



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

UNITED STATES POSTAL SERVICE,
LEHIGH VALLEY PDCF,

Respondent.

OSHRC Docket No. 21-0541

DECISION AND ORDER

APPEARANCES:

For the Complainant:

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U.S. Department of Labor
Philadelphia, Pennsylvania

For the Respondent:

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United States Postal Service
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Philadelphia, Pennsylvania

Sydney M. Snyder, Esq.
United States Postal Service
National OSHA Unit
Denver, Colorado

BEFORE: Carol A. Baumerich
Administrative Law Judge

I. HISTORY

In the latter months of 2020, during the height of the Covid-19 pandemic, Respondent, the

United States Postal Service (USPS), faced a growing problem at its Lehigh Valley Processing and Distribution Center Facility (the Lehigh Plant or Plant). Due to a combination of several factors, including the increase in absentee voting for the 2020 election, the increase in online shopping due to the pandemic, and the coming holiday season, the volume of mail and parcels coming into the Lehigh Plant for processing and distribution was growing substantially. (Tr. 311-12, 331, 493, 568, 583-85, 597, 605-06, 648-49, 696-698, 768-69). Meanwhile, the Plant was facing major staffing shortages resulting from high rates of employee absences, the Plant's apparent inability to find and onboard new employees, and a generous leave policy that had been instituted for Covid. (Tr. 597-98, 600-02, 606, 611, 645, 699-700, 730-31, 735, 840-41, 871-72; RX-54). By late November of 2020, the coalescence of these circumstances resulted in the Plant's increasing inability to process and distribute the volume of incoming mail. (Tr. 86-87, 121-22, 125-26, 487-89, 602, 641-42). As a result, mail, parcels, and the associated materials used in processing them started to build up in various aisles meant for mechanical equipment, powered industrial trucks (PITs), and pedestrian traffic, emergency exits routes from the Plant, and in front of at least one fire alarm pull station. This problem was particularly noticeable in the Plant's West and South Loading Docks (West Dock and South Dock). (*E.g.*, GX-8, at 1 (Photo ID #120120_2); *id.* at 3 & 3A (Photo ID #120120_9)).

Several complaints were made to the Occupational Safety and Health Administration (OSHA) about these problems and an unconnected issue with a Delivery Bar Code and Sorter (DBCS) machine on the Plant's processing floor. (Tr. 54, 66-69; JX-7, JX-10, GX-18, GX-26). After receiving these complaints, OSHA sent a Compliance Safety and Health Officer (CSHO) to inspect the Plant on two occasions, first on December 1, 2020, and again on February 10, 2021. (Jt. Pre-Hr'g Stmt. ¶ III (2); Tr. 54, 65-66; GX-6, at 2). On both occasions, the CSHO observed aisles designated for mechanical equipment, PIT traffic, and emergency exit routes in the West and

South Docks obstructed by various containers and materials associated with processing mail and parcels. (*E.g.*, GX-8, at 1 (Photo ID #120120_2); *id.* at 3 & 3A (Photo ID #120120_9); *id.* at 6 (Photo ID #021021_2); *id.* at 6 & 6A (Photo ID #021021_3); *id.* at 7 (Photo ID #021021_8); *id.* at 7 & 7A (Photo ID #021021_5)). During the December 1st inspection, the CSHO also observed a fire alarm pull station blocked by a metal cage and other materials, and further discovered a guardrail in front of a DBCS machine that did not allow for at least 30 inches of workspace for technicians servicing the machine's electrical panel. (Tr. 80-82, 246, 686; GX-8, at 4 (Photo ID #120120_12); *id.* at 5 (Photo ID #120120_17)).

On May 5, 2021, based on the CSHO's observations during both of his inspections, OSHA issued three Citations to Respondent alleging violations of safety standards promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the OSH Act).

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1910.165(e) for obstructing a fire alarm pull station on the South Dock on December 1, 2020.

Citation 1, Item 2 alleged a serious violation of 29 C.F.R. § 1910.176(a) for obstructing aisles meant for mechanical equipment, PIT, and pedestrian traffic. This item alleged four instances of the violation, two occurring on December 1, 2020, in both the West and South Docks, and two occurring on February 10, 2021, in both the West and South Docks.

Citation 2, Item 1 alleged a willful violation of 29 C.F.R. § 1910.37(a)(3) for obstructing emergency exit routes.¹ This item alleged four instances of the violation, two occurring on December 1, 2020, in both the West and South Docks, and two occurring on February 10, 2021, in both the West and South Docks.

¹ As issued, the Citation alleged a willful-serious violation of this standard. *See* Citation 8-9. At the start of the hearing, the Secretary moved to amend the Citation, in the alternative, as a repeat violation, if the violation is not found to be willful, with a commensurate reduction in the proposed penalty to \$42,911. (Tr. 11-13). Respondent did not oppose the amendment, only the penalty for the violation if it is found to be willful. (Tr. 14).

Citation 3, Item 2 ² alleged a repeat violation of 29 C.F.R. § 1910.303(g)(1)(i), occurring on December 1, 2020, for having less than 30 inches in front of electric equipment operating at 600 volts or less.

Subtracting the proposed penalty for the withdrawn item, the three Citations proposed a total penalty of \$193,872. (Tr. 10-11).

On June 2, 2021, Respondent filed a Notice of Contest with OSHA, thereby bringing this matter before the Occupational Safety and Health Review Commission (Commission).³ The Secretary filed her Complaint on July 23, 2021. Respondent filed its Answer on July 30, 2021, and its Amended Answer on March 15, 2022. A three-day hearing was held from July 11, 2022, to July 14, 2022, in Allentown, Pennsylvania. ⁴ Both parties filed post-hearing briefs and reply briefs.

The key issues for decision are as follows:

- (a) Whether the Secretary has established a prima facie violation of each of the Citation items.
- (b) For the violation of 29 C.F.R. § 1910.37(a)(3), whether the Secretary has established that the violation was willful or, in the alternative, a repeat violation.

² At the start of the hearing on this matter, the Secretary moved to withdraw Citation 3, Item 1, alleging a violation of 29 C.F.R. § 1910.157(c)(1), as a matter of prosecutorial discretion. The unopposed motion was granted. (Tr. 10-11).

³ The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c).

⁴ The Secretary called the following witnesses on direct: (1) CSHO David Sabo; (2) John Haggerty, USPS District Safety Specialist for the district including the Lehigh Plant; (3) Floyd Steinmetz, a mail handler at the Lehigh Plant; (4) Brian Odums, a mail handler tech (M-Tech) at the Lehigh Plant; (5) Joseph Pietruch, an electronics technician at the Lehigh Plant; and (6) Andrew Kubat, a manual letter distribution clerk and the local president of the American Postal Workers Union (APWU) for the Lehigh Plant. The Secretary also called a rebuttal witness, Chad Beer, an APWU full-time steward at the Lehigh Plant.

The Respondent called the following witnesses: (1) Lora Halpin, USPS District Senior Safety Specialist for the district including the Lehigh Plant; (2) Christopher Bruno, the Acting Plant Manager of the Lehigh Plant from August of 2020 until late December 2020; (3) Pablo Padin Gonzalez, a Manager of distribution and operations (MDO) at the Lehigh Plant; (4) Ivonne Ayala, the Supervisor of the Lehigh Plant's Business Mail Entry Unit; and (5) Greg Miller, the Acting Plant Manager of the Lehigh Plant, beginning in January 2021, following Mr. Bruno's departure. At the time of the hearing, Mr. Miller was the Lehigh Plant Executive Plant Manager.

(c) For the violations of 29 C.F.R. §§ 1910.165(e), 1910.176(a), and 1910.37(a)(3), whether Respondent has met its burden of demonstrating that compliance with the standards was infeasible.⁵

(d) For the violation of 29 C.F.R. § 1910.303(g)(1)(i), if the Secretary establishes a prima facie showing of noncompliance with the standard, has the Secretary established the violation was a repeat violation.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the undersigned issues this Decision and Order as the findings of fact and conclusions of law. Based on the analysis that follows, the Secretary has met her burden of establishing all elements of the violations in the Citations items by a preponderance of the evidence. However, the instant record does not establish Respondent's violations of 29 C.F.R. § 1910.37(a)(3) were willful. The evidence is sufficient, however, to establish these were repeat violations. Furthermore, Respondent has failed to establish its affirmative defense of infeasibility or "force majeure," asserted as to the violations of 29 C.F.R. §§ 1910.165(e), 1910.176(a), and 1910.37(a)(3). Finally, the Secretary established a prima facie showing of Respondent's noncompliance with 29 C.F.R. § 1910.303(g)(1)(i) and that the violation was a repeat violation.

Based on these findings, all the Citation items are affirmed and a total penalty of \$108,057 is assessed against Respondent.

JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in a business affecting commerce within the meaning of

⁵ Respondent asserted multiple affirmative defenses in its Answer and Amended Answer. Any defenses not pursued at hearing or in post-hearing briefing are deemed abandoned. *See Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The parties have stipulated, and the record supports, that Respondent was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the OSH Act. 29 U.S.C. § 652(5); (Jt. Pre-Hr'g Stmt. ¶¶ IV (1) & (2)). Respondent also timely filed a notice of contest to the Citations in this case. (Jt. Pre-Hr'g Stmt. ¶ IV (3); Tr. 10). The undersigned concludes that Respondent is covered under the Act and that the Commission has jurisdiction over this matter.

II. FACTUAL BACKGROUND

The Lehigh Plant & Daily Operations

The Lehigh Plant is part of the USPS and is located in a large, industrial warehouse in Bethlehem, Pennsylvania. (Tr. 60; JX-13, GX-24, at 2, 7, 8 13, 14, 18). The Plant's main operation is to receive large shipments of mail and parcels, sort them, and then ship them out for further distribution and delivery. (Tr. 290-91, 306-07, 431-33, 447-48, 588-97, 689-90, 694-95; RX-57). The Plant operates 24 hours a day, 7 days a week, with most employees working in one of three shifts, known as "Tours."⁶ (Tr. 497-98, 599-600, 785). Approximately 500 employees work at the Lehigh Plant in various capacities on any given day. (Tr. 599-600, 882-86).

During the relevant period in this case, the Lehigh Plant management organization was led by Acting Plant Manager Christopher Bruno from August 2020 until late December 2020. (GX-17, at 5, 7). In January 2021, Greg Miller began as the Lehigh Acting Plant Manager. (Tr. 866; GX-17, at 9). The Lehigh Plant Managers reported to David Webster, USPS Division Director. (Tr. 845-46, 865).

Five managers reported directly to the Lehigh Acting Plant Managers: Manager of In-Plant Support, Maintenance Manager, and three Managers of Distribution Operations (MDOs), one on

⁶ In the Plant, Bulk Mail Entry Unit (BMEU) employees work a traditional 9-to-5 shift. (Tr. 589, 758, 785).

each Tour. (Tr. 866). At that time, Logistics and Transportation reported to the Lehigh Acting Plant Manager. (Tr. 872). MDO Pablo Padin Gonzalez, who testified at the hearing, worked as the Tour 2 MDO at the Lehigh Plant.⁷ (Tr. 661). At that time, 15 Supervisors of Distribution Operations (SDOs), working on all three Tours reported to the MDOs.

During the relevant time, other managers working at the Lehigh Plant reported directly to USPS District Managers, not to the Lehigh Acting Plant Manager. Business Mail Entry Unit (BMEU) Supervisor Ivonne Ayala, worked in the Lehigh Plant once or twice a week. Ms. Ayala reported to USPS District Marketing. (Tr. 756-57, 784, 868). District Safety Specialist John Haggerty reported to the USPS District Manager of Safety. (Tr. 141, 175, 868).

Likewise, Human Resources (HR) was a USPS District department. (Tr. 868). Staffing for the Lehigh Plant was determined by the District Complement Committee, based on information from the Lehigh Plant regarding actual complement and Plant needs, and guidelines in the union contracts. (Tr. 868-70, 873-74). The Lehigh Plant management was not directly involved in hiring during the relevant period. (Tr. 868-71).

Four employee job classifications bear mention for purposes of understanding the events in this case. One employee classification is a “mail handler,” who is a USPS career employee and is responsible for unloading the delivery trucks that arrive at the Plant daily. (Tr. 168, 306-07, 539, 591-92, 693). Mail handlers are trained to operate mechanical equipment, including PITs, such as forklifts, to move larger containers of mail and parcels.⁸ (Jt. Pre-Hr’g Stmt. ¶ III (3); Tr. 168, 306-08, 539, 592-93, 693). Mail handler techs (M-TECs), also USPS career employees, operate PITs

⁷ As the Tour 2 MDO, Mr. Gonzalez managed all craft employees, mail clerks and mail handlers. He would assist with maintenance and, at times, transportation. (Tr. 661-62).

⁸ In fact, mail handlers and their part-time equivalents are the only employees trained to move mail with heavy lifting equipment; mail clerks and other employees are generally not trained in the use of this equipment and must rely on the mail handlers to move larger containers of mail. (Tr. 692-93).

in the building collecting empty equipment, trays, tubs, sleeves, to load onto trailers for recycling. (Tr. 345-46). Another employee classification is a “mail clerk,” also a USPS career employee, and is primarily responsible for running the sorting and processing machines once mail has been unloaded and brought on to the Plant floor. (Tr. 291, 447-49, 452, 456-57 539; GX-24, at 13, 14, 18). Both mail handlers and mail clerks have non-career, part-time equivalents known as “mail handler assistants” (MHAs) and “postal support employees” (PSEs), respectively. (Tr. 576-77, 881, 883-84; RX-8 & 9).

Mail and parcels are shipped into the Lehigh Plant in large trailer trucks and offloaded at one of two principal loading docks: the West Dock or the South Dock. (Tr. 290-91, 306, 431, 436, 443, 465-66, 669-70, 690-91; JX-13A, GX-24, at 1, 7, 8, 21; RX-57). Additionally, “bulk mail” is accepted by the BMEU.⁹ (Tr. 589, 667, 757-58, 764-65; JX-13B). Between the West Dock, South Dock, and the BMEU, there are approximately 38 bay doors for accepting mail and parcels at the Plant. (Tr. 636, 790; JX-13A).

As many as 200 trucks deliver mail and parcels to the Lehigh Plant daily, mostly between the hours of 8 a.m. and 5 p.m.¹⁰ (Tr. 589-91, 690, 695). Mail and parcels are packed in various ways on the delivery trucks coming into the Plant. Some mail is transported in trays, other mail is shrink-wrapped and palletized, and some parcels that cannot be shrink-wrapped and palletized are transported in large, wheeled “all-purpose containers” (APCs). (Tr. 180, 340-41, 689-90, 692; RX-57). The actual volume of mail delivered to and processed at the Lehigh Plant was not established

⁹ Bulk mail consists of mass mailings, like coupons or political fliers. (Tr. 667-68).

¹⁰ According to Acting Plant Manager Bruno, “8:00, 9:00 in the morning [the flow of mail] starts, and about 5:00 p m., it pretty much is over, but you might get some sporadic stuff from the units that feed into the [P]lant.” (Tr. 582-83, 590-91).

at the hearing.¹¹ (Tr. 862-64). Nevertheless, based on the estimates that were provided,¹² the volume of mail delivered to and processed at the Plant on a typical day is substantial.

Once a truck is parked in a delivery bay of the Plant, the mail is typically handled as follows. The truck is first scanned by an expediter. (Tr. 591). Then, a team of three to five mail handlers or MHAs begin to unload the containers of mail using various equipment, including forklifts for the larger pallets of mail.¹³ (Tr. 168, 306, 431, 592-93, 694; GX-24, at 1). During the process of unloading the truck, the mail is scanned and then “staged ... all the way across the dock ... and sometimes lined up by the door” so that another mail handler or MHA can pick up the mail and take it for sorting and processing by mail clerks and PSEs. (Tr. 594-96). Typically, the entire process of unloading a truck and moving all its contents to the proper machine for sorting takes approximately one hour, split equally between unloading the truck and moving the contents to various machines in the Plant. (Tr. 596-97, 694).

A description of two physical features of the Lehigh Plant is necessary to understand the events in this case. First, mechanical equipment, including PITs, and pedestrian traffic throughout the Plant, including in both the West and South Docks, is guided by yellow lines painted on the

¹¹ This data is available, however. According to Plant Manager Miller, the volume of processed mail is measured from data pulled from the Plant’s processing machines; the volume of unprocessed mail is estimated using a “standard conversion,” which is based on how much mail typically fits in a specific type of container and multiplying that number by the number of each container type. (Tr. 862-64).

¹² MDO Gonzalez estimated that a typical 53-foot trailer delivering mail to the Plant can fit as many as 52 pallets of mail or 39 APCs of parcels. (Tr. 690-92; RX-57). This volume would then be multiplied by the approximately 150 to 200 trucks that deliver to the Plant daily. (Tr. 695).

¹³ MDO Gonzalez noted that smaller pallets of mail, such as the ones depicted in the foreground of page six of exhibit RX-57 can be moved with a “hand jack,” i.e., it’s like

a two-inch pitchfork [that] goes in between the pallets and then you take the handle and you use it to lift it or to draw it. It has wheels on the front and wheels on the back, and it allows you to pull any type of equipment very freely, not freely completely because these are heavy pallets, but any person could lift or move that pallet with a hand jack.

(Tr. 691-92; RX-57, at 6). However, larger pallets, like those in the background of page six of exhibit RX-57, require the use of a forklift. (Tr. 691; RX-57, at 6). APCs, though wheeled, often require the use of a “tow motor” to move. APCs are not motorized. Single APCs are pushed by employees. (Tr. 149, 180, 340-41, 692-93; RX-57, at 7).

ground, lines which resemble and are used like vehicle lanes on a roadway.¹⁴ (Tr. 107, 111-12, 179-80, 307-10, 247-48, 434-35, 453, 457; GX-8, at 3; GX-24, at 2, 14, 18). Employees are instructed and trained to keep these lanes clear and unobstructed. (Tr. 310, 540; RX-8, at 19-21; RX-9, at 19-21). Second, emergency exit routes for employees throughout the Plant are designated by red lines painted on the ground which enclose black-painted walkways. (Tr. 107, 201, 178, 314, 569). Employees were instructed to use the exit routes for egress, during fire drills, and in the event of an emergency. (Tr. 178, 219-20, 314, 354, 569-72; RX-17). An evacuation plan was posted in the facility. *Id.* Employees are also instructed and trained to keep these walkways clear and unobstructed. (Tr. 168-71, 536-42; RX-8, at 19-21; RX-9, at 19-21).

DBCS 23

One of the sorting machines in use at the Lehigh Plant is Delivery Bar Code Sorter (DBCS) number 23, an approximately 70- to 80-foot machine located right off the South Dock, on the processing floor of the Plant. (Tr. 241-42, 381-82, 384; JX-13A). DBCS 23 is a 180-volt machine designed to scan and sort mail according to various bar codes. (Tr. 241-42, 381-83). The machine is “horseshoe” shaped, with a “feeder” section for incoming mail, a 90-degree turn into the “transport” section of the machine, and another 90-degree turn into the “reader” section.¹⁵ (Tr. 386). DBCS 23 has an electrical panel on the “front” transport section of the machine, which opens outward for maintenance. (Tr. 244-45, 385, 390; GX-8, at 5 (Photo ID #120120_17)).

¹⁴ APWU Local President Kubat explained that these aisles served both PIT and pedestrian traffic: “All of the aisles in the facility are pedestrian aisles. There are a few aisles that PIT equipment is not allowed to use, but all of the aisles are pedestrian.” (Tr. 449, 453, 457). For the sake of brevity, this decision will refer to these aisles as “PIT aisles.”

¹⁵ According to electronic technician Pietruch, DBCS 23 functioned as follows:

[S]tarting in the front, there’s a jogger they use to vibrate the mail and make sure they separate each mail piece. Right next to it is a feed table where they put the mail in. On the feed table is a belt system that will pull the mail off one piece at a time, run it through a camera that reads the bar codes. It decides which bin it goes to. There’s four different levels on the machine, and it will sort through gate systems to that particular bin.

(Tr. 381).

At the time relevant to the events of this case, an approximately three-to-four-foot-long yellow guardrail, which had been installed to protect the machine from PIT traffic, ran parallel to this “front” portion of DBCS 23. (Tr. 246-47, 388-89, 677, 685-87). At each end of the guardrail was a “three-inch square tubular post sitting on about a six-inch square steel plate ... bolted into the floor.” (Tr. 388; *see also* Tr. 680-81). Each of these posts was approximately three feet high and had two “V-shaped brackets,” one approximately eight inches from the ground, and the other approximately four inches from the top of the post. (Tr. 389, 392, 680; RX-72). The guardrails slid in between the two posts and themselves had complementary, inverted V-shaped brackets, which held the rails in place with the rails’ own weight. (Tr. 392-93, 680-81; RX-72).

DBCS 23 requires daily maintenance for a variety of mechanical issues, including some emergency maintenance while the machine is still energized.¹⁶ (Tr. 383-84, 386-88, 391-92, 405-09, 728). However, the installation of the guardrail in front of the machine left only approximately 24 inches of space between the guardrail and the electrical panel, which opened outward toward the guardrail, with increasingly less space as the guardrail followed the length of the front of the machine. (Tr. 246, 686; GX-8, at 5 (Photo ID #120120_17)). This left little space for technicians to service the machine. (Tr. 258-60, 390-91). To solve this space issue, the guardrails could be removed by lifting them up from the V-shaped brackets on the posts. (Tr. 246-47, 394-96, 682-84). Despite each rail’s weight, estimated between 20 to 40 pounds, a single technician was

¹⁶ Mr. Pietruch regularly performed maintenance on DBCS 23. (Tr. 384-85). “Preventative maintenance,” which included feeder alignment and dusting, is performed every night while the machine is not running. (Tr. 383-84). During the hours DBCS 23 is operational, mail clerks or PSEs operating the machine can call maintenance to report specific issues. (Tr. 385). A technician will then physically inspect the machine to diagnose and address the issue. Many issues require the technician to access the electrical panel on the front of the machine. (Tr. 386-87, 391-92, 405-09). Some of these issues, such as re-tightening loose bolts in the electrical panel, require DBCS 23 to be de-energized. (Tr. 386-87). For other issues, including “emergency” issues like when there is the smell of smoke coming from the machine, inspection of the DBCS 23 by the electronic technician is performed quickly without de-energizing the machine. (Tr. 391-92, 396, 405-09, 728). Adjustment of DBCS 23 machine “safety modules...for monitoring voltage” is performed yearly while the machine remains energized. (Tr. 387-88, 406-07).

capable of removing the guardrails, although more commonly removal was accomplished by two employees so that the rails could be lifted “uniformly” to avoid getting stuck on one of the posts. (Tr. 395-96, 402-04, 680-81). With two employees lifting the rails, the process of their removal took “no time at all.” (Tr. 395; *see also* 681-82, 728-29).

However, the removal of the guardrails to service DBCS 23 was far from a perfect solution to the lack of space between the electrical panel and the guardrail for at least three reasons. First, one of the rails was “slightly twisted” such that, even with two employees lifting it, the rail would often get stuck on the post. (Tr. 396). In such an instance, the rail would have to be dislodged, delaying the removal process by as long as five or ten minutes. (Tr. 394-96). Second, even with the guardrails removed, “[t]he post was still in the way” of technicians working on the electrical panel. (Tr. 391). Finally, in emergency situations, like when a mail clerk smelled smoke coming from DBCS 23, there was no time to de-energize the machine, let alone to remove the guardrails, before opening the electrical panel to investigate. (Tr. 391-92, 396, 407-08, 728).

2020 Increase in Mail and Parcel Volume; Safety Concerns

At the hearing, witness testimony about the obstructed PIT aisles and exit routes at the Plant focused on the time period from approximately November of 2020 to February of 2021, and so that time period is most relevant for purposes of the issues in this case. That said, some safety concerns presented by the increased mail and package volume arose earlier in 2020. One employee testified that he started noticing increased parcel volume at the Plant as early as April of 2020. (Tr. 311, 331).

The Lehigh Plant had a “Joint Labor/Management Safety and Health Committee” composed of members of Plant management, the USPS District Safety Specialist, and APWU and NPMHU union representatives, which met quarterly to discuss safety concerns raised by Plant

employees.¹⁷ (Tr. 183-89, 319, 326-27, 413-16; GX-22). USPS Forms 1767 “Report of Hazard, Unsafe Condition or Practice” were used by Lehigh Plant employees to report safety concerns to management.¹⁸ (Tr. 51, 123-24, 126-29, 147, 705, 773; GX-21). Joint Safety and Health Committee meeting notes reveal discussion of safety concerns, including 1767 Forms, accidents, and an OSHA complaint. (GX-22). Committee meeting notes, dated January 16, 2020, noted “very tight areas at the Christmas Annex.”¹⁹ (GX-22, at 7). Committee meeting notes, dated March 5, 2020, noted “trays being stacked too high on equipment.”²⁰ (GX-22, at 4). Committee meeting notes, dated July 22, 2020, noted “trays being piled really high in automation,” the July 20, 2020, OSHA complaint, and crowding in Bulk Mail.²¹ (GX-22, at 2).

Mr. Bruno took over as Acting Plant Manager of the Lehigh Plant in early August of 2020 to address “a small backup of mail, some parcels” and also address some budget and service issues. (Tr. 615). This small backup was cleared in two or three days. (Tr. 615).

On August 7, 2020, Mr. Bruno responded to a notice of Alleged Work Place Hazard that

¹⁷ OSHA CSHO Sabo requested and obtained the meeting minutes for the committee’s meetings held in 2019 and 2020. (Tr. 183-85; GX-22).

¹⁸ USPS 1767 Forms requested by CSHO Sabo during the inspection, and received in evidence, related to the violations alleged in the Citations, are dated October 28, 2020, through December 28, 2020. (GX-21; Tr. 126-29, 257).

A concerned employee could access the 1767 Form online or fill out a paper form, which was provided “at almost every entrance” of the Plant. (Tr. 705, 774). After filling out the form, the employee would take the 1767 Form to their direct supervisor who would investigate the alleged safety hazard. (Tr. 147, 638, 652, 705, 774). If the immediate supervisor could correct the safety concern on their own, they would do so, sign the form, and no further action would be taken. (Tr. 147, 636-38, 651-52, 705, 774; GX-21). However, if the direct supervisor could not correct the safety hazard, the matter would be referred to a higher member of Plant management to address the hazard. (Tr. 147, 638, 705-06, 774; GX-21).

¹⁹ One 1767 Form concerned “an employee operating heavy equipment while wearing headphones and dancing and singing loudly while driving through very tight areas at the Christmas Annex.” (GX-22, at 7).

²⁰ One 1767 Form concerned “trays being stacked too high on equipment. The trays were moved and all EAS were notified of the safety concern. . . . The MTEC drivers need to clear the area of Gaylords and skids. The area was cleared, and mail handlers will be given a service talk on proper staging of MTEC.” (GX-22, at 4).

²¹ Six 1767 Forms concerned “EMM trays being piled really high in automation. It restricts mule drivers from seeing and the trays could fall on people. A mail handler will be assigned to work on the trays.” APWU Local President Kubat, raised the issue that “[t]he Bulk Mail cage is being used as a storage area for delayed mail. The Bulk Mail people can’t move around.” (GX-22, at 2)

had been received by OSHA in July 2020. The notice stated a complaint had been received stating, in part, “[t]here has been multiple [gaylords]²² filled with mail, empty sacks and garbage in the aisles over the yellow line posing safety hazard risks to all employees with management knowledge. For two weeks now.” (GX-18, at 1). In the response letter to OSHA,²³ Mr. Bruno stated “[e]quipment that was impeding into the aisleways was moved. A service talk about keeping aisles free of obstacles was given to management and craft employees. All available employees received the talk as of August 4, 2020.” (*Id.*). Mr. Bruno also indicated that “[n]o 1767s were found on file relating to this concern.”²⁴ (*Id.*).

Backlog of Mail at the Lehigh Plant

Starting in approximately early November of 2020, a number of circumstances coalesced that began to impede operations at the Lehigh Plant and create a significant backlog of mail and parcels at the facility.

One set of circumstances substantially increased the volume of mail and parcels coming into the Lehigh Plant. First, November and December are always considered “peak season” for the USPS due to the holidays, with an attendant increase in mail and parcel volumes. (Tr. 331, 568, 597, 698). Second, because of the ongoing Covid-19 pandemic in late 2020 and the concomitant circumstances resulting from the pandemic (e.g., stay-at-home orders, closed shopping facilities, etc.), more people were shopping online, which led to an approximate increase of thirty percent in parcels that needed to be processed at the Lehigh Plant. (Tr. 311-12, 331, 493,

²² A gaylord is simply a large cardboard box, which is often stacked on pallets at the Lehigh Plant. (Tr. 333, 335, 342; GX-8, at 3). According to one employee, “[i]t’s a giant box where you put other boxes into, an empty box.” (Tr. 349).

²³ The CSHO explained that this particular complaint was a “phone and fax” complaint, wherein, rather than OSHA sending a CSHO to investigate the complaint, an OSHA representative contacts the employer, advises them of the hazard or hazards that have been reported, and requests certification of abatement. (Tr. 44-45).

²⁴ Review of the Joint Safety and Health Committee meeting notes and USPS 1767 Forms, predating August 7, 2020, corroborate this statement. (GX-21, GX-22).

583-84, 605-06, 648). Third, during the 2020 election, there was an increase in absentee ballots and campaign mail that needed to be processed at the Plant.²⁵ (Tr. 584-86, 648-49, 696-97, 768-69).

At the same time that the volume of mail and parcels coming into the Plant was surging, the Plant also faced a shortage of employees to process the extra volume. Perhaps most prominent was the number of employees calling off, or otherwise not showing up for work, increased substantially at the Plant during the time period at issue. (Tr. 597-98, 600-602, 606, 645, 699-700, 735). In November of 2020, for example, data pulled from the Plant's time and attendance database demonstrated nearly 300 more employee absences in November of 2020 than November of 2019 (from nearly 500 to nearly 800 absences reported). (RX-54).²⁶ Meanwhile, the Plant faced issues with finding new temporary/seasonal and career employees to offset the increase in other employees calling off. (Tr. 598, 700, 871-72). And once new hires *were* found, the onboarding process took as long as one or two months because the USPS requires fingerprinting, background checks, drug and "suitability" tests, as well as training that could only be conducted in small groups at the time because of the ongoing pandemic. (Tr. 598-99, 611, 840-41). Further exacerbating the problem of staffing at the Plant, USPS policy at the time allowed all employees, temporary and career, a certain amount of "Covid leave," which many new employees would take immediately after completing their onboarding process. (Tr. 598, 645, 730-31).

²⁵ Relatedly, because the Plant was located in Pennsylvania, a "hot spot for the election," the Office of the Inspector General, postal inspectors, were present in the Lehigh Plant office. (Tr. 584-85).

²⁶ The methodology leading to the graph depicted in RX-54 was discussed at length at the hearing and was based on as many as 1,500 pages of time and attendance data pulled from the USPS system. (Tr. 805). A Time and Attendance Control System (TACS) Report was introduced and accepted as an example of the records on which RX-54 was based. (Tr. 805-23; RX-42). TACS Reports for "all absences," including mail clerks and mail handlers, at the Lehigh Plant for the months December, January, February, and the first pay period in March, for the years 2019, 2020, and 2021, were gathered. (Tr. 816-19). The voluminous absentee data gathered is depicted in the 2019, 2020, and 2021 comparison graph. (Tr.817-826; RX-54). Based on Mr. Miller's extensive description at the hearing, the undersigned is persuaded that RX-54 accurately reflects a substantial increase in the absences for all employees, including mail handlers and mail clerks, for the period set forth in the graph.

At the hearing, Lehigh Plant management witnesses generally opined and speculated regarding the challenges Respondent faced when hiring temporary and career employees during the relevant time period between November 2020 and February 2021. However, the Lehigh Plant staffing and hiring was conducted by the District Human Resources Department, not by anyone at the Lehigh Plant.²⁷

The general assumptions and speculation of the Lehigh Plant managers regarding hiring, such as pay rates offered by USPS, pay rates offered by competing businesses, number of applications received, are accorded no weight. Respondent did not present a witness from the USPS District Human Resources Office with direct knowledge regarding hiring efforts employed and challenges faced. Also, other than the absentee graph (RX-54), Respondent did not present any business records regarding hiring, staffing, job advertisements, hiring notices, applications received, for USPS jobs or jobs with local competitors. (Tr. 528-29).

The high absenteeism left Plant management severely understaffed, thereby hindering the processing and distribution of mail and parcels at the Plant. As Acting Plant Manager Bruno described the situation: “[I]t was a hodgepodge of who would come in on a daily basis whether you could move the mail effectively or not ... [T]here [were] days our staff was so low we were lucky to actually even run a machine....” (Tr. 598, 600). Mr. Bruno recounted instances where there were no mail handlers or MHAs at all to unload the trucks that were delivering mail to the Plant. (Tr. 601). MDO Gonzalez recounted instances when he would have to run some of the

²⁷ Human Resources (HR) was a USPS District department. (Tr. 868). The District HR managed the District Complement Committee. (Tr. 870-71). Staffing for the Lehigh Plant was determined by the District Complement Committee, based on information from the Plant regarding actual complement and Plant needs, and guidelines in the union contracts. (Tr. 868-70, 873-74). The District Complement Committee also determined driver hiring. (Tr. 873-74). District HR posts positions and receives job applications. (Tr. 877). Local managers at the Lehigh Plant would not have information regarding the number of job applications received. *Id.* The Lehigh Plant management was not directly involved in hiring during the relevant period. (Tr. 868-71). Plant Manager Miller would have attended the Complement Committee meetings; however, no Complement Committee meetings were held during January and February 2021, due to the pandemic. (Tr. 870, 874, 876-77).

Plant's processing machines with half the typical number of mail clerks or PSEs. (Tr. 700). Mr. Bruno described instances where there were simply not enough employees to run the Plant's processing machines at all. (Tr. 603-04). Meanwhile, the flow of mail into the Plant did not slow down; indeed, as recounted above, it was perhaps larger than ever.

In the latter months of 2020, there was a convergence of increased volume of mail and parcels on one hand and a shortage of employees to process and distribute the incoming mail on the other. A significant backlog of mail and parcels emerged at the Lehigh Plant, and even the 300,000 square-foot building housing the Plant increasingly began to run out of physical space to store the backlogged mail, parcels, and leftover processing materials, MTEC.²⁸ (Tr. 86-87, 121-22, 125-26, 487-89, 602, 641-42).

As a result, starting in late October and throughout the month of November, employees began to report blocked aisles and doors throughout the Plant using the USPS 1767 Forms. (GX-21, at 3-4, 7-14, 17-19, 21-25, 27, 29, 30, 32-35).

Measures to Mitigate Obstructions in the Plant

The record establishes that the employees' complaints about the blocked aisles and exits did not go completely unheeded by Plant management, who instituted multiple measures to attempt to address obstructions caused by the backlog of mail, parcels, and processing materials at the Plant.

Spot abatement for obstructions

When alerted to specific instances of blocked aisles and exits in the Plant, management

²⁸ Empty equipment is referred to as MTEC. (Tr. 875). Acting Plant Manager Bruno and MDO Gonzalez both discussed the empty "trays" that are generated when mail has been processed and prepared for shipment from the Plant. (Tr. 607, 710). Mr. Bruno also described the empty conveyances that were often left over when mail has been fully processed for shipment, such as "bulk mail carriers," hampers, gurneys, and APCs. (Tr. 607). Both empty containers and empty conveyances have to be loaded on to what are known as MTEC trailers to be shipped out from the Lehigh Plant to a recycling facility in Philadelphia. (Tr. 344-45, 710-712).

would make attempts to clear the obstructions and thus abate the associated hazards. (Tr. 228-29, 313-14, 353-54, 605-08, 709-11). Acting Plant Manager Bruno and MDO Gonzalez recounted instances where an employee informed them of obstructions, and they temporarily moved the mail or processing materials to abate the hazard. (Tr. 605-08, 709-11; GX-26). These efforts were corroborated by employees from the Plant as well as the 1767 Forms submitted at the hearing, many of which indicate that the reported obstructions were addressed under the oversight of the immediate supervisor to whom they were reported. (Tr. 313-14, 353-54; GX-21, at 4, 8-14, 17-19, 21-25). However, it was universally acknowledged that these “spot abatements” of obstructions in the Plant offered, at best, only temporary relief from the problem caused by the growing volume of mail and parcels coming into the Plant and the general lack of employees to process the increased volume. (Tr. 228-29, 313-14, 353-54, 363-64, 605-08, 710-12). One mail handler tech, who worked on the South Dock, testified that in his experience loading up a trailer with mail or pallets or trash would clear obstructions on the South Dock “temporarily,” for “a couple [of] hours.” (Tr. 363-64).

Opening of the Christmas Annex

Sometime in mid-November 2020, approximately after Veterans Day, Plant management opened up what was known as the “Christmas Annex,” a nearby warehouse building that was often opened during peak season to temporarily accommodate the influx of parcels during the holiday season. (Tr. 280-82, 327-28, 363, 608, 801; RX-30). Opening it at this time was considered opening it early. (Tr. 608). During this time period, it was mainly used for oversized parcels and to “cycle equipment,” both of which were shipped over to the Annex in trailer trucks. (Tr. 608).

However, the opening of the Annex also had a limited impact on clearing the obstructions in the Plant. The Annex quickly filled with unprocessed parcels such that it “became gridlocked

as well.” (Tr. 608, 800-03; RX-30). Due to the staffing issues, only 10 employees were assigned to process the mail and parcels in the Annex, when normally 40 to 60 would have been assigned. (Tr. 608). Further, to the extent space could be cleared in the Annex to accommodate excess mail from the Plant, a driver often could not be found to move the trailers of mail from the Plant to the Annex. (Tr. 319-20, 329, 718).

National USPS negotiations with the national unions regarding hiring temporary workers

The USPS negotiates nationwide contracts, collective bargaining agreements and memorandums of understanding (MOUs), with unions representing their employees, which contracts and agreements apply to the USPS Central Pennsylvania District²⁹ and the Lehigh Plant.³⁰ (Tr. 498-500, 880-82). The union contracts and MOUs include staffing guidelines. (Tr. 486-87, 498-500, 869, 881-86). The contract between the USPS and the APWU included a provision that the number of non-career PSEs the USPS could hire was “capped,” or limited to 20 percent of the number of full-time regular mail clerks employed in the USPS District-wide. (Tr. 881). The contract further provided that the 20 percent “cap” on hiring non-career PSEs was waived during the peak season, typically the Saturday after Thanksgiving to January 1st, known as the “penalty exclusion period.” (Tr. 881; GX-17, at 4.). During the “penalty exclusion period” the USPS could hire as many PSEs as needed. (Tr. 486-87, 499-500, 881-82). Due to the Covid-19 pandemic, and the large increase in parcel volume, nationwide the USPS and APWU negotiated a MOU waiving the 20 percent “cap,” or limit, on hiring PSEs, beyond the normal peak season, extending the “penalty exclusion period.” (Tr. 498-500, 889-91, 894-95). Nationwide the USPS could hire as

²⁹ At the time relevant to the events in this case, the Lehigh Plant was in the Central Pennsylvania district which included the Lehigh Valley, Harrisburg, Wilkes-Barre, and Scranton, Pennsylvania. (Tr. 576, 882).

³⁰ Local Lehigh Plant management and the local APWU did not have authority to negotiate contract changes, such as changing pay rates. (Tr. 891-92, 893-95). The APWU represents employees in the clerk craft (mail clerks), maintenance craft, and motor vehicle services craft. (Tr. 412).

many PSEs as needed. (Tr. 498-500, 889-91). The record reveals that in 2021 the penalty exclusion period continued at least through March 2021.³¹ Chad Beer, a full time APWU Steward, at the Lehigh Plant testified regarding his knowledge of the USPS and APWU MOU waiving the cap. His understanding was that the 20 cap was also waived for MHA hiring, between the USPS and the National Postal Mail Handlers Union. (Tr. 889, 894-95).

Liberal overtime policy

The USPS's contracts with the Unions representing employees at the Plant included contractual overtime limits. (Tr. 841-42). During the time relevant to this case, "there was no "cap," in other words, no contract limit regarding overtime. (Tr. 841-42). The Lehigh Plant was "using employees to the maximum amount of overtime." (Tr. 841-42). Plant Manager Miller testified that "we try not to work people more than a 12-hour day."

During the time period at issue, the policy at the Plant was "free overtime," with each employee being able to work as many as 16 hours a shift.³² (Tr. 643-44, 701-03, 841-42). However, Plant management could only require a certain amount of overtime from a given employee, either two or four hours.³³ (Tr. 643, 701). The availability of voluntary and mandatory

³¹ "[T]he seasonal temp Ees are remaining in the facility through March." See CSHO interview of APWU Local President Kubat, on February 5, 2021[1]. (Tr. 90; GX-17, at 4, ¶ 6.). This interview was contemporaneous with the extended penalty exclusion period and is credited. APWU Local President Kubat recalled the MOU or agreement between the USPS and APWU was effective beginning in April 2020, expiring in May 2022. (Tr. 499, see Tr. 487). APWU Steward Beer recalled the MOU extending the penalty exclusion period became effective in January or February 2021. (Tr. 895.).

³² Acting Plant Manager Bruno began working at the Lehigh Plant in August 2020, in part, to address the Plant's budget. Mr. Bruno testified he was successful in getting the Plant budget under control by reducing the phenomenal number of high-dollar overtime hours worked by Plant employees. (Tr. 615-16). That said, a USPS Office of the Inspector General Audit Report (Audit Report) noted Lehigh Plant management's commitment to staffing additional positions and allocating overtime to process packages at the Plant. During the auditors October 5 to 8, 2020, onsite audit at the Lehigh Plant, they observed a large quantity of nonmachinable outside priority mail packages that the Lehigh Plant management planned to send to the Scranton P&DC for processing "due to employee availability issues" at the Lehigh Plant. The Audit Report states that "Lehigh Valley P&DC management decided to stop sending nonmachinable outside priority mail packages to the Scranton P&DC and instead committed to staffing additional employees and allocating overtime to process them at the Lehigh Valley P&DC." (GX-35, at 10).

³³ Acting Plant Manager Bruno and MDO Gonzalez had conflicting testimony on how many overtime hours they could require employees to work. Mr. Bruno indicated employees could be required to work 12-hour shifts, i.e., four hours

overtime had a limited effect in reducing the backlog of mail at the Plant. Acting Plant Manager Bruno testified to the limits of mandating overtime. “Well, you can work people up to 12 hours. After that ... if you work them 12 hours seven days a week, then they’re going to break down and call off. You just can’t work people around the clock.” (Tr. 643).

Use of cross-craft employees

The USPS’s contracts with the unions also included guidelines regarding employees working outside their craft, or job classification, that the unions call “cross craft.” (Tr. 701, 739-40). During this time, the unions representing the mail clerks and the mail handlers filed no grievances to get paid for “cross craft.” Everyone was working together to clear the backlog. (Tr. 735, 740-41). Plant management brought in a variety of workers from other offices and facilities to try and clear the backlog of mail and parcels in the Lehigh Plant. Acting Plant Manager Bruno described bringing in postmasters, supervisors, customer service representatives, and rural carriers who were essentially “functioning as craft employees, moving mail, working different machines wherever we could get them.” (Tr. 606, 650). MDO Gonzalez likewise described bringing in employees to work cross-craft as mail clerks and mail handlers, including custodians, and also having mail clerks work cross-craft as mail handlers. (Tr. 700-01, 734). During the peak season, retired employees returned to work. (Tr. 734). MDO Gonzalez further described bringing in employees from other facilities to help to clear the backlog, including from Philadelphia, Lancaster, Scranton, Wilkes-Barre, and East Stroudsburg, Pennsylvania. (Tr. 701, 734, 741).

of overtime, whereas Mr. Gonzalez indicated employees could only be required to work 10-hours shifts, i.e., two hours of overtime. (*Compare* Tr. 643, *with* Tr. 701-703). MDO Gonzalez testified that the “supplementary force” was required to work 12 hours daily. (Tr. 703). MDO Gonzalez also testified that a mail clerk could work up to 16 hours safely. (Tr. 703). Plant Manager Miller, who took over after the first OSHA inspection, stated only that “we try to not work people more than a 12-hour day.” (Tr. 842). Employees did volunteer to work more than 12 hours. *Id.* The resolution of this conflicting testimony is not necessary to address the issues presented by this case. Plant management could only mandate so many hours of overtime from a given employee.

Acquisition of extra trailers

Plant management made some efforts to bring in additional MTEC trailers to remove some of the excess processing equipment in the Plant.³⁴ (Tr. 151-52, 155, 157, 164, 609-10, 717). Acting Plant Manager Bruno testified that they rented and borrowed every trailer they possibly could, but it was a difficult time to get trailers. (Tr. 225, 650; GX-17, at 5).

In addition to the scarcity of trailers, Plant management also faced a scarcity of drivers to take away any additional trailers once they were loaded. (Tr. 319-20, 329-30, 718, 843). Further, using additional trailers as storage in the “staging areas” or “yards” in the South and West Docks had to be balanced against the need to leave enough space for traffic to get in and out of the loading docks. (Tr. 737, 798-99, 864-65). In other words, adding too many static trailers for the purpose of storage ran the risk of “gridlock[ing]” the yards and halting the delivery and distribution of mail and parcels to and from the Plant.³⁵ (Tr. 737).

Shelving

Mr. Bruno ordered approximately 60 feet of shelving “for the cardboard and the tubs that were having to be on the floor.” (Tr. 151-52, 155, 157, 164). However, the shelving did not offer any immediate relief to the backlog of mail in the Plant because it “took months to go up” (Tr.

³⁴ MDO Gonzalez and Plant Manager Miller both emphasized that storage of mail anywhere at the Plant was disfavored, with the emphasis being to “process it as it comes in and get it back out.” (Tr. 841; *see also* Tr. 370, 717). Thus, the focus was on acquiring additional MTEC trailers to remove the excess processing equipment, like mail trays or cardboard boxes, from the floor of the Plant, although this equipment could sometimes be “mixed” with processed mail. (Tr. 151, 609-10).

³⁵ The testimony offered at the hearing on how many, if any, additional trailers could have been parked in the yard of the Plant was inconsistent and inconclusive. A mail handler tech acknowledged that 42 trailers were already being parked in the yards and there would be no more room for additional trailers. (Tr. 370-73). MDO Gonzalez was of the opinion that the yards could accommodate “80-to-90 and nothing else,” meaning if he “gridlocked” the loading docks. This included 38 trailers at dock doors and an additional 40 to 60 trailers in the yard. (Tr. 737). MDO Gonzalez recalled that three to four MTEC trailers stayed at the facility. (Tr. 717, 738-39). Plant Manager Miller estimated that 42 trailers were parked in the yards when he took over management of the Plant in January of 2021, and he opined that no more trailers could be parked in the yards without gridlocking them. (Tr. 799, 875). This collective testimony reveals that the Plant’s yards had an upper limit as to how many trailers, and therefore how many additional trailers, they could accommodate before running out of space.

152).

Two More OSHA Complaints & OSHA's First Inspection

Ultimately, none of the measures implemented by Plant management, alone or together, adequately addressed the obstructions caused by the backlog of mail and parcels at the Lehigh Plant. Several employees testified that they frequently observed blocked aisles and exits from the time the volume started to pick up in late 2020. (Tr. 310-11, 348, 355-58, 431-51; GX-24, at 1, 2, 7, 8, 13). These observations are corroborated by the 1767 Forms submitted at the hearing. (GX-21, at 3, 7, 8, 9, 10, 11, 12).

On November 12, 2020, OSHA received a second complaint about blocked aisles at the Lehigh Plant. Particularly, the complaint alleged:

Trays are piling up in automation, in every aisle [to South Dock]. Some stacks are over 5 feet tall making it difficult to see into the aisle. Trays are stacked around the machines making it difficult for maintenance personnel to get to machines. Drivers are hitting stacks of trays with containers causing the trays to fall in the aisle.

(GX-26, at 4).

In response,³⁶ in a letter dated November 19, 2020, Acting Plant Manager Bruno certified correction of these conditions as follows:

Areas in the plant were determined to be congested with empty trays due to the unusually high mail volume that the plant has been experiencing. All areas that were identified as being congested, including [Automation]... and the [S]outh [D]ock were immediately abated and cleared of all empty equipment. The empty equipment (trays) were stacked, processed and moved to a staging area designated for empty equipment. They were then loaded on trailers and removed from the plant property.

Further, the Plant Manager has instituted measures in order to prevent further congestion, when mail volume is high. These control measures, including the painting of additional lines[,] will assure the proper flow of empty trays all the way through their removal from the workroom floor.

³⁶ This complaint to OSHA was also handled by the “phone and fax” method, rather than OSHA sending a CSHO to investigate the reported hazards.

(*Id.* at 1). Mr. Bruno again indicated that “[n]o 1767s were found on file relating to this concern.” (*Id.*).

By letter to OSHA, dated November 26, 2020, APWU Local Union President Kubat disputed Mr. Bruno’s representation that the hazard of empty trays piling up in the Automation aisles had been abated in a manner to prevent the same hazard from recurring. Mr. Kubat stated the APWU finds Acting Plant Manager Bruno’s “response to be woefully inadequate. Yes, the employer did clear most of the trays upon notification of the OSHA complaint. However, the hazard had not been abated and the piles of trays are accumulating again. Nothing in the employer’s response to the complaint indicates how they will prevent this hazard from returning.” (GX-26, at 7). Mr. Kubat also disputed Mr. Bruno’s representation regarding the 1767 Forms. “Many employees had report[ed] the hazards.” (GX-26, at 8). Mr. Kubat also stated previously the recurring safety hazard of empty trays accumulating in Automation had been addressed by the USPS assigning an employee to the “tray removal position,” already in existence.³⁷ (Tr. 421-28; GX-26, at 7, 8).

Several 1767 Forms, that predate the OSHA November 12, 2020 complaint, and Acting Plant Manager Bruno’s November 19, 2020 response, report safety hazards regarding the stacked MTEC trays in automation, blocking aisles, blocking access, creating a fire hazard.³⁸ (Tr. 631-38,

³⁷ The relevant exhibit notes:

The immediate unsafe condition, as reported to OSHA on November 12, 2020 was partially abated over the weekend of November 14-15, 2020. Since November 16, 2020, the unsafe condition has returned as stacks upon stack[s] of empty trays continue to accumulate in the automation. The APWU believes that management continues to leave the tray removal position unstaffed. Even if an employee is assigned to remove trays it is not enough to keep up with the rate that trays are being stacked. . . . The solution is to staff the positions, already in existence, and do not pull those employees off to do other duties. Allow those employees to perform the work of removing pallets of empty trays.

(GX-26, at 8).

³⁸ For example, November 11, 2020, 1767 Form: “Trays are everywhere!! You can barely get to your work area. We cannot see out of our work area & mail is blocking dock doors! The entire work floor is a fire hazard.” (GX-21, at 9).

GX-21, at 3, 7, 8, 9, 10, 11, 12). These 1767 Forms are dated October 28, 2020, November 3, and 11, 2020.³⁹ Several of the 1767 Forms note the management response was to assign a mail handler to clear the trays, to assign a mail handler to work on MTEC. (GX-21, at 8, 9, 10, 11, 12). Review of the record reveals that when the USPS November 2020 letter response to OSHA was sent, Mr. Bruno had not implemented a sustainable solution to the safety hazard presented by the accumulated MTEC trays, blocked aisles, and blocked exit access, hazardous conditions likely to recur. (Tr. 640-41).

On November 30, 2020, a third complaint was filed with OSHA concerning “[e]mpty mail trays on the floor causing a tripping hazard,” and “[t]rays . . . stacked 7 feet high making it impossible for employees to see around corners when operating equipment.” (JX-10). The same complaint also reported a separate concern with DBCS 23, namely that the guardrail installed in front of it did not allow for adequate space to access the “main power distribution unit.” (*Id.*). The next day, OSHA sent CSHO David Sabo to investigate the complaint and inspect the Plant. (J. Pre-Hr’g Stmt. ¶ III(1); Tr. 54; GX-6, at 2).

December 1, 2020, OSHA Inspection

Upon arriving at the Plant, CSHO Sabo met with Plant management, including Mr. Bruno, along with union officials to discuss the items addressed in the complaint. (Tr. 57-59). He followed the opening conference with employee interviews, with union representatives present. (Tr. 59). CSHO Sabo then proceeded to inspect the Plant, focusing on the West and South Docks, but also venturing onto the processing floor of the Plant to inspect the concern that had been

Further example, November 11, 2020, 1767 Form: “Emergency doors blocked by multiple APCs, stacks of plastic pallets and Ucart. Fire Hazard. Needs removal immediately! Blockage been there 4 weeks.” (GX-21, at 13).

³⁹ Notably many of the 1767 Forms, dated November 11, 2020, include a management response signed by Tour 2 MDO Pablo Padin Gonzalez. (GX-21, at 8, 9, 10, 11, 12). Mr. Bruno testified that if the issue had been resolved by a Plant manager below him, he would not have seen these forms, accounting for his representation to OSHA in this letter that no such forms were found. (Tr. 631-38, 651-52. *See* Tr. 427-29, 706-07).

reported regarding DBCS 23. (Tr. 59-61).

CSHO Sabo observed and documented the following while inspecting the South Dock:

- Between an emergency exit door and a rolling bay door, a fire alarm pull station obstructed by a “metal cage,” as well as “equipment for mail, material containers, and some loose debris not containerized.” (Tr. 80; GX-1, at 2; GX-8, at 4 (Photo ID #120120_12)). The metal cage was “too far for a human arm to reach through and gain access to the fire alarm pull station.” (Tr. 82; GX-1, at 2). CSHO Sabo believed the obstruction of the fire alarm pull station posed a burn hazard to employees, as it would delay an employee from being able to trigger the alarm in the event of a fire. (Tr. 82; GX-1, at 2-3). He also observed employees working in the South Dock “in proximity to the fire alarm pull station.” (Tr. 85; GX-1, at 2).
- In a pathway from the sorting area of the Plant leading to the South Dock, a PIT aisle obstructed by a large, cardboard “gaylord” filled with mail containers and, further down the aisle, a metal ladder also obstructing the aisle. (Tr. 111-12; GX-2, at 3; GX-8, at 3 (Photo ID #120120_9)). The CSHO observed employees operating PITs near this area. (Tr. 124-25; GX-2, at 3).
- In the same area, an emergency exit route completely blocked by a large, metal container filled with various materials. (Tr. 206-09; GX-8, at 3 & 3A (Photo ID #120120_9)). The CSHO observed employees operating PITs near this area. (Tr. 124-25; GX-2, at 3).
- In a different area of the South Dock, an emergency exit route emerging from a set of double doors to an emergency exit door obstructed by a caged metal cart, a plastic pallet leaning against the metal cart, and, behind the metal cart, another pallet with a cardboard box filled with various materials. (Tr. 203-04; GX-8, at 2 (Photo ID #120120_4)).⁴⁰ At a certain point along the route, CSHO Sabo measured only approximately 12 inches of unobstructed space in the exit route. (Tr. 205-06; GX-3, at 3; GX-8, at 2 (Photo ID #120120_5)).
- In a different area of the South Dock in front of a “work area with double doors,” several metal cages filled with mail containers completely blocking a marked emergency exit route. (Tr. 210-11; GX-3, at 3; GX-8, at 5 & 5A (Photo ID #120120_15)).

CSHO Sabo observed and documented the following while inspecting the West Dock:

- “Palletized mail,” i.e., mail shrink-wrapped onto pallets, along with containers and boxes blocking both PIT aisles as well as an emergency exit route. (Tr. 107-

⁴⁰ The CSHO explained that his orientation when taking this photograph was with the emergency exit door situated behind him. (Tr. 203-04).

08). More particularly, he observed one location in the West Dock where the shared space for both the PIT aisles and the emergency exit route, which abutted each other at this particular location, was only approximately 12 inches. (Tr. 108-10, 201-02; GX-3, at 3; GX-8, at 1 (Photo ID #120120_2)). Thus, both routes were obstructed by the pallets. (Tr. 108-10, 201-02). CSHO Sabo observed employees working in this area. (GX-3, at 3).

Several times during the inspection, Mr. Bruno, who accompanying CSHO Sabo for the inspection, acknowledged that there was simply “too much mail,” there was nowhere else for the mail to go, and suggested that employees operating PIT vehicles or otherwise navigating the South and West Docks needed to just go around the obstructions in the aisles. (Tr. 87, 121-22, 125-26, 195, 283-84, 298-99).

CSHO Sabo also inspected DBCS 23 during his inspection on December 1, 2020. (Tr. 240-42). Discussion of the DBCS 23 inspection is stated in the Citation 3, Item 2 Analysis below.

Following his inspection on December 1, 2020, CSHO Sabo held a closing conference with Acting Plant Manager Bruno, District Safety Specialist Haggerty, and union representatives, during which he listed the apparent violations he had seen during his inspection. (Tr. 63-64, 125-26, 195-96, 222-24, 617). During this closing conference, Mr. Bruno generally acknowledged the blocked aisles and exit routes but again stated to the effect that “there was nowhere else to put the stuff.” (Tr. 196). Regarding the obstructed egress routes, CSHO Sabo discussed with Acting Plant Manager Bruno the OSHA standard 1910.37(a)(3), the minimum width for egress, and how that minimum width was not available. (Tr. 223). During the walk-around inspection, they observed the hazard of the obstructed aisles. CSHO Sabo asked Mr. Bruno how an employee was to exit when the exit aisle was obstructed. Mr. Bruno “said the employee should go around the obstruction.” *Id.* During a subsequent OSHA interview, Mr. Bruno reiterated the same response, if the exit aisle was obstructed the employee should go around the obstruction. This was not explained to employees as an alternative to the published emergency evacuation plan. *Id.* (GX-17,

at 6).

Change in Acting Plant Manager

After OSHA's December 1st inspection of the Plant, the problems faced by Plant management remained largely unchanged. Although the 2020 election had since passed, the increase in the volume of mail and packages at the Plant as a result of peak season and increase in online shopping remained unchanged. (Tr. 311-12, 331, 493, 568, 583-84, 597, 605-06, 648, 698). Meanwhile, absenteeism at the Plant spiked in December of 2020, with almost 900 employee absences, including mail handlers and mail clerks, (an increase from approximately 600 the previous year), and, although absences dropped in January and February of 2021 to only 700, they remained higher than the previous year for both months. (RX-54). Employees continued to report additional instances of obstructions in the Plant throughout the month of December, including 1767 Forms.⁴¹ (Tr. 452-67; GX-21, at 27, 32-35; GX-24, at 14, 18, 19, 21).

On December 23, 2020, Mr. Bruno left for vacation. That was his final workday at the Lehigh Plant. (Tr. 626). In early January 2021, he was replaced by Mr. Miller as Acting Plant Manager. (Tr. 611, 624, 626, 629-31). After he began at the Lehigh Plant, no one informed Mr. Miller about the previous December 1, 2020, OSHA inspection, until the subsequent inspection on February 10, 2021. (Tr. 627, 630-31, 844-46). No one informed Mr. Miller that 1767 Forms had been received regarding obstructed aisles and exit routes. (Tr. 845).

What Mr. Miller did learn when he started as the Plant Manager was that a significant number of staff, particularly management staff, were absent due to Covid.⁴² (Tr. 796-97).

⁴¹ For example, December 2, 2020, 1767 Form: "Aisle on East Side of Bldg completely blocked by boxes full of packages. No exit, where it is clearly marked that it is an evacuation route. This is a safety hazard!! (on the way out of work.)" (GX-21, at 27).

⁴² Mr. Miller estimated that "95 percent" of management was out due to Covid infections when he first started. (Tr. 796). The only managers onsite were himself, "one other Supervisor of Distribution Operations, and two Acting Supervisors of Distribution Operations." (Tr. 796-97). As to the remainder of the staff, Mr. Miller found "[t]he overall

Moreover, his inspection of the Plant revealed “large volumes of mail on the floor in containers and also excess equipment ... which needed to be removed from the floor ...”, as well as an abnormally large number of unprocessed parcels being stored in the Annex. (Tr. 799-800; RX-30). Mr. Miller also found that there were 42 trailers staged in the Dock’s yards containing either incoming or outgoing mail. (Tr. 797-99). In short, the situation at the Plant had not improved in the month following OSHA’s December 1st inspection; in fact, Mr. Miller had never encountered a situation like the one at the Lehigh Plant in his 36-year career with the USPS. (Tr. 804).

Mr. Miller attempted to address the obstructions in the Plant with many of the same measures utilized by Mr. Bruno but confronted similar limitations on their efficacy. These included: spot abatement of specific obstructions, removal of empty equipment for disposal or recycling (Tr. 861-62); and a continued liberal overtime policy. (Tr. 841-42). As to additional trailers to help clear the Plant, Mr. Miller found “[t]here was no place really to put additional trailers without blocking the flow of the volume coming in and out” of the Plant. (Tr. 799). Mr. Miller also believed it would take “months” to acquire any new storage space, as it had for the Annex. (Tr. 841). All the while, truckloads of mail and parcels continued to be delivered to the Lehigh Plant. (Tr. 842-43).

Another OSHA Complaint & OSHA’s Second Inspection

Acting Plant Manager Miller’s efforts at clearing the Plant of the obstructions caused by excess mail and parcels turned out to be as unsuccessful as his predecessor’s. On February 8, 2021, OSHA received a fourth complaint about the Lehigh Plant concerning the following:

1. Exits routes are blocked with containers of mail and packages on the west and south loading docks. It has been months since two exits were accessible on either dock.

staffing due to Covid and callouts was extremely low in the building.” (Tr. 797).

2. PIT aisles are blocked on the west and south loading dock. In some areas, one PIT has to back up to allow the other to pass.

3. Fire alarm pull stations and fire extinguishers are blocked on the south and west loading docks.

(Tr. 66-69; JX-7). In response, on February 10, 2021, CSHO Sabo returned to the Lehigh Plant to investigate the allegations in the fourth complaint. (J. Pre-Hr’g Stmt. ¶¶ III(1) & (2); Tr. 65-66). After conducting another opening conference with Acting Plant Manager Miller, District Safety Specialist Haggerty, and union representatives, CSHO Sabo proceeded to inspect the Plant along with Mr. Miller, Mr. Haggerty, and the union representatives. (Tr. 69-70).

CSHO Sabo’s second inspection revealed the following conditions regarding the West Dock:

- In front of two overhead doors (one red and one yellow) with aisles meant for two-way PIT traffic, several “palletized boxes and crates” obstructing the aisles. (Tr. 115-16; GX-2, at 3; GX-8, at 6 (Photo ID #021021_2)).⁴³ The obstructions did not allow for PIT traffic without creating “visual” and “struck-by” hazards, and pedestrian traffic could only navigate the aisles by “snaking their way through these caverns of boxes and crates.” (Tr. 116-17).
- An emergency exit route, marked by a red line painted on the ground leading to a door with a clearly marked “EXIT” sign, obstructed by a “black and orange pallet[] with some shrink-wrapped items on top of it,” a “metal cage bin,” “several pallets with cardboard crates filled with material,” and to the right of that “another row of palletized cardboard crates in a line,” and further to the right “some more of those cardboard crates on pallets.” (Tr. 211-215; GX-3, at 3; GX-8, at 6 & 6A (Photo ID #021021_3)).

CSHO Sabo’s second investigation revealed the following conditions regarding the South Dock:

- Two roll-up doors with aisles obstructed by “large cardboard boxes of mail and other materials that appear to be at least four feet.” (Tr. 113-14; GX-2, at 3; GX-

⁴³ CSHO Sabo mistakenly identified this photo as depicting “the opposite perspective” of the obstructions he observed in the South Dock on February 10, 2021. (Tr. 115-16). However, the description provided in the Photo Mount Worksheet clearly identifies the area as the West Dock, and the photograph was clearly taken in a different area of the Plant. (Compare, GX-8, at 7 (Photo ID #021021_8)), with *id.* at 6 (Photo ID #012012_2)). Respondent has not contested that this photograph depicts conditions observed in the West Dock.

8, at 7 (Photo ID #021021_8)). The aisles leading to these roll-up doors were delineated by yellow paint on the ground and were meant for two-way PIT traffic, with PITs meant to “go in the right-hand door [and] coming out the left-hand door.” (Tr. 114; GX-16). CSHO Sabo observed that PITs “could not pass through the aisles without first moving the material” obstructing the aisles.” (Tr. 114-15).

- An emergency exit route, marked by a red line painted on the ground leading to a door with a clearly marked “EXIT” sign, obstructed by several large cardboard boxes and metal cages. (Tr. 215-18; GX-3, at 3; GX-8, at 7 & 7A (Photo ID #021021_5)).

OSHA Issues the Citations

Following the two inspections of the Lehigh Plant, OSHA ultimately issued the three Citations at issue in this case, discussed below.

Citation 2, Item 1, set forth Respondent’s alleged violation of 29 C.F.R. § 1910.37(a)(3) on both December 1, 2020, and on February 10, 2021, by obstructing emergency exits routes in both the West and South Docks. (GX-3). CSHO Sabo testified regarding the classification, and alternative classification, regarding the alleged violations of this standard. Based on a number of factors, including: the previous inspection where the same conditions were observed; his conversations with Plant management; his interviews with Plant employees; and his review of outside materials provided after the inspections, including 1767 Forms, OSHA 300 logs,⁴⁴ and meeting minutes from the Plant’s “Joint Labor/Management Safety and Health Committee,” Respondent’s alleged violation of this standard was characterized as willful. (Tr. 183-93). Alternatively, based on a previous settlement agreement between the USPS and the Secretary for a violation of the same standard and involving a substantially similar hazard, Respondent’s alleged

⁴⁴ “OSHA 300 logs are the employer’s reporting annually of lost time, accidents, or illnesses.” (Tr. 189); *see generally* 29 C.F.R. § 1904.4. Although CSHO Sabo did not notice a trend emerge from the accidents in these logs, he did highlight one incident which occurred between his inspections of the Lehigh Plant wherein a mail handler “[c]ould not fit through the [a]isle so employee got off the Walkie [a PIT] and pushed a box with his hands. When pushing this box, he felt a pinch in his left rib” resulting in abdomen strain on the left of the worker’s body. (JX-14, at 10 (second incident down)).

violation of this standard was characterized, in the alternative, as a repeat violation. (Tr. 11-13, 229-34).

Lehigh Plant Safety Training and Guidance

All new employees received facility-specific new employee safety orientation within thirty days of beginning employment, including temporary employees. (Tr. 537-41, 554, 575-79; RX-8, 9, 17). Safety orientation for temporary employees continued during the peak season in 2020. (Tr. 736).

Annually all employees, including mail handlers and mail clerks, received training regarding the emergency evacuation plan, routes, and procedures, means of egress, keeping exits clear, aisles clear, and alarm pull stations accessible and unblocked. (Tr. 168-69, 537-43, 549-57, 576-79; RX-8, 9, 17). In 2020, the Lehigh Plant employees received five instances of training regarding keeping aisles, exits, and alarm pull stations clear. (Tr. 555-56; RX-17). In 2019, the Lehigh Plant employees also received this safety training. *Id.* Annual employee safety training received by all Lehigh Plant employees is stated in the Program Evaluation Guide (PEG) audits for 2020,⁴⁵ and also for 2018, 2019.⁴⁶ (Tr. 542-63; RX-17).

USPS management provides The Postal Employee's Guide to Safety to all employees. (Tr. 94-97). The Guide to Safety specifically states that aisles, exits, passageways leading to fire exits,

⁴⁵ On March 17, 2020, the PEG audit confirmed training regarding the following PEG Audit queries: "100% of new employees complete the facility-specific New Employee Safety Orientation Training within 30 days of arrival." (Q# 3.3). "Has the facility completed Emergency Action Plan Awareness training? (Completion by 100% of employees required by OSHA)." The answer and corrective action columns, regarding this query, state: "No. not sure about 100%." (Q# 3.9). "Have all employees received the Fire Prevention General Awareness talk? (Completion by 100% of employees required by OSHA)." (Q# 3.21). "Is the Emergency Action Plan (fire/emergency reporting procedures and evacuation routes) current and available for employee review? (EAP may be communicated verbally if < 10 employees)." (Q# 2). "Are manual fire alarm pull stations accessible (not blocked)?" (Q# 7.1). (Tr. 553-54, 572; RX-17).

⁴⁶ The 2019 PEG Audit confirms Lehigh Plant employees received the same training, on April 18 and May 1, 2019, albeit with questions phrased a bit differently. (Tr. 549-52; RX-17). *See* PEG Audit questions for 2019 Q#s 5.1, 8.2, 8.3, 19, 26, 4, 7, 9, and 10. (RX-17).

exit doors, and fire alarm stations routes must be kept clear, unobstructed, and accessible at all times. (Tr. 94-97; JX-8, at 20, 27). All mail clerks and PSEs receive an One-the-Job Training Workbook, which instructs that new employee training provide a tour of the facility, including emergency exits, and a discussion of evacuation procedures, and means of egress, keeping aisles clear. (Tr. 537-38, 575-79; RX-8, at 19-21). Likewise, all mail handlers and MHAs receive a similar One-the-Job Training Workbook. (Tr. 538-40, 575-79; RX-9, at 19-21.)

III. ANALYSIS

All of the Citation items charge violations of standards promulgated by OSHA. “To establish a violation, the Secretary must prove that the cited standard applies, there was a failure to comply with the standard, employees were exposed to the violative condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence.” *Maxim Crane Works*, No. 17-1894, 2021 WL 2311880, at *1 n.4 (O.S.H.R.C., May 20, 2021).

Before addressing the merits of the Citation items, the undersigned notes that in its post-hearing brief Respondent has, by and large, not challenged any of the four elements (applicability, noncompliance, exposure, and knowledge) for the majority of the Citation items, with the exception of the noncompliance element of the violation of 29 C.F.R. § 1910.303(g)(1)(i). Resp’t Br. 31-32. In the same vein, Respondent has only challenged the classifications of the 29 C.F.R. §§ 1910.37(a)(3) and 1910.303(g)(1)(i) violations.⁴⁷ Resp’t Br. 26-28, 32; Resp’t Reply Br. 10-13. Rather than contest the elements of the violations, a substantial portion of Respondent’s brief is devoted to arguing for its infeasibility or “force majeure” defense, which has been asserted as to the violations in Citations 1 and 2.⁴⁸ Resp’t Br. 17-26; Resp’t Reply Br. 5-9.

⁴⁷ The Act sets forth four different classifications for violations of standards promulgated pursuant to the Act: “willful,” “repeated,” “serious,” and “not serious.” 29 U.S.C. § 666(a) – (c).

⁴⁸ Respondent’s defense is based on the backlog of mail at the Plant, the circumstances that led to it, and the Plant’s increasing inability to process the backlog due to those continuing circumstances. Respondent does not raise the

Even though Respondent has offered little argument on the elements of the violations, the Secretary has the burden of proof in proceedings before the Commission and must, therefore, set forth some evidence on each element of the violations charged. *See Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1790 (No. 89-1791, 1992) (the Secretary has the burden of proof by a preponderance of the evidence); *see also New River Corp. v. OSHRC*, 25 F. 4th 213 (4th Cir. 2022) (“If (and only if) the Secretary makes out a *prima facie* case with respect to all four elements, the employer may then come forward and assert [an] affirmative defense ...”). With that principle in mind, the key issues raised in this case are analyzed. First, the merits of the violations of 29 C.F.R. §§ 1910.165(e) (the obstructed fire alarm pull station), 1910.176(a) (the obstructed PIT aisles), and 1910.37(a)(3) (the obstructed emergency exit routes) will be discussed, including the willful and repeat classifications of the violation of Section 1910.37(a)(3), both of which Respondent has challenged. Second, because Respondent has only asserted its affirmative defense of infeasibility with regard to this first set of violations, the viability and merits of its defense will then be decided. Finally, the elements and classification of the violation of 29 C.F.R. § 1910.303(g)(1)(i) for the guardrail installed in front of DBCS 23 will be discussed.

Obstructed Fire Alarms, Aisles and Exits

Citation 1, Item 1

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.165(e), which states: “The employer shall assure that manually operated actuation devices for use in conjunction with employee alarms are unobstructed, conspicuous and readily accessible.”

The Citation alleged that Respondent violated 29 C.F.R. § 1910.165(e) as follows:

29 C.F.R. 1910.165(e): Manual operation. The employer did not assure that manually

affirmative defense of infeasibility as to Citation 3, Item 2, the violation of 29 C.F.R. § 1910.303(g)(1)(i). Resp’t Br. 17-26; Resp’t Reply Br. 5-9, 13.

operated actuation devices for use in conjunction with employee alarms are unobstructed, conspicuous and readily accessible.

a) South Loading Dock – On or about December 1, 2020, Employees were performing material handling tasks in this area and the installed and identified fire alarm pull station located near the emergency exit was obstructed by stored mail and therefore not readily accessible.

The Citation proposed a penalty of \$8,582 for Respondent’s alleged violation of 29 C.F.R. § 1910.165(e).

Applicability

29 C.F.R. § 1910.155(b) states that Subpart L of Part 1910, containing standards governing fire protection, “applies to all employments except for maritime, construction, and agriculture.” The standard, therefore, applies to Respondent.

Noncompliance

During his inspection on December 1, 2020, CSHO Sabo observed a fire pull station in the South Dock obstructed by a “metal cage,” as well as equipment for mail, material containers, and some loose debris not containerized.” (Tr. 80; GX-1, at 1; GX-8, at 4 (Photo ID #120120_12)). The metal cage was “too far for a human arm to reach through and gain access to the fire alarm pull station.” (Tr. 82; GX-1, at 2). Respondent has not refuted CSHO Sabo’s observations.

The Secretary has therefore proven that the fire alarm pull station in the South Dock was not “unobstructed” or “readily accessible” in violation of 29 C.F.R. § 1910.165(e).

Exposure

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff’d*, 79 F.3d 1146 (5th Cir. 1996). Here, CSHO Sabo observed employees working in the South Dock “in proximity to the fire alarm pull station” who would have

been unable to activate the fire alarm in the event of a fire and thereby exposed to burn hazards. (Tr. 82, 85; GX-1, at 2-3). Respondent has not refuted this element of the violation.

The Secretary has proven employee exposure to the hazard.

Knowledge

The Secretary can satisfy the knowledge element of the violation “by establishing that the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff’d*, 19 F.3d 643 (3d Cir. 1994) (Table). The actual or constructive knowledge of an employer’s supervisors can be imputed to the employer. *Id.*; *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, during CSHO Sabo’s inspection on December 1, 2020, he directly asked Acting Plant Manager Bruno about the obstructed fire pull station in the South Dock. (Tr. 87). Mr. Bruno acknowledged that the fire pull station was blocked but stated something to the effect that “there’s just nowhere else to put the mail.” (Tr. 87; GX-1, at 3). Respondent has not contested the Secretary’s evidence on this element of the violation. Mr. Bruno therefore had actual knowledge of the violative condition, which is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC at 1164; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Alternatively, the record also establishes constructive knowledge of the violation. One employee testified that Acting Plant Manager Bruno and MDO Gonzalez worked in the same area of the South Dock where the fire alarm pull station was obstructed. (Tr. 316-18, 661). Another employee observed Mr. Gonzalez working in the South Dock daily during the relevant time period. (Tr. 353-54, 356-59). Mr. Bruno testified to walking the entirety of the Plant daily during the relevant time period. (Tr. 607-08). The CSHO’s photograph of the obstructed fire alarm

demonstrates that it was not obscured but otherwise in “plain view” such that, with the exercise of reasonable diligence, Plant management could have uncovered the violative condition. *See Nordam Grp.*, 19 BNA OSHC 1413, 1417 (No. 99-0954) (constructive knowledge established where supervisors were “in and out” and had a “continuous presence” in the area where the violative condition existed), *aff’d* 37 F. App’x 959 (10th Cir. 2002). Mr. Bruno and Mr. Gonzalez’s constructive knowledge of the violation is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC at 1164; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Classification

The Secretary has classified the 29 C.F.R. § 1910.165(e) violation as serious. A violation is classified as serious under the Act if “there is substantial probability that death or serious physical harm could result.” 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

Here, the violation was classified as serious because “[w]ithout getting to the fire alarm pull station you risk the extra time in the hazard area, meaning in the fire.” (Tr. 100; *see also* GX-1, at 2 (“The additional time required for an employee to locate and travel to another pull station can result in burns.”)). Respondent has not contested the classification of this violation as serious. The violation was properly classified as serious. *Cf. Gould Publ’ns*, 16 BNA OSHC 1923, 1925 (No. 89-2033, 1994) (violation properly classified as serious where locked exit door could expose employees to fire hazard by delaying their exit in an emergency).

Citation 1, Item 2

Citation 1, Item 2 alleged a serious violation of 29 C.F.R. § 1910.176(a), which states:

- (a) *Use of mechanical equipment.* Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through

doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

The Citation alleged four instances of a violation of 29 C.F.R. § 1910.176(a) as follows:

29 C.F.R. 1910.176(a): Aisle(s) and passageway(s) were not kept clear and in good repair with no obstruction across or in aisles that could create a hazard.

a) South Loading Dock – On or about December 1, 2020, Employees were performing material handling tasks on the South loading dock. Mechanical material handling aisles were obstructed with palletized bulk mail exposing employees to struck by and tripping hazards.

b) West Loading Dock – On or about December 1, 2020, Employees were performing material handling tasks on the West loading dock. Mechanical material handling aisles were obstructed with palletized bulk mail exposing employees to struck by and tripping hazards.

c) South Loading Dock – On or about February 10, 2021, Employees were performing material handling tasks on the South loading dock. Mechanical material handling aisles were obstructed with palletized bulk mail exposing employees to struck by and tripping hazards.

d) West Loading Dock – On or about February 10, 2021, Employees were performing material handling tasks on the West loading dock. Mechanical material handling aisles were obstructed with palletized bulk mail exposing employees to struck by and tripping hazards.

The Citation proposed a penalty of \$13,653 for Respondent’s alleged violations of 29 C.F.R. § 1910.176(a).

Applicability

By its own terms, 29 C.F.R. § 1910.176(a) applies “[w]here mechanical handling equipment is used” Mechanical equipment was used daily to move pallets of mail and parcels throughout the Lehigh Plant.⁴⁹ The standard applies.

⁴⁹ Mechanical equipment, including PITs, used at the Plant include, manual pallet jacks, hand jacks, single, non-motorized all purpose containers (APCs) pushed by employees, APCs pulled by tow motors or “mules,” “walkie-riders,” also known as stand-up forklifts or stand-up power jacks, electric pallet movers, and forklifts. (Tr. 149, 179-80, 334-41, 691-93; Jt. Pre-Hr’g Stmt. ¶ III(3)).

Noncompliance

CSHO Sabo's observations established Respondent's noncompliance with the standard for all four instances alleged in the Citation as follows.

- a) On December 1, 2020, on the South Dock, in a pathway from the sorting area of the Plant leading to the Dock, a PIT aisle was obstructed by a large, cardboard gaylord filled with mail containers and, further down the aisle, a metal ladder also obstructing the aisle. (Tr. 111-12; GX-2, at 3; GX-8, at 3 (Photo ID #120120_9)).
- b) On December 1, 2020, on the West Dock, palletized mail, containers, and boxes blocked both PIT aisles, leaving only approximately 12 inches to be shared with the emergency exit route which abutted the PIT aisles. (Tr. 107-10, 201-02; GX-3, at 3; GX-8, at 1 (Photo ID #120120_2)).
- c) On February 10, 2021, on the South Dock, two roll-up doors with aisles obstructed by "large cardboard boxes of mail and other materials that appear to be at least four feet." (Tr. 113-14; GX-2, at 3; GX-8, at 7 (Photo ID #021021_8)).
- d) On February 10, 2021, on the West Dock, in front of two overhead doors (one red and one yellow) with aisles meant for two-way PIT traffic, several "palletized boxes and crates" obstructing the aisles. (Tr. 115-16; GX-2, at 3; GX-8, at 6 (Photo ID #021021_2)).

Respondent has not contested the conditions observed by CSHO Sabo or that they constituted "obstruction across or in aisles that could create a hazard" in violation of 29 C.F.R. § 1910.176(a). The Secretary has established all four instances of the violations alleged in Citation 1, Item 2.

Exposure

CSHO Sabo's observations established employee exposure for each instance of the violations of 29 C.F.R. § 1910.165(e), as follows:

- a) On December 1, 2020, on the South Dock, employees were operating PITs near the area where the PIT lanes were obstructed. (Tr. 124-25; GX-2, at 3).
- b) On December 1, 2020, on the West Dock, CSHO Sabo observed employees working in the area where the shared space between a PIT lane and an abutting

emergency exit route was only 12 inches. (GX-3, at 3).

- c) On February 10, 2021, on the South Dock, CSHO Sabo observed that PITs “could not pass through the [PIT] aisles without first moving the material” obstructing the aisles. (Tr. 114-15).
- d) On February 10, 2021, on the West Dock, CSHO Sabo observed PIT operators exposed to “visual” and “struck-by” hazards as well as pedestrians “snaking their way through the[] caverns of boxes and crates” obstructing the PIT aisles. (Tr. 116-17).

Respondent has not contested CSHO Sabo’s observations. The Secretary has therefore established “actual exposure or that access to the hazard was reasonably predictable” for each instance alleged in Citation 1, Item 2. *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6.

Knowledge

Respondent has not contested its knowledge of the blocked PIT aisles for any of the above-alleged instances. Nonetheless, the CSHO’s photographs of the blocked PIT aisles demonstrate that they were open and obvious to anyone working in the West or South Docks. (GX-8, at 1 (Photo ID #120120_2), at 3 (Photo ID #120120_9), at 6 (Photo ID #021021_2), at 7 (Photo ID #021021_8)). The two mail handlers who testified at the hearing both stated that Plant management regularly worked in the West and South Docks where the violative conditions were observed. (Tr. 312-14, 316-17, 332-33, 353-54, 358-59). The managers also testified to regularly walking the entirety of the Plant or otherwise working in the West and South Docks. (Tr. 607-08, 619-21, 662-63, 861-62).

The Secretary has, therefore, at the very least demonstrated that the violations were in “plain view” in that they were in a “conspicuous location and readily observable by anyone passing by ...” *Atl. Battery Co., Inc.*, 16 BNA OSHC 2131, 2166 n.56 (No. 90-1747, 1994). These violations could have been discovered with the exercise of reasonable diligence of the Plant’s managers, thereby giving them constructive knowledge of the violations. *See KS Energy Servs,*

Inc., 22 BNA OSHC 1261, 1268 (No. 06-1416, 2008) (constructive knowledge established where violations were in plain view and foreman was often present in the location of the violations). The managers' constructive knowledge is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC at 1164; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Classification

The violations of 29 C.F.R. § 1910.165(e) were classified as serious. In his violation worksheet, CSHO Sabo noted that “[o]bstructed aisles can cause impaired line of sight for equipment operators. Material handling equipment incidents and impact with pedestrians can cause fractured bones, blunt force trauma and death.” (GX-2, at 2). At the hearing, he further described the potential for these “visual” and “struck-by” hazards when aisles meant for moving equipment are obstructed. (Tr. 116-17, 124-25). Respondent has not challenged the Secretary’s classification of these violations as serious.

Accordingly, the violations were properly classified as serious. *See Merchant’s Masonry, Inc.*, 17 BNA OSHC 1005, 1008 (No. 92-424, 1994) (finding a forklift violation was serious where “the forklift operator could not see each other around corners” because an employee struck “by the extended forks, even at 5 miles per hour or less, could suffer serious injury.”).

Citation 2, Item 1

Citation 2, Item 1 alleged a willful violation, or in the alternative a repeat violation,⁵⁰ of 29 C.F.R. § 1910.37(a)(3), which states, in relevant part: “(a) *The danger to employees must be minimized.* ... (3) Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. ...”

29 C.F.R. 1910.34(c) defines an “exit route” as

⁵⁰ *See* note 1 above.

a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety (including refuge areas). An exit route consists of three parts: The exit access;⁵¹ the exit;⁵² and, the exit discharge.⁵³ (An exit route includes all vertical and horizontal areas along the route.)

Citation 2, Item 1, alleged four instances of a violation of 29 C.F.R. § 1910.37(a)(3), exit routes were not kept free and unobstructed, as follows:

a) USPS Lehigh Valley Distribution Center, South Loading Dock – On or about December 1, 2020[,] employees were performing warehouse tasks on the loading dock where two exit routes are delineated, one each leading to emergency exit doors nearest column line D.1 and E.1. Both exit routes were obstructed by palletized bulk mail exposing employees to unnecessary delay in evacuating the building during a crisis or emergency.

b) USPS Lehigh Valley Distribution Center, West Loading Dock – On or about December 1, 2020[,] employees were performing warehouse tasks on the loading dock. Three exit routes are delineated on the West loading dock and two of the three exit routes, one each leading to emergency exit doors nearest column line A.8 and A.6, were obstructed with palletized bulk mail exposing employees to unnecessary delay in evacuating the building during a crisis or emergency.

c) USPS Lehigh Valley Distribution Center, South Loading Dock – On or about February 10, 2021[,] employees were performing warehouse tasks on the loading dock where two exit routes are delineated, one each leading to emergency exit doors nearest column line D.1 and E.1. Both exit routes were obstructed by palletized bulk mail exposing employees to unnecessary delay in evacuating the building during a crisis or emergency.

d) USPS Lehigh Valley Distribution Center, West Loading Dock – On or about February 10, 2021[,] employees were performing warehouse tasks on the loading dock where three exit routes are delineated on the West loading dock, and two of the three exit routes, one each leading to emergency exit doors nearest column line

⁵¹ 29 C.F.R. § 1910.34(c) defines “exit access” as “that portion of an exit route that leads to an exit. An example of an exit access is a corridor on the fifth floor of an office building that leads to a two-hour fire resistance-rated enclosed stairway (the Exit).”

⁵² 29 C.F.R. § 1910.34(c) defines “exit” as “that portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge. An example of an exit is a two-hour fire resistance-rated enclosed stairway that leads from the fifth floor of an office building to the outside of the building.”

⁵³ 29 C.F.R. § 1910.34(c) defines “exit discharge” as “the part of the exit route that leads directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside. An example of an exit discharge is a door at the bottom of a two-hour fire resistance-rated enclosed stairway that discharges to a place of safety outside the building.”

A.8 and A.6, were obstructed with palletized bulk mail exposing employees to unnecessary delay in evacuating the building during a crisis or emergency.

As a basis for the willful or repeat classification of the violation, the Citation further alleged that:

The [USPS] was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.37(a)(3), which was contained in OSHA inspection number 1451114, citation number 1, item number 1 and was affirmed as a final order on May 14, 2020, with respect to a workplace located at 56 Hughes Rd. Madison AL 35758.

The Citation proposed a penalty of \$128,726 for Respondent's alleged willful violation of 29 C.F.R. § 1910.37(a)(3). In the alternative, the Secretary proposed a penalty of \$42,911 if the violations are found to be repeat violations. (Tr. 13-14).

Applicability

29 C.F.R. §§ 1910.34(a) and (b) state that Subpart E, containing standards governing "Exit Routes and Emergency Planning," applies, in relevant part, as follows:

(a) *Every employer is covered.* Sections 1910.34 through 1910.39 apply to workplaces in general industry except mobile workplaces such as vehicles or vessels.

(b) *Exits routes are covered.* The rules in §§ 1910.34 through 1910.39 cover the minimum requirements for exit routes that employers must provide in their workplace so that employees may evacuate the workplace safely during an emergency.

The standard therefore applied to Respondent and the emergency exit routes throughout the Lehigh Plant.

Noncompliance

CSHO Sabo's observations established Respondent's noncompliance with the standard for all four instances alleged in the Citation as follows.

- a) On December 1, 2020, on the South Loading Dock:
 - In a pathway from the sorting area of the Plant leading to the Dock, an

emergency exit route completely blocked by a large, metal container filled with various materials. (Tr. 206-09; GX-8, at 3 & 3A (Photo ID #120120_9)).

- In a different area of the South Dock, an emergency exit route emerging from a set of double doors to an emergency exit door obstructed by a caged metal cart, a plastic pallet leaning against the metal cart, and, behind the metal cart, another pallet with a cardboard box filled with various materials. (Tr. 203-04; GX-8, at 2 (Photo ID #120120_4)). At a certain point along the route, CSHO Sabo measured only approximately 12 inches of space unobstructed on the exit route. (Tr. 205-06; GX-3, at 3; GX-8, at 2 (Photo ID #120120_5)).
 - In a different area of the South Dock in front of a “work area with double doors,” several metal cages filled with mail containers completely blocking a marked emergency exit route. (Tr. 210-11; GX-3, at 3; GX-8, at 5 & 5A (Photo ID #120120_15)).
- b) On December 1, 2020, on the West Dock, palletized mail, containers, and boxes blocked an emergency exit route, leaving only approximately 12 inches to be shared with the PIT aisles abutting the route. (Tr. 107-10, 201-02; GX-3, at 3; GX-8, at 1 (Photo ID #120120_2)).
- c) On February 10, 2021, on the South Dock, an emergency exit route, marked by a red line painted on the ground leading to a door with a clearly marked “EXIT” sign, obstructed by several large cardboard boxes and metal cages. (Tr. 159-60, 163-64, 215-18; GX-3, at 3; GX-8, at 7 & 7A (Photo ID #021021_5)).
- d) On February 10, 2021, on the West Dock, an emergency exit route, marked by a red line painted on the ground leading to a door with a clearly marked “EXIT” sign, obstructed by a “black and orange pallet[] with some shrink-wrapped items on top of it,” a “metal cage bin,” “several pallets with cardboard crates filled with material,” and to the right of that “another row of palletized cardboard crates in a line,” and further to the right “some more of those cardboard crates on pallets.” (Tr. 211-215; GX-3, at 3; GX-8, at 6 & 6A (Photo ID #021021_3)).

Respondent has not contested the conditions observed by CSHO Sabo or that “materials or equipment [were] placed, either permanently or temporarily, within the exit route[s]” in violation of 29 C.F.R. § 1910.37(a)(3). A mail handler testified that the West Dock exit routes were blocked just about every day from the end of October 2020 until February 2021. (Tr. 314-16). A mail handler testified the South Dock exit routes were blocked beginning around September 2020. (Tr.

355). He testifies that South Dock exit routes were blocked every day from November 2020 to February 2021. (Tr. 355-56). The Secretary has established all four instances of the violation alleged in Citation 2, Item 1.

Exposure

CSHO Sabo's observations established employee exposure for each instance of the violations of 29 C.F.R. § 1910.37(a)(3), as follows:

- a) On December 1, 2020, on the South Dock, employees were operating PITs near the area where the emergency exit route was obstructed. (Tr. 124-25; GX-2, at 3).
- b) On December 1, 2020, on the West Dock, CSHO Sabo observed employees working in the area where the shared space between a PIT lane and an abutting emergency exit route was only 12 inches. (GX-3, at 3).
- c) For the instance on February 10, 2021, on the South Dock, a Plant employee who worked on the South Dock in February of 2021, observed the emergency exit routes obstructed regularly throughout this time. (Tr. 348-50, 355-56).
- d) For the instance on February 10, 2021, on the West Dock, CSHO Sabo interviewed an employee at the Plant, who indicated that he had worked on the West Dock in February and had observed the exit routes blocked on a daily basis. (Tr. 314-16; GX-3, at 3).

Respondent has not contested CSHO Sabo's observations or the employees' statements made to him. The Secretary has therefore established "actual exposure or that access to the hazard was reasonably predictable" for each instance alleged in Citation 2, Item 1. *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6.

Knowledge

Respondent has not contested its knowledge of the blocked emergency exit routes for any of the above-alleged instances. Nonetheless, the CSHO's photographs of the blocked PIT aisles demonstrate that they were open and obvious to anyone working in the West or South Docks. (GX-8, at 1 (Photo ID #120120_2), at 2 (Photo ID #120120_4), at 3 & 3A (Photo ID #120120_9)), at 5

& 5A (Photo ID #120120_15), at 6 & 6A (Photo ID #021021_3), at 7 & 7A (Photo ID #021021_5)). The two mail handlers who testified at the hearing both stated that Plant management regularly worked in the West and South Docks where the violative conditions were observed. (Tr. 312-14, 316-17, 332-33, 353-54, 358-59). The managers also testified to regularly walking the entirety of the Plant or otherwise working in the West and South Docks. (Tr. 607-08, 619-21, 662-63, 861-62).

The Secretary has, therefore, at the very least demonstrated that the violations were in “plain view” in that they were in a “conspicuous location and readily observable by anyone passing by ...” *Atl. Battery Co., Inc.*, 16 BNA OSHC at 2166 n.56. These violations could have been discovered with the exercise of reasonable diligence of the Plant’s managers, thereby giving them constructive knowledge of the violations. *See KS Energy Servs, Inc.*, 22 BNA OSHC at 1268 (constructive knowledge established where violations were in plain view and foreman was often present in the location of the violations). The managers’ constructive knowledge is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC at 1164; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Classification

The Secretary classified the violations of Citation 2, Item 1 as willful or, in the alternative, repeat violations. Respondent has challenged both classifications, and so each are discussed in turn.

Willful

In *Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, at *2 (O.S.H.R.C., Aug. 26, 2021), the Commission summarized the evidentiary showing required to sustain a willful violation as follows: A violation is willful if the employer’s state of mind at the time of the violation reflects

either: (1) “an intentional, knowing, or voluntary disregard for the requirements of the [Occupational Safety and Health] Act” or (2) “plain indifference” to either the cited “OSHA requirements” or “employee safety.” *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citations omitted), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001); *see also A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (stating that “conscious disregard” of the Act and “plain indifference” to the Act are two “alternative” forms of willfulness); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1188 (No. 00-0553, 2005) (“conscious disregard of . . . the safety and health of employees” constitutes willfulness); *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005) (applying same test). The Secretary can establish intentional disregard by showing that the employer “(1) had a heightened awareness of the applicable standard . . . and (2) consciously disregarded the standard.” *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016) (citations omitted). In other words, the Secretary can establish intentional disregard by showing that “the employer was actually aware, at the time of the violative act, that the act was unlawful . . .” *AJP Constr., Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (citation omitted). Alternatively, the Secretary can prove plain indifference by showing that the employer “possessed a state of mind such that if it were informed of the standard, it would not care.” (emphasis and citation omitted).

“However, a good faith effort to comply with a standard or eliminate a hazard, even though the effort is not entirely effective or complete, may constitute a defense to willfulness.”⁵⁴ *L.R. Wilson & Sons, Inc.*, 17 BNA OSHC 2059, 2063 (No. 94-1546, 1997), *rev’d on other grounds*,

⁵⁴ A second line of Commission case law provides a defense to willfulness where an employer “exhibited a good faith, reasonable belief that its conduct conformed to law,” i.e., that it was in fact in compliance with the standard. *Dover High Performance Plastics, Inc.*, No. 14-1268, 2020 WL 5880242, at *4 (O.S.H.R.C., Sept. 25, 2020). Respondent highlights only its good faith efforts to comply with the standard but does not argue that any member of Plant management had a good faith belief that the obstructions observed by the CSHO complied with the standard. Resp’t Br. 26-28.

134 F.3d 1235 (4th Cir. 1998). “[T]he Commission has previously found violations not willful where employers made efforts to establish safety rules and communicate them to employees or instituted other good faith measures to comply with the standards in question.” *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1363 (No. 92-3855, 1995) (*Hartford Roofing*). “An employer’s unsuccessful efforts to prevent a violation are sufficient to demonstrate that the employer’s state of mind was not one of disregard or indifference so long as the employer acted in an objectively reasonable manner.” *Id.* (citation omitted). In arguing that Respondent’s violations of 29 C.F.R. § 1910.37(a)(3) were willful, the Secretary points to several instances where Plant management was put on notice of the issues of obstructions of aisles and exits throughout the Plant such that it had a “heightened awareness” of the standard and associated hazards. Sec’y Br. 34-36. The Secretary goes on to argue that, despite being on notice of the hazardous conditions, Plant management “completely ignored the requirements of the OSHA Act and showed no regard for employee safety.” *Id.* at 37. The Secretary further asserts that “[i]t was not until OSHA received a fourth complaint in February of 2021, that [Respondent] began to address the hazardous conditions. Such inaction demonstrated that USPS was plainly indifferent to employee safety and the requirements of the OSH Act.” *Id.* at 38. For its part, Respondent argues that Plant management made good faith efforts to address the obstructions throughout the Plant thus defeating any finding of “bad purpose or evil motive” necessary to establish willfulness. Resp’t Br. 26-28.

On the totality of the instant record, the undersigned concludes that Respondent’s violations of 29 C.F.R. § 1910.37(a)(3) were not willful. Although the Secretary correctly argues that Plant management was on notice of the hazardous conditions resulting from obstructions throughout the Plant, the evidence does not support the Secretary’s contentions that Plant management

“completely ignored” those hazards or failed to act in response to those hazards until after OSHA’s inspection on February 10, 2021. Rather, as set forth below, the record establishes multiple good faith efforts were made to keep the aisles and exits clear throughout the Plant, even if those efforts were ultimately unsuccessful, thus defeating any finding of willfulness here.

Notice/Heightened Awareness

The Secretary asserts Respondent had a heightened awareness of the requirements of 29 C.F.R. § 1910.37(a)(3), that “[e]xit routes must be free and unobstructed, that [n]o materials or equipment may be placed, either permanently or temporarily, within the exit route.” Sec’y Br. 33-36. The undisputed case facts and record evidence demonstrate Respondent’s heightened awareness of the standard and the repeated obstruction of exit routes in the Plant.

Heightened awareness is shown by Respondent’s prior citation for a violation of § 1910.37(a)(3), which citation was settled and became a final order on May 14, 2020.⁵⁵ This prior citation is discussed below regarding the alleged repeat classification. Sec’y Br. 34.

The Secretary asserts that Respondent had heightened awareness of the hazard presented by obstructed aisles and exit routes from discussions during 2020 Joint Labor/Management Safety and Health Committee Meetings, as early as March 2020.⁵⁶ Sec’y Br. 34-35. (Tr. 183-89; GX-22). The Secretary also asserts that Respondent had heightened awareness, based on notice of the exit obstructions from the complaints to OSHA in July 2020 and November 2020, and Respondent’s acknowledgement and response to those complaints.⁵⁷ Sec’y Br. 35. (Tr. 183-89; GX-18, GX-26, JX-10). Further, to show Respondent’s heightened awareness, the Secretary relies

⁵⁵ This prior citation and final order, stated on the face of the willful Citation 2, Item 1, when issued, was also received in evidence at the hearing to support the alternative repeat classification of the violation of 29 C.F.R. § 1910.37(a)(3). (Sec’y Br. 34; *see also* Tr. 229-34; GX-9; JX-4).

⁵⁶ *See* notes 17-21, and accompanying text, above.

⁵⁷ *See* notes 22-24, 36-39, and accompanying text, above.

on the multiple 1767 Forms submitted by employees to Respondent emphasizing the safety hazard presented by the obstructed exit routes.⁵⁸ Sec'y Br. 35. (GX-21, at 4, 9, 10, 11, 13, 14, 19, 21, 22-25, 27, 29, 30, 33-35).

Heightened awareness regarding the safety requirements stated in 1910.37(a)(3) is demonstrated during the December 1, 2020 OSHA inspection, when CSHO Sabo discussed with Acting Plant Manager Bruno and District Safety Specialist Haggerty the exit route obstructions observed during the inspection walk around. Regarding the obstructed egress routes, CSHO Sabo discussed with Acting Plant Manager Bruno the OSHA standard 1910.37(a)(3), the minimum width for egress, and how that minimum width was not available. (Tr. 125-26, 196, 222-23). The Secretary asserts that following the December 2020 OSHA inspection, the hazardous condition regarding the obstructed exit routes continued. Employees continued to submit 1767 Forms regarding the obstructed exit routes. The Secretary also notes that when Acting Plant Manager Miller arrived at the Plant in January 2021, he was not informed about the December 1, 2020 OSHA inspection. Respondent had heightened awareness of the hazard presented by the violations of standard 1910.37(a)(3), yet when OSHA conducted the second inspection on February 10, 2021, the same hazardous conditions were observed. (Tr. 136-37, 221-22; JX-7). Sec'y Br. 35-37.

In summary, record evidence demonstrates Respondent's heightened awareness of standard 1910.37(a)(3) requiring that exit routes remain clear and unobstructed. The record further demonstrates that Plant management was on notice of the continuing exit route obstructions throughout the Plant, especially beginning around late October 2020 through February 10, 2021. That said, by the time the second OSHA complaint was lodged on November 12, 2020, it is undisputed that, by this point, *everyone* at the Plant had started to notice the backlog of mail,

⁵⁸ See notes 18-21, 38-39, and accompanying text, above.

parcels, and processing equipment and the associated obstructions throughout the Plant. The evidence showing heightened awareness is largely undisputed by Respondent. Respondent focused on its good faith efforts to clear the obstructions throughout the Plant. Resp't Br. 26-28.

Good Faith Efforts

The Secretary contends that Respondent consciously disregarded standard 1910.37(a)(3), the violations of the obstructed exit routes, and willfully violated this standard. The Secretary contends that Respondent was "aware of the violations and failed to take corrective measures." Sec'y Br. 33-36. The Secretary contends that the record evidence summarized above regarding Respondent's heightened awareness, further reveals Respondent "acted with plain indifference to employee safety and the OSH Act." Sec'y Br. 36-38. Review of the record as a whole does not support these contentions. The record indicates that Respondent instituted several good faith measures in an attempt to keep the aisles and exits throughout the Plant clear of obstructions. Resp. Br. 27-28.

To start, all mail clerks and mail handlers, and their non-career equivalent PSEs and MHAs, were trained to keep the emergency exit routes clear throughout the Plant as part of their orientation training. (Tr. 540-42; RX-8, at 19-21; RX-9, at 19-21). Likewise, the Postal Employee's Guide to Safety, provided by Respondent management to all employees, specifically states that exit routes must be kept unobstructed. (Tr. 94-97; JX-8, at 20, 27).

Respondent's annual employee safety training received by Lehigh Plant employees, is stated in the Program Evaluation Guide (PEG) audit for 2018, 2019, and 2020 (Tr. 542-63; RX-17). The PEG audit checklist, used regularly by safety personnel at the Plant, also establishes Respondent regularly trained its employees on keeping exit routes clear, with several such trainings occurring in 2019 and 2020. On March 17, 2020, training was confirmed regarding emergency

procedures and evacuation routes. *Id.* Thus, Respondent had a safety rule in place that it communicated to its employees to address the hazard of blocked exit routes, an indicator of good faith. *See Hartford Roofing*, 17 BNA OSHC at 1363 (the fact that an employer “made efforts to establish safety rules and communicate them to employees” weighs against a finding of willfulness).

The evidence further establishes that Plant management did not ignore specific instances of blocked aisles and exits when the issue was brought to their attention. The 1767 Forms accepted into evidence all indicate that the safety issues raised by the reporting employee either were addressed with the manager to whom the issue was brought or directed to a higher level of Plant management if the issue could not be resolved with the lower-level manager. (GX-21). The testimonies of several witnesses corroborate Plant management’s “spot abatement” of known issues throughout the Plant. Acting Plant Manager Bruno and MDO Gonzalez both recounted instances where an employee informed them of obstructions, and they temporarily moved the mail or processing materials to abate the hazard. (Tr. 605-08, 709-11). APWU Local President Kubat documented a specific instance of an obstructed emergency exit in the South Dock, which was unblocked by Plant management within a few hours of it being reported. (Tr. 460-65; GX-24, at 19 & 20). The two mail handlers who testified at the hearing also acknowledged attempts by Plant managers to address specific obstructions brought to their attention. (Tr. 313-14, 353-54). Even though these efforts were ultimately unsuccessful at keeping the exits clear throughout the Plant, they nonetheless represent good faith efforts to comply with the standard. *See Hartford Roofing*, 17 BNA OSHC at 1363 (even unsuccessful efforts at complying with the standard can demonstrate good faith efforts), citing *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209 (No. 87–2059, 1993).

Further undermining a finding of willfulness here is Respondent’s other additional good

faith, albeit unsuccessful, efforts, to clear the backlog of mail and parcels and thereby eliminate the obstructions throughout the Plant. As recounted in detail above, these efforts included: (1) the early opening of the Annex in November in an attempt to alleviate the obstructions throughout the Plant (Tr. 280-82; 327-28, 363, 608, 801; RX-30); (2) a liberal overtime policy and the use of mandatory overtime (Tr. 643-44, 701-02, 841-42); (3) the utilization of “cross-craft” employees (Tr. 606, 650, 700-01, 741); (4) Respondent’s nationwide negotiation with the APWU, the union representing mail clerks, to extend the penalty exclusion period, removing the “cap,” or contract limit, on the number of non-career PSEs hired (Tr. 486-87, 498-500, 869, 881-92, 893-95) and (5) attempts to secure additional trailers and shelving (Tr. 151-57, 609-10, 717). Although Respondent’s efforts were ultimately “not effective or complete,” this is not a case where Respondent made “no good faith effort” to comply with the standard. *See A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2013 (No. 85-369, 1991), citing *Calang Corp.*, 14 BNA OSHC 1789, 1791 (No. 85-319, 1990).

Based on the foregoing, the undersigned finds that Respondent’s violations of 29 C.F.R. § 1910.37(a)(3) were not willful.

Repeat

Although the Secretary failed to prove Respondent’s violation of 29 C.F.R. § 1910.37(a)(3) was willful, the Secretary alleged, in the alternative, that the violation was a repeat violation. (Tr. 11-23, 14-15). In this regard, section 17(a) of the Act, 29 U.S.C. § 666(a), imposes heightened penalties for “[a]ny employer who ... repeatedly violates the requirements of ... regulations prescribed pursuant to this chapter” “A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Jersey Steel Erectors*,

16 BNA OSHC at 1167, citing *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979) (*Potlatch*).⁵⁹ “Unless the violation involves a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard.” *Id.* This prima facie showing of substantial similarity may be rebutted “by evidence of the disparate conditions and hazards associated with these violations of the same standard.” *Id.*

As a basis for a repeat violation of 29 C.F.R. § 1910.37(a)(3), the Citation set forth as follows:

The [USPS] was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.37(a)(3), which was contained in OSHA inspection number 1451114, citation number 1, item number 1 and was affirmed as a final order on May 14, 2020, with respect to a workplace located at 56 Hughes Rd. Madison AL 35758.

At the hearing, the Secretary introduced an informal settlement agreement, signed by a representative of USPS on June 11, 2020, stipulating to a violation of 29 C.F.R. § 1910.37(a)(3) occurring on December 13, 2019, at a USPS facility in Madison, Alabama. (Tr. 229-34; GX-9; JX-4). Because this is the same standard alleged in Citation 2, Item 1, and Respondent has made no argument that standard qualifies as a “general standard,” the Secretary has established a prima facie case of substantial similarity for the repeat classification. *Jersey Steel Erectors*, 16 BNA OSHC at 1167; *see also Triumph Constr. Corp.*, 26 BNA OSHC 1331, 1346-47 (No. 15-0634, 2016) (ALJ) (finding that an informal settlement agreement constitutes a “Commission final order”

⁵⁹ The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Pennsylvania, in the Third Circuit, where the Lehigh Plant is located. The Commission has held that “[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission’s precedent.” *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). *See Reich v. D.M. Sabia Co.*, 90 F.3d 854, 856 (3d Cir. 1996) (“[We] now deem an OSHA violation to be ‘repeated’ ‘if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” quoting *Potlatch*, 7 BNA OSHC at 1063)). Thus, the classification of Respondent’s violation here would not differ under Third Circuit law.

for purposes of repeat classification), *aff'd*, 885 F.3d 95 (2d Cir. 2018).

In arguing against a finding of a repeat violation, Respondent argues that “the unique events surrounding the alleged violations [were] not even remotely similar,” and points to the “mass of mail that was descending on the [P]lant,” the “absentee problem because of Covid,” and a severe snowstorm that “prevented numerous employees for getting to work, or caused several employees to call off work in advance,” in the days leading to OSHA’s second inspection on February 10, 2021.⁶⁰ Resp’t Br. 29-30.

The additional factors relied on by Respondent do not rebut the Secretary’s prima facie showing of substantial similarity of the violations because they do not differentiate the *hazards* associated with the violations, which is the primary inquiry endorsed by the Commission. *Active Oil Serv.*, 21 BNA OSHC at 1189-90; *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996), *aff'd without published opinion*, 117 F.3d 1433 (11th Cir. 1997). Here, as can be seen from the photo mounting worksheets included in exhibit GX-9, the hazards associated with the blocked emergency exit routes for the violation at the USPS facility in Madison, Alabama are substantially similar to the ones created by the blocked emergency routes at the Lehigh Plant. *Compare, e.g.*, GX-8, at 3 (Photo ID #120120_9), *with* GX-9, at 9-10. Respondent has merely pointed to different circumstances which led to the violations, which are insufficient to rebut the Secretary’s prima facie showing of substantial similarity of the hazards presented by the violations.⁶¹ *Cf. Par Elec.*

⁶⁰ Relying on a NOHRSC Graph plot of Snow Water Equivalent, Snow Depth, and Snow Melt for Mount Pocono, PA, between January 30, 2021 and February 15, 2021 (RX-33) and a NOAA table of 2020-2021 Eastern US Seasonal Snowfall Totals (RX-32), Respondent requests that the undersigned take judicial notice “that there was a major snowstorm in Allentown, Pennsylvania, on the days immediately preceding the February 10, [2021],” OSHA inspection. (Tr. 831, 838; RX-32, RX-33). Respondent’s request that judicial notice be taken is rejected. The graph and table in evidence are insufficiently associated with the Allentown, PA, Plant location on February 10, 2023, to support the notice requested. Weight is accorded to Acting Plant Manager Miller’s hearing testimony regarding the weather conditions. (Tr. 829, 831-33).

⁶¹ Respondent’s reliance on *Wynnewood Refining Co.*, 27 BNA OSHC 1971 (No. 13-0644, 2019), is misplaced for a number of reasons. First, the majority of the Commission in that case found repeat characterization was unwarranted not because the employer rebutted the Secretary’s prima facie showing of substantial similarity but because a corporate

Contractors, Inc., 20 BNA OSHC 1624, 1628 (No. 99-1250, 2004) (“That is the same hazard cited here. We therefore find, based on the evidence, that the violation was repeated.”); *Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1633 (No. 97-0250, 1999).

Although the Secretary has failed to prove Respondent’s violations of 29 C.F.R. § 1910.37(a)(3) were willful, she has demonstrated that they were repeat violations.

Respondent’s Infeasibility Defense

For the violations alleged in Citations 1 and 2, namely for the violations caused by the obstructions throughout the Plant, Respondent has asserted an affirmative defense of infeasibility.⁶² The parties initially disagree on the proper formulation, and therefore the potential scope, of this defense, and whether Respondent can assert it under the circumstances presented by this case. The Secretary argues that Respondent must demonstrate that compliance with the

restructuring and change in safety personnel led to the conclusion that “the record does not support the Secretary’s contention that there was sufficient continuity in the safety personnel at the cited entity such that there was a Commission final order against the *same employer* for a substantially similar violation.” *Wynnewood Refining Co.*, 27 BNA OSHC at 1979 (emphasis in original). Second, the portion of *Wynnewood* quoted in Respondent’s brief for the proposition that “other factors [can] bear on the similarity of the two violations,” came from the partial dissent of Commissioner Attwood, who in fact *disagreed* with the recent holding she was quoting from *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246 (No. 08-1774, 2018). *Id.* at 1962 (Attwood, Comm’r, concurring in part & dissenting in part) (“I reiterate my view here that *Angelica* was wrongly decided” with regard to the issue of repeat characterization.). Third, the decision in *Angelica* itself has since been vacated by the Second Circuit, with directions to the Commission to dismiss the case as moot. *Scalia v. Angelica Textile Servs., Inc.*, 803 F. App’x 542 (2d Cir. 2020) (unpublished), *dismissed on remand*, 2020 WL 4475583 (O.S.H.R.C., July 27, 2020). Thus, any proxy reliance on the holding in *Angelica* by citing to Commissioner Attwood’s discussion of the case in *Wynnewood* is further misplaced. See *UHS of Westwood Pembroke, Inc.*, No. 17-0737, 2022 WL 774272, at *13 n.18 (O.S.H.R.C., March 3, 2022) (“The Second Circuit, however, has since vacated the Commission’s *Angelica* decision, rendering any arguments that rely on the rationale of that case unsupported.”).

⁶² Respondent’s opening brief makes a passing reference to a “corporate-wide Settlement Agreement with UPS for facilities engaged in the parcel delivery business (which USPS indisputably is)” in which OSHA “recognizes that in some instances strict maintenance of this clearance distance may not be possible at all times.” Resp’t Br. 1, citing OSHA Interpretation Letter, Re: “Termination of the January 2009 Corporate-Wide Settlement Agreement between United Parcel Service (UPS) and OSHA; Enforcement of 29 CFR 1910.37(a)(3) and 29 CFR 1910.36(g)(2)” (June 18, 2019). This settlement agreement between a different employer and OSHA is not relevant to the present case before the undersigned. See, Order on Motion *in Limine* in *U.S. Postal Service – Canovanas Post Office*, OSHRC Docket No. 21-0794 (April 14, 2022) (Chief Judge Rooney), *final decision & order directed for review* (Nov. 15, 2022) Sec’y Reply Br. Ex. A. Further, Respondent appears not to rely on this letter as a foundation for its infeasibility defense, but rather to highlight OSHA’s general acknowledgement “that it is not always feasible to comply with the standards requiring exit and exit routes remain clear and unobstructed.” *Id.*

standards was either technologically or economically infeasible and that, because Respondent “made no argument and presented no evidence of the costs of compliance or the effect on its finances” Respondent’s infeasibility defense must be “based on technological infeasibility.” Sec’y Br. 45-46; Sec’y Reply Br. 3-4.

Respondent argues for a more comprehensive view of the defense which can account for all “existing circumstances,” including those occurring at the Lehigh Plant with regard to increased volumes of mail and parcels and staffing shortages, during the time period at issue here. Resp’t Br. 18, 20-23. Respondent cites the Commission decision in *Otis Elevator Co.*, 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff’d* 762 F. 3d 116 (D.C. Cir. 2014). In that case the Commission stated, “To prove infeasibility, [an employer] must show by a preponderance of the evidence that (1) literal compliance with the terms of the cited standard was infeasible *under the existing circumstances* and (2) an alternative protective measure was used or there was no feasible alternative measure.” [citing] *Westvaco Corp.*, 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993) (emphasis in original) (citation omitted). *Otis Elevator.*, 24 BNA OSHC at 1087. Resp’t Br. 18.

Respondent further argues that the defense can apply “where the impediment to compliance was not economic or technological, but rather an unforeseen event, a *force majeure*.”⁶³ Resp’t Reply Br. 1, 4-7.

In *Home Rubber*, 2021 WL 3929735, at *44, the Commission summarized the evidentiary

⁶³ Respondent recognized that its formulation of its infeasibility defense does not fit neatly into the “technological” or “economical” categories forth by the Commission. (Tr. 520-22). However, nowhere prior to its reply brief, including in its Answer, Amended Answer, or its opening brief, did Respondent frame the defense as one of “*force majeure*,” i.e., “[a]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do.” *Force majeure*, BLACK’S LAW DICTIONARY (11th Ed. 2019). The undersigned therefore declines to analyze Respondent’s infeasibility defense under the lens of a *force majeure*. Further, the term “*force majeure*” appears nowhere in Commission caselaw, and the only case cited by Respondent in support of the defense involved the interpretation of a *force majeure* clause in a private contract, not as a defense to an administrative violation. See Resp’t Reply Br. 6, citing *JN Contemporary Art LLC v. Phillips Auctioneers, LLC*, 507 F.Supp.3d 490, 500 (S.D.N.Y. 2020). The undersigned declines to recognize a new defense in this case, particularly where Respondent has not raised the defense until its reply brief.

showing required to establish the affirmative defense of infeasibility, as follows:

To succeed in an infeasibility defense the Respondent must show that: (1) literal compliance with the terms of the cited standard was infeasible; and (2) an alternative protective measure was used or there was no feasible alternative measure. *Otis Elevator Co.*, 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff'd* 762 F.3d 116 (D.C. Cir. 2014). Infeasibility can be either economic or technological. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). Respondent bears the burden of proof for this defense. See *Briones Util. Co.*, 26 BNA OSHC 1218, 1220 (No. 10-1372, 2016).

See also *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No. 90-1349, 1993) (“[I]t is [Respondent’s] burden to show infeasibility as an affirmative defense, not the Secretary’s burden to show feasibility as an element of his case.”).

The *Home Rubber* decision further instructs that for a Respondent “[t]o succeed with an economic infeasibility defense the employer must show that the cost of compliance would have adversely affected the company’s existence.” citing *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995). *Home Rubber*, 2021 WL 3929735, at *45. Here, the US Postal Service does not argue economic infeasibility. Respondent presented no evidence regarding the costs of compliance or the effect of compliance on Respondent’s finances. Therefore, Respondent can rely only on the defense of technological infeasibility. ⁶⁴

Here, Respondent has not met its proof burden to establish either required component of the infeasibility defense, that literal compliance with the terms of the cited standard was infeasible; or that an alternative protective measure was used or there was no feasible alternative measure.

Literal Compliance was Possible

As to the first element, Respondent argues that it has established compliance with the

⁶⁴ The Third Circuit has made a passing reference to the infeasibility defense in *E. & R. Erectors, Inc. v. Sec’y of Labor*, 107 F.3d 157, 163 (3d Cir. 1997). However, it likened the defense to a “greater hazard (infeasibility) defense,” a separate defense Respondent is not arguing here.

standards was “infeasible under the circumstances” due the combination of increased volume of mail and parcels at the Plant, the staffing shortages at the Plant, and the USPS’s obligation to continue to accept mail and parcels at the Plant meaning it “had no control over the volume of mail and packages that were at the Lehigh Valley Plant.” Resp’t Br. 23; Resp’t Reply Br. 3-4. Respondent further argues that “[f]aced with these circumstances, everyone at [the Plant] did what they could but they could not magically reduce package volume and they couldn’t disregard the law and force employees to come to work.” Resp’t Reply Br. 6.

The Secretary focuses on the staffing issues at the Plant and argues that, with enough employees, Respondent admittedly could have cleared the backlog of mail and parcels and thereby the obstructions throughout the Plant. Sec’y Br. 46, 48. With the 20% cap on temporary workers lifted, Respondent had the ability to convene the Complement Committee and hire as much staff as needed but failed to do so. *Id.* 47-48; Sec’y Reply Br. 6-7. The Secretary also relies on the findings of an “Audit Report” from the USPS’s Office of the Inspector General.⁶⁵ Sec’y Br. 48-49, citing GX-25; Sec’y Reply Br. 5.

⁶⁵ This report, dated April 12, 2021, is titled *Delayed Mail at the Lehigh Valley, PA Processing and Distribution Center*. (GX-25, at 1). The Secretary points out that in the Report’s findings no mention is made of the pandemic or pandemic-related issues as a cause for delayed mail at the Plant. (*Id.* at 8-11). The undersigned places limited weight on this report in deciding the merits of Respondent’s infeasibility defense for several reasons. First, the Report itself acknowledges that it is not exhaustive, stating “[w]e were unable to determine all of the causes for the delayed mail ... at the Lehigh Valley [Plant]” (*Id.* at 3). Second, according to the Report, the Lehigh Valley Plant was selected for an audit on the potential causes for delayed mail at the Plant “because from January 1, 2019, to August 31, 2020, MCV [the USPS’s application for monitoring delayed mail] reported about 605 million delayed mail pieces, or 32.2 percent of the total pieces handled at this facility.” (*Id.*). Thus, the Report was commissioned to examine an existing problem of delayed mail at the Plant, not the backlog or aisle and exit obstructions resulting from swell of mail that started around November of 2020 and led to the violations at issue. Third, although the Report says that the audit was conducted “from September 2020 through April 2021,” it appears that most of the data was obtained from a single site visit conducted on October 5-8, 2020, before the period that is the focus of this case. (*Id.* at 13). Fourth, as Respondent points out in its reply brief, the report *does* mention the pandemic in a way that supports Respondent’s argument, noting as follows: “A portion of the audit scope and our site observations occurred during the COVID-19 pandemic. The Postal Service experienced decreased employee availability and increased package volume during this time, which impacted operations nationwide.” (*Id.* at 3). Finally, as discussed above, the Report noted Lehigh Plant management’s commitment to staffing additional positions and allocating overtime to process packages at the Plant. *Id.*, at 10. *See* note 32 above. This statement also supports Respondent’s argument.

Respondent contends that compliance with the cited standards was infeasible because under the Universal Service Obligation (USO), set forth in the Postal Reorganization Act of 1970, the US Postal Service is not permitted to turn away any mail or packages and must deliver everything it receives.⁶⁶ Resp't Br. 4-5. The USO does not excuse Respondent's failure to enforce the cited safety standards during the relevant time. Respondent contends its responsibility under USO continued without interruption. Likewise, importantly, Respondent's responsibility to maintain a safe workplace place for its employees, ensuring the safety standards were enforced, continued without interruption during this time. *Pitt-Des Moines, Inc.*, 16 BNA OSHC at 1434 (“[T]he employer's duty to comply with the standard is ongoing and applies to all employees at all times, not just to a particular [employee] at a particular time.”)

Respondent has failed to demonstrate that compliance with the cited standards was infeasible, even accounting for the circumstances at the Plant. A great deal of evidence shows compliance with the standards was possible when Plant management focused its efforts on keeping the PIT aisles and emergency exit routes clear. After the complaints to OSHA in late July and on November 12, 2020, Acting Plant Manager Bruno stated in the response letters to OSHA that the immediate obstructions had been cleared. (GX-18, at 1; GX-26, at 1). Most of the 1767 Forms submitted at the hearing demonstrate that the obstructions in the Plant could be cleared when management focused on the issue. (GX-21, at 4, 8-14, 17-19, 21-25, 27, 29, 30). The 1767 Forms frequently state the management response to the aisle and exit obstructions was to assign a mail handler to clear trays, to work on MTEC. *Id.* APWU Local President Kubat documented one particular instance on December 3, 2020, where an emergency exit route in the South Dock was

⁶⁶ Respondent cites 18 U.S.C. § 1700 (Desertion of mails), 18 U.S.C. § 1693 (Carriage of mail generally), and 39 C.F.R. § 211.2 (Regulations of the Postal Service). Respondent generally cites to the Postal Reorganization Act of 1970, without specific page, section, or text citation.

cleared of obstructions within a matter of hours. (Tr. 460-65; GX-24, at 19 & 20). Acting Plant Managers Bruno, Miller, and MDO Gonzalez, all testified to abating specific obstructions throughout the Plant when the obstructions were brought to their attention. (Tr. 605-08, 709-11, 861-62). Indeed, MDO Gonzalez acknowledged that with sufficient staff resources, he could have cleaned up the obstructions in the Plant “[w]ith [his] eyes closed.” (Tr. 733). Stated otherwise, with a sufficient number of “dedicated” staff the Lehigh Plant aisle and exit obstructions could have been cleared. Respondent’s District Safety Specialists testified that employees were trained not to put items, boxes, trash in the aisles and exit routes, that there was a method to keep the aisles and exit routes clear. In other words, the obstructions were preventable. (Tr. 150-51, 568-69). Although the managers who testified at the hearing pointed out the rise in absenteeism at the Plant,⁶⁷ Respondent has not adduced sufficient evidence that it could not, for example, dedicate existing staff to keeping the PIT aisles and emergency exits clear of obstructions to maintain compliance with the cited safety standards.⁶⁸

Respondent recognizes that it faces a “difficult burden” in establishing it was infeasible to keep the PIT aisles, emergency exit routes, and fire pull stations clear of obstructions. (Tr. 519). Resp’t Br. 19. Respondent has failed to meet that burden here.

Feasible Alternative Protective Measures

To establish infeasibility, Respondent must also establish “an alternative protective measure was used or there was no feasible alternative measure.” *Otis Elevator Co.*, 24 BNA OSHC at 1087. Here, Respondent does not argue that *no* feasible alternative measures were available to

⁶⁷ As discussed above, the general assumptions and speculation of Lehigh Plant managers regarding hiring, during the relevant period, are accorded no weight. *See* note 27 and accompanying text, above.

⁶⁸ By letter to OSHA on November 26, 2020, Mr. Kubat stated that previously the recurring safety hazard of empty trays accumulating in Automation had been addressed by the USPS assigning an employee to the “tray removal position” already in existence. (Tr. 421-28; GX-26, at 7, 8).

it to keep the aisles, exit routes, or fire pull stations clear of obstructions in the Plant. Rather, Respondent points to the efforts of Plant management to clear the obstructions in the Plant, highlighting: 1) the “spot abatement” of particular obstructions brought to management’s attention; 2) the ordering of extra trailers to store mail and MTEC; 3) the early opening of the Annex; 4) the liberal overtime policy at the Plant; 5) the utilization of employees in a “cross-craft” capacity; and 6) “expediting the onboarding and training processes and procedures for new employees when hired.”⁶⁹ Resp’t Br. 24-26.

Respondent’s argument on this prong of the defense fails because none of these measures were effective in keeping the aisles, exit routes, and fire pull stations clear throughout the Plant in any sustainable way. For an employer to establish the defense, the Commission requires that alternative abatement measures be effective in abating the hazard the standard is designed to address. *See, e.g., George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1933 n.16 (No. 94-3121, 1999) (rejecting the employer’s infeasibility defense where the alternative abatement measure was ineffectively implemented). Here, Plant management’s efforts to clear the obstructions in the Plant were concededly ineffective and left employees exposed to the tripping, struck-by, trampling, and fire hazards the standards were designed to address. (Tr. 66-69, 310-11, 348, 355-58, 431-51; JX-7, GX-21, at 4, 8-14, 17-19, 21-25; GX-24, at 1, 2, 7, 8, 13).

Respondent has, therefore, failed to carry its burden on either element of its infeasibility defense.

Citation 3, Item 2

⁶⁹ This portion of Respondent’s brief is obviously missing a good deal of intended argument, with entire sentences trailing off into ellipses and several blank citations, including a blank citation in support of this final effort of expediting the onboarding process. The undersigned can find no support for the assertion that Plant management expedited the onboarding process during the period at issue. Indeed, all three managers who addressed the topic at the hearing lamented that the protracted onboarding process was one of the factors causing a shortage of workers in the Plant. (Tr. 598-99, 611, 840-41).

Citation 3, Item 2, alleged a repeat violation of 29 C.F.R. § 1910.303(g)(1)(i)⁷⁰ as follows:

29 CFR 1910.303(g)(1)(i): Employer provided a work space that was less than 30 inches wide in front of electric equipment operating at 600 volts, nominal, or less:

a) USPS Distribution Center, Processing Floor – On or about December 1, 2020[,] a mail processing machine (DBCS 23) was operating under commercial electrical power at 600 volts or less. The available front working space for the electrical control panel was approximately 24”.

As a basis for the repeat classification of the violation, the Citation further alleged that:

The [USPS] was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.303(g)(1), which was contained in OSHA inspection number 1367892, citation number 1, item number 1 and was affirmed as a final order on 2/26/2019, with respect to a workplace located at 7001 S. Central Ave, Los Angeles, CA 90052.

The Citation proposed a penalty of \$42,911 for Respondent’s alleged repeat violation of 29 C.F.R. § 1910.303(g)(1)(i).

Applicability

By its own terms, the standard “applies to electric equipment operating at 600 volts, nominal, or less to ground.” 29 C.F.R. § 1910.303(g)(1)(i). DBCS 23 has a “boilerplate label on the side of the control panel that said 180 volts.” (Tr. 242; *see also* 381-83). Subsection (1)(i) of

⁷⁰ 29 C.F.R. § 1910.303(g)(1)(i) states, in relevant part:

(g) *600 Volts, nominal, or less.* This paragraph applies to electric equipment operating at 600 volts, nominal, or less to ground.

(1) *Space about electric equipment.* Sufficient access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment.

(i) Working space for equipment likely to require examination, adjustment, servicing, or maintenance while energized shall comply with the following dimensions, except as required or permitted elsewhere in this subpart:

...

(B) The width of working space in front of the electric equipment shall be the width of the equipment or 762 mm (30 in.), whichever is greater. In all cases, the working space shall permit at least a 90-degree opening of equipment doors or hinged panels ...

the standard applies to “equipment likely to require examination, adjustment, servicing, or maintenance while energized” Here, electronic technician Pietruch testified that DBCS 23 required servicing or maintenance while still energized, for the adjustment of “safety modules . . . for monitoring voltage” and particularly in “emergency” situations like when a mail clerk or PSE smelled smoke coming from the machine. (Tr. 387-88, 391-92, 396, 405-09, 728). The standard, therefore, applies. Respondent has made no argument to the contrary.

Noncompliance

The standard required Respondent to provide at least 30 inches of “working space” in front of DBCS 23 where the electrical panel was located. Here, it is uncontested that there was only 24 inches of space between the guardrail and DBCS 23’s electrical panel at the time CSHO Sabo inspected the machine. (Tr. 246, 686; GX-8, at 5 (Photo ID #120120_17)). Mr. Pietruch established that the existence of the guardrail hindered his and other technicians’ ability to navigate the working space in front of the machine. (Tr. 390-92). The Secretary has, therefore, demonstrated prima facie noncompliance with the standard.

In rebuttal, Respondent emphasizes that the guardrail was removable, “removing the rails takes only a matter of seconds,” and it therefore complied with the standard. Resp’t Br. 31. However, the ability of the guardrail to be removed does not demonstrate compliance with the standard on this record. First, although Mr. Pietruch did, as Respondent notes, testify that the guardrail could take “no time at all” to remove, this was only so if the technician servicing the machine was able to enlist another employee to help lift the rails uniformly from their posts. (Tr. 395; *see also* Tr. 681-82, 728-29). A single employee lifting the rails, which weighed as much as 20 to 40 pounds, ran the risk of getting the poles stuck on the post, especially since one of the rails was “slightly twisted.” (Tr. 394-96). Indeed, Mr. Pietruch recounted that on multiple occasions,

one of the rails would get stuck on the posts and he would have to get a “deadbolt hammer” to dislodge the rail, a process which took as long as five or ten minutes. (Tr. 395-96).

More to the point, however, is the fact that in emergency situations, like when a mail clerk or PSE reported the smell of smoke coming from DBCS 23, there was no time to remove the rails. (Tr. 396). A technician in such a situation, therefore, had to navigate inspecting the machine within the confines of the 24 inches between the guardrails and the machine’s electrical panel, which meant “there just was not enough room to kneel down in there.” (Tr. 390-91). Further still, even with the guardrails removed, Mr. Pietruch noted that “the post [was] sitting back there. The post [was] still in the way.” (Tr. 391). Thus, even with the guardrails completely removed, the pole intruded into the “working space” in front of DBCS 23’s electrical panel.

For these reasons, the removability of the guardrails does not demonstrate that Respondent provided the required 30 inches of working space in front of DBCS 23. The Secretary has, therefore, established noncompliance with the standard.

Exposure

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC at 1079 n.6. Here, Mr. Pietruch testified that he and other electrical technicians inspected and serviced DBCS 23, including while it was still energized. (Tr. 383-84, 386-88, 391-92, 405-09, 728). Respondent has not contested the element of employee exposure. The Secretary has established employee exposure to the hazard.

Knowledge

The Secretary can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Jersey Steel Erectors*, 16 BNA OSHC at 1164; *Dover*

Elevator Co., 16 BNA OSHC at 1286.

Here, MDO Gonzalez demonstrated his actual knowledge of the guardrail in front of DBCS 23 and also admitted that while “the OSHA regulation is 30 inches, but sometimes the way that the machines are closed, [the posts supporting the guardrails] have to be around 24 [inches away from the machine].” (Tr. 675-77, 686; GX-8, at 5 (Photo ID #120120_17)). MDO Gonzalez thus had actual knowledge of the violative condition in front of DBCS 23 and, as an undisputed supervisor at the Lehigh Plant, his knowledge is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC at 1164; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Classification

The Secretary classified the violation of 29 C.F.R. § 1910.303(g)(1)(i) as a “repeat” violation. In this regard, section 17(a) of the Act, 29 U.S.C. § 666(a), imposes heightened penalties for “[a]ny employer who ... repeatedly violates the requirements of ... regulations prescribed pursuant to this chapter ...” “A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Jersey Steel Erectors*, 16 BNA OSHC at 1167. “Unless the violation involves a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard.” *Id.* This prima facie showing of substantial similarity may be rebutted “by evidence of the disparate conditions and hazards associated with these violations of the same standard.” *Id.*

As a basis for the repeat classification of the violation, the Citation alleged that:

The [USPS] was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.303(g)(1), which was contained in OSHA inspection number 1367892, citation number 1, item number 1 and was affirmed as a final order on 2/26/2019, with respect to a workplace located at 7001 S. Central Ave, Los Angeles, CA 90052.

At the hearing, the Secretary introduced an informal settlement agreement, signed by a representative of USPS on February 26, 2019, stipulating to a violation of 29 C.F.R. § 1910.303(g)(1) occurring on December 10, 2018, at a USPS facility in Los Angeles, California. (GX-12). Because this is the same standard alleged in Citation 3, Item 2, the Secretary has established a prima facie case of similarity for the repeat classification. *Jersey Steel Erectors*, 16 BNA OSHC at 1167; *see also Triumph Constr. Corp.*, 26 BNA OSHC at 1346-47 (finding that an informal settlement agreement constitutes a “Commission final order” for purposes of repeat classification).

Against this prima facie showing of similarity, Respondent argues that “this was not for a substantially similar violation as the allegedly blocked electrical panel in front of DBCS 23 machine, as that was a moveable, temporary barrier, unlike a permanent, fixed one.” Resp’t Br. 32. However, in rebutting the Secretary’s prima facie showing of similarity, Respondent must show that the previous violations resulted in different *hazards*, not just distinguish the factual circumstances surrounding the instant violation and the previous one. *Amerisig Se., Inc.*, 17 BNA OSHC at 1661 (“[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards”). Respondent’s argument does not demonstrate that employees were exposed to different hazards; indeed, in both instances employees were exposed to the electrical hazards of not having sufficient workspace in front of energized electrical equipment. (Tr. 247, 258-60, 390-92; GX-5; GX-12, at 4). In any event, Respondent’s argument fails on its own terms. The items alleged to have been blocking the electrical equipment in the previous citation were “[i]tems such as a mail bin, light bulbs, and a portable ladder,” none of which constitute a “permanent, fixed [barrier]” as Respondent argues in its brief. Resp’t Br. 32. (GX-12, at 5).

The Secretary has proven that Respondent's violation of 29 C.F.R. § 1910.303(g)(1)(i) was a repeat violation.

IV. PENALTY

When OSHA issues a Citation, it may include a proposed penalty amount.⁷¹ See 29 U.S.C. § 659(a). The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. See *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0293, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995); *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

With Citation 3, Item 1 withdrawn, the Citations proposed a total penalty of \$193,872, broken down as follows.

For Citation 1, Item 1, the serious violation of 29 C.F.R. § 1910.165(e) for the obstructed fire pull station, the Citation proposed a penalty of \$8,582. In calculating this penalty, CSHO Sabo "wrestled back and forth between a high and medium severity," but ultimately landed on a medium severity because "there were other pull stations that [an] employee ... could have activated." (Tr. 100; GX-1, at 1). As to probability, CSHO Sabo found it to be "lesser" because of the existence

⁷¹ OSHA has published a Field Operations Manual (FOM) to, among other things, act as a guide for its CSHOs in proposing penalties. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-163 (eff. Sept. 13, 2019).

of additional fire pull stations in the area. (Tr. 100-101, GX-1, at 1). The gravity of the violation was determined to be “moderate” as a function of severity and probability in the “OSHA information system (OIS).” (Tr. 101). Because the USPS is a “larger employer,” Respondent was not entitled to a reduction based on size. (Tr. 101-02; GX-1, at 1). For good faith and history, CSHO Sabo determined that “in this case [they] go together,” and because the USPS had “a higher grade series of violations in the past five years,” a 10% increase in the penalty was added for history. (Tr. 102; GX-1, at 1). This led to a total calculated penalty of \$8,582.⁷²

For Citation 1, Item 2, the serious violations of 29 C.F.R. § 1910.176(a) for the obstructed PIT aisles throughout the Plant, the Citation proposed a penalty of \$13,653. In calculating this penalty, CSHO Sabo determined the severity was high “due to the nature of the injuries someone could [have] sustained from an accident occurring due to this hazard,” namely “fractured bones, blunt force trauma and death” if PITs were to collide with pedestrian traffic. (Tr. 197; GX-2, at 2). He further determined the possibility was “greater” based on the emergency egress aisles also being blocked “forcing employees into what was left of the two PIT aisles as far as available space forcing employees and machines into the same confined space.” (Tr. 197; GX-2, at 2). As a function of severity and probability, the OIS assigned the violations a high gravity. (Tr. 197; GX-2, at 2). CSHO Sabo further determined that no reduction was warranted for size or good faith and that a 10% increase was warranted based on Respondent’s history of violations in the last five years. (Tr. 198; GX-2, at 2). This led to a total calculated penalty of \$13,653.

For Citation 2, Item 1, the violations of 29 C.F.R. § 1910.37(a)(3) for the obstructed emergency exit routes throughout the Plant, the Citation proposed a penalty of \$128,726 based on the violations’ willful classification. At the hearing, the Secretary moved to amend for an

⁷² CSHO Sabo also testified that no reduction was given for a “quick fix,” which is a hazard in plain view that an employer can rectify while the CSHO is onsite. (Tr. 102-03; GX-1, at 1).

alternative classification of “repeat” if the violation was not found to be willful with a reduction in the proposed penalty to \$42,911. (Tr. 11-13). Because the undersigned has determined Respondent’s violations of this standard were not willful, but were repeat violations, only the second penalty remains at issue. In calculating this penalty, CSHO Sabo determined the severity was only “medium” because “[a]lthough the injuries would result in burns, smoke inhalation, trampling, that kind of stuff, the building was supplied with a[n] ... automated sprinkler system. So in the event of a fire, the sprinkler system should lessen the severity as well.” (Tr. 235-36; GX-3, at 2). He determined the probability was “greater” because of the “sheer number of employees that would be trying to get to these obstructed exit aisles at one time.” (Tr. 236; GX-3, at 2). As a function of severity and gravity, the OIS assigned the violations a “moderate” gravity. (Tr. 236; GX-3, at 2). Like with the previous violations, CSHO Sabo determined no reduction in penalty was warranted for size or good faith and a 10% increase was warranted based on history of violations in the last five years.⁷³ (Tr. 236-37; GX-3, at 2). The moderate gravity assessed by OSHA was accorded weight when calculating the penalty for the repeat violations found. This resulted in a total calculated penalty of \$42,911.

Finally, for Citation 3, Item 2, the repeat violation of 29 C.F.R. § 1910.303(g)(1)(i) for the failure to provide at least 30 inches of workspace in front of the electrical panel of DBCS 23, the Citation proposed a penalty of \$42,911. In calculating this penalty, CSHO Sabo determined the severity was medium “due to that fact that there was space in front of the electrical panel, just not adequate space.” (Tr. 265; GX-5, at 1). The probability was determined to be lesser based on interviewing the employee who reported the condition, who indicated that the task that would expose a technician to the hazard “was done very infrequently.” (Tr. 265-66; GX-5, at 1). As a

⁷³ The CSHO also multiplied the total penalty by ten based on the willful classification. (Tr. 237). However, that classification is no longer at issue in determining the penalty for the violations.

function of severity and probability, the OIS assigned a moderate gravity to this violation. (Tr. 266; GX-5, at 2). No reduction was warranted for size or good faith and a 10% increase was added based on violation history in the past five years. (Tr. 266; GX-5, at 2). The base penalty was then multiplied by five for a repeat classification penalty of \$42,911. (GX-5, at 2).

In arguing against the total proposed penalty,⁷⁴ Respondent argues the proposed penalty does not give “due consideration to the gravity of the violations, the size of the Postal Service, Respondent’s good faith, and its history of previous violations.” Resp’t Br. 33. However, Respondent does not make any specific arguments as to how this is so. Respondent goes on to argue that the proposed penalties “far exceed other OSHA citations for violations of the same standards,” but does not provide any evidence to support this claim. *Id.* Finally, Respondent points out that “there were no accidents and no deaths” from the violations, and, in fact, due to the staffing shortages at the Plant at the time, “the number of employees that could have been exposed to a potential hazard was significantly lessened.” *Id.* Respondent therefore asks that the proposed penalty be “reduced significantly.” *Id.*

Having weighed the relevant factors, the undersigned finds the proposed penalties for each of the violations is appropriate and therefore assesses them for each Citation item. Contrary to Respondent’s contentions, CSHO Sabo adequately accounted for the gravity of each violation, assigning all but one Citation item, the blocked PIT aisles, a designation of “moderate” gravity based on lesser probabilities and severities associated with the violations. The violations of 29 C.F.R. § 1910.176(a) were properly designated as high gravity violations based on the potential for serious injury to pedestrian traffic if a PIT collision occurred and the heightened possibility of such a collision occurring because of the number of employees using the aisles and the number of

⁷⁴ Respondent has not honed its arguments on penalty to any particular violation but generically argues against the total proposed penalty. Resp’t Br. 33.

obstructions blocking the aisles. Respondent's size is adequately accounted for as a large employer. Respondent's good faith efforts at reducing the obstructions in the Plant have resulted in the re-classification of the violations of 29 C.F.R. § 1910.37(a)(3) from willful violations to repeat violations with a commensurate reduction in the penalty of \$85,815. The undersigned finds no further reduction is warranted for Respondent's good faith. Finally, Respondent has introduced no evidence to contradict CSHO Sabo's representation as to its violation history which resulted in a 10% increase in all proposed penalties. In absence of any contrary evidence, the undersigned finds the increase based on Respondent's history is appropriate.

V. ORDER

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. See Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

Based on the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as a SERIOUS violation of 29 C.F.R. § 1910.165(e) and a PENALTY of \$8,582 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED as a SERIOUS violation of 29 C.F.R. § 1910.176(a) and a PENALTY of \$13,653 is ASSESSED.
3. Citation 2, Item 1 is AFFIRMED as a REPEAT violation of 29 C.F.R. § 1910.37(a)(3) and a PENALTY of \$42,911 is ASSESSED.
4. Citation 3, Item 1, the alleged violation of 29 C.F.R. § 1910.157(c)(1), Withdrawn by the Secretary, is DISMISSED.

5. Citation 3, Item 2 is AFFIRMED as a REPEAT violation of 29 C.F.R.
§ 1910.303(g)(1)(i) and a PENALTY of \$42,911 is ASSESSED.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

Date: September 29, 2023
Washington, DC