United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UNITED AIRLINES, INC., Respondent.	OSHRC Docket No. 22-0744

Appearances:

Seema Nanda, Jeffrey S. Rogoff, Jordan Laris Cohen, Jacob Heyman-Kantor, U.S. Department of Labor, Office of Solicitor, New York, New York

For Complainant.

Mark Ishu, Esq., Samuel S. Rose, Esq., Conn Maciel Carey LLP, Chicago, Illinois and Los Angeles, California

For Respondent United Airlines, Inc.

Before: Chief Judge Covette Rooney

DECISION AND ORDER

Just before Thanksgiving in 2021, employees were staging and positioning an aircraft in a hangar at Newark Liberty International Airport. The employees had to move the aircraft outside of the hangar. While performing the task, one of the aircraft's wheels ran over an employee's right foot.[1] The impact led to crushing injuries. The employee endured multiple surgeries, including the amputation of his toes.

[1] To protect the worker's privacy, in this decision, the person injured will be referred to as IW, or injured worker.

The Occupational Safety and Health Administration (OSHA) commenced its investigation the same day as the incident. After the investigation closed, the Secretary issued a serious citation, alleging that United Airlines, Inc. (United) violated Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1) (OSH Act). Section 5(a)(1) is commonly called the general duty clause. It requires employers to furnish a place of employment that is free from recognized hazards that cause, or are capable of causing, death or serious physical harm to employees. 29 U.S.C. § 654(a)(1).

The Secretary alleges that employees engaged in staging and positioning aircraft are exposed to being struck and crushed by aircraft. Employees moved aircraft when positioned in unsafe locations and were exposed to being run over or struck by aircraft wheels. The Secretary does not argue that Respondent can feasibly eliminate the hazard. Instead, she argues that Respondent can materially reduce the hazard feasibly by ensuring that ground aircraft towing operations adhere to specified procedures. Specifically, the Secretary maintains that feasible and effective abatement requires crew briefings, designating a safety guide, and using a checklist.

United timely contested the Citation. (Compl. 3; Answer 2.) A hearing was held over five days, August 23-25, 2023 and September 21-22, 2023, in New York, NY. Both parties filed post-hearing and reply briefs.

For the reasons set forth below, the Citation is AFFIRMED as a serious violation, and a penalty of $14,502 is ASSESSED.

I. Jurisdiction

United is engaged in aviation transportation.[2] It is a corporation organized under Delaware law, doing business in New Jersey and elsewhere. (Stip.1, Answer 1-2.) The incident that led to OSHA's inspection occurred at United's hangar located at Newark Liberty International Airport, 100 Brewster Road, Newark, New Jersey (the Worksite). Many of the materials and supplies it uses originated outside of New Jersey.[3]

United engages in business affecting commerce within the meaning of the OSH Act. (Stips. 1, 2, 4; Compl. 2; Answer 1; Tr. 305.) It accepts that it is an employer as defined in the OSH Act and that the Commission has jurisdiction over this matter.[4]

Under the OSH Act, "Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two different administrative authorities." *Martin v. OSHRC* (*CF&I Steel Corp*.), 499 U.S. 144, 147, 151 (1991). OSHA is tasked with setting and enforcing workplace health and safety standards. *Id.* The Occupational Safety and Health Review Commission, an agency independent of OSHA and the Department of

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[2] Stips. 1, 4; Answer 1. In its Answer, Respondent admitted that it was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act and that it is an employer within the meaning of section 3(5) of the OSH Act. (Compl. 2; Answer 1.) The parties stipulated:

> 1. The respondent, United Airlines, Inc., a corporation organized under laws of the State of Delaware and doing business in the State of New Jersey, maintaining its principal office and place of business at 233 South Wacker Drive, Chicago, Illinois 60606, is and at all times hereinafter mentioned was engaged in airlines transportation. …
>
> 2. The Respondent is and at all times relevant was engaged in aviation transportation work." In its Answer, Respondent admitted that it was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act and that it is an employer within the meaning of section 3(5) of the OSH Act.

[3] Stip.2; Answer 1. Stipulation 2: "Many of the materials and supplies used by Respondent originated and/or were shipped from outside the State of New Jersey."

[4] In its Answer, Respondent admitted that the Commission has jurisdiction over this matter by section 10(c) of the OSH Act. (Compl. 1; Answer 1.)

Labor, is responsible for carrying out adjudicatory functions. *Id.* Based on the stipulations and the record, the undersigned finds that United is an employer as defined in section 3(5) of the OSH Act. 29 U.S.C. § 652(5). The Commission has jurisdiction over this proceeding by United's timely filing of its Notice of Contest. 29 U.S.C. §§ 652(5), 659(c).

II. Factual Background

United technicians routinely move aircraft in and around airport hangars. (Tr. 21, 601-3, 839.) On the overnight shift on November 24, 2021, technicians at the Worksite were tasked with moving two airplanes outside of a hangar. (Tr. 39; Exs. J-2 at 1, J-4 at 1.) This process is referred to as a "tow operation." (Tr. 21, 24, 39.)

Under United's policies, workers are supposed to begin with a pre-tow crew briefing, which is commonly referred to at the Worksite as a safety briefing or team "huddle." (Tr. 29-30, 445, 615, 621-22, 771; Exs. C-4 at 1, 3, 5 (discussing "mandatory" crew briefings), C-5 (listing "crew briefing" as the first item), J-2 at 2-3.) United requires this for the safety of the tug operators. (Tr. 34, 446.) During this meeting, workers are told their roles and responsibilities. (Tr. 28-29, 34, 445, 568; Ex. J-2 at 2.) A tow operation requires at least five workers: a safety guide, a tug operator, a brake rider, and two wing walkers.[5] Depending on the nature of the work, additional workers may be added. (Tr. 737, 743-47; C-4 at 2-3, 5.)

[5] Tr. 21-24, 523, 547, 737; Exs. C-4 at 3-5, C-5. Witnesses sometimes used the term "tow operator," instead of "tug operator." (Tr. 23, 803.) Respondent's written policies refer to the role as "Tow Tractor Operator." (Exs. C-4, C-5 at 3-4.) Respondent used both terms in its post-hearing briefs, while the Secretary used "tug operator." This decision uses the term "tug operator," except when quoting from the Citation or other Exhibits.

The tug operator operates the "tractor" or "tow" vehicle used to pull the aircraft.[6] The safety guide verifies the path is clear and the hangar doors are adequately open. (Tr. 733-34, 745-46.) Under United's policy, completing the checklist was the responsibility of both the tug operator and the safety guide.[7] He or she acts as a "second set of eyes" for the tug operator. At times, the tug operator may lose visibility with some of the other workers. (Tr. 23, 452, 513.) When that occurs, the safety guide has a better angle of view and can relay information to the tug operator and brake rider. (Tr. 22-23, 452.) If the safety guide loses contact with any team member, the towing is to stop immediately. (Ex. C-4 at 2.) The safety guide oversees the overall operation and is the one "in charge" for hangar movements of aircraft. (Tr. 309, 525, 526-27; Ex. C-4 at 2.)

The brake rider sits in the aircraft's cockpit. (Tr. 23-24, 40, 737, 744.) The brake rider applies the brakes if there is an issue with the tow bar connection between the aircraft and the tug or if other issues arise. (Tr. 24, 737.) The brake rider can apply the aircraft's brakes so it "doesn't run away." (Tr. 24, 737-38; Ex. C-4 at 5.) As the name implies, the wing walkers walk near the outside of the airplane's wings, one on each side. (Tr. 23, 738, 744; Ex. C-4 at 5.) They watch for obstructions and help guide the tug operator. (Tr. 23, 738; Ex. C-4 at 5.) In addition, the wing walkers remove the "chocks" from the base of the aircraft's wheels at the start of the operation and usually place "chocks" back against the wheels once the aircraft is in its new position. (Tr. 26-27, 51, 745.) The chocks are large rubber blocks used to prevent any tire movement. (Tr. 25-26.) To

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[6] Tr. 22-23, 98, 736-37, 744-45; Exs. C-3, C-4 at 5, R-15. The injured worker indicated the tug operator was the lead "in charge of movement." (Tr. 44.) For point-to-point movements, which are not at issue here, the tug operator is the lead unless a safety guide is part of the team. (Ex. C-4 at 1-3.)

[7] Tr. 309, 737. Ex. C-4 at 4-5. When questioned on direct by the Secretary's counsel, Wilton Arizmendi, a United safety manager who participated in United's investigation, indicated that the safety guide "ensures that the checklist itself is completed." (Tr. 309; Ex. C-4 at 4.) Later, when testifying on direct for United, Mr. Arizmendi indicated that the tug operator was responsible for ensuring the checklist was completed. (Tr. 737.)

remove the chock, the worker typically must place a hand directly on one of the aircraft's wheels and then forcibly pull the chock from the wheelbase. (Tr. 27-28.)

Who will act in each of these necessary roles (safety guide, wing walker, etc.) is established during the crew briefing. (Tr. 145, 152-53, 290-91, 444, 617.) The crew briefing typically occurs at or near the aircraft to be moved with lines of communication and sight set at that time. (Tr. 145, 152-53, 290-91, 345-46, 444, 617.)

To ensure all the tasks are assigned and the proper steps are taken, workers must use a checklist that outlines procedures and safety policies for the operation.[8] An electronic version of the document is available to workers on computers and iPads. (Tr. 37-38.) A laminated copy of the checklist is also supposed to be kept on the tow vehicle. (Tr. 54-55.) The checklist has boxes that could be used for check marks. (Tr. 38.) However, workers indicated that the boxes were not physically or electronically marked in practice. (Tr. 38, 244-45, 512, 561.)

As part of a tow operation on November 24th, a technician was engaged in removing the chocks.[9] As he yanked on them, the tug operator started to pull the aircraft. (Tr. 42; Exs. J-2, J-4 at 1.) This action resulted in a worker's foot becoming trapped under one of the aircraft's wheels. (Tr. 42; Ex. J-2 at 2.) The worker's screams alerted his colleagues, who worked to free him. (Tr. 762; Exs. C-3, J-2, J-4.) He described the pain as "excruciating" and suffered serious injuries. (Tr. 42, 50; Ex. J-3 at 1.) He has had eleven surgeries, and all five toes on one foot had to be amputated. (Tr. 42-43; Stip. 3.)

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[8] Tr. 36, 53; Exs. J-2 at 1-3, C-3, C-5. Exhibit C-5 was also designated Joint Exhibit 7. (Tr. 37.) For simplicity, it will be referred to as C-5 throughout this decision.

[9] United refers to the workers involved in tow operations as technicians or mechanics. (Tr. 26.)

Only two of the technicians involved in the first move were also involved in the second move. (Tr. 320, 507; Exs. J-2 at 2, J-3 at 1.) Yet, there was no crew briefing or safety huddle before workers started to move into position around the aircraft, and no one was appointed safety guide. (Tr. 45; Exs. J-2 at 2-3, C-3.) Two workers who were in the hangar on November 24th testified, the injured worker and Joseph Marcille, a lead technician. (Tr. 20, 41, 123, 391-93, 313, 517; Ex. C-3 at 3.) Neither were assigned roles for the operation. (Tr. 39-41, 506-7.) Mr. Marcille noticed two people by the tow vehicle and went to the hangar door so it could be closed promptly after the move. (Tr. 483, 506, 508; Ex. C-3 at 3.) The injured worker did not see anyone near the "aft" wing and moved toward the aircraft's left main landing gear. (Tr. 39-40; Ex. J-2 at 1.) He then began removing one set of the chocks, which is typically one of the wing walkers' responsibilities. (Tr. 26-27, 51, 745; Exs. J-2 at 1-3, C-3, C-5.)

Mr. Arizmendi and Miguel Rodriquez investigated the incident. (Tr. 260, 263, 273.) Both were safety managers at that time. (Tr. 110, 260.) However, Mr. Rodriquez was new in his position. (Tr. 790.) Mr. Arizmendi prepared a draft report based on his investigation.[10] He testified about his discussions with workers. This hearsay evidence was admitted for the limited purpose of understanding what led him to write the report. There is no evidence that the workers he discussed the events with were unavailable. The firsthand testimony of the injured worker and Mr. Marcille is credited and weighed more heavily than Mr. Arizmendi's testimony or the draft report.

After Mr. Arizmendi submitted his draft report, others revised it. (Tr. 215; Exs. J-2, J-3, J-4.) The final report differs in some respects from Mr. Arizmendi's draft and a subsequent draft

[10] Tr. 318-19, 323; Ex. J-4. Mr. Rodriquez indicated he had a role in drafting another version of the report, which was admitted as Exhibit J-3. (Tr. 222.)

report. (Exs. J-2, J-3, J-4.) Still, the final report and the prior drafts all note the repeated failure to follow procedures for tow operations. (Exs. J-2, J-3 at 1, J-4 at 3.)

III. Analysis

The test for finding a violation of the general duty clause was long described as having four elements. For example, in *Arcadian Corp*., 20 BNA OSHC 2001 (No. 93-0628, 2004) (*Arcadian*), the Commission explained:

> [T]o prove a violation of section 5(a)(1), the Secretary must show that a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard.

20 BNA OSHC at 2007. As part of these elements or separately, under Commission precedent, the Secretary must also show exposure to and knowledge of the hazard. *Peacock Eng'g Inc*., 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017) (noting that in addition to the "four elements" the Secretary must also show "employees were exposed to the asserted hazard" and "the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition"); *UHS of Westwood Pembroke, Inc*., No. 17-0737, 2022 WL 774272, at *2 (OSHRC Mar. 3, 2022) (*Pembroke*) (requiring the four elements from *Arcadian* plus a showing that the employer "knew, or with the exercise of reasonable diligence, could have known of the hazardous condition"), *aff'd*, No. 22-1845, 2023 WL 3243988 (3d Cir. May 4, 2023) (unpublished); *Roadsafe Traffic Sys., Inc*., No. 18-0758, 2021 WL 5994023, at *2 (OSHRC Dec. 10, 2021) (same). Thus, to establish the alleged violation, the Secretary must show: (1) a condition or activity in the workplace presented a hazard which was causing or likely to cause death or serious physical harm; (2) employees were exposed to the hazard, (3) the employer or its industry recognized the hazard; (4) the employer knew, or with the exercise of reasonable diligence could have known the hazardous condition

existed at its worksite, and (5) a feasible and effective means existed to eliminate or materially reduce the hazard. *Id*.

A. The Employer Knew the Cited Hazard Was Present and Capable of Causing Serious Injury

The Secretary alleges that Respondent violated the general duty clause because:

> Employees engaged in staging and positioning aircraft are exposed to being struck and crushed by the aircraft. Employees move aircraft while they are positioned in unsafe locations near the moving aircraft, exposing them to being run over or struck by the aircraft wheels. On or about 11/24/2021, an employee's right foot was run over by the wheel of a 727 resulting in crushing injuries and amputation of the employee's toes.

(Citation 1.)

Respondent tries to tweak the test set out above by arguing that the Secretary had to disprove its claims that a more specific standard applies to the cited hazard. (Resp't Br. 10-12.) In *U.S. Postal Service*, 21 BNA OSHC 1767 (No. 04-0316, 2006) (*Postal Service*), the Commission concluded that a specific standard requiring personal protective equipment did not apply to the employer's failure to provide high-visibility clothing to minimize the hazard of being struck by a vehicle. 21 BNA OSHC at 1769-73. Instead, the general duty clause applied. *Id.* at 1773. With specific standards, the Secretary must prove the cited standard applies to the hazard or condition. *Id*. In contrast, for alleged violations of the general duty standard, the Secretary must show that a condition or activity in the workplace presented a hazard that was causing or likely to cause death or serious physical harm. *Pembroke*, 2023 WL 3243988, at *1 n.2. As discussed in Section III.D.1, Regulatory Preemption, when the Secretary asserts a violation of the general duty clause, an employer can raise the affirmative defense of preemption by timely pointing to a specific standard's application to the hazard. Here, the cited hazard, being struck or crushed by aircraft during tow operations, is not addressed in the standard Respondent points to

(29 C.F.R. § 1910.178). (Resp't Br. 9-12, 45.) Nor is there any evidence another specific standard applies.

Since this is a general duty clause case, the multi-part test outlined above applies. There is little for debate about most of those elements. The Secretary identified a hazard capable of causing serious physical harm or death, employees were exposed to it, and the employer knew about the hazard's presence at the Worksite.

1. Activity Presenting a Hazard Causing or Likely to Cause Serious Physical Harm

Towing an aircraft involves moving "a deadly piece of equipment." (Tr. 444.) Such operations present "struck-by" and "crush-by" hazards, *i.e.*, the risk of a worker being stuck or crushed during the activity. (Tr. 95, 131, 276-77, 420-21, 850, 853.) The risks include being run over by the plane and the possibility of amputation. (Tr. 42-43, 131, 420; Ex. J-2 at 1 (discussing "very serious injury").) *See Peacock*, 26 BNA OSHC at 1590 (finding hazard element met when activity presented struck-by, crush-by, and amputation risks); *Briones Util. Co.*, 26 BNA OSHC 1218, 1221 (No. 10-1372, 2016) (noting, in the context of a violation of a specific standard, that broken bones and fractures constitute serious physical harm). The Secretary met this element by showing that tow operations present the risk of serious or deadly injury to workers. (Tr. 42-43, 131, 276, 536.) *See Peacock*, 26 BNA OSHC at 1590 (activity hazardous even though it occurred "thousands" of times without accidents).

2. Exposure

The amputation risk present during aircraft moves was realized at United's Worksite. "On November 24, 2021, in the course of a tow operation at Hangar 52 of Newark Airport, United employee [IW] sustained a severe injury to his right foot requiring an amputation." (Stip. 3.) IW's

foot was struck and crushed by an aircraft. (Stip. 3; Tr. 42-43.) Other workers involved in the tow operation were in the same area and near the aircraft as it moved. (Exs. J-2 at 1, C-3.)

Moving aircraft was a routine part of the work done at the Worksite. (Tr. 418-19, 601-2, 657, 839.) Workers were exposed to the type of hazard that led to injuries on November 24th and in each tow operation. (Tr. 26-28, 420-21, 443-44, 523-24; Ex. J-2.) The Secretary established this element.

3. Hazard Recognition

This element is met when there is proof that a hazard is recognized by the employer or by showing there is a "general understanding" in the employer's industry that the activity or condition is hazardous. *Roadsafe*, 2021 WL 5994023, at *4. An employer's work rules may establish recognition of a hazard under the general duty clause. *Id.*

As noted, the Secretary defines the hazard here as subjecting workers "engaged in staging and positioning aircraft" to "being struck and crushed by the aircraft." (Citation 1.) United has policies to mitigate hazards, such as being struck or crushed by aircraft, during tow operations. (Tr. 131, 277-78, 427, 443-44, 850; Exs. C-4, R-3.) These are set out in United's Global Safety Standards (GSS) and its General Maintenance Manual (GMM), specifically GSS-06040604 PIT / GSE / Motor Vehicle Safety (Motor Vehicle GSS), GMM-11-05-20 (GMM 20), and GMM-11-05-25 (GMM 25, and collectively with Motor Vehicle GSS and GMM 20, "Tow Safety Procedures"). Tow Safety Procedures include policies to mitigate the specific risk of a worker being run over or struck by a plane during tow operations. (Tr. 23-24, 131, 427, 850; Ex. C-4 at 1, 7, 8.)

Supervisors were aware of the work being done and of the stuck-by and crushed-by hazards moving aircraft presented. (Tr. 277, 423-25, 535-36, 657.) United has a job title of "Supervisor." (Tr. 419, 616; Ex. J-2 at 3.) The test for supervisory authority under the OSH Act is not dependent

on how an employer labels a worker. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080-81 (No. 99-0018, 2003) (hourly paid union employee was a supervisor, even though not designated as such by the employer and could not hire or fire other workers). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to the employer." *Tampa Shipyards, Inc*., 15 BNA OSHC 1533, 1537 (No. 86-630, 1992). *See also Access Equip.,* 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (employee who was "in charge" or "like the lead" for one or two other employees was a supervisor for purposes of determining knowledge of the hazardous condition). Applying this test, United's lead technicians were supervisory employees.

Lead technicians supervise and participate in towing operations, including the one that led to severe injuries on November 24th. (Tr. 119-20.) A lead technician involved in the incident explained that tow operations present a hazard of striking or running over a worker and that such operations could lead to death. (Tr. 420, 423-25, 444.) Additional higher-level supervisors oversee at least some tow operations and could participate in moves. (Tr. 125-26, 525, 616-17.) The Senior Manager for Technical Operations at the Worksite could observe tow operations from his office. (Tr. 129, 516, 520.) He acknowledged that tow operations can cause injuries, including being run over. (Tr. 522-24.) Likewise, Mr. Arizmendi testified that tow operations present a risk of injuries. (Tr. 277.)

United was aware of the risk in general and specifically at its Newark, New Jersey location. (Resp't Br. 14 ("United has been aware of the hazards associated with conducting aircraft pushback/towing operations ... and for several years had developed work rules to address the very same hazards"), and 19 ("United had a safety program in place which had specific work rules to address the normal hazards associated with moving an airplane").)

In addition, the airline industry recognized the hazard. Mr. Rodriquez and Mr. Marcille testified that there are industry-wide safety standards recognizing the risks of physical injury during tow operations. (Tr. 131, 421-22, 426, 431, 443-44.) Mr. Arizmendi was unaware of any airline lacking procedures for tow operations. (Tr. 279.) Mr. Arizmendi and Mr. Marcille knew of workers employed by other airlines being run over or struck by aircraft during tow operations. (Tr. 276-77, 423-25.)

Government guidance also noted hazards associated with towing operations. Federal Aviation Administration (FAA) Advisory Circular No. AC 00-65 (Aug. 27, 2009) (FAA Advisory 65) provides guidance for "towbar and towbarless movement of aircraft." (Ex. C-7 at 2.) In a typical move, the "towbar" connects the tug to the nose landing gear of an aircraft. (Tr. 254; Ex. C-4 at 2-3.) FAA Advisory 65 notes "several reported cases (documented and undocumented) of near incursions and mishaps involving tug operators moving aircraft." (Ex. C-7 at 3.) When discussing "preventing injuries to personnel and damage to aircraft during ground handling," Advisory 65 states, "the aviation industry has found, through experience, that the potential for damage and/or injury if a mishap occurs is high." *Id.* Similarly, a subsequent FAA Advisory Circular from 2015 notes the risk of "injury or death" for workers towing aircraft on the ground.[11] It cites the possibility of aircraft colliding with people or other objects. (Ex. C-6 at 2 (noting "accidents" occurring during towing operations and involving aircraft and "personnel"), 26 (definition of "accident" as used in the document includes collisions between aircraft and a person).)

[11] Ex. C-6 at 2. FAA, Ground Vehicle Operations to Include Taxiing or Towing an Aircraft on Airports, AC No. 150/5210-20A (Sept. 1, 2015), was admitted as Exhibit C-6.

Norman Kopicko, Jr. is United's Managing Director for Aircraft Maintenance, Northeast Region, and was United's authorized representative at the counsel's table during the hearing. (Tr. 580-81.) Mr. Kopicko explained that airlines receive FAA advisory circulars.[12] United incorporates these advisories into its policies and operations. (Tr. 843-44, 847, 951.) As the titles specify, these FAA documents are advisory. Still, they support the Secretary's contention that stuck and crushed by hazards when towing aircraft are recognized hazards in the relevant industry and by United. *See Beverly*, 2000 WL 34012177, at *31 (advisory document can bear on industry recognition of a hazard).

The Secretary established the presence of a recognized hazard to which employees were exposed.

4. Knowledge

Frequently, evidence of hazard recognition also supports finding that the employer had knowledge of the hazardous condition in its Workplace. That is true in this matter.

Simply put, tow operations are "dangerous." (Tr. 536.) United knew employees were tasked with moving aircraft on the ground and that this work presented risks of being stuck by or crushed by the aircraft. (Tr. 130-31, 420, 499, 536.) Supervisors work in an office with windows with views of the hangar floor. (Tr. 419, 480.) They regularly oversee tow operations and are expected to do so when in the vicinity. (Tr. 124-26, 519; Ex. C-1 at 9, 11.) As noted, United was aware of injuries occurring during tow operations, including workers employed by other

[12] Tr. 843-44; Exs. C-6, C-7. These FAA advisories were timely identified and were admitted into evidence. (Tr. 76-82.) The Secretary did not need to rely on these documents due to the admissions and extensive evidence that United recognized the hazard. Still, neither their admittance nor the Secretary's reference to them in her post-hearing brief is inappropriate. *See Beverly Enterprs*., No. 91-3144, 2000 WL 34012177, at *31 (OSHRC Oct. 27, 2000) (consolidated) (advisory document can bear on the issue of industry recognition of a hazard).

companies being run over or struck by aircraft. (Tr. 276-77, 423-25.) United's work rules and supervisors' understanding of those rules support the finding that the employer had knowledge of the hazard. (Tr. 130-31, 536.) *See Roadsafe*, 2021 WL 5994023, at *4, 6 (work rules can establish recognition of a hazard); *Peacock*, 26 BNA OSHC at 1592 (management's awareness of work methods used supported finding knowledge).

The Secretary notes that in addition to the knowledge of the hazard, Respondent also knew that its abatement measures were not being implemented. (Sec'y Br. 27-33.) Knowledge is established if the record shows the employer knew or could have known the "hazardous condition" existed in its workplace. *Peacock,* 26 BNA OSHC at 1589, 1592. Establishing knowledge does not require showing that the employer was aware it was violating the OSH Act. *See, e.g.*, *Peacock,* 26 BNA OSHC at 1589, 1592; *PSP Monotech Indus*., 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008) (knowledge requirement relates to knowledge of the hazardous condition).

Although such a showing was not required, the Secretary established that the employer knew there were significant gaps in how United's abatement for the cited hazard was implemented at the Worksite. (Ex. J-6A.) Lead technicians were involved in most tow operations, and supervisors regularly observed them. (Tr. 120, 123-26, 229, 412, 418; Ex. C-1 at 9.) Mr. Marcille was involved in the November 24th move, for which there was no pre-move huddle, no assignment of a safety guide, and no one indicated the safety checklist was completed. (Tr. 210-12, 229, 506-7.) The failure to adhere to aspects of the Tow Safety Procedures was routine. Management was aware of past failures to hold crew briefings and adhere to the Tow Safety Procedures. (Ex. J-6A.) Managers had meetings where information regarding continued non-compliance was shared. (Tr. 158-61, 631-32; Ex. J-6A.) United argues that the worker-led audits did not identify the workers

who violated the rules. (Resp't Br. at 8.) The anonymity of the non-compliance does not remove the knowledge the supervisors gained.

The Secretary established the presence of a recognized hazard capable of causing serious injury or death, and United had knowledge of the hazard's presence at its Worksite.

B. Abatement

1. United's Existing Abatement, as implemented, was Inadequate

Where an employer has undertaken measures to address the cited hazard, the Secretary, in establishing the efficacy of her proposed abatement, must show that the employer's measures were inadequate. *Postal Serv.*, 21 BNA OSHC at 1773-74; *Cerro Metal Prod. Div.*, 12 BNA OSHC 1821, 1823 (No. 78-5159, 1986). United had policies and procedures for moving aircraft in and around airport hangars at the Worksite. (Tr. 84-85, 130-32, 209, 275, 278, 282, 356-57, 425-28, 608-9, 626, 709, 728-29, 846, 850-51; Ex. C-4.) The policies set out the "rules" employees are required to follow. (Tr. 846-49; Ex. C-4.) Some aspects of these policies were focused on protecting the aircraft from damage and others related to worker safety.

The Secretary focuses on three aspects of the Tow Safety Procedures: (1) having a pre-move crew briefing (safety huddle), (2) establishing and using a safety guide, and (3) using a checklist before commencing a tow operation. The Secretary established that these actions routinely did not occur at the Worksite during the time the Citation references. United's abatement efforts to address the hazard of being stuck or crushed by aircraft during tow operations, as implemented, were inadequate to protect workers from the known cited hazard. *See SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1206, 1215 (D.C. Cir. 2014) (finding existing safety procedures inadequate); *BHC Nw. Psych. Hosp., LLC v. Sec'y of Labor*, 951 F.3d 558, 565 (D.C. Cir. 2020) (*BHC*) (finding incomplete and inconsistently implemented safety protocols were inadequate to

address the cited hazard); *Roadsafe*, 2021 WL 5994023, at *6 (employer's claimed abatement measure not adequate when it conflicted with the company's safety rules).

a. Crew Briefing

United policies called for pre-move crew briefings during which roles and responsibilities are assigned and acknowledged. (Tr. 445, 615, 621, 771; Exs. C-4, J-2 at 2-3.) The injured worker explained that the purpose of the crew briefing was to negate risks. (Tr. 34.) It is important because, among other reasons, the safety guide and other positions are established during the briefing. (Tr. 145, 152-53, 290-91, 443-44, 616, 621; Ex. J-2 at 2.) Holding a crew briefing is an "essential" part of a tow operation. (Tr. 444, 621.) It is "unsafe" to move an aircraft without a crew briefing. (Tr. 146, 291-93, 443-44, 446, 535, 552, 621.) This was known industry wide. (Tr. 444.)

Two people who participated in the November 24th move testified: the injured worker and Mr. Marcille. Neither indicated that he had engaged in a pre-move discussion or huddle. (Tr. 40-41, 45, 211, 254, 316, 451; Exs. J-2 at 1-3, J-3 at 2.) Nor did they testify that anyone was assigned a role for the move or that a safety guide had been designated as the lead for the tow operation. (Tr. 40-41, 45, 506.) The injured worker indicated that Mr. Marcille "briefly" made a "general announcement in the break room" that the workers would be moving an aircraft from inside the hangar to outside, placing it in front of a different hangar. (Tr. 40-41.) Neither Mr. Marcille nor anyone else said that the breakroom announcement constituted a crew briefing or met the requirements for one. (Tr. 40-41; Exs. C-3, C-4, J-2 at 1-3, J-3 at 2.)

It would be unusual for a crew briefing to occur in the break room. (Tr. 617.) Lines of sight are established during the crew briefing, so, typically, the briefings occur right around the aircraft to be moved. (Tr. 144-45, 617.) The breakroom announcement did not meet the criteria for a crew briefing under the Tow Safety Procedures. (Exs. C-4, J-2 at 1, J-3 at 2.) First, it is

unclear if all team members were in the break room when the announcement was made. (Tr. 45-46.) Second, each team member is supposed to acknowledge "roles and responsibilities" as part of the briefing. (Tr. 445-46; Ex. C-4 at 1; Resp't Br. 28.) Each crew member must know and accept his or her role. (Tr. 446; Ex. C-4 at 1.) This did not occur. (Tr. 40-41, 45, 506-7; Exs. C-3, J-2 at 1-3, J-3 at 2.)

Respondent claims a crew briefing occurred because people moved into positions. (Resp't Br. 3-4, 28-29; Tr. 493, 782.) The evidence does not compel such a finding. Just because workers started going in different directions does not mean there was a crew briefing, roles were assigned, someone was acting as the safety guide, or anyone went over the checklist. (Tr. 34, 41; Exs. J-2 at 2, J-3 at 2.) Workers with an understanding of the task can move into positions without discussing the safety equipment and assigning roles for the move. (Tr. 33-34, 41; Ex. J-2 at 2.) No one involved in the November 24th incident testified that there was a briefing where each person acknowledged what role they were assuming or confirmed the responsibilities he was assuming. (Tr. 445-46; Ex. C-4 at 1.) Notably, no one indicated he was the safety guide or specified that he was supposed to give the "all clear" to commence movement, a key safety guide responsibility. (Exs. C-3, C-4.) Being in a position is not the same as acknowledging who would give the all-clear and understanding whether you were just going to close the door or were supposed to be the tug operator's second set of eyes. *Id.* The fact that some workers started an aspect of the task does not mean all the safety protections set out in the Tow Safety Procedures were in place.

The workers' testimony about a lack of a crew briefing on November 24th is consistent with United's post-incident investigation. (Tr. 654, 802-3; Exs. J-2 at 1 ("no huddle was conducted), J-3 at 1-2, J-4 at 2 ("there was no huddle conducted").) The failure to have a crew briefing before a tow procedure that day was not an aberration. (Tr. 222, 330, 657.) Such briefings occurred "very,

very rarely" at the Worksite. (Tr. 30-33; Ex. J-3 at 2.) Instead, workers would look around to see what roles are already taken and then assume another position. (Tr. 33-34, 40.) For example, if no one was near the aircraft's wing tip, a worker might move to that area. (Tr. 33-34, 39-40.) Workers repeatedly completed tow operations in a manner less safe than what is called for by the Tow Safety Procedures. (Tr. 30; Exs. J-2, J-3.) The Secretary showed that United failed to fully implement abatement through crew briefings before all aircraft towing operations.

b. Safety Guide

During all moves in the hangar, one person was to be assigned the role of Safety Guide before the tow commenced. (Tr. 152, 624; Exs. C-4 at 3, C-5.) This is an important step in the Tow Safety Procedures. (Tr. 22-23, 152, 309-10, 624.) The safety guide communicates with the tug operator and informs that person when to initiate the operation. (Tr. 770-71, 774-75; Ex. C-4 at 4.) In particular, the safety guide is "responsible for the tow operation," including relaying "information from other move team members to the Tow Tractor Operator," ensuring "all tow team members are in place prior to aircraft movement," and verifying the "tow path is clear." (Tr. 152; Ex. C-4 at 4.)

When United's counsel questioned Mr. Rodriquez, he indicated that Mr. Marcille was a guide person for the move. (Tr. 252.) Mr. Arizmendi was less definitive than Mr. Rodriquez. When questioned by United's counsel, he indicated that Mr. Marcille was the "lead" for the operation and was "following the requirement of a safety guide." (Tr. 760.) However, Mr. Marcille did not give clearance for the operation to commence, which is the safety guide's responsibility. (Tr. 770-71.) Nor did Mr. Marcille tell anyone he was the guide person for the move. (Tr. 782; Ex. C-3.) No one assigned Mr. Marcille the role, and he did not think he was the safety guide for the operation. (Tr. 493-94, 506-7; Ex. C-3.)

Like Mr. Arizmendi, Mr. Kopicko also stopped short of saying Mr. Marcille was the safety guide for the operation. (Tr. 975.) In his assessment, Mr. Marcille was the lead and, in opening the hangar door, was "acting in a guide person capacity." (Tr. 975, 977.) But Mr. Kopicko did not contend that Mr. Marcelle took on or was assigned the role of safety guide in a crew briefing or in another manner. He did not claim that Mr. Marcille was performing all of a safety guide's typical duties or had informed anyone he was acting as the safety guide before the tow operation commenced. (Tr. 22-23, 152, 309-10; Ex. C-4.) And, Mr. Kopicko acknowledged that the tug operator started to move the vehicle without a guide person in place. (Tr. 987.)

Mr. Marcille was present and involved in the November 24th incident. He definitively stated that he was not the safety guide and could not confirm who, if anyone, was in that role during the move that led to injuries. (Tr. 506-7; Exs. C-3 at 3, J-2 at 2-3.) He was walking toward the hangar door when IW's foot was run over, but he was not serving as the safety guide or fulfilling those responsibilities for the move. (Tr. 483, 493-94, 506-7; Exs. J-2, C-3.) His testimony on this point is consistent with his statement to local authorities shortly after the incident and Mr. Arizmendi's testimony. (Tr. 749-50, 770-71; Ex. C-3 at 3.)

Mr. Rodriquez's testimony contrasted with United's final investigative reports, as well as earlier drafts, and the witness statements given shortly after the incident to the Port Authority Police Department. (Tr. 208-9; Exs. C-3, J-2 at 2, J-3 at 2, 5, J-4 at 2.) The testimony of Mr. Marcille and the other evidence is credited over Mr. Rodriquez's assertion that Mr. Marcille was the safety guide for the operation. No one indicated he had been given that role or was serving in it for the November 24th move preceding the OSHA inspection. (Tr. 39, 493-94, 506-7; Exs. C-3, J-2 at 3.)

As with crew briefings, the failure to designate a safety guide for the move that led to injuries was not unusual. About half the time, no safety guides were in place during tow operations. (Tr. 225, 806-7; Ex. J-3 at 2.) The Secretary established that this abatement method was not adequately implemented at the time of the inspection.

c. Checklist

United has a checklist designed to take workers through the appropriate procedures for certain operations, such as moving aircraft. (Tr. 133, 283, 431, 851; Exs. C-4 at 1, 2, 4-5, C-5.) The Tow Safety Procedures require workers to use the checklist for every tow procedure. (Ex. C-4 at 1.) The checklist has eight items. (Ex. C-5.) It reminds workers of key steps to ensure everything is in place before the move and the operation safely occurs. (Tr. 283, 431; Exs. C-4, C-5.) For instance, the first item is "Crew Briefing." (Ex. C-5.) The checklist also notes that the tow truck operator is not supposed to move the vehicle until everyone is in position. *Id.* Using the checklist with every tow operation helps to prevent injuries. (Tr. 283, 431-32; Ex. C-4.)

There was a physical copy of the checklist at the Worksite, and workers knew it was available.[13] However, there is no evidence it was used before the move that led to an injury. No one testified that the team went through the checklist before the move on November 24th that prompted OSHA's investigation. (Tr. 55, 740.)

Further, its use overall was not consistent. (Tr. 137-38, 441; Ex. J-6.) The only checklist in evidence is a blank version of the document. (Ex. C-5.) One worker indicated they were expected to check off each step, but he did not know where completed checklists went or if they were reviewed. (Tr. 472, 474, 546.) The injured worker said he had never seen a checklist filled

[13] Tr. 37-38, 54-55, 739-40, 852, 856-69; Exs. R-4, C-5, J-6 at 1. "Typically," there's a laminated copy of the checklist in the tow vehicle. (Tr. 740.)

out, i.e., with checks or other marks in the boxes. (Tr. 38; 54.) Another worker agreed that the checklist form was not always filled out. (Tr. 442.) Mr. Arizmendi testified that the requirement was to go through each thing on the checklist, but no one had to mark or read aloud any item. (Tr. 377-78.)

Using Mr. Arizmendi's more generous definition of what it means to "use the checklist" does not change the assessment of the extent to which this abatement was in place before the inspection. The safety manager acknowledged that employees did not use the safety checklist at all times. (Tr. 137-38.) This failure to follow procedures was known, and there is no evidence of adequate enforcement or discipline for failing to use the checklist before the inspection commenced. (Exs. J-6, R-11.) The Secretary showed that this aspect of Respondent's existing abatement was inadequate.

d. Existing Abatement was Inadequate

The general duty clause requires employers to "take all feasible steps" to protect workers from recognized hazards. *Gen. Dynamics Corp., Quincy Shipbuilding Div. v. Sec'y of Labor*, 599 F.2d 453, 464 (1st Cir. 1979). In its brief, Respondent tries to characterize establishing United's enforcement of work rules as the Secretary's burden. (Resp't Br. 37.) The Secretary's burden is to show that the methods "undertaken" by the employer to address the hazard were "inadequate." *See Postal Serv.,* 21 BNA OSHC at 1774. In other words, was the existing abatement effective at addressing the cited hazard? *Id.* In contrast, it is the employer's burden to show adequate communication and enforcement of work rules if it wishes to make out the unpreventable employee misconduct defense. *W. World, Inc. v. Sec'y of Labor,* 604 F. App'x 188, 191 (3d Cir. 2015) (unpublished); *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1984) ("we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions"); *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d

840, 845-46 (D.C. Cir. 2004) (employer's ambivalence regarding fall protection defeated employee misconduct defense).

The abatement requirement was added to ensure that the OSH Act did not result in strict liability. *Nat'l Realty & Constr. Co. v. Sec'y of Labor*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). It was a way to limit OSHA's authority to cite hazards for which there is no way to eliminate or materially reduce the hazard. *Id.*

Respondent seeks to broaden this limitation substantially. The test the Commission developed for assessing violations of the general duty clause does not include an exception for entities that choose to leave enforcement of safety policies to others. *Well Sols., Inc*., 17 BNA OSHC 1211, 1214 (No. 91-340, 1995) ("the Act places ultimate responsibility for compliance with its requirements on the employer, who cannot contract away those duties to another party"); *PBR, Inc. v. Sec'y of Labor*, 643 F.2d 890, 895 (1st Cir. 1981) (the employer "cannot escape responsibility for the violation because it warned its employees to exercise caution"). The OSH Act requires employers to "ensure" a safe workplace "free" from recognized hazards. 29 U.S.C. § 654(a); *Nat'l Realty*, 489 F.2d at 1266 (Congress intended to require the elimination of recognized and preventable hazards). Employers have flexibility in how they accomplish this requirement but cannot alter the requirement to provide a safe workplace free from recognized hazards. *Id.*

It is not disputed that United trains workers about safety, including the Tow Safety Procedures. (Tr. 695, 698-99, 808-9, 859-69; Ex. R-4.) The injured worker and lead technician appeared to understand what the Tow Safety Procedures involved, such as conducting briefings, having a safety guide, and using the checklist. (Tr. 22, 28-29, 36-37, 443-44, 477-78.)

United looks for violations of the Tow Safety Procedures and other safety violations. (Tr. 842-43, 875-77, 883-901; Exs. J-6A, R-6 thru R-11, R-20.) Relevant to this matter, Respondent's management conducts audits concerning crew briefings (Exs. R-7, R-10), using the checklist (Ex. R-11), "Aircraft Movement Policy" (Ex. R-8), and "Post Move Activity" (Ex. R-9). (Tr. 889-901; Exs. R-6, R-7, R-8, R-9, R-10.) Mr. Kopicko stated that the policy was for supervisors to conduct two audits of tows every 27 days. (Resp't Br. 7-8, 15-16; Tr. 876-77.) However, none of the audit records provided reflect that frequency of auditing for 2021 in the months prior to the incident. (Exs. R-6 thru R-11.) Some of the management led audit data provided by Respondent begins after OSHA's investigation commenced. (Ex. R-11.) The rest includes few examples of audits within the months preceding the November 24, 2021, incident. (Ex. R-6 (appears to refer to two audits in 2021); R-7 (three audits in 2021, with the most recent being months before the incident), R-8 (four audits in 2021), R-9 (two audits in 2021 before November 24th), R-10 (two audits in 2021 before November 24th), R-11 (showing no audits in 2021 prior to November 24th).)

The regularity with which the Tow Safety Procedures were not adhered to establishes that effective abatement for the cited hazard was not in place. *See Chevron Oil Co.*, 11 BNA OSHC 1329, 1333 (No. 10799, 1983) (finding employer's abatement approach inadequate partly because of the lack of accurate measuring and monitoring of data collected through inspections). It calls into question United's commitment, prior to the inspection, to correct identified violations of safety protocols that mitigate the hazard of being struck or crushed by aircraft during tow operations. Often, there were no crew briefings before moves. (Tr. 31-33, 39, 210-12, 225, 806-7; Ex. J-3 at 2.) Frequently, moves lacked a designated safety guide. *Id.*

Workers may have acted as safety guides without being assigned the roles. Still, without the briefings, there can be confusion about who is in what role and who is responsible for giving

the "all clear" to begin movement of the tug and aircraft. (Tr. 28-29, 59, 145; Ex. C-4 at 5.) For example, some claimed Mr. Marcille was the safety guide on November 24th, but he did not believe he was the safety guide. (Tr. 493, 506-7; Ex. C-3.) One worker thought the tug operator was the lead instead of the safety guide. (Tr. 44; Ex. C-4.)

At this Worksite, deviating from the written program was normal. (Tr. 211, 325-26, 806-7; Exs. J-3 at 2, 5, J-4 at 3, J-6 at 12, 18, 26.) Respondent appears to acknowledge this. However, it claims it could not fully enforce its safety policies because of a collective bargaining agreement (CBA) and an agreement with the FAA. (Tr. 15; Resp't Br. at 38-43; Resp't Reply Br. 1-2, 6, 9, 17-18.)

Through collective bargaining, United agreed to limit how it would discipline certain actions by the subset of workers covered under the CBA. (Tr. 930-31.) In particular, United agreed to provide various procedural safeguards before imposing the harshest discipline.[14]

United does not claim it had no enforcement ability, and the record shows it could enforce workplace policy and procedure. (Resp't Br. 38.) It retained its ability to implement policy and utilize an array of work rule enforcement tools. (Tr. 471-72, 637-39, 650, 883, 888-89, 931, 933-34; Ex. R-6.) It could coach and discipline employees. (Tr. 471, 521, 637-39, 648-50, 958-59.) It could fire employees for not following the rules and take other actions. (Tr. 471, 934-35.) It could intervene when audits uncovered non-compliance with policies. (Tr. 882-83, 886, 891-94; Ex. R-6.) United's claim that the Secretary could not show inadequate abatement because of the CBA is rejected.

[14] Tr. 388-89, 570-71, 930-31, 934; Resp't Br. 43; Exs. R-1, R-2. The CBA is not in the record.

Having found that the CBA does not change the finding of a lack of effective abatement in place, we turn to United's claim that its ability to enforce its work rules was restrained by its agreement with the FAA. (Tr. 937; Resp't Br. 39-43.) The FAA and OSHA both have responsibilities related to the aviation industry. In 2000, the two agencies entered into a Memorandum of Understanding (2000 MOU) "to enhance safety and health in the aviation industry." *Memorandum of Understanding between The Federal Aviation Administration U.S. Department of Transportation and The Occupational Safety and Health Administration U.S. Department of Labor* (Aug. 8, 2000) https://www.osha.gov/laws-regs/mou/2000-08-09. As the 2000 MOU explains, OSHA enforces OSH Act requirements for maintenance and ground support personnel, while the FAA is responsible for the safety of civil aircraft in operation. *Id.* "In operation" refers to the time between when the aircraft is first boarded by a member of the flight crew in preparation for a flight until the completion of the flight. *Id.* Outside of that time, OSHA enforces OSH Act requirements. *Id.* There is no contention that the aircraft that ran over a technician's foot was "in operation" within the meaning of the 2000 MOU.

As the FAA has acknowledged OSHA's authority to regulate maintenance and ground personnel in the 2000 MOU, Respondent points to a different agreement. It cites a voluntary agreement between United and the FAA and argues it precludes the Secretary from establishing a violation of the general duty clause under the OSH Act. (Tr. 937; Resp't Br. 39-42; Ex. R-2 ("Voluntary Withdrawal".) In 2020, United and the FAA entered into their own Memorandum of Understanding (TSAP MOU). (Ex. R-2.) OSHA is not a party to the agreement. *Id.* In the TSAP MOU, the FAA agreed to limit enforcement actions it would take related to reported violations of FAA requirements and other aircraft safety concerns reported as part of a voluntary program. *Id.* at 2, 5, 8. Under the process, a worker who participates in or becomes aware of a violation of Title

14 of the Code of Federal Regulations or a general safety concern can file a report under the Technical Operations Safety Action Program (TSAP). (Tr. 193-94, 572-73, 935-36; Exs. R-1, R-2.) Such reports are reviewed by the Event Review Committee (ERC). (Tr. 194, 937-38, 940-41; Ex. R-2.) United has a representative on the ERC. (Tr. 194; Ex. R-2 at 6.) The ERC evaluates the TSAP report. (Tr. 194.) Sometimes the ERC indicates more training or other responses are necessary. (Tr. 193-94, 502, 649; Ex. R-2.) For example, if a technician forgets a step during maintenance, the ERC will require the aircraft to be checked. (Tr. 194, 573.)

United agreed that when the ERC accepts a TSAP, it will refrain from taking certain disciplinary actions, and the FAA agreed to limit enforcement of FAA (Title 14) requirements. (Tr. 503, 647-49; Exs. R-1, R-2.) Specifically, United will not discipline a person for the action of filing a TSAP.[15] Non-disciplinary actions such as training and coaching are not precluded by the TSAP MOU. (Tr. 194, 502-3, 573, 650.) Further, while the act of filing a TSAP is protected, it does not mean any behavior described therein is immune from disciplinary action. (Ex. R-2.) The TSAP does not preclude all corrective action or provide complete automatic protection from discipline. (Tr. 194, 502; Ex. R-2.) "It's not like a get-out-of-jail-free card." (Tr. 502.)

Most of the workers involved in the November 24th incident filed TSAP reports to self-disclose activities related to the aircraft move. (Resp't Br. 42: Exs. R-1, R-2.) At one point, Mr. Kopicko claimed that "all" the workers involved filed such disclosures. (Tr. 674.) However, he later clarified that one worker did not. (Tr. 574, 1000; Resp't Br. 42.) What the TSAP reports contained is not in the record. After the incident, United suspended one worker with pay. (Tr.

[15] Mr. Rodriquez indicated that United does not know who filed a TSAP. (Tr. 805.) However, another witness indicated that four of the people involved in the November 24th incident filed TSAPs. (Tr. 1000.) Mr. Kopicko stated that United does not know right away when a TSAP is filed. (Tr. 962-63.) However, he was able to inquire and find out that Mr. Saborido and others filed TSAPs. (Tr. 1000; Ex. R-5.)

999-1000; Ex. R-5.) When United learned the worker filed a TSAP, it ended the suspension. (Tr. 1000; Ex. R-5.)

The ERC can reject TSAP reports but it accepted them in this case. (Tr. 644.) Still, the TSAP filings don't explain United's past lack of enforcement of the Tow Safety Procedures related to crew briefings, safety guides, and using a checklist. Mr. Kopicko initially indicated he did not believe the workers involved in the November 24th move had violated United's safety policies. (Tr. 646-47, 1007-8.) Mr. Arizmendi believed one worker committed misconduct. (Tr. 770.) He failed to offer a coherent explanation of why the failure to have a safety huddle, appoint a safety guide, and follow the checklist was the fault of one worker. (Tr. 770-71.) Mr. Rodriquez believed policies and procedures were violated but did not specify who violated them. (Tr. 802-4.)

Accepting that the TSAP MOU explains why United ended one worker's suspension after the November 24th incident does not compel finding that United had adequate abatement in place. The Secretary is not only relying on one incident to establish the abatement's inadequacy. Audit records show routine failures to comply with Tow Safety Procedures. (Exs. J-3, J-6A.) There is no evidence of any prior TSAP filings related to these identified instances of non-compliance with the Tow Safety Procedures. Mr. Kopicko indicated there were only three or four instances when he believed he could not discipline an employee because of the TSAP MOU with the FAA. (Tr. 828, 966.) Deviating from the Tow Safety Procedures was endemic at the Worksite at the time of the inspection. (Exs. J-3 at 5, J-4 at 3, J-6A.) Yet, failing to have a crew briefing, a designated safety guide, or use the checklist did not result in adequate corrective action despite the lack of TSAP reports.

Judges consider what was being done to address the hazard, not merely what the employer's policies or procedures were. *BHC*, 951 F.3d at 565 (finding inadequate abatement

when the employer had policies but did not fully implement them). Although discipline can establish enforcement of a safety program, in assessing the adequacy of an employer's abatement, the test is the degree to which the abatement is in place. *Nelson Tree Servs., Inc. v. Sec'y of Labor*, 60 F.3d 1207, 1211 (6th Cir. 1995) (the fact that employer "incorporated the relevant" safety measures "into its own safety manual does not satisfy its obligation" under the general duty clause). To abate the hazard to the extent feasible, having written policies or procedures is insufficient if they are routinely ignored. *Id. See also BHC*, 951 F.3d at 565; *UHS of Westwood Pembroke, Inc*., No. 17-0737, 2022 WL 774272, at *39-40 (OSHRCALJ, Mar. 3, 2022) (finding existing abatement inadequate when employer did not implement the measures it had identified as being part of its abatement program), *aff'd*, No. 22-1845, 2023 WL 3242988 (3d Cir. May 4, 2023) (unpublished).

The examination focuses on whether the abatement the employer claims to have adequately addressed the hazard at the time of the Citation. *Postal Serv.,* 21 BNA OSHC at 1773-74 (Secretary failed to show that alternative reflective vests offered more protection than the ones the employer was already providing). In other words, was the employer's abatement in place, or did it exist "mainly on paper." *BHC Nw. Psych. Hosp., LLC*, No. 17-0063, 2019 WL 989734, at *42 (OSHRCALJ Jan. 22, 2019) (finding abatement inadequate when employer "failed to implement the policies it had on paper"), *aff'd*, 951 F.3d 558 (D.C. Cir. 2020). In *BHC*, the employer had safety procedures but failed to take sufficient measures to ensure the protocols were used consistently. 951 F.3d at 565. Likewise, in *SeaWorld*, certain safety measures were used only some of the time. 748 F.3d at 1215. The employer's failure to ensure their use throughout its facility supported affirming the general duty clause violation. *Id.* The undersigned is confronted with an analogous situation. The employer identified abatement measures but had them in place only some of the time.

The inadequate abatement at the Worksite was not caused by United's voluntary entry into the TSAP MOU or the CBA. When it chose to act, United was able to implement corrective action. (Tr. 212, 883; Ex. R-6.) For example, the checklist requirement began to be followed "to the Tee" after a worker suffered serious injuries.[16] Mr. Marcille, as a lead technician, acknowledged he had technicians follow the rules and could stop work if they were not doing so. (Tr. 396.) Despite its ability to implement procedures, United did not act until deviance from the procedure was normalized and OSHA's investigation commenced. (Tr. 471-72; Ex. J-4.) The Secretary showed that United's pre-citation abatement for the cited hazard was inadequate.

2. Feasible and Effective Abatement

Having shown that the employer's approach to the hazard was inadequate, the final element of the Secretary's burden is the requirement to show at least one feasible and effective method to materially reduce the cited hazard that the employer could have taken. *Pembroke*, 2023 WL 3243988, at *1, n.2. The method identified by the Secretary must be capable of being done and effective at materially reducing the hazard. *Arcadian*, 20 BNA OSHC at 2011. The Secretary does not have to show that the abatement would eliminate the hazard. *Id*.

The Secretary calls for United to "follow all requirements for aircraft movement operations and procedures set in the United Airlines company training policies … ."[17] Specifically, the

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[16] Tr. 454-55. The management-led audits started in 2019. (Tr. 896.) Respondent's audit records reflect significantly more audits in the months after November 24, 2021. (Tr. 889-900; Exs. R-7 (showing 3 audits in 2021 and 12 in 2022), R-8 (showing 4 audits in 2021 and 12 in 2022), R-9 (showing 2 audits in the months preceding November 24, 2021, and 11 in the year after), R-10 (showing 3 audits in 2021 and 10 in 2022) and R-11 (showing 19 audits in December 2021 following the start of OSHA's investigation). Respondent did not provide any records of management-led audits of the checklist requirement for the time before OSHA's investigation commenced. (Tr. 889-901; Ex. R-11.) In contrast, the worker-led audit information covers the years 2020 through 2023. (Ex. J-6A.)

[17] In full, the Citation states:

> Among other feasible and acceptable methods of abatement are to follow all requirements for aircraft movement operations and procedures set in the United Airlines company training policies

Secretary identifies three practices from the Tow Safety Procedures: having crew safety briefings, using a designated safety guide, and using the tow safety checklist. (Sec'y Br. 14.)

> GSS-06040604 PIT / GSE / Motor Vehicle Safety, GMM-11-05-20 and GMM-11-05-25 to include but not limited to:
>
> 1.) GSS-06040604 Section 3-B (item 3) - which requires local safety personnel to assist management with ensuring that employees in their areas of responsibility are in compliance with this standard and any additional governmental regulations.
>
> 2.) GSS-06040604 Section 3-C (item 6) - which requires local management with ensuring all safety requirements set forth within this standard are performed in accordance with the standard as well as any and site specific standards, regulations, or work methods.
>
> 3.) GMM-11-05-20 Section 2 -B (items 1-3) which requires a mandatory tow team crew briefing for all towing operations. The briefing must include (but not limited to) (1) the aircraft status, destination and final parking spot, (2) Roles / Responsibilities acknowledged by all tow team members, (3) Potential threats along path of travel i.e. obstacles, light poles, GSE, etc.
>
> 4.) GMM-11-05-20 Section 2 -H - which requires that the aircraft will not be moved until the required number of personnel are present, briefed, and in position for safe movement.
>
> 5.) GMM-11-05-20 Section 2 -L - which requires the tow tractor operator to keep frequent observation of the aircraft to ensure it is tracking properly while vigilant to any additional tow team members present. If the safety guide or the tow tractor operator (when in-command) lose contact with any tow team member, the tow will come to an immediate stop.
>
> 6.) GMM-11-05-20 Section 2 -O - which requires when maneuvering the aircraft in close quarters (25 feet or less), wing walker (s) and / or tail walker (s) will be used to assist the tow team.
>
> 7.) GMM-11-05-20 Section 3 -B (item 3) which requires communications between the entire tow team must be established prior to initiating the tow. Tow Team Warning Systems (TTWS) or their equivalent are required when these systems are available in conjunction with standard hand signals. If TTWS are not available, local management will ensure that acceptable alternate means of communications for the tow team is utilized to accomplish the move.
>
> 8.) GMM-11-05-20 Section 3 -C (item 1-5) which requires the Safety Guide to maintain a safe position in view of the tow tractor operator and wing / tail walker(s), Relays information from other move team members to the Tow Tractor Operator, Responsible for the Pre-Tow crew briefing (huddle), Ensures all tow team members are in place prior to aircraft movement, Verifies tow path is clear and Is the only team member authorized to give the "all clear to move" order indicating to all team members that safe movement can commence. The Tow Tractor Operator Tow Tractor Operator is responsible for determining who will be responsible for ATC communications, ensures tow team member (s) are in place prior to aircraft movement and verifies tow path is clear.

(Ex. J-1 (punctuation as in original).) At the hearing and in her briefs, the Secretary focused on three requirements set out in the Tow Safety Procedures: (1) having a pre-move huddle (crew briefing), using a safety guide, and using a tow safety checklist. (Sec'y Br. 14.) Because the Secretary established that those three measures, individually and taken together, would materially reduce the hazards associated with tow operations, the undersigned need not address the Secretary's additional proposals. *See Pembroke*, 2022 WL 774272, at *8-12.

a. Technical Feasibility

Put simply, the Secretary must show that the abatement is "capable of being done." *SeaWorld*, 748 F.3d at 1215 (concluding that "abatement is feasible when it is economically and technically capable of being done"). The Secretary met this requirement.

United can implement the Tow Safety Procedures set out in the Citation. (Tr. 154, 156, 308-9, 447-48, 478-80, 531, 621, 630; Exs. J-2, J-3, J-4.) None of the proposed abatement measures are too costly to implement. (Tr. 154, 448-49, 478, 622, 630, 648.) In fact, there are no costs associated with holding a safety briefing or completing a tow checklist before each tow operation. (Tr. 151, 154, 448, 476, 530, 532, 622.) It is not difficult to complete the tow safety checklist before every tow operation. (Tr. 476, 530-32; Ex. R-11.) United has enough personnel for there to be a safety guide for each tow operation. (Tr. 308-9, 630; Exs. J-2 at 2, J-3 at 4, J-4 at 2.) It had enough personnel to implement all the proposed abatement methods without altering its flight scheduling obligations. (Tr. 149-50, 156, 308-9, 447-48, 476, 478, 530, 621-22, 630; Exs. J-2 at 2, J-3 at 4, J-4 at 2.)

Respondent offers various theories about why it could not implement the proposed abatement. Witnesses refuted these arguments. Supervisors acknowledged that the proposal was affordable and could be implemented. United's partial use of crew briefings, safety guides, and the safety checklist a portion of the time further strengthens the Secretary's position. Extension of abatement methods already in use has repeatedly been found to be feasible. *See Con Agra, Inc., McMillan Co. Div*., 11 BNA OSHC 1141, 1145 (No. 79-1146, 1983) (finding abatement method feasible when it required the employer to extend existing practices more broadly); *SeaWorld*, 748 F.3d at 1215 (finding abatement feasible when it was in practice in part of the facility); *Wheeling-Pittsburgh Steel Corp*., 10 BNA OSHC 1242, 1246 n.5 (No. 76-4807, 1981) (consolidated)

(finding abatement method feasible when it had previously been used at the facility), *aff'd*, 688 F.2d 828 (3d Cir. 1982) (table). Relatedly, post-inspection changes can establish feasibility. *SeaWorld*, 748 F.3d at 1215 (abatement feasible when employer implemented many of the proposed measures on its own); *Sci. Applications Int'l Corp.*, No. 14-1668, 2020 WL 1941193, at *8 (OSHRC Apr. 16, 2020) (proposed abatement was feasible because employer had put it into effect after the accident). As noted, post-inspection, the requirement to use the checklist was strictly adhered to, at least for a time. (Tr. 454-55; Ex. R-11.)

In *BHC*, the D.C. Circuit upheld abatement measures as feasible when the employer had previously applied them inconsistently at its facility. 951 F.3d at 565 (citing "the employer's failure to extend throughout its workplace the very safety measures it had already applied, albeit inconsistently" when upholding the ALJ's decision to find a violation of the general duty clause). Like in *BHC*, here, the Secretary is calling for the full implementation of the safety procedures United "had already embraced at least on paper." *Id*. *See also Wheeling,* 10 BNA OSHC at 1246 n.5 (finding abatement method feasible when previously used at the facility).

In addition, others in the same industry have adopted similar abatement to the Secretary's proposal. (Tr. 131, 426, 430-31, 443-44, 847.) Mr. Marcille indicated that no airline would move airplanes without first conducting a crew briefing. (Tr. 444.) He also noted the relevant industry's use of a safety checklist before moves are commenced. (Tr. 431-32, 443-44.) The Tow Safety Procedures are also consistent with FAA Advisory 65. (Ex. C-7 at 5.) FAA Advisory 65 notes that tow procedures should include a checklist and provide a sample checklist. *Id.* at 3-5, 13. "Crew Briefing" is the first item on the checklist in FAA Advisory 65. While advisory, the document "contains generally accepted information and safety practices." *Id.* at 3, 13. This general acceptance within the industry further supports the Secretary's position that the proposed

abatement is feasible. *See Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 19 (1st Cir. 1984) (proposed abatement was economically feasible because other employers had implemented the same measure).

The Secretary satisfied the requirement for technical feasibility.

b. Effectiveness

Besides showing that the abatement can be done, the Secretary must also show it will materially reduce the hazard. There is no dispute that the Tow Safety Procedures called for more safety precautions than what occurred during the incident that led to OSHA's investigation. United's own post-incident investigation focused on preventing injuries from happening again. (Tr. 315-16, 654-55, 703; Exs. J-2, J-3, J-4.) The failure to have a crew briefing and a safety guide was part of the "direct root cause" of the incident that led to a worker's very serious injuries. (Ex. J-2 at 3; Tr. 316, 654, 703.) In its assessment, failing to follow the procedural requirement to have a crew briefing and a safety guide "triggered the unwanted event" on November 24th. (Tr. 703-4; Ex. J-2 at 3.) United believed that following its Tow Safety Procedures and conducting crew briefings would prevent injury. (Tr. 277-78, 662; Ex. J-2 at 3.)

As discussed in more detail below, workers attested to the effectiveness of the proposed abatement. Their testimony is bolstered by FAA Advisory 65. (Ex. C-7.) The document notes "several reported cases" of "near incursions and mishaps" while towing aircraft. *Id.* at 3. It explains that the "aviation industry" has found that the identified practices prevent injuries to personnel. *Id.* The identified practices include conducting crew briefings and using checklists. *Id.* at 3, 5, 13.

a. Crew Safety Briefing

During the crew briefing or huddle, roles and positions are determined. (Tr. 28-29.) Crew briefings minimize risks and make towing operations safer. (Tr. 34, 146-49, 426-27, 446-47, 535,

552-53, 556, 620-21, 662.) Failure to complete a crew briefing "is going to put you in a bad spot." (Tr. 553.) It can lead to miscommunication and confusion, which increases the risk of injury during a tow. (Tr. 345-46, 446, 620-21, 662.) As noted above, moving an aircraft without a crew briefing is considered unsafe in the relevant industry. (Tr. 291-93, 443-44, 446, 535, 552, 621.)

The lack of clarity about who was in charge of the tow operations in general and on November 24th illustrates this proposed abatement method's effectiveness. (Tr. 22, 524, 526-27; Exs. C-3, C-4, J-2 at 3.) The injured worker thought the tug operator was the lead and in charge of tow movements. (Tr. 22.) But under United policy, for the type of movement occurring, the safety guide was supposed to be the lead and "in charge" of the move. (Tr. 152, 524, 526-27; Ex. C-4.) On November 24th, the tug operator thought there was a "common understanding" of who was in what role because he and another worker had moved an aircraft earlier in the shift. (Exs. J-3 at 1.) However, the second move involved three different workers. (Exs. J-2 at 1, J-3 at 1, J-4 at 2.) No one was established as the guide person, and there was not a shared understanding of who was in charge of the move. (Tr. 22; Exs. C-3, J-2 at 2, J-4 at 2-3.) Without the crew briefing, workers could be confused about whether each role was assigned and who had what responsibilities. (Tr. 345-46.)

b. Safety Guide

Using a safety guide improves the safety of tow operations for workers. (Tr. 34-35, 426-27.) The safety guide watches the move operation and relays information to the tug operator. (Tr. 23, 152, 513.) Safety guides reduce the risk of injury during a tow. (Tr. 310-11, 451-53.) Not establishing a safety guide before tow operations is "dangerous." (Tr. 529, 563.) Again, the incident that led to injuries on November 24th shows the utility of having a designated safety guide. According to United's report, the tug operator thought he heard the word "Go." (Ex. J-2.) However, no one else reported hearing this. No one indicated there was an "all clear," nor was it

established who was supposed to give that critical instruction. (Exs. J-2 at 2, J-3 at 3, J-4, C-3, C-4 at 5.)

c. Tow Safety Checklist

The checklist reminds workers of key steps, such as did they have a crew briefing and designate a safety guide. (Tr. 377; Exs. C-4, C-5.) Using it mitigates the risk of injuries and exposure to the hazard. (Tr. 139-40, 283, 541-42, 542, 546-47, 612, 615.) Not following the checklist could result in injuries, including being run over by a plane. (Tr. 426-27, 431-32, 476, 546-47.)

d. Secretary Established the Effectiveness of the Proposed Abatement

Mr. Rodriquez asserted that none of the proposed measures would materially reduce the cited hazard. (Tr. 826.) Other supervisors and workers refuted his testimony, and it is rejected. Mr. Kopicko explained that the Tow Safety Procedures facilitate "safe" aircraft moves and mitigate the risk of employee injury, including "struck by" hazards. (Tr. 849-50, 853.) Similarly, Mr. Arizmendi asserted that the Tow Safety Procedures reduce the risk of employee injury if followed. (Tr. 277-78.) Consistent with these witnesses, United notes that if the Tow Safety Procedures were adhered to, the move on November 24th would not have resulted in exposing workers to crush by or struck by hazards. (Resp't Br. 26.)

United, relying on *Postal Service*, argues that the Secretary cannot propose an abatement consistent with a company's existing policies. *Id.* at 9, 13-19, 26. This argument misses the mark. First, in *Postal Service*, the issue was that the Secretary failed to show that what the employer was doing was not enough. 21 BNA OSHC at 1773-74. The Postal Service required the use of high-visibility vests. *Id.* at 1774. The vests used differed from those used by others in the same industry. *Id.* However, the Secretary failed to establish that using different vests would be more effective at

reducing the hazard than continuing to use the vests the employer had. *Id.* There was no evidence of the employer's staff being stuck by a vehicle because of a lack of visibility. *Id.*

In contrast, here, as addressed, the Secretary established that United failed to abate the known hazard adequately. United had knowledge of the hazard, and workers were exposed to it. The Secretary showed how fully implementing the Tow Safety Procedures would materially reduce the hazard. Such evidence of the proposed abatement's increased effectiveness, beyond what the employer was doing being cited, was missing in *Postal Service*. *Id.*

Second, here, as in both *BHC* and *Pembroke*, the Secretary is not calling on United to keep doing what it was doing prior to the commencement of OSHA's inspection. 951 F.3d at 567; 2022 WL 774272, at *27, 39-40. She identified the specific aspects of the Tow Safety Procedures that were routinely ignored before the incident during which a worker suffered severe injuries. There's no dispute that the Tow Safety Procedures called for more safety precautions than what occurred during the November 24th incident that prompted OSHA's investigation. United cannot claim that the identified practices were being followed consistently. Like in *BHC* and *Pembroke*, the steps laid out in the identified policies frequently were not used before OSHA's investigation commenced. *BHC,* 951 F.3d at 565 (citing the need for measures to be consistently applied); *Pembroke*, 2023 WL 3243988, at *2-3 (Third Circuit upholding multiple abatement measures to reduce a hazard). United's abatement must be assessed by the degree to which those safety precautions were implemented and whether the employer could feasibly reduce the hazard further. *See Nat'l Realty*, 489 F.2d at 1266–67 ("[a]ll preventable forms and instances of hazardous conduct must ... be entirely excluded from the workplace")

Third, the Secretary established that adhering to the identified aspects of the Tow Safety Procedures would materially reduce the hazard. The Secretary established the existence of feasible

means that the employer could and should have taken to reduce the cited hazard substantially. *See Nelson Tree*, 60 F.3d at 1211 (upholding violation when there "there existed feasible means, which [the employer] could and should have taken, to eliminate or substantially reduce the hazard of being struck by a prematurely felled tree.").

The Secretary met all elements the Commission requires to establish a violation of the General Duty Clause, including showing that her proposed abatement measures were feasible and would materially reduce the hazard.

C. Unpreventable Employee Misconduct

Under Commission precedent, if an employer has abatement in place, the Secretary must show it is inadequate. *Postal Serv*., 21 BNA OSHC at 1773-74. In contrast, as noted, the employer must show adequate communication and enforcement of work rules if it wishes to make out the unpreventable employee misconduct (UEM) defense. *Mountain States Tel & Tel. Co*., 9 BNA OSHC 2151, 2152 (No. 13266, 1981) (UEM is an affirmative defense considered after the Secretary makes out a prima facie case of a violation). To establish an affirmative defense of UEM, an employer has the burden of proving it has: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Stark Excavating, Inc*., 24 BNA OSHC 2215, 2220 (Nos. 09-0004, 2014) (consolidated) (affirmative defense of UEM fails when policies were not enforced). *See also W. World,* 604 F. App'x at 191 (identifying the same four-part test).

United repeatedly tries to litigate the incident on November 24th. It attempts to lay all blame for the injuries on one worker. It claims the tug operator engaged in misconduct but did not

present direct evidence of his actions. It relies on its own reports and hearsay to support its UEM claim. (Reply Br. 10-12.)

United's UEM defense fails for the same reason the Secretary was able to show that the existing abatement was ineffective. United's Tow Safety Procedures were widely and routinely violated without corrective action. Failing to hold safety briefings, conducting towing operations without a safety guide, and neglecting to use the checklist were commonplace. (Exs. J-2 at 3, J-3 at 2-5; J-4 at 3, J-6.) For example, crew briefings occurred only one-third of the time before aircraft moves, and tows frequently lacked a safety guide. (Tr. 215-16, 221-22, 250, 325, 336-42, 345, 657, 659, 806-7; Exs. J-3 at 2, 5, J-4 at 3, J-6.) Similarly, workers reported the checklist was not consistently used. The only checklist in evidence is a blank version of the document. (Ex. C-5.) The injured worker indicated he had never seen a checklist filled out, i.e., with checks or other marks in the boxes. (Tr. 38; Ex. C-5.) Another worker agreed that the checklist form was not always used.[18]

United failed to establish effective enforcement of its safety rules. Conducting towing operations without a crew briefing, establishing a safety guide, or using the tow safety checklist was not an aberration and had not resulted in discipline. (Tr. 279; Ex. J-6.) Failure of enforcement defeats the defense. *W. World*, 604 F. App'x at 192 (UEM defense fails when employer did not take reasonable steps to uncover violations of its policies and enforce its rules); *P. Gioioso & Sons,*

[18] Tr. 138, 441-42; Exs. J-3 at 5, 10; J-6.) At the hearing, Mr. Rodriquez was asked several questions about the tow safety checklist and its use. (Tr. 133-140.) He was hesitant and halting in his answers. His answers were frequently evasive and contradicted by prior deposition testimony. *Id.* As discussed in more detail below, United's counsel repeatedly objected during this testimony. *Id.* In contrast to his testimony at the hearing, Mr. Rodriquez's deposition testimony is consistent with the testimony of other witnesses and documentary evidence.

inc. v. Sec'y of Labor, 115 F.3d 100, 109-10 (1st Cir. 1997) (UEM defense fails when employer does not prove that "it insists upon compliance with the rules").

Respondent also cites the fatigue of one team member involved in the move that led to injuries on November 24th. (Resp't Br. 5-6, 21-23, 44; Ex. J-3.) United does not claim it was forced to have workers too fatigued to follow the rules tow aircraft. While under the CBA, employees were permitted to work longer than an 8-hour shift, they had to follow work rules and could be fired if they could not comply. (Tr. 471, 630-31.)

Further, the focus on one worker's possible fatigue is misplaced. The analysis must focus on the cited hazardous condition and how employees regularly interacted with it.[19] The hazard existed in tow operations before and after November 24th. Routinely, workers faced the cited hazard without the Tow Safety Procedures' protections. A worker being fatigued, even if that fact was sufficiently established, does not alter the Secretary's burden or the burden associated with the affirmative defense of UEM.

In addition, it is not clear that any worker was suffering from fatigue. United claimed the tug operator was fatigued. (Resp't Br. 21-22.) However, no one involved in the tow operation indicated the tug operator was fatigued. (Ex. C-3.) The tug operator had two and a half days off before arriving at work and apparently told United he had a "good night's sleep" before the incident. (Tr. 766-67.) United's investigative reports indicate that the worker informed the investigators that he "slept well the night before and no external stressors [or] personal worries

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[19] *See Mar-Jac Poultry MS, LLC,* No. 21-1347, 2023 WL 8187200, at *16 (OSHRCALJ Oct. 5, 2023) (one employee's intoxication did not establish UEM when multiple workers routinely placed hands on a machine), *appeal docketed,* No. 24-60026. (5th Cir. Jan. 15, 2024). Here, the Secretary cited United for failing to adequately protect against being struck or crushed by an aircraft when engaging in staging and positioning tasks. One worker being fatigued does not explain why there was no safety guide, no crew briefing, and the checklist was not used. *See Design Decorators, Inc.*, No. 96-0822, 1997 WL 658427, at *10 (OSRHCALJ Oct. 9, 1997) (possible drug or alcohol use by one or two workers did not constitute UEM when there was routine failure to follow a safety rule).

contributed to distractions." (Exs. J-3 at 4, J-4 at 2.) United did not call the worker to testify whether he was fatigued or to corroborate Mr. Arizmendi's recollection of their conversation and the description of his alertness contained in United's reports. (Tr. 767.)

Each action, having a crew briefing with everyone present, using a checklist, and having a designated safety guide, minimizes the risk of any worker failing to act appropriately. (Tr. 283, 431-32, 444-45, 447; Ex. C-4.) During the crew briefing, workers ensure everybody's at their best and knows where the plane is going. (Tr. 444-46.) Using the checklist each time is necessary because of human error and potential forgetfulness. (Tr. 640, 700-1.) It reminds workers of the steps they need to take. (Tr. 377, 431.) The safety guide acts as set eyes and can report on things the tug operator can't easily see. (Tr. 22-23, 34-35, 453, 513.)

The Secretary does not have to establish what caused a worker's injury. As noted, her burden is to show the presence of a hazard for which there are feasible means to materially reduce it. Nor does the Secretary have to establish the hazard can be eliminated. *Arcadian*, 20 BNA OSHC at 2011 (Secretary does not have to show that abatement would eliminate the hazard); *Sci. Applications*, 2020 WL 1941193, at *4 (general duty clause applicable to drowning hazard that employer could not eliminate). So, even if Respondent's argument that the proposed abatement does not address fatigue was accurate, this would not be grounds for vacating the Citation. It is sufficient for the Secretary to establish one feasible abatement method that can effectively materially reduce the hazard. *Pembroke,* 2022 WL 774272, at *8 ("Secretary need only prove that at least one of the measures he proposed was not implemented and that the same measure is both effective and feasible in addressing the hazard").

D. Preemption

General duty clause citations can be defended against on the basis that there is a more specifically applicable standard. 29 C.F.R. § 1910.5(c)(1). This is called regulatory preemption. *Mansfield Indus., Inc*., No. 17-1214, 2020 WL 8871368, at *3 n. 6 (OSHRC, Dec. 31, 2020), *aff'd*, No. 21-60169, 2021 WL 5354110 (5th Cir. Nov. 16, 2021). In addition, an employer can argue that a regulatory agency other than the OSHA has exercised its authority to prescribe or enforce standards affecting occupational safety or health at the particular worksite. 29 U.S.C. § 653(b)(1) (this provision is also known as section 4(b)(1) of the OSH Act). This is referred to as statutory, or section 4(b)(1), preemption. *Mansfield,* 2020 WL 8871368, at *3, n. 6. Under Commission precedent, both types of preemption are considered affirmative defenses. *Id.*

This matter may be ultimately appealed to the D.C., Seventh, or Third Circuits. (Stip. 1.) The Commission typically applies the precedent of the relevant circuits. *Kerns Bros. Tree Svc.*, No. 96-1719, 2000 WL 294514, at *4 (OSHRC Mar. 6, 2000). In this instance, Third Circuit precedent appears to diverge from that of the Commission when the issue is statutory preemption, i.e., whether OSHA's authority is preempted under section 4(b)(1) of the OSH Act (29 U.S.C. § 653(b)(1)). The Third Circuit indicated that this type of preemption, as opposed to regulatory preemption, did not have to be raised in the Answer. *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980) ("[A] section 4(b)(1) claim can be raised initially on appeal or by the court sua sponte."). *Cf. Mansfield,* 2020 WL 8871368, *3 n. 6; *Idaho Travertine Corp.*, 3 BNA OSHC 1535, 1536 (No. 1134, 1975) (concluding that it had been "well settled" that section 4(b)(1) preemption was an affirmative defense); *MEI Holdings, Inc.*, 18 BNA OSHC 2025, 2025 n.1 (No. 96-740, 2000) (finding that there was no evidence that D.C. Circuit considered statutory preemption (29 U.S.C. § 653(b)(1)) to be jurisdictional as opposed to an affirmative defense), *aff'd*, 247 F.3d 247 (11th Cir. 2001) (unpublished).

As discussed below, the undersigned finds that Respondent's statutory and regulatory preemption claims are untimely because they were not raised in the Answer or as soon as practicable. Further, to the extent that the timing of the statutory preemption defense was raised is acceptable under the Third Circuit precedent, the preemption claims are rejected due to their lack of merit. *See Columbia Gas*, 636 F.2d at 918 (addressing only statutory preemption under 29 U.S.C. § 653(b)(1).)

1. FAA Regulations- 4(b)(1) Statutory Preemption

Respondent claims that OSHA's authority is preempted by the FAA. (Reply Br. 9.) The Commission evaluates an employer's argument that OSHA's authority is preempted under section 4(b)(1) by considering whether the other federal agency has the statutory authority to regulate the cited working conditions and, if the agency has that authority, whether the agency exercised it over the cited conditions by issuing regulations having the force and effect of law. *See Emery Air Freight Corp.*, 20 BNA OSHC 1928, 1929 (No. 00-1475, 2004) (FAA did not exercise authority over the working condition, so preemption argument was rejected); *Idaho Travertine*, 3 BNA OSHC at 1536 (Department of Interior did not exercise authority at the stone processing plant).

To the extent that Respondent's arguments overlap with the requirement to establish jurisdiction or other elements of the Secretary's burden, the undersigned finds jurisdiction is established over the hazard and United as an employer involved in interstate commerce. *See* Section I. Jurisdiction, Section III. A-C above. Respondent is an employer within the meaning of the OSH Act, and the Secretary met her burden on the other elements. *Id.* "In the OSH Act, Congress endeavored 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' 29 U.S.C. § 651(b)." *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 96 (1992). "Congress authorized the Secretary of Labor to set mandatory

occupational safety and health standards applicable to all businesses affecting interstate commerce." *Id*. OSHA has authority over the Worksite and the cited hazard. *See Chao v. Mallard Bay Drilling,* 534 U.S. 235, 240-45 (2002) (OSHA's authority over the working conditions not preempted by Coast Guard regulations); *SeaWorld*, 748 F.3d at 1211 ("Congress has vested in the Secretary and the Commission general authority to protect employees from unhealthy and unsafe work places"); *Shamokin Filler Co., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 772 F.3d 330, 332-33 (3d Cir. 2014) (OSHA is the default agency for worker safety and health). *See also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Gen. Dynamics Land Sys., Div. v. Sec'y of Labor*, 815 F.2d 1570, 1576 (D.C. Cir. 1987) (adherence to specific standards did not absolve employers from the general duty to provide a safe place of employment).

Like other employers, Respondent must comply with laws other than the OSH Act. There is no evidence that complying with the OSH Act's general duty clause conflicts or interferes with FAA compliance. Indeed, the proposed abatement is to implement the Tow Safety Procedures, which existed, albeit mainly on paper in critical respects, prior to the Citation's issuance. Mr. Marcille explained that after the incident on November 24th, workers began to follow the Tow Safety Procedures faithfully. (Tr. 454-55.) Respondent does not claim, and could not establish, an inability to comply with the Tow Safety Procedures because of FAA requirements. It does not claim that the FAA has regulated tow procedures or that it cannot implement the Tow Safety Procedures because of a conflict with FAA requirements.

Indeed, OSHA and the FAA have clarified the extent to which the FAA regulates maintenance and ground operations. As addressed above, OSHA and the FAA entered into the 2000 MOU regarding workplace health and safety in aviation. In raising its 4(b)(1) preemption defense, Respondent does not address or cite the 2000 MOU. It does not indicate it is relying on

Northwest Airlines, Inc., No. 13649, 1980 WL 121045 (OSHRC Sept. 3, 1980) (*Northwest*), a case decided twenty years before the 2000 MOU and involving different facts. In *Northwest*, the Commission did not conclude that FAA had fully occupied the space such that OSHA was preempted from addressing any airline working condition. 1980 WL 121045, at *8 n. 18. *See also Am. Airlines*, *Inc.*, 17 BNA OSHC 1552, 1553-54 (No. 93-1817, 1996) (consolidated) (finding that OSHA was not preempted despite an FAA requirement that airlines prepare ground operations manuals).

The 2000 MOU clarified the relationship between the two agencies for ground activities, explaining which working conditions the FAA was not addressing. (2000 MOU.) The FAA's regulations only relate to the working conditions of employees on aircraft in operation. *Id.* Other aviation industry employees, such as maintenance and ground support, are covered by OSHA. *Id.* OSHA requirements apply to such personnel, and OSHA enforces those requirements. *Id.* Much like the situation in *Mallard Bay,* the two agencies work alongside each other. 534 U.S. at 243-45. *See also Idaho Travertine*, 3 BNA OSHC at 1536 (memorandum of understanding clarified that OSHA was not preempted). The 2000 MOU reiterates that OSHA's authority has not been preempted for ground activities.

United attempts to circumvent the 2000 MOU between the FAA and OSHA by pointing to the TSAP MOU between United and the FAA. (Ex. R-2; Resp't Br. 39-42; Reply Br. 1-2, 9, 17-18.) A voluntary contractual memorandum of understanding, like the TSAP MOU, does not constitute an exercise of statute authority for purposes of OSH Act preemption, particularly when OSHA is not a party to the agreement. *See Mallard Bay,* 534 U.S. at 243-45 (existence of memorandum of understanding regarding inspected vessels did not preempt OSHA's jurisdiction over uninspected vessels); *Ensign Bickford Co*., 717 F.2d 1419, 1421 (D.C. Cir. 1983) (contractual

obligation with the Department of Defense does not constitute an "exercise [of] statutory authority to prescribe or enforce standards or regulations" giving rise to preemption under the OSH Act); *Emery Air*, 20 BNA OSHC at 1929 (declining to find preemption when there was no evidence that the FAA had engaged in "any preemptive exercise of authority). The TSAP MOU is not a regulation with the force of law, a necessary prerequisite for finding 4(b)(1) preemption. *Id.*

Statutory preemption under the OSH Act occurs when another agency acts to exercise its authority over the cited hazard or condition by issuing regulations having the force and effect of law. *JTM Indus., Inc*., 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001). In the TSAP MOU, the FAA did not attempt to limit OSHA's jurisdiction. (Ex. R-2.) Practically, the FAA agreed *not to act* under certain circumstances. *Id.* at 5. As such, the TSAP MOU does not support finding statutory preemption. *See Emery Air*, 20 BNA OSHC at 1929.

The proposed abatement does not require any changes to the TSAP MOU or discipline. United does not claim that having crew briefings, safety guides, and using a checklist requires the type of discipline the TSAP MOU limits. United is free to train, incentivize, encourage, and insist upon compliance with the Tow Safety Procedures. The TSAP MOU very rarely limited United's ability to discipline employees.[20] In addition, compliance with the Tow Safety Procedures improved even though certain workers utilized the TSAP process after the November 24th incident. (Tr. 454-55.) As noted, there is no evidence that prior use of the TSAP process precluded discipline for numerous, frequent other violations of the Tow Safety Procedures.

[20] Tr. 966. As stated above, Mr. Kopicko indicated that he had only been unable to discipline employees because they filed a TSAP three or "possibly four times" in his career. (Tr. 966.) Mr. Kopicko worked for United for 33 years and had been the Managing Director for four years at the time of the hearing. (Tr. 581-82.)

The Secretary established jurisdiction and authority over the cited working condition. The statutory preemption claim was not substantiated.

2. Regulatory Preemption – Untimely and Unsubstantiated

As for regulatory preemption under 29 C.F.R. § 1910.5(c)(1), consistent with its Answer, Response to Interrogatories, and the opening statement, during the hearing, Respondent offered no factual evidence to support the applicability of a specific standard (29 C.F.R. § 1910.178) to the hazard cited in the Citation. Nor did Respondent elicit facts from employees to conclude that the tow truck fell without the meaning of the powered industrial truck standard. Respondent concedes that the record is "devoid of any specific standards considered." (Resp't Br. at 11.)

Respondent tries to twist the lack of evidence for a preemption defense into a claim that the undersigned precluded it from "fully" exploring preemption because its questions of the standards the Secretary considered (but rejected) were limited during the hearing. *Id.*

Barring a preemption defense not raised in the answer or disclosed as soon as practicable is permissible under the Commission Rules. 29 C.F.R. §§ 2200.34, 2200.67. Nonetheless, the undersigned did not preclude Respondent from presenting facts to support its late raised defense.

Respondent points to a limited portion of its cross-examination of the CO to support its claim it was prevented from presenting full evidence to support its late regulatory preemption defense. (Resp't Br. 11.) Respondent's counsel asked the CSHO if FAA regulations preempt OSHA regulations. (Tr. 91.) The witness requested clarification and counsel modified the question to see if the CSHO had training about when FAA regulations might apply. *Id.* The witness answered the question. *Id.* Respondent continued to successfully inquire into the scope of OSHA's investigation, including whether the CSHO investigated any other standards. (Tr. 99.) Counsel then sought to inquire about what standards were considered but not ultimately cited. *Id.* The

Secretary's counsel objected because inquiring into this area is protected by the deliberative process privilege. *Id.* That objection was sustained. *Id.*

Respondent's questions were about the thoroughness of OSHA's investigation, not eliciting testimony about the applicability of 29 C.F.R. § 1910.178. (Tr. 99.) When asked what his questions related to, Respondent's counsel stated, "it goes to whether he conducted a thorough investigation." *Id.* The undersigned made clear that what was at issue was a violation of the general duty clause, and counsel had already asked whether other standards were considered. (Tr. 99-100.)

Pre-decisional information about standards the Secretary declined to cite is within the scope of the deliberative process privilege and protected from disclosure. *See Stone & Webster Constr., Inc.*, 23 BNA OSHC 1939, 1941 (No. 10-0130, 2012) (consolidated). United does not dispute that pre-decisional information that would reveal pre-decision advisory opinions, recommendations, or deliberations is privileged. *See id.*; *Latite Roofing and Sheet Metal, LLC*, 23 BNA OSHC 1368, 1371-73 (No. 09-1074, 2010) (protecting pre-decisional information sought); *So. Pan Servs., Co.*, 25 BNA OSHC 1081, 1083-84 (No. 08-886, 2014). Respondent did not explain how the protected information would support any affirmative defense. It did not address why the privilege should be set aside. *See* 29 C.F.R. § 2200.52(d) (discussing how to challenge privilege claims).

In any event, it is unclear whether the information sought by the inquiry would have helped establish the powered industrial truck standard's applicability. There was no argument or offer of proof as to how the objected-to questioning or other questions not asked could have related to meeting the burden of proof on the applicability of 29 C.F.R. § 1910.178. *See* 29 C.F.R. § 2200.72(d). This does not appear to be a mistake. Rather, it appears to be a calculated decision

that the CO would not be able to establish facts to support finding that being struck by or crushed by an aircraft is covered by the powered industrial truck standard.

During the hearing, the undersigned reminded United's counsel that it had the burden of proof for affirmative defenses and stated she "would permit" questions about the defenses the CSHO considered. (Tr. 102.) Still, what is relevant to affirmative defenses in this matter is not what the Secretary evaluated but what evidence Respondent has to support its preemption claims. (Tr. 102-104.)

Respondent was not precluded from establishing facts through other witnesses or evidence to support a specific standard's applicability. It was only precluded from obtaining information protected by the deliberative process privilege. Respondent did not call the tug operator. It did not ask technicians or supervisors for information to support its claim that 29 C.F.R. § 1910.178 addresses an employee being stuck by or crushed by aircraft. Other than limited colloquy with the CSHO, Respondent did not elicit any testimony about the powered industrial truck standard. The Citation focuses on hazards from the "moving aircraft," not the tractor or other vehicles in the hangar.

The record does not show that an aircraft is a powered industrial vehicle within the meaning of 29 C.F.R. § 1910.178. That standard has sixteen main sub-parts, and Respondent does not identify any particular subpart as being applicable to the cited hazard. (Resp't Br. 10.) Instead, Respondent notes that the standard addresses training and operating a powered industrial truck. *Id.* at 11. But Respondent fails to identify how the standard addresses stuck-by hazards created by an aircraft being towed, as opposed to an industrial truck operator's ability to see a clear path of travel and stop. *Id.* at 12. Respondent does not argue that the struck-by hazard that injured an

employee at its Worksite was caused by a lack of training required by 29 C.F.R. § 1910.178, an obstruction, or excessive speed by the tug operator. *Id.*

Respondent's Tow Procedures do not refer to the powered industrial truck standard, i.e., 29 C.F.R. § 1910.178. (Exs. C-4, C-5.) This is unsurprising because 29 C.F.R. § 1910.178 does not refer to aircraft and addresses different hazards. The words aircraft, crush, struck, or towing are not in 29 C.F.R. § 1910.178. The nature of the proposed abatement also shows that 29 C.F.R. § 1910.178 is not more specifically applicable. The proposed abatement measures address being struck or crushed by an aircraft, not a forklift or other powered industrial truck. IW acknowledged that an "airplane" led to his injury. (Tr. 46-47.) There is no dispute that his foot became lodged under the airplane wheel.

The Secretary concluded that a specific standard did not apply to the cited hazard. The record supports her conclusion, and Respondent did not show otherwise. The Secretary established jurisdiction and authority over the cited working condition. Preemption, either regulatory or under section 4(b)(1) of the OSH Act, was not substantiated.

IV. Failure to Timely Comply with Discovery Obligations and Attempts to Re-Open the Record

1. Attempts to Introduce Document Not Produced During Discovery Into the Record In violation of the Scheduling Order

The undersigned's November 10, 2022, Notice of Hearing, Scheduling Order and Special Notices ("Scheduling Order") required all discovery for this matter to be completed on or before June 16, 2023.[21] Hours before the close of discovery and nearly six months after the Secretary

[21] Specifically, the Scheduling Order states:

requested it, Respondent provided certain responsive documents. (Jul. 28, 2023, Order 2-3.) As a result of this very late disclosure, the parties agreed to hold two depositions after the June 16, 2023 deadline. *Id.* at 1-2. Those depositions marked the end of the discovery.

The hearing commenced as scheduled on August 23, 2023, and continued over the next two days. The Secretary rested on the third day. (Tr. 663.) Respondent's counsel directly acknowledged the Secretary had concluded her case in chief. (Tr. 663, 668-69.) Indeed, after the Secretary rested, Respondent moved for a judgment as a matter of law. (Tr. 669, 675.) Respondent could not complete the presentation of its case in the remaining time initially allocated, so the matter was continued until September 21, 2023. (Tr. 296-97, 675; Aug. 30, 2023 Order.) Respondent indicated it would prefer to begin its presentation after the continuance, and that request was accommodated.

Respondent did not attempt to introduce any document not disclosed in discovery at the Pre-Hearing Conference, during the first three days of the hearing, or in the three weeks after the Secretary rested. Instead, a few days before the hearing was scheduled to resume, it filed a Motion seeking to re-open discovery and revise its exhibits. (Sept. 9, 2023 Mot.) One day before filing the Motion, it provided the Secretary with the document. (Tr. 685; Sept. 9, 2023 Mot. Ex. C.)

> "Completed" means "propounded and answered," i.e., all discovery shall be served in sufficient time for the responses thereto to be served by this deadline. Counsel must resolve all discovery disputes or bring them to the undersigned's attention in a timely manner so as to allow sufficient time for the completion of discovery within the time set. The conduct of any discovery which would require a later due date shall be permitted only on the order of the administrative law judge or by filed stipulation of the parties, and only in cases that will not be delayed for trial thereby. The parties should be aware that a stipulation to the extension of time for discovery anticipates no discovery disputes and, therefore, the administrative law judge will not hear discovery disputes arising during any such extensions.

(Order 1.) The Scheduling Order also set deadlines for the filing of various motions. Dispositive pre-hearing motions had to be filed by July 7, 2023, and motions in limine had to be filed by July 10, 2023. (Order 2.)

The Secretary informed Respondent that it objected to Respondent's attempt to introduce a document after the Secretary rested when that was not provided during discovery and had not been included in the Joint Prehearing Statement. (Sept. 9, 2023 Mot. Ex. C.) The Secretary did not have an opportunity to use the document during depositions or in her case in chief. *Id.*

Respondent's untimely Motion violated the rules and procedures set out to regulate the course of this proceeding, and it is rejected. First, discovery had to be completed by June 16, 2023. (Scheduling Order.) This was not a random or arbitrary deadline. It was established in consultation with the parties and followed their Joint Planning Recommendations, which specifically requested the June 16, 2023 date for concluding discovery. (Oct. 27, 2022 Order 2; Jt. Planning Recommendations 2.)

Second, Respondent's mid-hearing Motion violates other provisions of the Scheduling Order. Motions in Limine to address evidentiary issues had to be filed by July 10, 2023. (Scheduling Order 2.) Respondent's request came after this deadline. The Scheduling Order also required the parties to file a Joint Pre-Hearing Statement setting forth all exhibits to be offered into evidence by August 14, 2023. (Aug. 11, 2023 Order; Scheduling Order 2; Jt. Planning Recommendations 2.) Respondent did not identify the document in the Joint Pre-Hearing Statement or provide a copy at that time. The following week, during the August 21, 2023 pre-hearing conference, Respondent did not refer to the document. It did not seek assistance with introducing a document that had neither been disclosed during discovery nor identified in the Joint Pre-Hearing Statement.

The Scheduling Order controls the course of actions to be taken by the parties unless the Court modifies it. *See* Fed. R. Civ. P. 16(3)(d). Rules and procedures of the Commission and the Court provide the predictability and structure necessary for the timely resolution of cases with

fairness and due process for all concerned. Such Rules have been carefully considered and modified as necessary over time and may not simply be ignored by any party.

The document Respondent lately disclosed and sought to be introduced appears to be drafted by Respondent in 2017 and seems to have been revised in 2020. (Sept. 9, 2023 Mot. Exs. A, B.) There is no contention that Respondent lacked possession of the documents or could not identify and produce them by the deadlines set out in the Scheduling Order. *Id*. at Exs. A-C. The parties agreed to multiple depositions of Respondent's employees. There is no contention that any of the deponents referred to the documents Respondent now seeks to introduce. Likewise, no witness disclosed them during the Secretary's case in chief.

Accordingly, after being given further opportunity to argue the issue, Respondent's Motion was denied on September 21, 2023. (Tr. 688-90.) Respondent then attempted to have a witness discuss the contents of the documents. (Tr. 960-61.) The Secretary's counsel objected, and the objection was sustained. *Id.*

As stated in the Scheduling Order, witnesses may not be permitted to testify, and exhibits may not be accepted into evidence unless they are timely identified in a pre-hearing exchange. (Scheduling Order 2; Tr. 689.) The Scheduling Order notes, in bold, the requirement that counsel certify that "**all exhibits have been exchanged**." (Scheduling Order 2.) It also explicitly informs parties that any exhibit not listed as part of the Joint Prehearing Statement "is subject to exclusion." *Id.*

In its Post-Hearing Brief, Respondent seeks to make a late "offer of proof" and attached an affidavit to its brief. (Resp't Br. n.6.) Under the Commission Rules, a motion, such as Respondent's request, cannot be contained in another document but must be made separately. 29 C.F.R. § 2200.40. Neither during its opportunity to be heard on the Motion during the hearing nor

when the objection to the witness's testimony about the contents of a document did Respondent seek to make an offer of proof. Both parties have now rested. Respondent establishes no basis for re-opening the record. The request is rejected, and the record stands.

2. Additional Attempt to Re-Open the Record

Respondent further attempted to supplement the record in its Reply Brief by attaching *seven* potential new exhibits. (Reply Br. 5.) Respondent did not file a separate motion as required by Commission Rule 40, 29 C.F.R. § 2200.40. Respondent's late attempt to supplement the record fails to comply with Commission Rules and is rejected.

The Secretary presented her case through almost all adverse witnesses. These witnesses were repeatedly evasive and contradicted prior statements during their testimony. During the hearing, at times, United's Counsel offered lengthy explanations when objecting to the Secretary's counsel's attempts to impeach or refresh witnesses' recollections with reference to past deposition testimony. (Tr. 121-23, 129, 135, 143-44, 220-21, 223, 280, 333-38, 342-43, 604-7, 625.) The Secretary raised concerns that these objections amounted to coaching. (Tr. 605-6.) The undersigned acknowledged the need not to make arguments and the importance of ensuring that counsel's arguments do not influence witnesses. (Tr. 606.) Several objections claiming improper impeachment were made after a continuing objection was granted. (Tr. 146, 165, 217, 223, 271-72, 276, 286-87, 293-95, 325, 410, 412, 434, 468-69, 538, 544, 550, 592, 661, 707-8.)

Commission judges have the duty and power to "regulate the course" of Commission proceedings. 29 C.F.R. § 2200.67. The undersigned explicitly and repeatedly stated on the record that Respondent could explore the deposition portions the Secretary used for impeachment and

introduce other portions if needed to clarify the record during the proceedings.[22] The undersigned had copies of all deposition excerpts used during the hearing and carefully followed along. At times, the Secretary's counsel, either on his own or at the undersigned's direction, highlighted additional portions of the deposition testimony for context and clarity. (Tr. 272, 293-95, 411-15, 421-23, 468-69, 473-74, 545.)

On cross-examination, Respondent's counsel was able to ask leading questions and clarify any testimony, including testimony relating to the depositions and topics on which testimony at the hearing appeared to differ from the deposition testimony. (Tr. 243, 501-2, 551-58.) In addition, Respondent was free to call the same witnesses during her case in chief.[23] Respondent elected to do so, calling three of the Secretary's witnesses, Mr. Arizmendi, Mr. Kopicko, and Mr. Rodriquez. The other three people for whom Respondent now seeks to introduce deposition testimony were United employees and could have been called during Respondent's presentation. (Tr. 389-90, 403.)

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[22] Tr. 123 ("and then you can come back and question the witness as to what his understanding of the question was"), Tr. 127 ("you can on your cross examination revisit that"), Tr. 137 ("counsel, if you believe that there's some clarification, on cross, you can get into that"), Tr. 140 ("I'm going to allow you to on cross examination clarify your objection"), Tr. 141 ("And again, as I said … during the course of cross examination you can go through this"), Tr. 219 ("on cross examination you can ask him that"), Tr. 223 ("I'll allow you to cross"), Tr. 295 ("on cross examination … you can pursue this"), Tr. 412 ("You will have the opportunity, at the time that I turn the case over to you, for you to cross-examine the witness. And you can certainly feel free to point the Court to another section of the deposition"), Tr. 415 ("You are going to have an opportunity to clarify this; so objection noted"), Tr. 435 ("I'm going to allow you, on your cross-examination, to go further with respect to the response"), Tr. 545 ("you certainly can have an opportunity to ask the witness to clarify what he was referring to in the deposition"), Tr. 550 ("you can certainly, again, during your cross-examination, clarify anything that you would like to have clarified"), Tr. 658-59 (Respondent's counsel discussing prior deposition testimony with witness).

[23] Tr. 389-90 ("feel free to conduct a direct examination. So, I'm not trying to stifle you, but it's my understanding it's still your intention to call these adverse witnesses in your case in chief?" to which counsel indicated, "Yes, it is our intention to do both … cross-examination and direct"), Tr. 403 ("I certainly would allow you to conduct direct examination").

Yet, Respondent largely declined to explore other portions of the depositions during its cross-examinations and direct questioning. Instead, it waited until its Reply Brief to attempt to introduce hundreds of pages of deposition testimony. (Resp't Reply Br. Exs. A, B, C1, C2, D1, D2, E.) There is no evidence any of the witnesses were unavailable. All had testified before the proceedings were recessed in August 2023. (Tr. 663, 668, 675.)

The undersigned expressly informed counsel on the record that a motion could be made to submit deposition transcripts after the direct examination was complete. (Tr. 658-59.) To date, Respondent has never made such a motion.[24] Respondent was freely able to cross examine each witness whose credibility was impeached and to call the same individuals to testify. There is no adequate explanation as to why this was insufficient. *Cf. Williams Enters., Inc.,* 13 BNA OSHC 1249, 1251 (No. 85-355, 1987) (preclusion of testimony was harmless error). United's attempt to belatedly attach deposition transcripts to a reply brief is rejected.

V. Penalty

When assessing penalties, the OSH Act requires the undersigned to give "due consideration" to four criteria: the size of the employer's business, the violation's gravity, the employer's good faith, and its prior history of violations. *J. A. Jones Constr. Co*., No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *Id*. "The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id*.

[24] As noted, Respondent's request in its Reply Brief does not constitute an appropriate motion.

The Secretary proposed a penalty of $14,502 based on the violation's high gravity, the employer's large size, and the widespread non-compliance with measures to mitigate the hazard. (Sec'y Br. 33-35.) Respondent raises no specific arguments regarding the penalty amount.

The violation was capable of causing life-altering injuries and had a significant, permanent impact on a worker. (Stip. 3; Tr. 42-43.) Workers were exposed to the hazard without the precautions United and its industry-recognized would reduce the risks. (Tr. 26-28, 839.) The gravity of the violation warrants the proposed penalty without any size, good faith, or history reductions.

United is a large employer. (Tr. 837, 839; Ex. R-2 at 1.) While it had a safety program, the Tow Safety Procedures were not adequately implemented. The Secretary implicitly asks for judicial notice of United's history of violations. (Sec'y Br. 35 n. 11.) The undersigned concludes that such a request is unnecessary. Even if United had no violations within the last five years, the penalty amount is appropriate for the violation's gravity.

Viewing the record as a whole with the greatest emphasis on gravity, the undersigned assesses the proposed penalty of $14,502 for Citation 1, Item 1.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Commission Rule 90(a)(1), 29 C.F.R. § 2200.90(a)(1).

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $14,502 is ASSESSED.

SO ORDERED.

/s/Covette Rooney
Covette Rooney
Chief Judge, OSHRC

Dated: May 7, 2024
Washington, D.C.