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

SECRETARY OF LABOR, **Complainant,** **v.** **CENTRAL TRANSPORT, LLC,** **Respondent.**	**OSHRC DOCKET NOS.** **14-1452, 14-1612, 14-1934**

ORDER DENYING RESPONDENT'S MOTION TO STRIKE THE SECRETARY'S CLAIM FOR ENTERPRISE-WIDE ABATEMENT OR, IN THE ALTERNATIVE, TO SEVER AND STAY THAT CLAIM

The Secretary's January 26, 2015 Complaint in Central Transport, LLC, case #14-1934 (Billerica, Massachusetts), includes a request for the entry of an order of enterprise-wide abatement against Respondent Central Transport compelling Respondent's compliance with standard 1910.178(p)(1) at all of Respondent's workplaces.[1] See Complaint ¶¶ XV, XVI, XVII, XVIII, XIX, and Relief Requested. Respondent's March 18, 2015 Answer denies many of the factual allegations set forth in the Complaint regarding the enterprise-wide abatement requested and denies that the Occupational Safety and Health Act (the Act) authorizes the use of enterprise-wide abatement and denies that the Occupational Safety and Health Review Commission (Commission) can grant enterprise-wide relief. See Answer ¶¶ XV, XVI, XVII, XVIII, XIX, XX, and Affirmative Defenses.

[1] The Secretary requests the entry of an order of enterprise-wide abatement regarding Respondent Central Transport. This relief is not requested regarding Respondent Transport Tech, LLC. *See* Secretary's January 26, 2015 Complaint in Central Transport, LLC, case #14-1934; Secretary's September 14, 2015 Response in opposition to Respondent's Motion to consolidate for hearing the citations issued to Central Transport #14-1612 and Transport Tech #14-1616; and Secretary's October 2, 2015 Opposition to Respondent's Motions to strike, sever and stay and for a preferred order of cases. *See* November 12, 2015 Prehearing Scheduling Order regarding hearing sequence and consolidation, which includes Transport Tech, LLC case #14-1616.

Respondent Central Transport filed a Motion to strike claim for enterprise-wide abatement or, in the alternative, to sever and stay the enterprise-wide abatement claim pending resolution of the underlying citations.[2] (Respondent's Motion). The Secretary filed an Opposition to Respondent's Motion to strike, sever and stay.[3] (Secretary's Opposition). Respondent filed a Reply in support of Respondent's Motion to strike or sever claim for enterprise-wide abatement. (Respondent's Reply).[4]

For the reasons stated below, Respondent's Motion to strike the claim for enterprise-wide abatement is denied. Further, Respondent's alternative request to sever and stay the enterprise-wide abatement claim pending resolution of the underlying citations is denied. The Secretary's claim for enterprise-wide relief will be heard and decided with Central Transport case #14-1934 (Billerica).[5]

The Citation and Contest.

Respondent Central Transport has its office and place of business at 12225 Stephens Road, Warren, Michigan 48089.

Central Transport #14-1934 (Billerica, Massachusetts).

The Andover, Massachusetts OSHA Area Office inspected Respondent Central Transport's job site, located at 7 Dunham Road, Billerica, Massachusetts, from May 15, 2014 through November 10, 2014. The inspection number is 976899. On November 10, 2014, OSHA issued to Respondent Central Transport an eight item serious citation, a four item willful citation,

[2] Respondent's September 14, 2015 Motion set forth Respondent's preferred order of cases. Respondent's Reply set forth Respondent's opposition to the Secretary's Motion to consolidate for hearing the forklift citations in Central Transport case #s 14-1452, 14-1612, and 14-1934. Hearing sequence and consolidation are addressed in the November 12, 2015 Prehearing Scheduling Order.

[3] The Secretary's October 2, 2015, Opposition set forth the Secretary's opposition to Respondent's preferred order of cases. The Secretary further moved for the willful forklift citations in Central Transport case #s 14-1452 and 14-1612 to be consolidated into the Central Transport case # 14-1934 (Billerica). Hearing sequence and consolidation are addressed in the November 12, 2015 Prehearing Scheduling Order.

[4] The Secretary's October 15, 2015 Motion for leave to file a Sur-Reply in response to Respondent's Reply is not necessary. Therefore, the Motion is denied.

[5] As stated in the November 12, 2015 Prehearing Scheduling Order judicial efficiency will be promoted and needless duplication and repetition will be avoided through the receipt into evidence of transcript testimony or documentary evidence offered and received in an earlier case that also is relevant to a claim or defense in a later case, if any.

a two item repeat citation, and notification of penalty (citation). The total penalty proposed was $330,800.00. Respondent filed a notice of contest.

The willful citation items include the alleged violation of standard 1910.178(p)(1) regarding defective or unsafe powered industrial trucks not withdrawn from service until restored to safe operating condition.

On January 26, 2015, the Secretary filed a Complaint, attaching and adopting by reference the November 10, 2014 citation. Complaint ¶ V. In addition to the citations regarding the Billerica, Massachusetts inspection, the Complaint further alleged Respondent's failure to comply with the safety standard for powered industrial trucks, standard 1910.178(p)(1), at other Respondent shipping terminals, where employees are required to perform similar work, thereby exposing employees to violative conditions and hazards due to damaged, defective and unsafe powered industrial trucks. Complaint ¶¶ XV, XVI, XVII, XVIII and XIX. At the end of the Complaint, the "Relief Requested" paragraph requests affirmation of the Billerica citations and to the extent that Respondent has failed to comply with standard 1910.178(p)(1) at any Respondent worksite, directing other appropriate relief available under section 10(c) of the Act, including, an order of "enterprise-wide abatement" compelling Respondent's compliance with standard 1910.178(p)(1) at all Respondent workplaces.

Specifically, regarding the request for enterprise-wide abatement, the Complaint alleged as follows:

> ALLEGATIONS OF RESPONDENT'S FAILURE TO COMPLY WITH OSHA'S STANDARDS FOR SAFETY OF POWERED INDUSTRIAL TRUCKS, AT LOCATIONS OTHER THAN BILLERICA, MASSSCHUSETTS
>
> XV.
>
> In addition to the Billerica Terminal, Respondent operates approximately 170 shipping terminals and service centers in the United States (each, a "Shipping Terminal"). Respondent operates these terminals under the common control of its corporate executives, officers and management officials. Respondent's employees at the Shipping Terminals handle and move freight on loading docks using powered industrial trucks, and transport the freight by trailer trucks to and from customers and other terminals.
>
> XVI.

At the Billerica Terminal and other Shipping Terminals, Respondent has failed to remove powered industrial trucks from service that were in need of repair, defective or otherwise unsafe, as required by 29 C.F.R. § 1910.178(p)(1), thereby exposing employees to violative conditions that are similar at multiple locations. As alleged in Billerica Citation 2, Item 4, Respondent willfully failed to remove five (5) damaged and unsafe forklifts from service at the Billerica Terminal. These forklifts had a variety of defects, including a non-functioning horn and/or lights, a damaged tire, and a battery that leaked corrosive battery acid. Respondent's employees at the Billerica Terminal operated the forklifts as much as four (4) hours per day, and were exposed to struck-by and tip over hazards. The Billerica Inspection and other inspections of Respondent reveal that employees who perform similar work at other Shipping Terminals have been, and likely are, exposed to similar violative conditions.

XVII.

Since September 2006, or earlier, Respondent has been aware of the need to implement enterprise-wide measures at its Shipping Terminals to remove damaged, defective and/or unsafe powered industrial trucks from service, as required by 29 C.F.R. § 1910.178(p)(1). On September 25, 2006, Complainant cited Respondent for a Repeat violation of 29 C.F.R. § 1910.178(p)(1) at a Shipping Terminal in York, Pennsylvania. From and including that time, Respondent has received eleven (11) final order citations under the same standard, including eight (8) final order Repeat citations. The eleven (11) final order citations were for violations at eleven (11) different Shipping Terminals, located in Pennsylvania, Connecticut, Massachusetts, Wisconsin, Georgia, Ohio, New Jersey, Nebraska and Illinois. Like employees at Billerica Terminal, employees at these locations were exposed to hazards from damaged, defective and unsafe forklifts, including forklifts with damaged tires, leaking batteries and inoperable lights and horns.

Respondent's corporate safety managers and safety director participated in several of the inspections, and were aware of the widespread nature of the violations. Despite this knowledge, Respondent failed to abate the hazards on an enterprise-wide basis, thereby exposing employees at other Shipping Terminals to damaged and unsafe forklifts.

XVIII.

Complainant recently issued two (2) willful citations to Respondent for violations of 29 C.F.R. § 1910.178(p)(1) at terminals in Rock Island, IL ("Rock Island Terminal") and Hillside, IL ("Hillside Terminal"). Complainant's inspection of the Rock Island Terminal, OSHA Inspection No. 962911 (the "Rock Island Inspection") revealed, among other violations, that Respondent willfully failed to remove six (6) defective and unsafe forklifts from service. Complainant issued the citation, Willful Citation 2, Item 1, to Respondent on August 29, 2014, together with Serious, Repeat and Other-Than-Serious citations for other hazards at the Rock Island Terminal.

Complainant's inspection of the Hillside Terminal, OSHA Inspection No. 966185 (the "Hillside Inspection") revealed, among other violations, that Respondent willfully failed to remove three (3) defective and unsafe forklifts from service. Complainant issued the citation, Willful Citation 2, Item 1, to Respondent on September 25, 2014, together with Serious, Repeat and Other-That-Serious citations for other hazards at the Hillside Terminal.

The Rock Island and Hillside Citations are currently before the Commission as Docket Nos. 14-1452 and 14-1612, respectively.

XIX.

Respondents' employees at the Billerica, Rock Island and Hillside Terminals operate forklifts on a daily basis to move, handle, load and unload freight and other materials. Employees are required to perform similar work at other Shipping Terminals and, upon information and belief, are similarly exposed to struck-by and tip over hazards due to damaged, defective and unsafe powered industrial trucks.

RELIEF REQUESTED

Under 29 U.S.C. § 659(c), the Commission is authorized to "issue an order . . . affirming, modifying, or vacating the Secretary's citation or proposed penalty or directing other appropriate relief . . . ." Based on this statutory grant of authority, Complainant respectfully requests that the Commission:

(1) affirm the Billerica Citations and all associated proposed penalties; and
(2) to the extent that Respondent has failed to comply with 29 C.F.R. § 1910.178(p)(1) at any Central Transport worksite, direct other appropriate relief available under Section 10(c) of the Act, including: (A) entering an order of enterprise-wide abatement against Respondent compelling its compliance with 29 C.F.R. § 1910.178(p)(1) at all of Respondent's workplaces; and (B) based on the evidence provided at trial, such additional relief as appropriate under Section 10(c) of the Act.

On March 18, 2015, Respondent filed an Answer denying specific Complaint allegations and asserting the following affirmative defenses, among others, (1) unconstitutional vagueness of the standards alleged and as interpreted and applied, (2) failure to provide adequate notice of interpretation of standards, (3) alleged violations and required abatement actions not described with reasonable particularity, (4) no hazard, (5) no employee hazard exposure, (6) citation classifications alleged unsupported by the evidence, (7) alleged violations *de minimus*, (8) compliance with industry occupational safety and health standards, (9) misapplication of the cited standards, (10), infeasibility, (11) greater hazard, (12) no knowledge, (13) isolated supervisory misconduct, (14) isolated employee misconduct and (15) failure to state a claim upon which relief can be granted.

In addition, Respondent denied that the use of enterprise-wide abatement is authorized by the Act and further denied that the Commission can grant enterprise-wide relief. Answer ¶¶ XV, XVI, XVII, XVIII, XIX and XX.

Specifically, regarding the Complaint request for enterprise-wide abatement, the Answer stated as follows:

XV.

Central Transport admits only that it operates approximately 170 shipping terminals and service centers in the United States. Central Transport further admits that its employees at these shipping terminals handle and move freight on loading docks using powered industrial trucks, and transport the freight by trailer trucks to and from customers and other terminals. All other allegations in [Complaint] paragraph XV are denied.

XVI.

Central Transport denies any and all allegations in [Complaint] paragraph XVI.

XVII.

Central Transport admits only that it received an alleged repeat citation for an alleged violation of 29 C.F.R. § 1910.178(p)(1) at a shipping terminal in York, Pennsylvania on September 25, 2006. Central Transport further admits only that it received additional citations for alleged violations of 29 C.F.R. § 1910.178(p)(1) at other shipping terminals in other states. Central Transport denies all other allegations in [Complaint] paragraph XVII including any inference that it engaged in a violation of the OSH Act, that employees were exposed to any hazards, or that enterprise-wide enforcement measures were or are needed. Central Transport denies that any corporate safety managers and safety directors were aware of an alleged widespread nature of the asserted violations or that OSHA has presented sufficient information to allege a widespread nature of the asserted violations. Central Transport further denies that it failed to abate any alleged hazards.

Further, Central Transport denies (1) that the use of enterprise-wide abatement is authorized by the OSH Act and (2) that the Occupational Safety and Health Review Commission can grant enterprise-wide relief.

XVIII.

Central Transport admits only that it received two allegedly willful citations for alleged violations of 29 C.F.R. § 1910.178(p)(1) at terminals located in Rock Island, IL and Hillside, IL. Central Transport admits that it was issued Citation No. 2, Item 1 on August 29, 2014 following the Rock Island, IL inspection and Citation No. 2, Item 1 on September 25, 2014 following the Hillside, IL inspection, along with other citations stemming from these two inspections. It admits that these citations are currently before the Commission in Docket Nos. 14-1452 and 14-1612. Central Transport denies all other allegations in [Complaint] paragraph XVIII including any inference that it engaged in a violation of the OSH Act. Further, Central Transport denies (1) that the use of enterprise-wide abatement is authorized by the OSH Act and (2) that the Occupational Safety and Health Review Commission can grant enterprise-wide relief.

XIX.

Central Transport admits only that its employees at its various terminals operate forklifts on a daily basis to move, handle, load and unload freight and other materials. Central Transport denies all other allegations in [Complaint] paragraph XIX including any inference that it engaged in a violation of the OSH Act or that OSHA has sufficient information or belief to assert that employees at other Shipping Terminals are exposed to struck-by and tip over hazards due to allegedly damaged and defective and unsafe powered industrial trucks. Further, Central Transport denies (1) that the use of enterprise-wide abatement is authorized by the OSH Act and (2) that the Occupational Safety and Health Review Commission can grant enterprise-wide relief.

XX.

Central Transport denies any and all allegations in the unnumbered [Complaint] paragraph titled "relief requested" and, in particular, that the Secretary is entitled to the relief requested. Central Transport also denies (1) that the use of enterprise-wide abatement is authorized by the OSH Act and (2) that the Occupational Safety and Health Review Commission can grant enterprise-wide relief.

XXI.

All allegations of the Secretary's Complaint, not heretofore specifically admitted or otherwise specifically addressed, are denied.

Positions of the Parties.

Respondent.

Respondent contends that pursuant to section 10(c) of the Act and Commission Rule 34, the Commission has no statutory authority to order enterprise-wide relief. *See* 29 U.S.C. § 659(c); 29 C.F.R. § 2200.34(a)(2). Section 10(c) of the Act and Commission Rule 34, when read in conjunction, preclude an order of enterprise-wide abatement that would apply to an employer's worksites that have never been inspected by OSHA. Read in conjunction, Section 10(c) and Commission Rule 34 limit the Commission's authority to remedying specific violations at individual worksites based on findings of fact. Respondent contends that allowing the Secretary to pursue the enterprise-wide abatement claim "would tip Congress' carefully balanced enforcement scheme." Motion p. 9. *See* Motion pp. 3, 5-10; Reply pp. 2, 5-6, 8-9, 11-12.

Respondent contends that an order for enterprise-wide relief would violate "the due process rights of employers who would be held in 'violation' of the OSHA rules at worksites that

have never been inspected by OSHA and for which no final orders have been affirmed by the Commission." Motion p. 5. *See* Reply p. 9.

Respondent relies on the decision in Delta Elevator Service Corp., 24 BNA OSHC 1968 (No. 12-1446, 2013)(ALJ Coleman). Motion pp. 3, 7-9; Reply pp. 5, 6-8.

As the Commission has no statutory authority to order enterprise-wide relief, Respondent argues that the claim for an order of enterprise-wide abatement in the Billerica Complaint must be struck – dismissed with prejudice - from the Complaint. Simply stated, the Commission lacks the authority – or jurisdiction – to grant the relief requested. Reply pp. 4, 12.

Respondent's contends that the Motion to strike the claim for enterprise-wide abatement is not a Fed.R.Civ.P. Rule 12(b)(6) Motion to dismiss for failure to state a claim upon which relief can be granted.[6] Reply p. 4. Respondent further contends that even under a notice pleading standard, the Billerica Complaint as written, regarding the claim for an order of enterprise-wide abatement, fails to satisfy the Commission Rule 34 pleading requirements. Pursuant to Commission Rule 34 the Secretary must plead the "time, location, place, and circumstances of each such alleged violation." 29 C.F.R. § 2200.34(a)(2)(ii). Reply pp. 4, 12-13.

Respondent states that in the Billerica Complaint, the Secretary requested that the Commission order enterprise-wide relief for all Central Transport facilities across the country to the extent that the facilities were not complying with standard 1910.178. Motion p. 4. Respondent contends that the Secretary, in its Opposition, appears to have changed its original request for enterprise-wide abatement at individual worksites, focusing instead on an order directing Central Transport to take actions at the corporate level to protect against "future violations." The Secretary's request, as stated in the Opposition, "appears to concern Central Transport's overall forklift policies and procedures." Reply p. 6. Respondent argues that this request for an order directing corporate level action also is not included in the Act's remedies and is beyond the Commission's authority to grant. Reply pp. 3, 6-8.

[6] Respondent states that its Motion to strike the claim for an enterprise-wide abatement remedy is "more akin" to a Fed.R.Civ.P. Rule 12(b)(1) Motion to dismiss for lack of subject-matter jurisdiction, a Fed.R.Civ.P. Rule 12(c) Motion for judgment on the pleadings, or a Fed.R.Civ.P. Rule 12(f) Motion to strike. Reply p. 12.

Allowing the Secretary to pursue the enterprise-wide abatement claim will violate Respondent's due process rights in several ways, including chilling employers in their right to file notices of contest to citations, empowering OSHA to pursue claims for enterprise-wide relief in every case, and granting OSHA an open search warrant to inspect any Central Transport location without probable cause. Motion pp. 9-12; Reply pp. 5, 10-11.

In the alternative, Respondent argues that if the claim for an order of enterprise-wide abatement is not struck from the Complaint, then the enterprise-wide abatement claim should be severed from the alleged violations set forth in the Complaint and the discovery and litigation of the enterprise-wide abatement remedy should be stayed until the individual forklift citations in Central Transport case #s 14-1452, 14-1612, and 14-1934 are fully litigated, through the appellate process,[7] and decisions issued. Motion pp. 3, 12-17; Reply pp. 15-16.

Secretary.

In opposition, the Secretary contends that Respondent's Motion to strike should be denied as it requests the extreme sanction of striking – or dismissing – the Secretary's claim for "other appropriate relief" before discovery and an opportunity for hearing. Respondent's Motion should be denied because the Secretary has pled a credible claim for "other appropriate relief" with more than sufficient particularity. The Secretary argues that Respondent's Motion applies too narrow a reading of section 10(c) of the Act and Commission Rule 34 and that Respondent misinterprets the nature of the Secretary's claim. Opposition pp. 2, 5.

The Secretary contends that section 10(c) of the Act gives the Commission statutory authority to order enterprise-wide relief in certain appropriate cases. Section 10(c) provides that, after an opportunity for a hearing, the Commission shall "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or *directing other appropriate relief*." (emphasis added). The Secretary states that this case presents the novel question "whether the '*other appropriate relief*' clause [in section 10(c) of the Act] permits the Commission to direct abatement measures beyond the specific violations identified in the citations." It is the Secretary's position that the Commission may grant relief of this type and

[7] "[T]he Secretary should not be permitted to pursue an enterprise-wide claim against Central Transport without ever having to prove initially – and Central Transport have full rights to appeal – even one alleged [1910.178(p)(1)] forklift violation" in Central Transport case #s 14-1452, 14-1612 and 14-1934. Reply p. 17.

that this type of relief is necessary in the extraordinary circumstances of this case. Opposition p. 2.

The Secretary contends that the Commission has broad remedial authority to achieve the purposes of the Act. The Secretary's position, that the Commission has authority to order enterprise-wide relief pursuant to the "other appropriate relief" provision in section 10(c) of the Act, is supported in the Opposition by a detailed discussion of federal case law precedent and the legislative history of the Act.[8] Opposition pp. 6-9.

The Secretary contends that Respondent's "heavy reliance" on the decision in *Delta Elevator Service Co.* is misplaced. 24 BNA OSHC 1968. Opposition pp. 9-10.

The Secretary contends that Respondent's Motion to strike the Secretary's claim for an enterprise-wide abatement remedy is, in essence, a Fed.R.Civ.P. 12(b)(6) Motion to dismiss for failure to state a claim upon which relief can be granted. Opposition p. 4. The Secretary states that to survive a motion to dismiss, the Complaint must only contain sufficient facts, which if accepted as true, state a plausible claim for relief. The Secretary contends that the Billerica Complaint is more than sufficiently pled and compliant with the pleading requirements in Commission Rule 34(a)(2). Opposition pp. 5, 5.n.4; 10-11.

Regarding Respondent's challenge to the "sufficiency of the factual allegations" in the Billerica Complaint request for enterprise-wide abatement, the Secretary responds that the Billerica Complaint is more than sufficient to provide fair notice to Respondent of the nature of the Secretary's claim.[9] The Secretary contends that Respondent misconstrues the nature of the "other appropriate relief" sought by the Secretary. In the Billerica Complaint, the Secretary seeks enterprise-wide relief to address corporate practices. Opposition p. 5.

The Secretary contends that Respondent's claims of prejudice and lack of due process are speculative and unfounded. Opposition pp. 11-13.

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[8] *See* pages 14-16 below.

[9] The Secretary contends that if the Complaint lacks sufficient particularity the appropriate remedy is not dismissal. Respondent may move for a more definite statement pursuant to Fed.R.Civ.P. 12(e). The Secretary would then have the opportunity to amend the complaint to address any insufficiency. *See Del Monte Corp.*, 4 BNA OSHC 2035, 2038 (No. 11865, 1977). Opposition p. 11 n.6.

Discussion.

Jurisdiction.

The principal question presented in Respondent's Motion to strike is whether the Commission has the statutory authority to order the enterprise-wide relief requested in the Billerica Complaint. Respondent contends that pursuant to section 10(c) of the Act and Commission Rule 34, the Commission has no statutory authority to order enterprise-wide relief. Section 10(c) of the Act and Commission Rule 34, when read in conjunction, preclude an order of enterprise-wide abatement that would apply to an employer's worksites that have never been inspected by OSHA. Read in conjunction, section 10(c) and Commission Rule 34 limit the Commission's authority to remedying specific violation at individual worksites, based on findings of fact. As the Commission has no statutory authority to order enterprise-wide relief, Respondent argues that the claim for an order of enterprise-wide abatement against Respondent, in the Billerica Complaint, must be struck – dismissed with prejudice - from the Complaint. Motion pp. 3, 5-10; Reply pp. 2, 4-6, 8-9, 11-12.

In Opposition, the Secretary asserts that section 10(c) of the Act does give the Commission statutory authority to order enterprise-wide relief in certain appropriate cases. The Secretary acknowledges that this case presents the novel question "whether the '*other appropriate relief*' clause [in section 10(c) of the Act] permits the Commission to direct abatement measures beyond the specific violations identified in the citations." Opposition p. 2. Respondent acknowledges that the Secretary's legal theory is novel. Motion pp. 3, 17.

Respondent states that the only case to directly address the Secretary's request for an enterprise-wide abatement remedy is *Delta Elevator Service Corp.*, 24 BNA OSHC 1968 (No. 12-1446, 2013)(ALJ Coleman). Respondent highlights the denial of the Secretary's requested enterprise-wide remedy in *Delta* as strong support for Respondent's Motion to strike in the instant case. Respondent argues that the *Delta* decision supports Respondent's contention that, read together, section 10(c) of the Act and Commission Rule 34(a)(2) reveal that the Commission lacks the authority to order relief at worksites that have never been inspected or cited. Motion pp. 3, 7-9; Reply pp. 5, 6-8.

At issue in *Delta* was one serious citation alleging a violation of the general industry standard regarding personal protective equipment (PPE) for employees working in areas presenting potential electrical hazards. Following a detailed discussion of the worksite and the work performed, the judge found that the work performed by Delta was an integral and necessary part of the overall demolition project. Therefore, Delta was performing construction work and the general industry standard cited by the Secretary did not apply to Delta's work at the subject worksite. The cited general industry standard was vacated. The merits of the general industry standard were not adjudicated. 24 BNA OSHC at 1974-76.

Prehearing, the Secretary had amended the *Delta* Complaint to request an order of enterprise-wide abatement against Respondent compelling compliance with the cited general industry standard at all of Respondent's workplaces. The Secretary alleged that Delta's employees performed work like that at the subject worksite at other worksites without using appropriate PPE. 24 BNA OSHC at 1975-76. The judge noted that even though the cited general industry standard was found inapplicable to the subject worksite, the citation vacated, and the merits of the citation not adjudication, the Secretary "appeared" to contend that a violation of the general industry standard could still be found based on the evidence presented at the hearing to support the Secretary's claim for enterprise-wide abatement: that Delta performed work pursuant to service contracts at over 2000 jobsites, a regular part of the service work performed involved activities like those performed at the subject worksite, and that Delta generally did not require its elevator mechanics to wear PPE compliant with the general industry standard. The Secretary alleged that this evidence, together with the evidence presented to prove a violation of the standard at the subject worksite, established violations of the general industry standard at all Delta worksites.

The judge rejected the Secretary's argument and denied the request for enterprise-wide abatement. He found the evidence "insufficient" to support a determination that Delta violated the general industry standard at sites other than the subject worksite. 24 BNA OSHC at 1976. In analyzing the Secretary's request, the judge first noted that there was no Commission or other precedent holding that enterprise-wide abatement may be directed pursuant to the "other appropriate relief" clause in section 10(c) of the Act. Second, the judge stated that the requested remedy would "require an order that (1) is not based on any work performed at a worksite where

an inspection took place and (2) is not the subject of any allegation contained in the citation underlying the contest." Referencing Commission Rule 34(a)(2) regarding Complaints, the judge stated that "the Secretary would have the Commission judge grant relief based solely upon claimed violations for which the Secretary presented no evidence as to the time, location, or place of the claimed violations, and only the most general evidence respecting the circumstances of those claimed violations." 24 BNA OSHC at 1976. Third, the judge noted that, even if a violation of the general industry standard had been found at the subject worksite and an abatement remedy ordered, the "requested enterprise-wide abatement [would be] a "redundancy," as all of Delta's elevator mechanics worked out of one location. 24 BNA OSHC at 1976.

Respondent advocates for an broad reading of the *Delta* decision: that section 10(c) of the Act and Commission Rule 34, read in conjunction, preclude an order of enterprise-wide abatement that would apply to worksites that have never been inspected by OSHA and for which no final order has been affirmed by the Commission; that section 10(c) and Commission Rule 34, read in conjunction, limit the Commission's authority to remedying specific violations at individual worksites based on findings of fact.[10] Motion pp. 3, 7-9; Reply pp. 5, 6-8. Respondent's reading of the *Delta* decision focuses on specific statements made in the decision - in isolation - divorced from the factual context within which those statements were made. In Opposition, the Secretary argues that the judge's decision in *Delta* was based, at least in part, on case specific facts. Opposition pp. 9-10.

I agree with the Secretary that the statements made in the *Delta* decision are more accurately read in the context of the specific facts presented in that case. The judge analyzed the Secretary's claim for an enterprise-wide abatement remedy at the end of the decision after the *one* serious general duty clause citation had been *vacated*, as inapplicable to the subject worksite. No citation remained. The decision statements that the requested enterprise-wide relief "is not based on any work performed at a worksite where an inspection took place" and "is not the subject of any allegation contained in the citation underlying the contest" are read in that context.

[10] The Secretary's Post-Trial Reply brief in *Delta* contains hearsay facts and argument not included in the *Delta* decision findings of fact or discussed in the decision legal analysis and, therefore, is unhelpful. Reply, Exhibit 1.

The *Delta* decision was based on case specific facts. A detailed factual analysis of the subject worksite was necessary to determine whether the general industry standard was applicable at the subject worksite or whether the work performed was covered by the construction industry standards. The judge held that "the evidence [was] *insufficient* to support a determination that Delta violated the cited standard at sites other than the subject worksite." 24 BNA OSHC at 1976 (emphasis added).

Importantly, the *Delta* decision issued following a hearing at which both parties had an opportunity to present their evidence. Further, the facts and alleged violations at issue in the Central Transport cases, including multiple alleged willful violations of forklift standard 1910.178(p)(1) and Central Transport's history of numerous alleged serious and repeat violations of that same forklift standard, are very different from the one serious citation at issue in *Delta*.

Respondent's contentions regarding the *Delta* decision do not justify the extreme sanction of striking – dismissing with prejudice – the Secretary's credible claim for an order of enterprise-wide abatement from the Billerica Complaint, at this very early stage in the proceeding. The *Delta* decision will be accorded weight. It has precedential value as an unreviewed judge's decision. It is not controlling.

The Secretary contends that the Commission has broad remedial authority to achieve the purposes of the Act. The Secretary's position that the Commission has authority to order enterprise-wide relief pursuant to the "other appropriate relief" provision in section 10(c) of the Act, is supported in the Opposition by a detailed discussion of federal case law precedent and the legislative history of the Act. Opposition pp. 6-9.

The Secretary asserts that the Commission's remedial authority is akin to the remedial authority of an Article III Federal District Court. As stated by the Supreme Court in *Franklin v. Gwinnett County Public Schools,* the "general rule" is that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. 60, 70-71 (1992). The Secretary also cites *Bell v. Hood*, 327 U.S. 678, 684 (1946) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229. 239 (1969) to support this general rule. Opposition pp. 6-7.

The First Circuit has applied the remedial presumption in favor of all available remedies to the Act. In *Reich v. Cambridgeport Air Systems, Inc.*, the First Circuit held that the phrase "all appropriate relief" in section 11(c) of the Act includes all forms of relief "normally available," including punitive damages. 26 F.3d 1187 (1st Cir. 1994). *Cambridgeport* concerned a retaliatory discharge action brought by the Secretary pursuant to section 11(c) of the Act. In that case, the Secretary requested and the district court awarded damages in the amount of twice the employees' backpay. On appeal, the First Circuit analyzed the language in section 11(c) of the Act which states that in a retaliatory discharge action the district court shall "order *all appropriate relief* including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C. § 660(c)(emphasis added). Opposition p. 7.

In reaching its decision in *Cambridgeport*, the First Circuit compared the case before it to the Supreme Court's decision in *Gwinnett*. In *Gwinnett* the Supreme Court held that "all appropriate relief" included "any of the procedures or actions normally available . . . according to the exigencies of the particular case." *Id.* at 1191, *quoting* 503 U.S. at 68. The First Circuit concluded that section 11(c) of the Act authorized exemplary damages, based on the "expansive language" in *Gwinnett* and the lack of "clear direction" by Congress in the legislative history of the Act to limit the court's normal ability to order all appropriate relief. *Id.* at 1191, 1192-94.

The decisions in *Gwinnett* and *Cambridgeport* were issued by Article III courts. As emphasized by the Secretary, the role of the Commission has been analogized to that of a district court. Distinct from other administrative bodies, the Commission "was envisioned by its creators to be similar to a district court." *Oil, Chemical & Atomic Workers Intl. Union v. OSHRC*, 671 F.2d 643, 652 (D.C. Cir. 1982)(per curiam). The Commission "was established to settle disputes between employers and the Secretary of Labor over citations issued by the Secretary's inspectors. Like a District Court, it has no duty or interest in defending its decisions on appeal and it has no stake in the outcome of the litigation." *Id.* The Secretary also cites *Dole v. Phoenix Roofing, Inc.*, 992 F.2d 1202, 1208-09 (5th Cir. 1991); *In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989); and *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 65 (1st Cir. 1985). Opposition pp. 7-8.

In addition, the Secretary states that the legislative history of the Act also reveals the Congressional intent when establishing the Commission was to create an independent tribunal

akin to a district court. The creation of the Commission as an independent tribunal, the Secretary argues, further supports a broad reading of the Commission's authority under section 10(c) of the Act to direct "other appropriate relief." Opposition p. 8.

The Secretary argues that the Supreme Court's reasoning in *Gwinnett* and First Circuit's reasoning in *Cambridgeport* support a broad reading of the Commission's remedial authority, as the grant of authority to the Commission in section 10(c) "other appropriate relief" is almost identical to the grant of authority to the Commission in section 11(c) "all appropriate relief." In addition, the Act's legislative history reveals that *rather than* a "clear direction" by Congress limiting the Commission's authority to issue all normally available remedies, the Act establishes the Commission as an independent tribunal akin to a district court with broad remedial authority to direct "other appropriate relief." Opposition pp. 8-9.

In several cases, regarding settlement agreements that included broad terms of relief beyond the conditions alleged as violations of the Act in a citation, the Commission concluded that it did have jurisdiction, pursuant to the "other appropriate relief" provision of section 10(c), to order the relief in accordance with the terms of the settlement agreement. *See Oil, Chemical & Atomic Workers Intl. Union*, 16 BNA OSHC 1339, 1342-43 (No. 91-3349, 1993); *Phillips 66 Co.*, 16 BNA OSHC 1332, 1335-36 (No. 90-1549, 1993); *Davies Can Co.*, 4 BNA OSHC 1237, 1238 (No. 8182, 1976)(Section 10(c) empowers the Commission to grant "appropriate relief" to parties in proceedings before the Commission; the Commission's authority to approve the parties' settlement agreement, including terms regarding employer plants not mentioned in the citation, is "analogous to the exercise of a court's ancillary jurisdiction.")[11] See also, *Lumex Medical Products, Inc.*, 18 BNA OSHC 2002, 2005, 2005 n.7 (No. 97-1522, 1999)("There is no language in the Act dictating that the only way in which an abatement requirement can be imposed is through a citation.")

[11] The reasoning for the Commission's jurisdiction finding in those cases, found in section 10(c) of the Act and the court's ancillary jurisdiction, is different from the reasoning advocated by the Secretary in the instant case. As discussed in the text, in the instant case the Secretary contends that the Commission's authority to grant an enterprise-wide remedy is found in the Act's legislative history establishing the Commission as an independent tribunal akin to a district court with broad remedial authority to direct "other appropriate relief," the absence in the Act's legislative history of a "clear direction" by Congress to limit the Commission's authority to issue all normally available remedies, and the remedial presumption in favor of all available remedies as described by the Supreme Court in *Gwinnett* and as found applicable to the Act in *Cambridgeport*. I agree with the Secretary that the question presented in the instant Central Transport case is *novel*.

I have carefully considered the many cases cited by the Secretary in support of the claim for enterprise-wide relief. The Secretary's detailed analysis is supportive of the Secretary's position that the Commission has the authority under the "other appropriate relief" clause in section 10(c) of the Act to order enterprise-wide relief in cases where appropriate. The Secretary's detailed analysis is persuasive that the Commission has the jurisdiction to hear and decide the Secretary's the novel question "whether the '*other appropriate relief*' clause [in section 10(c) of the Act] permits the Commission to direct abatement measures beyond the specific violations identified in the citations." Opposition p. 2. I find, at this early stage in the proceeding, before discovery has been conducted and hearings held, that the Commission does have jurisdiction to hear and decide the novel question presented in the Secretary's claim for enterprise-wide abatement.

Due Process.

Respondent contends that allowing the Secretary to pursue the enterprise-wide abatement claim will violate Respondents' due process rights in several ways. First, knowledge that OSHA may seek, in a Complaint, broader relief than OSHA may include in a citation and notification of penalty under the Act Sections 9 and 10, may chill employers in their right to file a notice of contest to a citation and notification of penalty. "Congress certainly did not envision the filing of a Notice of Contest - a right given to employers under the Act - as creating a vehicle for OSHA to then seek broader relief than it could pursue when investigating the working conditions at one employer worksite, thereby chilling [an] employer['s] right to contest alleged violations." Motion p. 10. *See* Motion pp. 9-10; Reply pp. 10-11.

Next, Respondent contends that if the Commission allows OSHA to pursue the claim for enterprise-wide abatement in the instant case, OSHA will be empowered to pursue a claim for enterprise-wide abatement in every case, without the requirement of actually conducting inspections at worksites. Motion p. 11; Reply p. 5.

Further, Respondent contends that an order for enterprise-wide relief - at least as envisioned in the Billerica Complaint – will allow the Secretary to inspect any Central Transport location to verify abatement. In other words, Respondent contends that a grant of enterprise-wide abatement will amount to OSHA possessing an open search warrant that OSHA may

exercise without probable cause to inspect any Central Transport location. Motion pp. 11-12; Reply p. 10.

The Secretary contends that Respondent's claims of prejudice and lack of due process are speculative and unfounded. The Secretary notes that OSHA mentioned the prospect of enterprise-wide relief to Respondent Central Transport's representative at the informal conference. Thereafter, Respondent filed its notice of contest. Regarding Respondent's contention that if the Commission permits OSHA to pursue enterprise-wide abatement in this case, the Commission will empower OSHA to pursue enterprise-wide abatement in every case, the Secretary asserts that enterprise-wide relief has been requested in only a limited number of cases and there is no reason to believe that any of those claims were frivolous. Opposition pp. 11-13.

The Secretary contends that Respondent's allegation that the Secretary's claim for enterprise-wide relief will enable OSHA "to conduct warrantless inspections" thereby depriving Central Transport of due process is unfounded. The Secretary "knows of no reason why this would be true" and further states that "Respondents certainly could require OSHA to get a warrant, as it could in any other situation when OSHA seeks to enter its premises, unless a court determined otherwise." Opposition p. 13.

At this very early stage in the proceeding, before discovery has been conducted and hearings held, I find Respondent's due process claims speculative. Respondent's claims do not warrant the extreme sanction of striking the Secretary's claim for an order of enterprise-wide abatement from the Billerica Complaint.

Commission Rule 34 and the Complaint Request for Relief.

Respondent also challenges the "sufficiency of the factual allegations" in the Billerica Complaint, regarding the request for enterprise-wide abatement. Respondent contends that even under a notice pleading standard, the Billerica Complaint, as written, fails to satisfy the Commission Rule 34 pleading requirements that the Secretary must plead the "time, location, place, and circumstances of each such alleged violation." Reply pp. 4, 12-13.

Respondent contends that the Secretary, in its Opposition, appears to have changed its original request for enterprise-wide abatement at individual worksite, focusing instead on an order directing Central Transport to take actions at the corporate level to protect against "future violations." Respondent contends that pursuant to section 10(c) of the Act and Commission Rule 34 the Commission has no authority to order a remedy directing corporate level action. This is because an enterprise-wide remedy directing corporate level action would "affect worksites that have never been inspected or cited" and "seeks relief against violations that have not even occurred." Reply pp. 3 and 6, respectively. *See* Reply pp. 3, 6-8. Respondent further argues that the Secretary's request to remedy Central Transport's company-wide policies concerns "future violations that cannot be pled with specificity," therefore, "any [Complaint] amendment would be futile." Reply pp. 4, 12-14.

The Secretary contends that Respondent's Motion to strike the Secretary's claim for an enterprise-wide abatement remedy, pursuant to Section 10(c) of the Act is, in essence, a Fed.R.Civ.P. 12(b)(6) Motion to dismiss for failure to state a claim upon which relief can be granted. Opposition p. 4. The Secretary states that to survive a motion to dismiss, the complaint must only contain sufficient facts, which if accepted as true, state a plausible claim for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Secretary contends that the Billerica Complaint is more than sufficiently pled and compliant with the Commission Rule 34(a)(2) pleading requirements. Opposition pp. 5, 5.n.4, 10-11.

Commission Rule 34(a)(2) sets forth the pleading requirements for Complaints filed with the Commission. The Commission Rule 34 requirements have not been strictly construed. The standard at the Commission is notice pleading. The "essential consideration [being] whether there is fair notice of the circumstances of the alleged violation that will permit a fair defense." *Del Monte Corp.*, 4 BNA OSHC 2035, 2038 (No. 11865, 1977)(discussing prior Commission Rule 33(a)(2)(ii), currently Commission Rule 34(a)(2)(ii)). In administrative proceedings pleadings are liberally construed and easily amended. [12] *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 104 (2d Cir. 1996); *Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 930-31 (7th Cir. 1986). Fed.R.Civ.Pro. 15(a)(2) sets forth a liberal amendment policy.

[12] Respondent's contention that the specific Complaint pleading requirements set forth in Commission Rule 34 are analogous to the pleading particularity required in a defamation claim is rejected. Reply p. 12.

Well established Commission policy is to decide cases based on their merits, rather than on procedural flaws. Dismissal of a pleading is an extreme sanction that is not appropriate unless the record reveals that Respondent was prejudiced by the lack of particularity. *See Berg Lumber Co.*, 13 BNA OSHC 1822, 1824 (No. 87-0397, 1988); *Meadows Industries, Inc.*, 7 BNA OSHC 1709, 1710-11 (No. 76-1463, 1979). More particular information regarding the citations and complaint allegations may be obtained during later proceedings. The Commission has stated:

> Even if we were to find that the citation was not sufficiently particular, dismissal of the complaint would not be proper. Lack of particularity in a citation may be cured at the hearing. Whether a citation gives an employer fair notice of the nature of the alleged violation does not depend solely on the language of the citation but may be determined from factors external to the citation, such as the circumstances surrounding the inspection or the employer's familiarity with his own business. Furthermore, available discovery procedures enable a respondent to obtain sufficient additional information about the alleged violations to remedy any lack of particularity in the citation and complaint.

Meadows Industries, 7 BNA OSHC at 1710-11 (citations omitted). *See Brock v. Dow Chemical, 801 F.2d at 930-31, 934; Berg Lumber*, 13 BNA OSHC at 1824.

At this very early stage in the proceeding, I find that the request for an order of enterprise-wide abatement set forth in the Billerica Complaint satisfies the pleading requirements of Commission Rule 34. See Complaint ¶¶ XV – XIX, Relief Requested. The Complaint provides notice to Respondent that its compliance with forklift standard 1910.178(p)(1), at multiple locations, is at issue. The Complaint pleads allegations of common control over terminal operations (para. XV), common work conditions and hazards from unsafe forklifts (para. XVI and XIX), a systemic pattern of 1910.178(p)(1) citations at multiple worksites (para. XVII), corporate knowledge of the citations, failure to abate across multiple locations (para. XVII), among other allegations.

The Secretary contends that Respondent misconstrues the nature of the "other appropriate relief" sought by the Secretary. The Secretary denies Respondent's characterization of the relief claimed as trying to hold Central Transport in violation of OSHA rules at worksites that have never been inspected by OSHA or affirmed by the Commission as final orders. In the Billerica

Complaint "the Secretary seeks enterprise-wide relief to address corporate practices, not individual forklifts."[13] Opposition p. 5.

> The request [for an order of enterprise-wide abatement] does not concern any one particular occurrence or location, nor does it seek affirmance of any unpled violations of 1910.178(p)(1). Rather, the enterprise-wide claim seeks an order, injunctive in nature, compelling Respondents to take reasonable action at the corporate-level to protect employees from use of unsafe forklifts before any future violations occur.

Opposition p. 6.

The Secretary states that the prospect of enterprise-wide relief was initially mentioned to Respondent at the informal conference before Respondent filed its notice of contest to the Billerica citation. Opposition p. 12; Reply pp. 10-11. More importantly, at this very early stage in the proceeding, the Secretary has provided additional notice regarding the claim for enterprise-wide relief in its Opposition. More particular information regarding the Complaint request for an order of enterprise-wide abatement may be obtained later in this proceeding during discovery.

The Secretary anticipates that the specifics of the proposed relief requested will be refined in discovery and, based on the information obtained in discovery, the request for "other appropriate relief" in the Billerica Complaint may be amended to include elements of the abatement sought. The remedy will ultimately be determined by the Court based on findings of fact at trial. Opposition p. 6, 6 n.5.

At this early stage in the proceeding, I find that Respondent has not been prejudiced by any lack of particularity in the Complaint's remedy claim. I find that the extreme sanction of striking – or dismissing – the Secretary's claim for an order of enterprise-wide abatement unwarranted.

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[13] The Secretary asserts that in connection with the Billerica inspection, OSHA determined that the pattern of violations in the past and present cases was attributable to corporate policies and decisions made above the terminal level. Corporate managers determined the forklift inventories at the terminals and had the authority to grant requests to repair or replace damaged forklifts. Corporate policy also required that employees follow a computerized start-of-shift procedure that OSHA found resulted in defective forklift inspections. The Secretary alleges that the company failed to meaningfully address these company-wide practices in response to similar 1910.178(p)(1) citations, previously issued, including numerous repeat citation items. Opposition pp. 3-4, 14.

Respondent's Alternative Motion to sever the claim for an enterprise-wide abatement remedy and to stay the discovery and litigation of the enterprise-wide abatement remedy.

Respondent argues that if the claim for an enterprise-wide abatement remedy is not struck from the Complaint, then the enterprise-wide abatement claim should be severed from the alleged violations set forth in the Complaint and the discovery and litigation of the enterprise-wide abatement remedy should be stayed until the individual forklift citations in Central Transport case #s 14-1452, 14-1612, and 14-1934 are fully litigated, through the appellate process, and decisions issued. Respondent relies upon Commission Rule 10 and the Fed.R.Civ.P. Rules 21 and 42(b). Motion pp. 3, 12-17; Reply pp. 15-16.

Commission Rule 10 provides that upon its own motion or upon the motion of any party, "where a showing of good cause has been made" claims in a proceeding may be severed by order of the Judge or Commission. 29 C.F.R. § 2200.10.

> [T]here is a strong federal policy . . . against the confusion, overlapping decisions, and wasted effort that often result from piecemeal adjudication. . . . It will generally be more efficient for the judge to issue a single decision disposing of all issues so that the parties can seek Commission and court review of the entire case at one time and so that the entire record can be kept together.

LTV Steel Co. 13 BNA OSHC 1090 (No. 86-449-A, 1987).

Commission policy does not favor stays. The party requesting the stay must file a motion setting forth the "reasons a stay is sought and the length of the stay requested." Commission Rule 63. Generally, stays are granted only in limited circumstances. *See Aerospace Mft'g CT Systems, LLC*, 23 BNA OSHC 1641 (No. 11-0315, 2011) (pending the outcome of a parallel criminal proceeding); *Erie Lackawanna Railway Co.*, 1975 WL 4633 (No. 7621, 1975)(ALJ Chalk) (awaiting a higher court ruling regarding a dispositive legal issue).

Respondent contends that litigation and decisions regarding the merits of the underlying 1910.178(p)(1) forklift citations in the pending Central Transport cases could potentially dispose of the more onerous and costly enterprise-wide abatement claim. Motion pp. 3, 15-16; Reply pp. 15-16.

Respondent contends that litigating the enterprise-wide abatement claim requires substantially different and broader evidence than the specific facts necessary to resolve the non-

enterprise issues in the Central Transport cases. Therefore, if the Secretary is allowed to pursue the enterprise-wide abatement claim, it will dramatically increase the burden and cost of the litigation in these cases. Motion pp. 10-12, 16. Reply pp. 3-5, 9-11, 14-16.

In Opposition, the Secretary states his intention to offer evidence of Respondent's actions at the corporate level, among other evidence, regarding the willful characterizations regarding the alleged violation of forklift standard 1910.178(p)(1) at Central Transports Rock Island, IL, Hillside, IL, and Billerica, MA, locations. Even absent a prayer for enterprise-wide relief, to prove willfulness the Secretary's stated intention is to seek "discovery concerning forklift safety policies and practices and knowledge of past citations (as well as other information) at the corporate level." Opposition p. 12. The Secretary contends that the same witnesses and documents offered to prove the willful classification also will be relevant to the Secretary's request for an enterprise-wide remedy. The enterprise-wide remedy is specifically requested to abate the alleged willful violations of forklift standard 1910.178(p)(1). Opposition pp. 12, 14, 15.

I find overstated Respondent's claim that the enterprise-wide abatement claim will require substantially different and broader evidence than the specific facts necessary to resolve the merits of the underlying citations alleging willful violations of forklift standard 1910.178(p)(1). In the cases before the court, the willful forklift violations alleged broaden the scope of relevant inquiry to support any claims of heightened awareness, intentional disregard, and plain indifference. Such inquiry may include evidence of corporate-wide policies and practices.[14]

Respondent contends that the Secretary's ability to pursue the claim for enterprise-wide relief is dependent upon the Commission affirming alleged violations of standard 1910.178(p)(1) in the pending Central Transport cases. Motion pp. 15-16. This contention is narrowly focused on the alleged forklift violations in the pending Central Transport cases. Review of the Complaint discloses that the Secretary's request for enterprise-wide relief, regarding the cited forklift standard, is based on the alleged willful violations of standard 1910.178(p)(1) in the pending Central Transport cases <u>and</u> also on Central Transport's alleged history of numerous

[14] Therefore, Respondent's comparison of the enterprise-wide abatement requested in the Central Transport cases to a "*Monell* claim" is inapt and unhelpful. Motion pp. 13-15.

serious and repeat violations of this standard at Central Transport terminals, in numerous states, which violations are included in final orders. Complaint ¶¶ XVI, XVIII, and XVII.

Further, the prehearing discovery process may be used to focus the scope of inquiry. Either party may raise objections during the discovery process. Protective orders may be requested.

To bifurcate and stay the discovery and litigation of the enterprise-wide abatement claim, until the underlying cases are fully litigated, through the appellate process, will delay the litigation of the enterprise-wide abatement claim for years, jeopardizing the litigation of this claim, as necessary, relevant evidence may be lost and memories will fade. Bifurcation will delay abatement. Opposition p. 15. In fact, Respondent argued that the pending cases before the court should be litigated in the order in which the citations issued "to help ensure that key witnesses are available and the evidence is still fresh." Motion p. 17.

Respondent's Motion to sever the claim for an enterprise-wide abatement remedy and stay the discovery and litigation of Respondent's enterprise-wide abatement claim is denied. Respondent has not demonstrated the requisite good cause for severance. I do not find good cause that would justify severing the litigation of the remedy claimed for Respondent's alleged willful violations of forklift standard 1910.178(p)(1) from the litigation of the merits of the alleged willful violations of that standard. I find the risks of piecemeal adjudication to be substantial. Litigation efficiency will be promoted by litigating the violation alleged and the remedy requested for those violations simultaneously.

Respondent's Motion to stay the discovery and litigation of the Secretary's claim for an enterprise-wide abatement remedy is denied. The length of Respondent's requested stay of the discovery and litigation of the enterprise-wide abatement remedy is until the individual forklift citations in the Central Transport cases are fully litigated, *through the appellate process*, and decisions issued. This is a time period that may encompass years. I do <u>not</u> deem appropriate a discovery and litigation stay of the claim for enterprise-wide abatement. I find the stay requested will jeopardize the litigation of the claim for enterprise-wide abatement.

Conclusion.

Respondent's Motion to strike the Secretary's claim for enterprise-wide abatement is raised at a very early stage in this proceeding. Formal papers have been filed by the parties in Central Transport case #s 14-1452, 14-1612 and 14-1934 and a Prehearing Scheduling Order regarding hearing sequence and consolidation has issued. Formal discovery has not begun. No hearings have been held. Especially in a case where a novel legal theory is advanced, the decision regarding that claim should be made upon a complete record following full discovery by all parties.

Order.

Respondent's Motion to strike the Secretary's claim for an enterprise-wide abatement remedy is denied. This Order is without prejudice to Respondent's right to renew its Motion based upon a fully developed record at the hearing.

Respondent's alternative Motion to sever the litigation of the enterprise-wide abatement remedy from the alleged violations the requested abatement seeks to remedy and to stay the discovery and litigation of the severed enterprise-wide abatement claim until the individual forklift citations in all three pending Central Transport cases are fully litigated, through the appellate process, is denied.

SO ORDERED.

/s/ Carol A. Baumerich

Dated: December 7, 2015
Washington, D.C.

Honorable Carol A. Baumerich
Judge, OSHRC

CERTIFICATE OF SERVICE

This is to certify that a copy of the Order was emailed to the parties listed below on December 7, 2015.

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