

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

HILDA L. SOLIS, Secretary of Labor,
United States Department of Labor, :
Complainant, : OSHRC DOCKET
v. : No. 09-1013
WAL-MART STORES INC., :
Respondent. :

RESPONDENT'S POST-HEARING STATEMENT OF FACTS AND PROPOSED

FINDINGS OF FACT

A. The Nature of Blitz Day and Respondent's General Safety Precautions

1. Respondent's annual day-after-Thanksgiving "Blitz Day" sale was comparable in nature to Black Friday sales at retail stores across America. Tr. 69, 114, 901.

2. Respondent's home office distributed Blitz Day planning materials via email and the Company intranet ("The Wire"). Tr. 998, 1002-03. However, Respondent's Store Managers had primary responsibility and discretion for planning the Blitz Day events at their respective stores. Govt. Ex. 148, at 56-57, 63-65, 158-59.

3. Respondent's Asset Protection employees helped Store Managers to plan for Blitz Day. Govt. Ex. 148, at 158. The work of Asset Protection employees is focused on accident-reduction and theft prevention. Tr. 183.

4. Respondent provided training at the company level that was meant to ensure safety during Blitz Day events and other activities. This included training on preventing and removing slip, trip, and fall hazards, training on the "ten-foot rule" (*i.e.* greeting and offering assistance to customers who come within ten feet of an associate), training on safe lifting procedures, and training on the safe disposal of hazardous waste. Tr. 100-01, 164, 895, 923, 981.

5. Respondent maintained an Emergency Procedures Manual that provided instructions on addressing disaster scenarios such as in-store violence and severe weather. Tr. 985-86; Resp. Ex. 30, 31. Copies of this plan were accessible to employees at several locations in the Valley Stream Store ("the Store"), including the Service Desk, the Phone Operator's Desk, and the Store Manager's Office. Tr. 986-87. The Manual was in effect at all times material to this case. Tr. 984.

6. Respondent instructed its employees to contact the police in case of an emergency. Tr. 101, 164, 262, 541, 923, 982.

B. Events that Took Place During Blitz Days at the Valley Stream Store from 2005 to 2007

1. On Blitz Day 2005, employees at the Store monitored the line to provide assistance, to encourage walking, to keep carts out of the line, and to prevent customers from becoming “rowdy.” Tr. 193, 901-02. The crowd was orderly as it entered the Store. Tr. 198. A door popped off its hinge, but it remained upright and secured in its frame. Tr. 200-01, 285, 904. For safety reasons, the doors had been designed to pop off their hinges when subjected to relatively-small amounts of pressure. Tr. 259, 1038.

2. On Blitz Day 2006, the Store used cones, balustrades, and a line of shopping carts to demarcate the waiting area. Tr. 199, 989. Employees monitored the line to provide assistance, to distribute maps and hot drinks, and to encourage walking. Tr. 989-93. Employees continuously monitored the floor to clear any debris that might cause slip, trip, and fall hazards. *Id.* Respondent instructed employees to stay out of the crowd’s way as it entered the Store. Tr. 990.

3. The Nassau County Police were present at the Store when it opened on Blitz Day 2006. Tr. 271-72. Employee Salvatore D’Amico had obtained their assistance by making a single phone call to the local precinct prior to the event. *Id.* Officers parked near the entrance and used their lights and bullhorns to keep the crowd in order. Tr. 237-38.

4. On Blitz Day 2007, there were approximately 700 people in line. Tr. 995. Employees stood outside to keep the line straight and orderly, to assist customers, to keep carts out of the line, and to encourage walking. Tr. 911, 991-92. They also instructed waiting customers to stay on the sidewalk and out of the parking lot. Tr. 1035. And they monitored the floor to clear any debris that could cause slip, trip, and fall hazards. Tr. 992. The crowd was generally responsive to employees’ instructions. Tr. 167.

5. The Store refrained from using shopping carts to demarcate the line in 2007 because this had impeded customers from entering the Store in 2006. Tr. 992-93. Similarly, the Store refrained from distributing maps in 2007 because customers had discarded them on the ground in 2006, raising the potential for slip, trip, and fall hazards. Tr. 994.

6. The Store had contacted the Nassau County Police Department prior to Blitz Day 2007 to ensure there would be additional patrols in the area. Tr. 1036-37.

7. Before the opening on Blitz Day 2007, employees stood between the Store's entrance and the crowd to create enough space to open the doors. Tr. 129-30. The crowd moved back as requested. Tr. 166-67. Respondent instructed employees to stay out of the crowd's way as it entered the Store. Tr. 165.

8. When the Store opened, customers entered the vestibule in a manner comparable to the way crowds normally enter subway cars. Tr. 169. Some customers fell in the waiting area outside the Store, but none fell *inside* the Store. Tr. 170.

9. As the crowd entered the Store, it bumped into employee Justin Rice and stepped on his toes without injuring him. Tr. 167. One customer threw a boot through the vestibule door, and Mr. Rice received a "paper cut" from falling glass. Tr. 124, 167, 919, 924, 995-96. Mr. Rice treated his cut with a Band Aid and continued working. Tr. 997.

10. A door came off its hinge during the opening, but it remained upright and secured in its frame. Tr. 995.

11. No Store employee had received a recordable crowd-related injury on a Blitz Day prior to 2008, and with the exception of Mr. Rice's cut, Respondent is not aware of any associate injury during a prior Blitz Day at the Store.

C. The Events Preceding and During Blitz Day 2008

1. Planning for Blitz Day

1. Steve Sooknanan was Manager of the Store in 2008, and the employees who worked at the Store all understood that he was the “overall” manager. Tr. 68, 235, 915. He had worked for the Company for sixteen prior Blitz Days. Tr. 976.

2. Sal D’Amico was Market Asset Protection Manager at the Store in 2008. Tr. 182-83. He had worked for the Company for four prior Blitz Days. Tr. 179, 231-23.

3. The Store’s employees understood that they should call the police in case of an emergency. Tr. 101, 164, 262, 541, 923, 982.

4. In preparation for the holiday season, the Store hired 100 temporary associates. Tr. 234. It had not hired this many in any previous year. *Id.*

5. The Store anticipated 900 shoppers on Blitz Day 2008 based upon annual trends, which indicated a 12-13% increase in sales over the prior year. Tr. 997-98.

6. Several weeks before Blitz Day, Respondent’s home office began distributing Blitz Day planning materials to individual stores via email and The Wire. Tr. 998, 1003. Mr. Sooknanan relied upon these materials in planning for Blitz Day at the Store. Tr. 1003. In addition, the Store’s Safety Committee (comprised of hourly associates and led by Asset Protection Coordinator Julius Blair) met regularly to implement safety strategies from The Wire. Tr. 982.

7. Mr. Sooknanan held regular meetings with Store personnel. Tr. 999-1000. In these meetings and on other occasions prior to Blitz Day, Mr. Sooknanan instructed employees to monitor the line, encourage customers to walk, answer customers’ questions, ensure customers that the Store had enough product, inform customers where products were located, keep the floor

free of potential slip, trip, and fall hazards, and stand out of the crowd's way as it entered the Store. Tr. 1111-13.

8. Mr. Sooknanan also held weekly meetings with management employees to plan for Blitz Day. Tr. 1111. And Mr. D'Amico held weekly meetings with Asset Protection employees to plan for the event. Tr. 275-76. At some Store meetings, managers discussed the possibility that the crowd might be smaller in 2008 than it had been in previous years due to an economic recession. Tr. 268.

9. In October 2008, Mr. D'Amico contracted for two security guards to be present for the Store's opening. Tr. 270, 1075-76; Govt. Ex. 154.

10. At around this time, Regional Asset Protection Manager Brian Broadus sent Blitz Day planning materials to Mr. D'Amico and other Asset Protection employees. Govt. Ex. 54. Mr. D'Amico reviewed these materials and implemented all "actionable" items. Tr. 217, 230, 232.

11. On November 7, 2008, Mr. D'Amico developed a Market 45 Action Plan ("the Plan") and forwarded it to managers and Asset Protection personnel at the Store. Tr. 221; Govt. Ex. 11. The Plan was meant to guide Asset Protection employees' preparations for Blitz Day and to compliment Mr. Sooknanan's general Blitz Day planning. Tr. 1003-04. A variation of the Plan had worked without incident at Respondent's Farmingdale Store on Blitz Day 2007. Tr. 268.

12. At around this time, Mr. D'Amico encountered Officer Malley of the Nassau County Police Department in the Store. Tr. 236-39. Mr. D'Amico asked Officer Malley if he would be present for Blitz Day and Officer Malley told Mr. D'Amico to call his precinct in order to secure a police presence. Tr. 238. In line with Officer Malley's instruction, Mr. D'Amico and

Mr. Sooknanan both asked Asset Protection Coordinator Julius Blair to contact the police. Tr. 239, 999.

13. Mr. Blair called the Nassau County Police Department on two occasions prior to Blitz Day to ask if officers could be present for the event. Both times, the police stated that although they could not be present throughout the night, they would be there for the Store's opening. Resp. Ex. 145(a), at 188-89, 193-94.

14. In late November, at Mr. Sooknanan's instruction, Mr. Blair leased barricades from Highway Technology, Inc. Tr. 1003; Govt. Ex. 145, at 176-79; Resp. Ex. 4. Mr. Sooknanan's intent was to use these barricades to demarcate a waiting area forty feet in front of the entrance (thus leaving a "buffer zone" in front of the doors), to open the doors at 3:00AM on Blitz Day (for the purpose of allowing customers to see a clear path of entry), and to allow customers to enter the Store at 5:00AM. Tr. 1004-05. Highway Technology provided Mr. Blair with "construction-style" barricades for his intended use. Tr. 224, 379, 823, 1050.

15. Three days before Blitz Day, Mr. Sooknanan held a meeting with Store Department Managers to discuss the event. This meeting was recorded by a student from the New York Institute of Technology ("NYIT"). Govt. Ex. 53. During this meeting, Mr. Rice asked Mr. Sooknanan if there could be more people with him at the front door, and Mr. Sooknanan responded that more people would be at the door. *See id.* On Blitz Day, Mr. Sooknanan stationed more employees in the vestibule than had been there in previous years. Tr. 122, 143.

16. Approximately two days before Blitz Day, Mr. Rice suggested to Steve Sooknanan that the Store should use movie ropes to demarcate the line. Tr. 135. Mr. Sooknanan took Mr. Rice's suggestion into consideration, Tr. 999, but he decided against the use of movie

ropes because he had already ordered barricades for the purpose of demarcating and controlling the line, Tr. 1060.

17. Respondent implemented a substantial majority of the Secretary's recommended abatement measures. *See* Respondent's Post Hearing Brief, Exhibit 1. These included a crowd management plan with a clear "who, what, when, where, how, [and] why." *See* Tr. 682-86.

2. Prior to the Opening on Blitz Day

1. On Thanksgiving night, Julius Blair and Andrew Gilroy positioned the Highway Technology barricades forty feet in front of the Store's entrance. Tr. 1061; Govt. Ex. 145, at 180. The barricades made an "L"-shaped waiting area, and they extended for forty feet along the sidewalk. Tr. 1053, 1062-63. Andrew Gilroy hung a sign on the exterior of the Store to indicate where customers should line up. Govt. Rebuttal Ex. 1, at 14. The sign was legible and achieved its intended result, with customers lining up where indicated. *See* Govt. Ex. 34(a).

Mr. Sooknanan monitored Mr. Blair and Mr. Gilroy's placement of the barricades. Tr. 1053. Mr. D'Amico found that they were an acceptable alternative to his suggestion, in the Market 45 Action Plan, that the Store should use ropes and cones to form a waiting area. Tr. 224, 269.

2. Also on Thanksgiving night, at Mr. Sooknanan's direction, employees moved vending machines from the lobby of the Store and positioned them so as to bisect the vestibule. Govt. Ex. 152, at 108-10. The intent of this placement was to prevent customers from entering the vestibule from both sets of outer doors and colliding in the middle; the Store reserved one set of doors for exiting traffic. *Id.* Other stores had bisected the vestibule with vending machines on prior Blitz Days without incident. *Id.* at 109.

3. On Blitz Day morning, the Store's Safety Committee stationed employees at fire exits to ensure that they remained unblocked. Tr. 1002.

4. All people greeters, managerial employees, hourly supervisors, cart pushers, Electronics and Lawn and Garden employees, back room supervisors, and Asset Protection employees had walkie-talkies. Tr. 223, 1077, 1107. In addition, there were several base stations throughout the Store that employees could use to contact a manager. Tr. 1107.

5. The employees who worked on Blitz Day wore uniforms and name badges to identify themselves to customers. Tr. 1006-07.

6. Managers instructed employees to assist customers, to keep customers in an orderly line, to refrain from touching customers or being discourteous, to monitor the floor and clear potential slip, trip, and fall hazards, to keep carts out of the line, to encourage walking, to address customers' questions and concerns, and to stand out of the crowd's way as it entered the Store. Tr. 73, 87, 101, 103, 110, 246-47, 1009, 1020, 1111-13.

7. A crowd gathered outside the Store that was incomparably larger and more intense than the crowds that had assembled on prior Blitz Days. Tr. 172, 278, 988, 1012, 1015-16, 1110. There were approximately 2,000 people in line. Tr. 768.

8. At around 3:00AM, some customers became unruly and jumped over the barricades. Tr. 1014, 1084. Because of the crowd's behavior, Mr. D'Amico decided not to open the doors early as the Store had planned, and Mr. Blair called the police to request assistance. Tr. 1012-15; Resp. Ex. 145(a), at 202-06. The police arrived soon after Mr. Blair's call and restored order. Tr. 1014-15. The customers who had jumped over the barricades were asked to leave. Tr. 1109.

9. As the crowd grew, approximately fifteen employees monitored the line to provide assistance, keep carts out of the line, encourage walking, discourage pushing, and "keep attitudes in check." Tr. 87, 103, 925, 1007. Associate Dennis Fitch joked with customers to

“keep them happy.” Tr. 103. The crowd was initially responsive to employees’ instructions.

Tr. 925.

10. At around 4:30AM, the crowd again became disorderly and jumped over the barricades, accumulating *en masse* in front of the doors. Tr. 241, 1016-17. Employees asked the police for assistance, but they stated that it was “not in their job description.” Tr. 105. Customers talked about breaking the doors, chanted “push,” and yelled profanities. Tr. 105. Some customers fought each other in line. Tr. 278. Employee Dante Wedderburn assisted a family member to the front of the crowd. Govt. Ex. 145, at 231.

11. At 4:40AM, the police left the Store entirely. Officer Pierre stated that the situation was “hopeless.” Tr. 278-80.

12. Also around this time, six or seven employees addressed themselves to the crowd and asked customers to move back from the doors. Tr. 242. They removed the front barricade to increase customers’ freedom of movement. Tr. 87-88. At Mr. D’Amico’s instruction, they formed two lines and tried to restore the “buffer zone,” but they were unsuccessful. Tr. 242, 249. Mr. D’Amico instructed the employees to go back inside and to “be cautious about getting caught up” in the crowd. Tr. 86-87, 242. All employees re-entered the Store. Tr. 242, 925.

13. From the time the police left until the time the Store opened, employees repeatedly contacted the police department to request that they return and provide assistance. Tr. 1017, 1094.

14. At about 4:45AM, Mr. Sooknanan held a meeting with all Store employees. Tr. 82. He told them to be safe, to have fun, to assist customers, and to stay out of the crowd’s way as it entered the Store. Tr. 102, 883, 915.

15. At around this time, Mr. Sooknanan and Mr. D'Amico had another meeting to discuss whether the Store should remain closed. Tr. 1018-19. They decided that their safest option was to open the Store. *Id.* And they reminded employees to stay out of the crowd's way and to keep the floor clear of debris. Tr. 1020, 1100.

16. Just before 5:00AM, a mass of customers rushed from their cars in the parking lot to the front of the Store, cutting in front of the customers who had been waiting in line. Tr. 926.

17. In the seconds before the opening, approximately ten employees stood in the vestibule holding the doors. Tr. 141-42. They were attempting to keep them from re-closing (after they opened) or from breaking due to the pressure of the crowd. 141, 889. However, they had no concern that the doors would come all the way out of their frame. Tr. 148. On the other side, customers were pushing on the doors, causing them to shake. Tr. 1019. A pregnant woman was pressed against the glass. Tr. 896.

18. Although the Store had contracted for two security guards to be present for the opening, only one arrived on time. *See* Tr. 1075-76; Respondent's Supplemental Response to Secretary's Interrogatory 22, at 7, May 3, 2010.

19. Consistent with prior years' anticipation and excitement, employees counted down from ten to one. Tr. 890-91; Govt. Ex. 152, at 115.

20. Respondent's employees had no expectation that customers or employees would be injured as they opened the doors. Tr. 106, 173, 896, 926.

3. After the Opening on Blitz Day

1. Immediately after the Store opened, Mr. Sooknanan escorted the pregnant woman to the Service Desk. Tr. 1020.

2. Customers surged inside and pushed the doors off their hinges. Tr. 153. The crowd bumped into several employees without causing them injury. Tr. 106, 156-57; Govt. Ex.

151, 109-110. Individuals slipped and fell in the vestibule, and employees assisted the people who had fallen. Tr. 93.

3. Within a few minutes, employees observed that Mr. Damour was on the floor in the vestibule and not moving. Tr. 159. They surrounded him to keep the crowd away and clear a path for medical assistance. *Id.*

4. Upon entering the Store, some customers turned back toward the vestibule and vandalized the Store's security devices, causing them to become unbolted from the floor and to fall down. Tr. 1021. Other customers hoarded TVs and attempted to re-sell them on the sales floor. Tr. 106.

5. The police returned to the Store shortly after it opened and they were able to restore order in a matter of seconds. Tr. 107, 174, 1021-22.

D. The Store's 2009 Day-After-Thanksgiving Sale

1. For its 2009 day-after-Thanksgiving sale, the Store took several new steps to manage and interact with customers pursuant to a non-prosecution agreement with the Nassau County District Attorney's office. Govt. Ex. 148, at 226.

2. The Store was opened for twenty-four hours during its 2009 sale. Tr. 162, 404. There was no "hard" opening, and customers flowed continuously into the Store instead of accumulating outside as they had in previous years. *Id.*

3. There was a "massive" police presence at the Store's 2009 sale. Tr. 567-68. Members of the local media were also present in large numbers. Tr. 816.

4. The crowd remained orderly throughout the event, even in those places where the Store was not actively engaged in managing or interacting with customers. Tr. 553-54.

E. Facts Pertaining to Paul Wertheimer's Testimony and Qualifications

1. The Secretary's expert, Paul Wertheimer, has "no experience in the retail industry." Tr. 355. His experience with crowds has focused upon concert and live entertainment events. Tr. 306, 336.

2. Mr. Wertheimer holds no license or degree in crowd safety, management, or control, nor is he licensed or trained as a security guard or law enforcement officer. Tr. 340-41.

3. The goal of Mr. Wertheimer's purported field of experience, "crowd management," is "to protect people who gather in crowds or who assemble in crowds." Tr. 318-19.

4. Although Mr. Wertheimer claims to have published one article on crowd management that was "probably" peer reviewed, he admits that it did not pertain to retail. Tr. 342. The Secretary has not introduced evidence of this or any other peer-reviewed article by Mr. Wertheimer.

5. Mr. Wertheimer has not drafted a crowd management plan since 1984, and he has never drafted or seen a crowd management plan for a retail sales event. Tr. 348, 475.

6. Mr. Wertheimer's website, CrowdSafe.com, is equivalent to a blog. Tr. 453.

7. Mr. Wertheimer has only provided crowd management training to three distinct entities. Tr. 580.

8. Mr. Wertheimer has not conducted empirical research concerning the effectiveness of his crowd management techniques, either in general or in a retail setting. Tr. 351-52, 624.

9. On November 29, 2008, the day after Mr. Damour's death, Mr. Wertheimer wrote on his website that the Store had "created an environment . . . known to promote competition and anxiety among people in a crowd." Tr. 435. He had not reviewed any of Respondent's planning

materials or the Secretary’s investigatory file but based his opinions on “preliminary information.” Tr. 438.

10. On December 1, 2008, three days after Mr. Damour’s death, Mr. Wertheimer wrote on his website that “Wal-Mart management knew or should have known the crowd dangers they were putting their customers in by inciting them with special retail sales discounts, early door openings, limited prize items, and hyped advertising.” Tr. 439. Again, he had not reviewed Respondent’s planning materials or the Secretary’s investigatory file, but based his opinions on “preliminary” information. Tr. 438-41.

11. On December 3, 2008, five days after Mr. Damour’s death, Mr. Wertheimer wrote on his website that Respondent’s Blitz Day 2008 sale was “recklessly planned and managed.” Tr. 456. He still had not reviewed any of Respondent’s planning materials or the Secretary’s investigatory file. *Id.*

12. On May 10, 2009, after Respondent had reached a settlement with the Nassau County District Attorney in an investigation relating to Mr. Damour’s death, Mr. Wertheimer posted a cartoon on his website suggesting that Respondent had “screwed” the public. Tr. 461.

13. Mr. Wertheimer was under retainer by Mr. Damour’s estate at all times while assisting the Secretary and providing testimony in this case. Tr. 458-59.

14. Mr. Wertheimer’s principle source of income for 2010 is the expert testimony he has provided in this case. Tr. 466. Expert testimony has been Mr. Wertheimer’s principle source of income for the past several years. Tr. 467.

15. Mr. Wertheimer has only testified on behalf of a defendant on one or two prior occasions in his career. Tr. 468. He only recalls one of these occasions, and it involved

testifying on behalf of a parking lot owner in litigation against an event sponsor. *Id.* He has never testified against a non-corporate plaintiff who claimed personal injuries.

16. Aside from himself, Mr. Wertheimer is only aware of five “crowd management experts” in the world. Tr. 471-73. He claims that he could find other “experts” in a phone book, on the Internet, or in consultation with “a local assembly occupancy building, a venue, a concert hall, a sports arena . . . [or] the local police department.” Tr. 360.

17. Prior to 2010, access to crowd management training was “almost non-existent.” Tr. 578-80.

18. Mr. Wertheimer’s opinions concerning the relevant issues in this case are not based upon scientific research or formulas; rather, they represent the application of “management factors.” Tr. 483-84, 510, 520, 619-20. These “factors” cannot be re-applied by different experts to yield consistent results. Tr. 627-28.

19. Mr. Wertheimer advocates profiling crowds on the basis of race (among other “demographic” factors) as a necessary step toward developing any crowd management plan. Tr. 508-12. By considering the “age, gender, race,” and other “demographic” characteristics of the crowd, he believes that retailers can intuit both the crowd’s likely behavior (i.e. whether “some people” could “pose a danger”) and the necessary abatement measures (i.e. whether “extra care and attention” is required). *See* Tr. 508-512. “From experience,” he thinks Canadian crowd members are particularly docile in this regard. *See* Tr. 512.

F. Facts Pertaining to the Basis for the Citation

1. The Secretary has never before issued a General Duty Clause citation for crowd-related hazards, nor has she promulgated any health and safety standards on-point. Tr. 17.

2. This was the first time that the Secretary inspected a retail establishment in reference to a crowd-related hazard. Tr. 694.

3. Before Blitz Day 2008, there had never been a crowd-related fatality or serious injury at a Black Friday sale or a similar retail event. Tr. 708-11, 988

4. There are no industry standards or national consensus standards that require retailers to mitigate crowd-related hazards to employees. Tr. 43, 721-22.

5. The Store is classified as a mercantile occupancy under the National Fire Protection Association's Life Safety Code, and the Code's provisions pertaining to crowd management and crowd control are inapplicable to mercantile occupancies. Tr. 585, 723; Govt. Ex. 22 and 23 at § 12.7.6.1 and 13.7.6.1.

6. Area Director Anthony Ciuffo was responsible for deciding to issue the original citation. Tr. 758. However, he is not competent to assess the nature of the hazard or the abatement measures that are listed in the original or amended citation. Tr. 673, 683, 687, 770, 831, 835-37.

7. For purposes of the citation, a crowd can be anywhere between "three and three million" people. Tr. 768.

8. Area Director Ciuffo determined that Respondent's methods to address the alleged hazard were ineffective because "the crowd knocked people down" on Blitz Day 2008. Tr. 692, 770.

9. In determining to issue the citation, Mr. Ciuffo only knew of a single prior injury to an employee during a Blitz Day sale: Justin Rice's "paper cut." Tr. 710.

10. The citation is premised upon a finding of *actual* recognition, not industry recognition. Tr. 711-12.

11. The citation was not based upon insufficient engineering controls or insufficient work practices, but upon "misjudgment of a hazardous situation." Tr. 719-20.

12. There is no scientific or objective evidence to support the Secretary's contention that "crowd management techniques" are effective at abating the alleged hazards. Tr. 771, 833, 845-47.

13. The amended citation was issued without Area Director Ciuffo's authority or the authority of anyone within the Occupational Safety and Health Administration. Tr. 759-60.

14. The amendments to the citation made several major changes. Among other things, they redefined the alleged hazard from one of "asphyxiation by crowd crush" to one of "asphyxiation, *or being struck*, due to crowd crush, *crowd surge or crowd trampling*;" they changed the location of the hazard from "East entrance of 77 Green Acres Mall" to "East 77 Green Acres Mall;" they changed the definition of incidents that triggered a need for abatement measures from "large sales events" to "special events anticipated to attract the public;" and they added a requirement of "appropriate crowd management techniques" to the original citation's requirement of "crowd management training or [n]ecessary tools." See Complaint ¶ 5.

15. The amendment of the citation to change "large sales events" to "special events anticipated to attract the public" had the effect of bringing more events within its coverage, such as any sale or discounted merchandise offered by Respondent. Tr. 609-10, 771-72.

16. The amendment of the citation to change "crowd crush" to "crowd crush, crowd surge, and crowd trampling" added separate and distinct alleged hazards. Tr. 318, 327-28.

17. The amendment of the citation to add the language "being struck" had the effect of adding a new, broader hazard. Tr. 766, 777-80.

18. The amendment of the citation to delete the language "east entrance" had the effect of broadening the alleged location of the hazard to an unspecified area "just beyond the vestibule." Tr. 778-79.

19. The Retail Industry Leaders Association had not recognized or discussed any potential crowd-related hazards to customers or employees as of November 2008. Tr. 1131-32.