these chemicals is not maintained by Austin Industrial Specialty Services and not readily accessible in the work area where the tank cars are cleaned.

The cited standard provides:

The employer shall maintain in the workplace copies of the required safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s) (Electronic access and other alternatives to maintaining paper copies of the safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options).

The evidence establishes that MSDSs for the chemicals Austin's rail cleaners worked with were kept in the control rooms immediately adjacent to both the A/B track and the

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<sup>7</sup> Six inches from the bottom of the railcars, levels reached 30 ppm (Tr. 598). Employees would not get into that area until they were ready to enter under a confined space permit.

East/West track (Tr. 275). The MSDS sheets were available in two forms. First, Lubrizol maintained binders that contained paper copies of the sheets (Tr. 203, 275). The MSDSs were also available in electronic form on Lubrizol computers maintained at the control room (Tr. 84, 185, 275). Employees were free to access an MSDS from the Lubrizol computers by asking a Lubrizol operator to print it out. If a Lubrizol employee was present, the Austin employee was allowed to print it out himself (Tr. 276-278). No special password or code was required (Tr. 280). If a Lubrizol employee was not present in the control room, Austin employees were not allowed to access the computer due to Lubrizol's concern that they could mess up the computer (Tr. 281). Under that circumstance, the Austin employee had the option to wait until an operator arrived, or use the binders (Tr. 281).

The Secretary asserts that the MSDS sheets were not "readily accessible" as required by the cited standard. The Secretary notes that for the MSDS to serve as a source of detailed information on hazards, it must be located close to the workers, and readily available to them during each work shift. *Safeway Store No. 914*, 16 BNA OSCH 1504 (No. 91-373, 1993). She contends that the MSDSs were not "readily accessible" because Austin employees could only access the Lubrizol computers if a Lubrizol operator were present. It is the Secretary's position that an MSDS stored in a computer is not "readily accessible" if there is no one present to retrieve the document." *General Motors Corp., Delco Elec. Div.*, 1988 WL 212715 \*4 (No. 87-0526, 1988)(ALJ). Moreover, the Secretary contends that the MSDSs were not "readily accessible" because Austin employees had to leave their work station and go to the control room of another employer to obtain an MSDS. *Turner Industries Group*, 2011 WL 7678663 \*14-15.

The Secretary next disputes the existence of the MSDS binders. According to the Secretary, the binder was not observed by or mentioned to the Compliance Officer during the inspection, but was raised for the first time two years later (Exh. R-23). She notes that the Compliance Officer obtained "one or two" bankers' boxes full of MSDSs just for the 200 chemicals the crew was exposed to in the four months prior to the accident (Secretary's Brief at 33). On that basis, the Secretary questions whether all the required MSDSs could have been in the binders. Ashford did not know if all the MSDSs were kept in the binders, whether the binders were kept up to date, or even if they were used anymore (Tr. 286-287). Also, supervisor Ashford testified that he never went to the binders without a Lubrizol operator present. When asked if he could get the books without an operator around, Ashford testified he wasn't sure and

stated that he “probably could, but I didn’t” (Tr. 283).

I do not agree that the MSDSs were inaccessible simply because employees had to walk to the Lubrizol control room. These rooms were adjacent and “pretty close” to the tracks (Tr.620). The evidence suggests that, a Lubrizol operator would only be absent from the control room for a short time. Virgil Little testified that, when he wanted an MSDS and the Lubrizol operator was not in the control room, he would “just wait on him till he come back” (Tr. 204). Little had work to perform. It is unlikely that he would be able to wait for a Lubrizol employee if he would not return to the control room for any protracted period of time. Moreover, the evidence demonstrates that, if a Lubrizol employee was not in the control room, the MSDSs were available in paper form in binders. Little acknowledged that the binders were available, but chose to access the MSDS from the computer because if he had questions, he could ask the operator (Tr. 204-205).

The cases cited by the Secretary are readily distinguishable. In *General Motors*, the Judge stated that an MSDS is “not “readily accessible” by employees if there is no one present to retrieve the document.” However, the requested MSDS was not produced by the employer for two days after it was requested. Here, there is no indication that a Lubrizol operator would be unavailable for any protracted period.

In *Turner*, the employer was a subcontractor in at a Georgia-Gulf chemical plant. As here, the MSDSs were in both Georgia Gulf computers and paper form. Entering the room where the paper MSDSs were located required the use of a key card. Accessing the computer required logging into the computer with a Georgia Gulf ID. Turner employees did not possess either the key cards or the computer passwords to enable them to find the MSDSs on their own. Neither the computerized nor paper MSDSs were located in areas where employees worked. Employees seeking to consult an MSDS were required to leave their work area and go to either the Georgia Gulf control room or its safety office. They could request an MSDS from a supervisor, which sometimes went unheeded. Here, there is no evidence that the Lubrizol control rooms were ever locked. They were located immediately adjacent to the Austin work areas and did not require key cards for entry. Employees seeking an MSDS could obtain it on their own, without the intervention of a supervisor. Clearly, the impediments to obtaining an MSDS in *Turner* did not exist here.

There is no merit in the Secretary’s questioning of the existence and contents of the

binders. The evidence was clear that the binders did exist. Testimony about the existence of the binders was provided by Supervisor Ashford (Tr. 275) and employee Virgil Little (Tr. 203, 205). Indeed, Little testified that, when first hired, he was shown the books and told to use them to obtain an MSDS (Tr. 184-185). Having observed the demeanor of both witnesses, I find that their testimony was clear, truthful, credible and convincing.

I also find no merit in the Secretary's speculation that the binders were not large enough to contain paper copies of the MSDSs. The Compliance Officer was uncertain whether the paper copies provided to him were in one or two boxes (Tr. 618). There is no indication of the size of the binders. Also, Ashford testified that while he didn't know for sure, it was his belief that all the applicable MSDSs were in the binders (Tr. 286-287). To hold that Ashford's uncertainty meets the Secretary's burden would require this Court to turn the burden of proof on its head. It is not the Respondent's burden to establish that the MSDS sheets were "readily accessible." Rather, the burden is on the Secretary to establish that they were not. "Maybe" does not satisfy that burden.

Accordingly, I find that the Secretary failed to establish by a preponderance of the evidence that the MSDSs were not "readily accessible." Citation No. 1, Item 3a is vacated.

### **Citation No. 1, Item 3b**

In Citation No. 1, Item 3b, the Secretary alleges that Austin violated 29 C.F.R. § 1910.1200(h)(3)(i)-(h)(3)(iv) on the grounds that:

(a) At Lubrizol-Deer Park Plant, rails A/B & E/W, employees are exposed to numerous chemicals (approximately 200 chemicals in a three month period) when cleaning rail cars. The company does not provide the employees with the information needed to safely perform their duties. Employee training did not include the potential presence of hydrogen sulfide in the rail cars and the importance of wearing a hydrogen sulfide monitor.

(b) At Lubrizol-Deer Park Plant, rails A/B & E/W, employees are exposed to numerous chemicals (approximately 200 chemicals in a three month period) when cleaning rail cars. The company does not provide the information and training on the hazards related to each chemical.

The cited standards provide:

1910.1200(h)(3)

*Training.* Employee training shall include at least;

1910.1200(h)(3)(i)

Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

1910.1200(h)(3)(ii)

The physical, health, simple asphyxiation, combustible dust, and pyrophoric gas hazards, as well as hazards not otherwise classified, of the chemicals in the work area;

1910.1200(h)(3)(iii)

The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and

1910.1200(h)(3)(iv)

The details of the hazard communication program developed by the employer, including an explanation of the labels received on shipped containers and the workplace labeling system used by their employer; the safety data sheet, including the order of information and how employees can obtain and use the appropriate hazard information.

The evidence demonstrates that the Austin rail cleaning crew was not trained as required by the cited standards. When he was hired, Terry Wilson was told by supervisor Ashford “to try to learn my chemicals and if I don’t know, look at the sample charts and go ask the operators” (Tr. 87). He was also told that, if he wanted the MSDSs, to “just go ask Lubrizol for one and they’ll print you one out” (Tr. 87). Wilson testified that, in the six months between his hiring and the date of the accident, he could not remember ever asking for an MSDS so he could learn the chemicals (Tr. 87). When asked if his supervisors followed up to ensure that they were learning their chemicals, Wilson replied: “No. But, you know, we learned our chemicals through the way we washed the cars. We learned them like that as we washed them. But we never just personally studied the MSDSs” (Tr. 88). Exhibit C-1 is a list of the cars to be worked on the day of the accident, along with such information as the chemicals with which they would be working identified by number rather than name. When asked whether he was able to indicate the hazards of the chemicals listed on the exhibit, he was unable to do so, even though he worked with those chemicals on a routine basis (Tr. 88). The crew members did not go over any MSDSs during that morning’s toolbox meeting and were not provided with any MSDS for the railcars to be cleaned

that day (Tr. 84, 88-89).

Similarly, Virgil Little testified that he was told that, if unaware of the product in the car being cleaned, they could go to the operators and obtain an MSDS. Other than telling them how to obtain an MSDS, they did not provide any other training on the chemicals contained in the cars (Tr. 184-185). When asked how long the conversations were about the MSDSs, Little replied:

When you come in, it's just taking you through the procedures. They just say, you know, what kind of products you're messing with. You can go get the MSDS or get them from the operator. And that was it, you know.

(Tr. 185).

Little also testified that he would “almost always” ask the operators questions about the material in the car being washed and he was never denied the information (Tr. 223). However, although the chemicals were identified by a code number, Little, like Wilson, was not familiar with the chemicals the codes stood for (Tr. 65, 206).

Austin asserts that the Compliance Officer's investigatory file indicated that it had a plant-wide hazard communication program (Tr. 638; Exhs. R-22, R-24). Respondent contends that it is illogical to allege a training failure where it has an acceptable plant-wide hazard communication program (Respondent's Brief at 36). I fail to find any inconsistency. It is not enough to have a paper program. The key is in the implementation. Respondent had an adequate written plant-wide program. This does not preclude a failure to properly implement that program at specific sites and activities at the Lubrizol facility.

Respondent contends that its training was appropriate because employees had the right to obtain MSDSs. Also, the JSA noted the H<sub>2</sub>S hazards and was kept on the tracks for them to read at any time (Tr. 169-170; Exh. C-9). However, an employer cannot shift the burden of compliance to its employees. The standard<sup>8</sup> places the burden on the employer to actually train its employees, not merely to make the information available to those employees who may have

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<sup>8</sup> 29 C.F.R. 1200(h)(1) which introduces the training requirements upon which item 3(b) is based provide in part:

*Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area.*

(emphasis added)

the initiative to seek it. This record provides a perfect example of why the burden must be on the employer. While the information may have been available to employees, Terry Wilson did not available himself of the opportunities provided and, therefore, had incomplete knowledge about the chemicals with which he was working.

#### Exposure

Employees were exposed to over 200 chemicals. Respondent's failure to instruct the employees deprived them of knowledge necessary to inform them of the hazards of the chemicals, assist them to detect the presence or release of these chemicals,<sup>9</sup> inform them of the measures necessary to protect them from the hazards posed by the chemicals, and make them aware of the details of the Austin hazard communication program.

#### Knowledge

Supervisors Ashford and Boyd were present at the site and responsible for training employees. Ashford testified that he was aware that the rail cars could contain potentially hazardous chemicals (Tr. 251). Terry Wilson testified that, when he first went to work for Austin, supervisor Ashford assigned him to work with Mr. Godines, so he could train him (Tr. 235). This evidence demonstrates that Austin had actual knowledge of their obligation to provide training and that they had knowledge or with the exercise of reasonable diligence could have known that the training was inadequate.

#### Characterization

The violation was properly characterized as serious. The evidence is clear that the failure to train employees could have resulted in death or serious physical harm. As demonstrated by the accident, these chemicals had the potential to be deadly (Tr. 638-639).

#### Penalty

The Secretary proposed a penalty of \$7,000.00 for Citation No. 1, Items 3a and 3b, combined. Having vacated Item 3a, a reduction in the penalty is in order. Also, as noted in Citation No. 1, Item 1, I find that Austin's Star Approval status in the VPP program warrants a credit for good-faith. Of Items 3a and 3b, I find the allegations in Item 3b to be the more serious.

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<sup>9</sup> I note that the personal monitors worn by employees may have helped them detect certain levels of H<sub>2</sub>S, but were ineffective in detecting the presence of other chemicals used in the workplace.



The failure to train employees seriously exacerbated the hazards faced by the employees due to their exposure to numerous hazardous chemicals, regardless of the accessibility of MSDSs. Therefore, I do not find it appropriate to merely divide the penalty in half and then grant a credit for good-faith. Rather, I find that, standing alone, a penalty of \$5,000.00 is justified for Item 3b. Granting a 10% credit for good-faith, I find a penalty of \$4,500.00 to be appropriate.<sup>10</sup>

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

### **ORDER**

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. § 191910.134(d)(1)(iii) is affirmed, and a penalty of \$6,300.00 is assessed;
2. Citation No. 1, Item 2a, alleging a serious violation of 29 C.F.R. § 1910.1000(b)(2) and Citation No.1, Item 2b, alleging a serious violation of 29 C.F.R. § 1910.1000(e) are vacated, and no penalty is assessed;

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<sup>10</sup> In its brief, Respondent cites cases to support its argument that the items should be vacated because the Secretary failed to demonstrate the feasibility of abatement. However, the cases cited by Respondent refer to section 5(a)(1) of the Act, the General Duty Clause. *National Realty & Constr. Co.v.* OSHRC, 489 F.2d 1257, 1268 (D.C.Cir. 1973); *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1781 (No. 76-2636, 1982). Unlike cases based on an alleged violation of standards, the general duty clause is, in essence, a catch-all, which enables the Secretary to cite hazards that are “recognized” by the employer or the employer’s industry, but for which a standard has yet to be promulgated. Being a catch-all provision, the General Duty Clause itself proscribes no method of abatement. Therefore, the burden is on the Secretary to establish that a feasible method of abating the recognized hazard exists. Similarly, where the standard does not specify a means of abatement, due process requires the Secretary to establish that a feasible means of abatement is available. *Granite City Terminals*, 12 BNA OSHC 1741, 1745-46, n. 11 (No. 83-882-S, 1986). Here, the standards set forth the means of abatement, i.e., monitoring, training. Therefore, the burden is on the employer to establish, as an affirmative defense, that abatement was not feasible. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993)(consolidated).

3. Citation No. 1, Item 3a, alleging a serious violation of 29 C.F.R. § 1910.1200(g)(8) is vacated, and no penalty is assessed; and

4. Citation No. 1, Item 3b, alleging a serious violation of 29 C.F.R. § 1910.1200(h)(3)(i)(h)(3)(iv) is affirmed, and a penalty of \$4,500.00 is assessed.

SO ORDERED.

/s/ \_\_\_\_\_

Date: **June 4, 2013**  
**Atlanta, Georgia**

**Stephen J. Simko, Jr.**  
**Administrative Law Judge**