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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AMERICOLD LOGISTICS, Respondent.	OSHRC Docket No. 23-1589

Appearances:

Joel P. Clark, Esq., Felix R. Marquez, Esq., Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Thomas E. Ullrich, Esq., Lucas I. Pangle, Esq., Wharton, Aldhizer & Weaver, PLC, Harrisonburg, Virginia
For Respondent

Before: Judge Joshua R. Patrick – U. S. Administrative Law Judge

DECISION AND ORDER

I. Introduction

During the evening shift at Respondent's facility in La Porte, Texas, two workers were injured while unloading boxes of frozen chicken feet from a refrigerated rail car. As the two workers were unloading the railcar, a pallet (or more) of boxes—each box weighing roughly 50 pounds—fell onto the workers. One of the workers was knocked out by the falling product and experienced minor injuries for which he denied medical treatment. The other, however, is now paralyzed as a result of his injuries. Complainant initiated an inspection after it received a report of the injury. As a result of his inspection, Compliance Safety and Health Officer (CSHO) Simon Cabello issued a Citation and Notification of Penalty, which alleges Respondent violated section

5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (the Act), also known as the general duty clause.

Complainant contends Respondent failed to protect its employees from the hazard posed by unstable loads during the railcar unloading process. To address this issue, Complainant argues Respondent needs to: (1) develop and implement adequate procedures for the unloading of railcars, (2) secure unstable loads, (3) ensure dunnage is utilized, and (4) provide and utilize protective devices during the unloading process. *See* Ex. C-28, *Citation and Notification of Penalty* at 7. Respondent contends Complainant failed to establish: the existence of a recognized hazard, that it had knowledge of the hazard such that it could be prevented, or that the proposed abatement methods were feasible.

The Court agrees with Respondent, in part. Complainant failed to establish Respondent knew or, with the exercise of reasonable diligence, could have known of the conditions constituting a hazard. Further, Complainant failed to show Respondent's existing program was insufficient and proposed abatement items that are either expressed in terms of a desired result or are too vague to be assessed for feasibility. Based on these failures, and others discussed below, the Court finds Complainant failed to establish a violation of the general duty clause.

II. Procedural History

The incident giving rise to the case at bar occurred on March 30, 2023. (Ex. C-29 at 3). In response to the matter being reported to OSHA, Complainant sent CSHO Cabello to Respondent's worksite on April 5, 2023. (Tr. 254-55; Ex. C-29 at 3). On September 20, 2023, Complainant issued a Citation and Notification of Penalty alleging a single violation of the general duty clause and proposing a penalty of $15,625. (Ex. C-28). Respondent filed a timely notice of contest on October 9, 2023, which brought this matter before the Commission. (Jt. Stip. No. 2).

The Court held a two-day trial in Houston, Texas on February 11-12, 2025. The following individuals testified: (1) [redacted], an employee of Respondent; (2) [redacted], an employee of Respondent; (3) Jorge Pena, a second shift supervisor at Respondent's La Porte facility; (4) Jerry Harrelson, operations manager at the La Porte facility; (5) Simon Cabello, Compliance Safety and Health Officer; and (6) Kyle Hartwick, the other second shift supervisor at La Porte. Both parties timely submitted post-trial briefs for the Court's consideration.

III. Stipulations and Jurisdiction

Complainant and Respondent reached several stipulations prior to trial, both factual and legal, which the Court will incorporate by reference.[1] Those stipulations include: (1) the Commission has jurisdiction over this matter under section 10(c) of the Act, and (2) Respondent is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act. (Jt. Stip. Nos. 1 & 2).

IV. Factual Background

A. Respondent's Business

Respondent runs a cold storage warehouse in La Porte, Texas, which receives, stores, and ships refrigerated and frozen products. (Tr. 194). At the time of the inspection, Respondent employed approximately 10,000 employees nationwide. (Jt. Stip. No. 10). Of those employees, approximately 120 of them worked at the La Porte facility at the time of the events giving rise to this case. (Jt. Stip. No. 9). Work at the La Porte facility is split into first (day) and second (night) shifts. (Tr. 32, 259). Some products are received through semi-truck deliveries, while others come via railcar. (Tr. 32). This case addresses the process by which product is unloaded from railcars prior to being stored and subsequently shipped to customers at the end of the supply chain.

[1] Where applicable, the Court shall cite those stipulations as follows: Jt. Stip. No. ___.

B. The Process of Unloading

Respondent is a specialized intermediary in a complex, nationwide food supply chain that connects the producers of frozen and refrigerated food products to the distributors of those products. (Tr. 194-96). According to Jerry Harrelson, the operations manager for the La Porte facility, products that come via rail typically take weeks to travel from their point of origin to the La Porte facility. (Tr. 198). In many cases, the railcar will already be on its way to Respondent's facility before Respondent is aware that it is coming. (Tr. 198-99). Because of this complex chain of loading, transport, storage, and reshipment, there are many instances where Respondent does not have the opportunity to communicate with the loader prior to the shipment being sent. (Tr. 198-99).

Once the railcar arrives at Respondent's facility, the unloading process begins with an assessment of the car, as well as the product contained therein. (Tr. 168-69). That process does not begin until second shift, which is responsible for unloading. (Tr. 39). Even before that, according to Peña, there are three meetings that take place prior to unloading product from the rail car. (Tr. 155-56). First, he meets with the wave planner[2] and lead person to discuss the work for the evening. (Tr. 156). Next, Peña meets with the entire second shift to discuss the work to be performed, corporate safety notes, daily talking points, and discussing safety specific to the jobs being performed that night. (Tr. 156; Exs. C-13, C-14, R-8). Finally, Peña meets with the railcar crew to discuss the process of unloading the product, including standard operating procedures (SOPs) and potential hazards. (Tr. 155-56, 160; Ex. C-3 (standard operating procedure)).

[2] The record does not have much information about the duties of a wave planner. However, Peña testified that when he was unable to check on the progress of unloading, he would send the wave planner in his stead, opining "if I'm not on the dock, [the wave planner] is in charge." (Tr. 128-29).

The physical process of unloading starts with ensuring the car is secured and documenting the car temperature. (Exs. C-3, C-5; Tr. 169). If the temperature is above zero degrees, employees are directed to pause, contact a supervisor, and determine whether it was a failure of the thermometer or whether the product has spoiled. (Tr. 169). An issue with the load, such as the temperature, could result in the load being rejected. (Tr. 136, 153). If the temperature is satisfactory, the seal on the door is broken. Next, the SOP states that two employees are required to open the door and for those employees to use extreme caution to avoid falling product. (Ex. C-3). According to Harrelson, having two people open the door allows the employees to protect against boxes that could fall once the door is opened. (Tr. 168). Once the door is opened, the forklift driver retrieves and sets the dock plate to connect the floor of the dock to the entry of the railcar, which is located on its side. (Tr. 36, 168, 176; Ex. C-3).

With the dock plate in place, Peña or Hartwick survey the state of the load in the doorway and determine whether their initial plan remains effective. (Tr. 116-18, 120). This, in turn, will depend on the manner in which the product was loaded and whether there are any issues with the load once the door is opened. (Tr. 39, 117-18, 168-69). The loads arrive in one of two ways: palleted or floor-loaded boxes. (Tr. 168-69, 194-95). Floor-loaded product is, as it sounds, stacked directly onto the floor and packed to fill the space. (Tr. 195). Palleted product, on the other hand, is stacked in rows onto wooden pallets, which limits the ability of the loader to fill the space. (Tr. 195). Accordingly, the loader will utilize plastic wrap and dunnage to prevent the load from shifting or falling during transit. (Tr. 101, 207, 220). Dunnage is essentially a gap-filler, which is placed in the spaces left between palleted loads of product to create a more stable load. (Tr. 184). Dunnage materials can range from air bags to boxes of the product. (Tr. 154, 184).

There are benefits and drawbacks to each method of loading. Floor-loaded product is more time-consuming, because it necessarily must be done by hand; however, because it can fill the space, there is less need for dunnage and less likelihood of shifting loads. (Tr. 54, 184). Under ideal circumstances, pallet-loaded boxes are easier to load/unload with the use of a forklift; however, if the product is shifted or unbalanced, the initial unloading—if not the whole car—must be done by hand. (Tr. 37-38). In that case, Respondent begins the unloading process with a device called a cage. (Tr. 82, 124-26; Exs. C-8 at 8, R-4).

A cage is a pallet-sized platform that attaches to the front of a forklift.[3] (Tr. 177, 208; Exs. R-4; C-8 at 8). It elevates employees so they can unload product located too high to simply grab by hand. (Tr. 208). While in the cage, the employee will pull boxes off the top of the palleted load[4] and place them in the cage. (Tr. 174-75). Those boxes will then be lowered and re-stacked on a pallet, which will be taken inside the warehouse via forklift. (Tr. 174). This process will be repeated until the employees have cleared the top pallets in the center of the railcar. (Tr. 174, 207). From there, employees will return to ground level and begin to unload the pallets located on the floor in the doorway. (Tr. 208-09). Once enough pallets are cleared from the middle of the railcar, additional crew members can enter the space to clear both the short side and the long side.[5] (Tr. 209). According to Harrelson, the entire process can take anywhere from six to eight hours. (Tr. 209).

As noted earlier, there are instances where the palleted material shifts while in transit, which requires re-assessing the unloading plan. (Tr. 37-38). While a shifted load might affect the

[3] The platform is equipped with handrails. (Ex. C-8 at 8). Respondent requires employees to wear a harness while in the cage. (Tr. 125, 177).
[4] The cage is also used with floor loaded product for the same reason. (Tr. 208). In the case of floor loaded boxes, the goal is to create a stair step orientation to permit easier access to the hard-to-access top boxes. (Tr. 131-32, 210; Ex. R-1).
[5] The "short" side is where the refrigeration unit is located and, thus, has less room to store product.

ability to lift the pallets with a forklift, Harrelson testified the load is not necessarily unstable or hazardous because it shifted. (Tr. 205). This is due, in part, to the fact that the palleted loads are also wrapped in plastic to hold them in place. (Tr. 178). The weight of the testimony and evidence indicate that a hallmark of instability is whether the palleted load is leaning. (Tr. 179-81). According to Peña and Harrelson, a shifted load that is still standing vertically does not necessarily indicate a hazard. (Tr. 117, 122-23, 205). Yet, under such circumstances, employees are required to stop and seek the input of their superior to determine the appropriate course of action. (Tr. 144-45; Ex. R-1). In some instances, the remedy is to remove the boxes by hand. (Tr. 37). According to Harrelson, the plastic wrap is cut progressively from top to bottom as the boxes are removed from the top, which, presumably, permits the stack to retain stability. (Tr. 178).

In other instances, Respondent will utilize a "controlled fall". (Tr. 150, 207). According to Harrelson, Peña, and the SOP/policy, an employee must contact their supervisor when confronted with a leaning pallet load. (Tr. 91, 205-07; Ex. R-1). Based on the available information, the supervisor will assess whether a controlled fall is the appropriate remedy and, if necessary, initiate it. (Tr. 206). A controlled fall is when the supervisor clears the car of employees and initiates a fall by cutting the remaining plastic wrap and allowing the product to fall to the floor for removal by hand. (Tr. 207-08).

C. Training and Evaluation

The above-discussed process is introduced to new employees[6] through a three-hour orientation training, which addresses Respondent's safety program. (Tr. 77-79, 336, 341; Exs. C-6, R-7). At the conclusion of the formal, orientation training, new employees are assigned to an experienced "professional", who will provide on-the-job training. (Tr. 341-42). The on-the-job

[6] Respondent hires both permanent and temporary employees to perform unloading tasks. One of the injured employees, M.R., was a temporary agency employee. (Tr. 365-66).

training focuses on the tasks the employee will perform, SOPs, and safe work practices. (Tr. 341-42). In addition, Respondent provides daily safety talks and training modules to ensure employees are current on policies and procedures. (Tr. 236; Exs. R-8, R-9, R-10).

To ensure training is effective and retained by the employee, Respondent implemented a system of observations and evaluations. (Tr. 237). The first of these is called a Safety and Pride Walk, which is a facility-wide assessment wherein a supervisor will correct and document unsafe practices or conditions. (Tr. 238; Ex. R-9). Respondent also uses a system called Behavioral Based Safety (BBS) and Coaching Method Observations (CMO). (Tr. 236; Ex. R-10). As compared to the Safety and Pride Walk, the BBS and CMO system is designed to identify specific behaviors in advance that will be the subject of review and evaluation. (Tr. 237-39). Based on the documentation submitted, it appears these evaluations occurred daily. (Ex. R-8, R-9, R-10).

D. The Pallets Collapse

On the evening of M.R.'s injury, the pre-unloading process described above was carried out by Mr. Peña, including all meetings, training, and discussion of the plan for Railcar No. ARMN 112477, which had arrived earlier that day. (Tr. 119-21; Jt. Stip. No. 12). Based on photographs subsequently sent to Respondent from the loader, Freeze-N-Store, the jumbo railcar was loaded with frozen chicken feet,[7] loaded two pallets high, secured with plastic wrap, and equipped with airbags (dunnage) between the palleted columns. (Ex. R-12). The contents of the railcar did not have the same appearance when they arrived.[8] (*See* Ex. R-3).

According to Peña's testimony, the pallets appeared to be "perfect, straight up and down". (Tr. 116-117). While he noted the visible palleted loads had shifted, he testified the stability of the

[7] The parties used the terms "feet" and "paws" and even "Lamex" interchangeably to refer to the product in the boxes.
[8] There are no photographs of the pallets upon arrival. The only other photographs of the loads within the railcar were taken after the pallets had collapsed. (Tr. 152; Ex. R-3).

load was not affected because they were not leaning. (Tr. 117-18). [redacted] also noted the shift of the product and testified he had complained about shifted loads in the past. (Tr. 38, 53). When pressed further about his complaints, he testified that his concerns had to do with the effort required to unload a railcar by hand; he did not have any concerns for his safety, nor did he relay any such concerns to management when previous loads arrived shifted off the pallets. (Tr. 53-55, 61). Based on the state of the load, Peña directed [redacted] and M.R. to address the top row of pallets in the middle. (Tr. 61). Peña recommended the crew use the cage, which they did. (Tr. 133-34).

A couple of hours later, prior to the crew's first scheduled break, Peña sent wave planner Victor Fernandez to check on the crew's progress. (Tr. 133-34). Fernandez reported to Peña that unloading was proceeding as planned. (Tr. 133-34). Not long after Fernandez made his observations, the unloading crew took its mid-shift break. (Tr. 134). The unloading crew did not report any issues to Fernandez or Peña prior to the load collapsing. (Tr. 94, 141).

After the crew returned from their break, they had cleared out the middle four pallets—two top, two bottom. (Tr. 61-62). They had not completed clearing out the middle two rows, which is required to make room for the forklift. (Tr. 70-71, 209; Ex. R-15 (diagram of pallets and their numbers)). As [redacted] and M.R. were working, the forklift driver, [redacted], noticed a pallet start to move. (Tr. 95). "Within a minute" of observing the movement, [redacted] set off to tell Peña; however, as he left to do so, a stack of pallets collapsed onto [redacted] and M.R.. (Tr. 95-96). [redacted] went to inform Peña, who called 911. (Tr. 97). As a result of the collapse, M.R. suffered severe injuries resulting in paralysis. (Tr. 277). [redacted] was initially knocked out but quickly came to and began removing the boxes that fell onto M.R. (Tr. 44). He did not go to the hospital with the paramedics but testified that he has trouble remembering the specifics of the night of the injury. (Tr. 49).

Subsequent investigation by Respondent revealed a lot of the air bags used as dunnage had deflated in transit. (Tr. 59-60, 190). Respondent also found that the pallet that ultimately fell was pushed over from behind by another pallet that was hidden from view. (Tr. 219-20, 223-24; Ex. R-3). In response, Respondent clarified its existing policies, reached out to loaders to request future loads be floor loaded, and experimented with tools, such as a load lock, to address load stability on floor-loaded railcars. (Tr. 182-84).

E. Complainant's Inspection

Complainant sent CSHO Simon Cabello to Respondent's La Porte Facility after a report of an injury resulting in hospitalization. According to the testimony, CSHO Cabello's inspection focused mainly on the accident itself through employee and management interviews. (Tr. 256). CSHO Cabello did not have the opportunity to inspect the railcar at issue, nor did he observe the railcar unloading process during his inspection. (Tr. 256). Further, CSHO Cabello testified he did not independently research how the industry, as a whole, handles the process of unloading railcars. (Tr. 316-17).

At the conclusion of his inspection, CSHO Cabello recommended, and Complainant issued, a single-item Citation and Notification of Penalty, which alleges Respondent violated section 5(a)(1) of the Act for its failure to protect its employees from the hazard of being struck by unstable loads. (Tr. 260). Complainant proposed a penalty of $15,625. (Tr. 270). As explained below, the Court finds Complainant failed to establish a violation of the general duty clause.

V. Analysis

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> Section 5(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were not protected from the hazard of being struck by unstable loads:

a) On or about March 30, 2023, at the jobsite, employees manually unloading boxes of frozen poultry adjacent to pallets with leaning boxes were exposed to struck-by hazards from the movement of the unstable load.

Abatement Note:

Among other methods, one feasible and acceptable method to correct the hazard would be for the employer to:

1. Secure unstable loads when working adjacent to the load.

2. Develop and implement a railcar specific process to remove unstable loads.

3. Ensure dunnage is utilized when receiving product by railcar.

4. Provide and utilize protective device for employees manually unloading pallets with unstable loads.

See Citation and Notification of Penalty at 7.

The general duty clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). To prove a violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known that the hazardous condition existed at its worksite. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-360, 1992) (consolidated).

As will be discussed below, Complainant overemphasizes the fact of the accident to support her conclusion that the general duty clause was violated in this case. There is no denying Respondent's employees were exposed to, and suffered, serious injury when the pallet collapsed onto them. But, the occurrence of an accident, in and of itself, is not sufficient to establish a

violation of the general duty clause. *See Wiley Organics*, 17 BNA OSHC 1586, 1594 (No. 91-3275, 1996) ("The risk of injury to employees, *not the specific incident or accident that results in injury*, is the relevant consideration in determining the existence of a recognized hazard.") (emphasis added), *aff'd*, 124 F.3d 201 (6th Cir. 1997). In a general duty clause case, it is incumbent on Complainant to show that there was a recognized, hazardous condition that Respondent knew about and failed to adequately address. As pointed out by Respondent, and fleshed out below, Complainant ultimately failed to prove: (1) Respondent's knowledge of the condition; (2) that Respondent's existing abatement methods were inadequate; or (3) that its proposed methods of abatement were feasible.

A. Complainant Proved Respondent's Employees Were Exposed to a Recognized Hazard

To prove a violation of the general duty clause, Complainant must define the hazard "in a way that apprises the employer of its obligations, and identifies conditions and practices over which the employer can reasonably be expected to exercise control." *Arcadian Corp*., 20 BNA OSHC at 2007. The hazard must be defined "in terms of the physical agents that could injure employees rather than the means of abatement." *Chevron Oil Co*., 11 BNA OSHC 1329, 1331 n.6 (No. 10799, 1983); *see also Baroid Div. of NL Indus., Inc. v. OSHRC*, 660 F.2d 439, 444 (10th Cir. 1981) ("A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.").

According to the Citation, Complainant alleges Respondent's employees were exposed to a struck-by hazard while working next to unstable, palleted loads. (Ex. C-28). What then, is an unstable load? Based on the Citation, as well as the testimony of CSHO Cabello, Complainant appears to argue that an unstable load can be identified by whether it is "leaning". Respondent, however, contends Complainant failed to prove any pallets were leaning prior to the pallet

collapsing and, thus, failed to prove the existence of the alleged hazard. The Court finds Complainant established the existence of a hazard; however, perhaps not in the manner Complainant suggests.

Whether intentionally or not, Complainant makes an inference that is not warranted by the evidence. Complainant alleges Respondent's employees were exposed to the hazard of being struck by unstable loads while working next to "pallets with leaning boxes." (Ex. C-28). In her brief, Complainant repeated this characterization of the hazard as "leaning"; however, in Section IV.D, Complainant equates a shifted load with a leaning one. *See Compl't Br.* at 24-25. At no point during the trial did a witness testify that a load that shifted *on* the pallet was a hazard, nor did anyone testify the load in question was leaning until mere moments before the load collapsed. Although the evidence indicates the shrink-wrapped stack of boxes had shifted on the pallet, there was no testimony to suggest that a shifted load, alone, was hazardous. Peña assessed the load and determined that, despite the shift, there was no hazard. Complainant provided absolutely no evidence, beyond the fact of the accident, to suggest that assessment was flawed. Complainant also points to the testimony of [redacted] to support this inference. [redacted] testified that he regularly complained about the shifted loads; however, he also admitted that his complaints had to do with the effort required to unload a railcar by hand. He never stated, or implied, that he or anyone else recognized the shifted load as hazardous.

While the Court does not accept Complainant's shifting characterization of the hazard, the Court still finds Respondent's employees were exposed to a hazard. Sticking with the original formulation—an unstable load, characterized by leaning, that can strike a nearby employee—the fact of the accident itself establishes Respondent's employees were exposed to the hazard as alleged by Complainant. *See Wayne Farms*, No. 17-1174, 2020 WL 5815506, at *3 n.2 (OSHRC

Sept. 22, 2020) ("[T]he injury sustained by Employee #1 here is . . . relevant to assessing actual exposure and would likely satisfy that element of the case if we were to reach that issue . . . ."). Although [redacted] testified the hazard (leaning boxes) did not exist for very long, the duration of exposure does not negate the existence of a hazard.[9] Respondent's employees were in the railcar when a pallet began to lean and eventually fell onto them. Irrespective of how it happened, or how long it took for the hazard to come to fruition, this is sufficient to establish exposure under the Act.

The next question is whether the hazard to which Respondent's employees were exposed was *recognized*. "Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry." *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984). Alternatively, there are instances where the hazard is so obvious that its existence cannot reasonably be denied. *See id.* ("[W]here a hazard is 'obvious and glaring,' the Commission may determine that the hazard was recognized without reference to industry practice or safety expert testimony." (quoting *Tri-State Roofing v. OSHRC*, 685 F.2d 878, 880 (4th Cir. 1982)); *see also Wiley Organics, Inc.*, 17 BNA OSHC at 1593 (affirming ALJ's determination that discharge of hazardous chemicals into an employee work area is "an obvious hazard for which no particular expertise is necessary to establish recognition"). Although the testimony regarding industry practice was virtually non-existent, the Court finds Respondent recognized the hazard, as alleged by Complainant, based on the testimony of its management team, as well as its own unloading SOPs. (Ex. R-1). Harrelson testified that leaning product is unsafe and can fall and cause serious injuries. (Tr. 180-81). Further, Respondent's SOP directs employees to "[n]otify your supervisor

[9] Though, as discussed below, the duration of the exposure, at least in this instance, is relevant to the question of knowledge. *See, e.g., LJC Dismantling*, 24 BNA OSHC 1478, 1480-81 (No. 08-1318, 2014) (plain view alone does not establish knowledge when it was not clear that a supervisor could reasonably be expected to have seen the condition given the brief amount of time it was capable of being discovered).

of any leaning product" and that "picking near the bottom may cause the load to lean and collapse." (Ex. R-1). The Court finds this sufficient to establish Respondent recognized the alleged hazard.

B. The Hazard Was Likely to Cause Death or Serious Physical Harm

According to [redacted], each box of frozen chicken feet weighed roughly 40-50 pounds, and each pallet contained roughly 40-50 boxes. (Tr. 33, 42). Although [redacted] declined medical assistance, he stated that he was knocked out and suffered memory loss as a result of the incident. M.R. fared far worse. As a result of the accident, M.R. was paralyzed from being crushed by the falling boxes. Accordingly, the Court finds the hazard was likely to cause death or serious physical harm.

C. Complainant Failed to Show Respondent Was Aware of the Condition

In her argument regarding the question of knowledge, Complainant yet again conflates a shifted load with a leaning or unstable load without ever having established that a shifted load is equivalent to either or constitutes a hazard.[10] According to both Harrelson and Peña, the simple fact of a shifted load is not, of itself, hazardous. Nevertheless, Respondent requires a supervisor to make an assessment—based on their experience and training—as to how the unloading process should proceed in light of the condition of the load upon arrival. This includes whether a load can be removed by forklift, by hand, or through a controlled fall. In this instance, Peña determined there was no hazard but that the initial part of the load would need to be done by hand. Aside from the result, CSHO Cabello did not present any competent evidence to indicate a flaw or shortcoming in Peña's examination or his conclusion.

[10] Complainant specifically argued, "Here, the Respondent knew or reasonably could have known of the hazardous condition at issue, *namely that the freight had shifted off a pallet*." *Compl't Br.* at 24 (emphasis added).

Nobody disputes the loads were shifted on the pallets.[11] What was not made clear is whether that specific amount of shift was sufficient to place Respondent on notice that additional measures were required or that a latent hazard existed elsewhere. According to subsequent investigation by Harrelson, he believes an unstable pallet—that was not yet visible to [redacted] and M.R.—pushed into another pallet, which caused it to collapse onto them. (Tr. 218-24; Exs. R-2, R-3, R-15).[12] Again, this was not disputed by Cabello or by the testimony of any other witness. That being the case, while the Court finds Complainant proved the existence of a recognized hazard to which Respondent's employees were exposed, it does not find Respondent knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. If Complainant's conclusion is based on [redacted]' observation of "movement" less than a minute prior to the collapse, there was not enough time to place Respondent on notice.[13] *See LJC Dismantling*, 24 BNA OSHC at 1483 n.8. If based on the mere fact of a shifted load, CSHO Cabello did not provide adequate evidence to contradict the assessment of Peña, who found it was not hazardous.

Finally, though not directly argued by Complainant in the section regarding knowledge (though perhaps intimated at in other areas), [redacted]'s previous complaints to his supervisors regarding the state of these cars did not indicate a hazard either. As [redacted] admitted, his complaints had to do with the work involved, not his safety.[14] Granted, simply because no

[11] The Court rejects the characterization of the load being shifted "off" of the pallet. Indeed, a portion of the load may have shifted over the edge; however, as noted by Peña, it was still standing vertically, straight up-and-down.
[12] For a clearer depiction, the diagram in Ex. R-15 illustrates how the pallets were numbered. According to Harrelson, the crew had removed the top and bottom stacks of 1, 2, 3, and 4 ("clearing the middle"). (Tr. 173, 222). Given the condition of the pallets, Mr. Harrelson concluded the collapse occurred when the top pallet of stack 7 fell into the top of stack 5. (Tr. 218-24; Exs. R-3, R-15).
[13] CSHO Cabello mentioned that, during his interview, [redacted] told the CSHO that he reported a concern about moving pallets to management prior to the accident. (Tr. 297). However, at trial, [redacted] testified he expressed his concerns to management "only during the incident", meaning "explaining to management how the product fell and how it hurt an employee." (Tr. 94). When recalled by Complainant, [redacted] could only remember talking to management *after* the incident. (Tr. 247-48).
[14] Additionally, there is no indication that, in those instances, the supervisor failed to perform the standard assessment of the load.

accidents occurred before does not mean what Respondent was doing was safe. *See Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1059 (No. 89-2804, 1993) ("[T]he goal of the Act is to prevent the first accident."). The key here, as in other parts of this decision, however, is that Complainant failed to prove Respondent's procedures and manner of assessment were so flawed as to place Respondent on constructive notice of a hazard Complainant could not consistently define.

D. Complainant Failed to Prove a Feasible Means of Abatement

While an accident resulting in paralysis simplifies the proof required to establish Respondent's employees were exposed to a recognized hazard, the burden to introduce *competent* evidence on the topic of abatement remains. Typically, the general duty clause analysis comes down to two questions: (1) whether the Secretary proved an employer failed to abate a recognized hazard; and (2) whether the Secretary proved her proposed methods are effective and capable of being implemented. Complainant failed to do either in this case. First, Complainant was unable to highlight the shortcomings of Respondent's program independent of the unfortunate accident in this case. Second, most of Complainant's proposed abatement methods were couched in terms of the results she desired to achieve, rather than the method designed to achieve those results. Finally, the failure to describe the specific method required to abate the hazard highlights another problem in Complainant's case: not only is the Court incapable of analyzing the effectiveness of a result, but the manner in which the abatement proposals were presented at trial illustrates CSHO Cabello did not possess the requisite experience or expertise to convincingly opine on any of them. *See Hurlock Roofing Co.*, 7 BNA OSHC 1108, 1111 (No. 76-357, 1979) (finding CSHO's opinion testimony should not be credited where it is "not explained" and "no basis [is] given"); *see also Missouri Basin Well Svc., Inc.*, No. 13-1817, 2018 WL 1309482, at *6 (OSHRC, Mar. 1, 2018) ("As the compliance officer was never proffered as an expert with the qualifications necessary to

opine on this question under Federal Rule of Evidence 702, his opinion on this question is given no weight.")

To prove feasibility, Complainant must "*specify* the proposed abatement measures and *demonstrate* both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters., Inc.*, No. 91-3144, 2000 WL 34012177, at *34 (OSHRC, Oct. 27, 2000) (consolidated) (emphasis added) (citations omitted). To be capable of being put into effect means "economically and technologically capable of being done." *Baroid Div. of NL Indus., Inc.*, 660 F.2d at 447 (citing *Am. Textile Mfgr. Inst., Inc. v. Donovan*, 452 U.S. 490, 503 (1981)). "Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in 'prescribing a safety program.'" *Beverly Enters.,* 2000 WL 34012177, at *34 (quoting *Nat'l Realty*, 489 F.2d 1257, 1266 (D.C. Cir. 1973)). "The question is whether a precaution is recognized by safety experts as feasible, and not whether the precaution's use has become customary." *Id.* (citations omitted).

i. Complainant Failed to Show Respondent's Existing Policies and Procedures Were Insufficient

As a threshold matter, if an employer has implemented methods, practices, or procedures to address the hazard, it is incumbent upon Complainant to show those methods are insufficient. *See U.S. Postal Svc.*, No. 04-0316, 2006 WL 6463045, at *8 (OSHRC, Nov. 20, 2006). To determine whether a company's safety program was sufficient to protect its employees from exposure to the hazard, the Court must consider whether the employer "has established workrules designed to prevent exposure, has properly communicated those rules to its employees, has taken steps to discover noncompliance with the rules, and has effectively enforced its rules in the event of noncompliance." *Ala. Power Co.*, No. 84-357, 1987 WL 89119, at *4 (OSHRC, Apr. 17, 1987) (citations omitted); *see also CF&T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2198

n.9 (No. 90-239, 1993) ("The mere existence of a safety program on paper does not establish that the program was effectively implemented on the worksite, as required.").

Complainant contends the evidence illustrating the insufficiency of Respondent's safety program is substantial. Specifically, Complainant identifies the following deficiencies in Americold's processes: (1) the safety policy for Railcar Loading/Unloading "merely states that employees should notify their supervisor of leaning products"; (2) the policy does not provide guidance on how to unload by hand, when or how to use the cage, how to secure a load, or when it is appropriate to refuse a load; and (3) Respondent relied too heavily on vague and unhelpful admonitions, such as "take your time" and "be careful". (Tr. 69).

In response, Respondent argues its process is adequate for the identified hazard. While it does not deny providing the type of general, cautionary reminders identified by Complainant, Respondent also points to its process for identifying and addressing "leaning" product and its creation of unloading plans for each railcar that enters the facility. (Ex. R-1). Further, Respondent argues, this written process is supported through orientation, on-the-job training with experienced unloaders, pre-shift procedure review and job hazard analysis for each railcar, and periodic review and coaching of the process. Finally, Respondent contends its written directives are general in ways that permit adaptation based on the unique circumstances of each railcar and load.

Complainant correctly states, and Respondent does not dispute, general admonitions and unfettered employee discretion to determine safety protocol are insufficient to address an identified and recognized hazard. *See Ala. Power Co.*, 1987 WL 89119 at *4. However, "a safety rule is not inadequate merely because it requires employees to exercise a certain degree of judgment and discretion." *Id.* To determine whether a work rule is adequate, "the nature of the hazard and overall circumstances of the work operation must be considered." *Id.*

With respect to Complainant's first argument—that Respondent's procedures for unloading were insufficiently specific—the Court notes, first of all, that work rules do not need to be written down if employees understand the process. *See Aquatek Systs., Inc.*, No. 03-1351, 2006 WL 305302, at *2 (OSHRC, Feb. 2, 2006) ("The Commission has never required an employer to reduce its safety rules to writing."). According to the Commission, a work rule is "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *Danis Shook*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001) (citation omitted), *aff'd*, 319 F.3d 805 (6th Cir. 2003). "Thus, while an employer need not have a *written* work rule, it must have a rule that reflects the requirements of the cited standard and is clearly and effectively communicated to employees." *Lake Erie Constr. Co., Inc.*, No. 02-0520, 2005 WL 2902315, at *2 (OSHRC, Sept. 23, 2005).

As noted above, Complainant argues Respondent's procedure is insufficiently specific because it "merely states that employees should notify their supervisor of leaning products" and does not provide guidance on how to unload by hand, when or how to use the cage, how to secure a load, or when it is appropriate to refuse a load. *See Compl't Br.* at 27. This is a confusing line of argument because it simultaneously criticizes Respondent for not granting employees sufficient discretion on how to handle leaning products while also giving them too much discretion to determine whether a cage is necessary for unloading. First, the Court does not see any issues with Respondent directing its employees to notify a supervisor when a load is leaning or unstable. It is a rule that "requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *Danis Shook*, 19 BNA OSHC at 1501. Further, the rule identifies a hazard and prescribes behavior in the face of

that hazard. There is no indication that Respondent's employees failed to understand this rule, nor is there any indication that the rule as written exposed Respondent's employees to a hazard.

Complainant argues, however, that the rule, as applied, exposed employees to a hazard. Complainant points to the testimony of Peña, who, at one point, seemed to suggest that employees should continue to unload while the supervisor was being summoned. *See Compl't Br.* at 28 (citing Tr. 145). The Court is not as persuaded by this isolated statement when it is read in context:

> **Q.** Do you know if employees who are concerned about a tilting load, when do they have the authority to stop their work?
>
> **A.** Yes, always. If they see anything that's unusual to report that to the supervisor.
>
> **Q.** And when they make that report, are they to stop working on that load?
>
> **A.** Yes. Yes, to stop working what they're doing and get with the supervisor.
>
> **Q.** Are they required to continue working until they are told by a supervisor or managers that they no longer have to work on that particular project or unloading?
>
> **A.** Yes.
>
> **Q.** So independently they could not stop working unloading the boxes on a pallet until they communicated that to the supervisor?
>
> **A.** That's correct.

(Tr. 144-45). Notably, Peña testified employees have stop work authority and are "to stop working what they're doing and get with the supervisor" if they see anything unusual. (Tr. 145). Thus, it is unclear how Peña interpreted the phrase "continue working" after he just stated employees should stop what they're doing. Further, the question itself is not a model of clarity. The question does not indicate if counsel for the Secretary is still talking about the tilting load discussed in the previous question or the project as a whole. It is certainly reasonable to assume that, simply because they cannot offload a particular pallet, employees should continue working in some capacity while

waiting for the supervisor. It was perfectly reasonable for Peña to read the question in the same way.

In a further attempt to highlight the insufficiency of Respondent's safety program, Complainant suggests that Peña brought up the cage "as an option". *Compl't Br*. at 16, 28. First of all, a rule is not deficient merely because it vests a degree of judgment and discretion in the employee. *See Alabama Power Co.*, 1987 WL 89119 at *4. Second of all, and more troublesome than above, Complainant repeatedly mischaracterizes Peña's testimony regarding the employees' discretion in the use of the cage, citing to the transcript on pp. 126-127. *See Compl't Br.* at 16. Again, in the interests of providing context and clarity, the colloquy is reproduced below:

> **Q.** And is it common to use that cage?
>
> **A.** Yes, yes. At that time that was brought up as well because of how compact the pallets were. As if, you know, in the middle they, you know -- so if you try to pick up a pallet it was too compact in the middle. So you had to use the cage to unload.
>
> **Q.** And you said it was brought up. Can you explain what you mean by brought up?
>
> **A.** In my routines of unloading railcars that's one of the main things that I bring up.
>
> **Q.** All right. You bring -- okay. So you mean you bring up to them or do they bring up to you?
>
> **A.** No, I bring that up to them.
>
> **Q.** As a -- as a what? As an option for them to use?
>
> **A.** As a safety -- safety precaution to -- once they're actually unloading the top sections.
>
> **Q.** And so –
>
> **A.** I have.
>
> **Q.** And so at the time of your safety meeting with your crew at the beginning of the shift, did you discuss that as one of the options?
>
> **A.** Yes.

Q. Do they need your permission to use the cage?

A. No, they don't. But I bring that up to their attention.

(Tr. 126-27). The only suggestion that the cage was optional was made by counsel for Complainant. In fact, when asked about whether the cage was an option, Peña referred to it as a "safety precaution". (Tr. 126). Insofar as the Court can tell, the use of the cage is not optional so much as conditional. In this case, Peña clearly testified that if the pallets could not be removed from the center, then they needed a cage to get to the top, which they did. (Tr. 133). Further, simply because employees do not need permission to use the cage does not imply they are permitted not to use it when circumstances dictate otherwise.

Further undermining Complainant's assertion that Respondent's work rules and procedures are deficient are the multiple meetings and assessments that occur prior to the railcar being unloaded. Other than the fact of the accident itself, Complainant did not put forth competent or persuasive evidence to indicate Respondent's existing safety regime was deficient.

ii. Complainant's Proposed Abatement Methods are Too Vague, Were Not Supported by Competent Evidence, and Are Framed In Terms of Results, not Methods

"Feasible means of abatement are established if conscientious experts, familiar with the industry would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Arcadian Corp.*, 20 BNA OSHC at 2011 (citation omitted). "Reliable expert testimony is sufficient to establish that an abatement method meets that requirement." *Cedar Springs Hosp., Inc.*, No. 20-0887, 2023 WL 9604921, at *65 (OSHRCALJ, Dec. 22, 2023) (citing *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *13-14 (OSHRC, Mar. 4, 2019)). In *Integra*, the Commission found that reliable expert testimony is sufficient to establish that an abatement method would materially reduce a hazard, even if

the expert cannot quantify the reduction. *See Integra Health Mgmt.*, 2019 WL 1142920, at *14 (citing *Beverly Enters.*, 2000 WL 34012177, at *34, where the Commission opined that "[t]he question is whether a precaution is recognized by safety experts as feasible, and not whether the precaution's use has become customary.").

While the hazard must be recognized by the employer or the industry, "[t]he means of abatement, unlike the hazard itself, does not have to be recognized by an employer or the employer's industry." *Litton Systs., Inc.*, No. 76-900, 1981 WL 18925, at *3 (OSHRC, Nov. 23, 1981). That is because it is incumbent on employers to take "all feasible steps . . . whenever [an abatement measure] is recognized by safety experts as feasible, even though it is not of general usage in the industry." *Gen. Dynamics Corp. v. OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979) (citation omitted). Relying on the industry's lack of knowledge or awareness of a particular form of abatement to ascertain its effectiveness or feasibility "would allow an entire industry to avoid liability by maintaining inadequate safety training." *Id.*

Complainant proposes four methods of abatement: "1) secure unstable loads when working adjacent to the load; 2) develop and implement a railcar specific process to remove unstable loads; 3) ensure dunnage is utilized when receiving product by railcar; and 4) provide and utilize protective device for employees manually unloading pallets with unstable loads." *Compl't Br.* at 28-29. In response, Respondent argues the proposed abatement methods are either: (a) framed in terms of results, as opposed to concrete steps to address the hazard; (b) are not within its control; or (c) repetitious. Based on its review of the transcript and record evidence, the Court agrees with Respondent.

It is not enough to propose measures that might be effective or merely describe a desired result. *See Arcadian Corp.*, 20 BNA OSHC at 2011-13 (holding Secretary must show there were

feasible abatement measures that would have effectively reduced a hazard further than any measures already in use by the employer). In other words, it is not enough to describe *what* will reduce the hazard; it is incumbent on Complainant to illustrate with specificity *how* the proposed abatement will do so. *See Nat'l Realty*, 489 F.2d at 1268 ("[T]he Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and demonstrate the feasibility and likely utility of those measures."). In the case of an employer with a pre-existing program, Complainant must show specific, additional measures required to abate the hazard. *See Mid-South Waffles*, No. 13-1022, 2019 WL 990226, at *6 (OSHRC, Feb. 15, 2019) (citations omitted).

With respect to the first and fourth proposals, the Court shall consider them together, because it is unclear how "securing an unstable load" through the use of a device and "provid[ing] and utiliz[ing] [a] protective device for employees manually unloading pallets with unstable loads" are materially different from one another. Most telling about Complainant's position with respect to the proposed abatement method is CSHO Cabello's lack of specificity as to what would be an appropriate device that would be effective at restraining an unstable load. When asked about what could be used to secure a load or how that implement would be effective, CSHO Cabello's answers were overly general and lacked evidentiary support. For example, when asked how the first proposed abatement method would be effective, CSHO Cabello more or less restated the abatement method: "By having some type of preventive measures, something that would prevent the boxes from tipping over onto the employee while they're inside the rail car." (Tr. 291-92). Similarly, when asked about the fourth proposed abatement method, CSHO Cabello testified, "Again, that's basically touching on number 1 as well. You know, a way to protect the employee from -- you

know, having some kind of device to protect the employee in case of the load shifting onto the employee, right, to protect the employee while he's in the railcar. So some kind of device that will prevent that." (Tr. 301). On follow-up, CSHO Cabello was asked whether it mattered what the device was, "so long as it serves as a protective device for employees." (Tr. 302). He replied, "It doesn't matter." (Tr. 302).

As the Court sees it, the crux of Complainant's argument is that there is "some kind of device" out there that Respondent should use to prevent boxes from tipping over. Over the course of the trial, CSHO Cabello proceeded to point to multiple "devices", such as the cage, a pallet, or a load lock. The problem, however, is that CSHO Cabello was incapable of providing more than speculation regarding how and whether the cage, a pallet, or a load lock would work in isolation, let alone how it would be *more* effective than the current regime.[15]

Because it is one of the only proposals that approaches the requisite specificity—in that Complainant identified a tool or process by name—the Court shall address Respondent's subsequent implementation of a load lock. A load lock, in its intended form, is an implement that over-the-road trucks use to support loads in transit. (Tr. 183). In this case, Harrelson testified they implemented the load lock on floor-loaded railcars to prevent the top row from sliding. (Tr. 183). There was little to no testimony regarding the capacity of these load locks, how they worked, or whether they would have been capable of restraining the load and dynamic force imposed by the pallets that fell in this instance. CSHO Cabello could only testify that Respondent had implemented them; the remainder of his testimony was largely speculative. Further, as noted by Respondent, the load lock, as well as the other specific implements discussed at trial, was not proposed as a means of abatement in the Citation, nor did Complainant seek to amend the Complaint to include it. (Tr.

[15] In contrast, [redacted], Harrelson, and Hartwick testified quite clearly, and based on extensive experience, as to why each of those devices were insufficient for the purposes of the identified hazard. (Tr. 68-69, 71, 209, 363-64).

375-76). Much like the Respondent in *Mid-South Waffles*, Respondent "lacked adequate notice as to what the Secretary was claiming was the extent of [its] obligation under the general duty clause. In short, the Secretary has merely identified the result it asserts [Respondent] must achieve, but not the additional steps—beyond those the company already had in place—it should have taken to achieve this result and consequently, abate the hazard." *Mid-South Waffles*, 2019 WL 990226, at *6.

Complainant's second proposal suffers from the same lack of specificity. Complainant alleges that one feasible means of abatement is to "develop and implement a railcar specific process to remove unstable loads" and then completely fails to identify the specific, additional steps Respondent should add. Instead, as with the previously discussed abatement proposals, CSHO Cabello expressed the result to be achieved:

> **Q.** How might the plan be better as spelled out in the policy?
>
> **A.** Have actual maybe equipment or, you know, something that would actually prevent in the case of, you know, the load being leaning or shifting, to have something that actually will prevent the employee while he is in there. One of the things that they mention in there says something about a controlled fall. You know, maybe that's something that they could have done.

(Tr. 297). There is nothing in this recitation, nor in any other part of CSHO Cabello's testimony, that apprises Respondent of its specific obligations under the Act, how they are to be achieved, or whether those methods will be effective. (*See, e.g.,* Tr. 314-16). This is insufficient for the purposes of the general duty clause.

Finally, Complainant proposes that Respondent ensure the use of adequate dunnage. The primary problem with this proposal is that Respondent does not have control over the loading of the railcar and, as noted above, there are instances where the car is in transit prior to Respondent becoming aware of its existence. Further, as it relates to this incident, images sent to Respondent

show the loader utilized dunnage to secure the load. While it appears many of those bags failed in transit, ensuring their use would not have had an impact on the hazard in this case. Additionally, CSHO Cabello did not have the requisite experience or expertise to opine on the most basic facts about dunnage and, therefore, could not opine on the effectiveness of this proposal as an abatement measure as compared to Respondent's existing regime.

Subsequent to this incident, Respondent began requesting that its loaders beef up their loading practices, including, but not limited to: dunnage, wrapping from top to bottom, and tightly loading the middle section through floor loading or slip sheets. (Ex. C-24). Respondent also indicated it may be forced to reject loads due to "unsafe conditions", though it did not specify what that meant. (Ex. C-24). Complainant did not include rejecting a load as a proposed method of abatement in the Citation, nor were the particular details of such a method explored at trial beyond past practice.[16] Previously, loads were rejected when the refrigerated car failed to maintain its temperature. (Tr. 136). Although flat out rejecting a load is a sure-fire way to prevent injury, it is not exactly the most profitable way to run a business. There was no discussion of how to implement such a drastic remedy or when it would be appropriate to do so. Further, the discussion of this and every other remedy lacked a critical element of proof under the general duty clause: economic feasibility.

To prove a violation of the general duty clause, Complainant must show her proposals are both technologically and economically feasible. *See USPS*, 2023 WL 2263313 at *9 (noting that a proposed abatement measure is feasible if it is "economically and technologically capable of being done." (citing *Beverly Enters.*, 19 BNA OSHC at 1191)). "When evaluating economic feasibility,

[16] Moreover, this proposal was not tried by consent.

the Commission may consider 'whether the cost of compliance would jeopardize a company's long-term profitability and competitiveness.'" *Id.* (citing *Waldon Health*, 16 BNA OSHC at 1063).

Complainant only makes one argument for economic feasibility, and it is in the context of the proposed changes to the railcar unloading procedure. Specifically, Complainant argues that Respondent updated its Railcar Loading/Unloading procedure after the accident, which illustrates its economic feasibility. (Tr. 167). First, although Respondent updated its policy, the weight of the testimony indicates Respondent did not change the policy but, instead, put into words what it already practices. (Tr. 167-68). Second, while a change to written procedure may not require substantial expense, the remaining proposals do require some expense. Whether it is some unnamed, nondescript device used to restrain loads or the drastic option of rejecting an entire railcar, Complainant failed to put forth any evidence regarding the expense involved or whether Respondent was capable of incurring that expense. As such, Complainant's argument regarding economic feasibility fails, as well.

VI. Conclusion

At bottom, Complainant focused too intently on the fact of the accident in this case. While an accident can be *some* evidence of a violation, it cannot be the only evidence. In the arena of the general duty clause, it is incumbent upon Complainant to provide the Court with a clear understanding of the work being performed, the potential hazards, and industry practice. Instead, Complainant premised almost its entire argument on the idea that the accident alone highlighted shortcomings in Respondent's safety and health program. The problem, however, is that Complainant's proposed abatements were nothing more than general admonitions to secure the load, update procedures to secure the load, and to tell the loaders to secure the load. There was no

nuance or specificity to the proposals, nor was there any explanation of how the proposals would be effective in and of themselves, let alone how they would be more effective than the existing regime. For this, and for all of the reasons mentioned above, the Court finds Complainant failed to establish a violation of the general duty clause.

VII. Order

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.

SO ORDERED.

/s/ Joshua R. Patrick
Joshua R. Patrick
First Judge, OSHRC

Date: January 26, 2026
Denver, Colorado