

No. 24-3107

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MFA ENTERPRISES, INC., DBA WEST CENTRAL AGRI SERVICES,

Petitioner,

v.

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION;
SECRETARY OF LABOR,**

Respondents.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Christopher D. Helms)

BRIEF FOR RESPONDENT SECRETARY OF LABOR

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SUMMARY OF THE CASE

An Occupational Safety and Health Administration (“OSHA”) safety standard, 29 C.F.R. § 1910.132(d)(1)(i), requires employers to assess their workplaces for hazards that necessitate the use of personal protective equipment (“PPE”), and when such hazards are found, select appropriate PPE and “have each affected employee use” it. OSHA issued MFA Enterprises, Inc., dba West Central Agri Services (“MFA”) a citation for violating that standard because MFA determined that certain PPE (a personal fall protection system) was necessary to protect employees from a fall hazard when they worked atop railcars, but managers did not actually require employees to use that PPE. An administrative law judge (“ALJ”) of the Occupational Safety and Health Review Commission (“Commission”) affirmed that MFA “willfully” violated the cited standard because MFA routinely permitted employees to be exposed to a serious fall hazard. On appeal, MFA argues that it lacked constitutionally fair notice of its obligations under OSHA’s standard and that its violation was not willful.

The Secretary believes that the briefs in this case constitute a thorough presentation of the facts and legal issues and that oral argument would not significantly assist the Court in deciding the issues before it. If oral argument is ordered, 10 minutes will be sufficient to present argument on these issues.

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STATEMENT OF JURISDICTION

This matter arises from an enforcement proceeding brought by the Secretary of Labor (“Secretary”)¹ before the Commission under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“OSH Act”). The Commission had jurisdiction over this proceeding under 29 U.S.C. § 659(c). The ALJ’s decision became a final order of the Commission on August 22, 2024, and MFA filed a timely petition for review with this Court on October 16, 2024.² *See* 29 U.S.C. § 660(a). This Court has jurisdiction over the petition for review under 29 U.S.C. § 660(a).

STATEMENT OF ISSUES

1. Whether the ALJ correctly determined that MFA had constitutionally fair notice of its obligation under an OSHA standard, 29 C.F.R. § 1910.132(d)(1)(i), to have employees use PPE that MFA provided to protect

¹ The Secretary has delegated his responsibilities under the OSH Act to an Assistant Secretary who directs OSHA. Secretary’s Order 08-2020, 85 Fed. Reg. 58393 (Sept. 18, 2020). The terms “Secretary” and “OSHA” are used interchangeably in this brief.

² The caption also lists the Commission as a respondent, but the Commission is not an active party. *See Donovan v. Int’l Union, Allied Indus. Workers of Am. and its Local 370*, 722 F.2d 1415, 1420 (8th Cir. 1983) (“several courts of appeals have held that *** the Commission is not a real party in interest to appeals taken from its orders, and is not entitled to defend them in court any more than a trial judge is entitled to appear in court to defend his decisions on appeal”).

them from falls, where MFA had a work rule that required employees to use the PPE, the text of the standard instructs employers to “have each affected employee use” PPE that the employer selects to protect employees from hazards, and OSHA notified the regulated community that OSHA may cite employers under § 1910.132(d) if they do not protect employees from falls in the specific factual circumstances under which MFA was cited.

Apposite cases:

Nat’l Indus. Constructors, Inc. v. OSHRC, 583 F.2d 1048 (8th Cir. 1978)

Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec’y of Labor, 674 F.2d 1177 (7th Cir. 1982)

Echo Powerline LLC v. OSHRC, 968 F.3d 471 (5th Cir. 2020)

Nat’l Roofing Contractors Ass’n v. U.S. Dept. of Labor, 639 F.3d 339 (7th Cir. 2011)

2. Whether substantial evidence supports the ALJ’s determination that MFA demonstrated plain indifference to employee safety, and therefore “willfully” violated § 1910.132(d)(1)(i), where MFA regularly permitted employees to forgo using a personal fall protection system while working atop railcars and thereby allowed employees to be exposed to a known and potentially fatal fall hazard.

Apposite cases:

Valdak Corp. v. OSHRC, 73 F.3d 1466 (8th Cir. 1996)

Altor, Inc., No. 99-0958, 2011 WL 1682629 (OSHRC Apr. 26, 2011)

Weirton Steel Corp., No. 98-0701, 1999 WL 34813785 (OSHRC July 31, 2008)

Gen. Motors Corp., CPCG Okla. City Plant, Nos. 91-2834E & 91-2950, 2007 WL 4350896 (OSHRC Dec. 4, 2007)

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History

This case involves MFA's petition for review of a Commission final order affirming that MFA willfully violated an OSHA standard. *See* ADD-1-32 (A.R.Vol.6(71)).³ OSHA inspected an MFA facility, at which MFA stored and shipped bulk farm products, after an explosion occurred. ADD-5 (A.R.Vol.6(71) at 5). OSHA discovered that, just prior to the explosion, and employee had been working atop a stationary railcar without any fall protection. *Id.* OSHA ultimately issued citations to MFA alleging several

³ Citations to the addendum and appendices are abbreviated as follows: MFA's Addendum ("ADD-[##]"); MFA's Appendix ("A-[###]"); the Secretary's Appendix ("S.A-[##]"). Parallel citations to the administrative record refer to the certified list, filed on November 18, 2024, and are abbreviated "A.R.Vol.[#]([Item/Exhibit #]) at [#]," except cites to the hearing transcript, Volumes 1-3, are abbreviated "Tr. [#]." Citations to MFA's opening brief are abbreviated "Br. [#]."

violations of OSHA standards, including one willful violation of 29 C.F.R. § 1910.132(d)(1)(i) for failing to have employees use a personal fall protection system that MFA provided to protect employees from falls when working on the tops of railcars. ADD-2 (A.R.Vol.6(71) at 2); A-22 (A.R.(Vol.5(1))).

MFA contested the citation to the Commission, and, after a hearing, an ALJ affirmed the violation on July 9, 2024. ADD-1-32 (A.R.Vol.6(71)). MFA filed a petition for discretionary review (“PDR”) requesting that the Commission review the ALJ’s decision, but the Commission did not, and the ALJ’s decision became a final order on August 22, 2024. A-268 (A.R.(Vol.6(74))). MFA filed a timely petition for review with this Court on October 16, 2024.

II. Statement of Facts

A. Statutory and Regulatory Background

1. The OSH Act and OSHA Standards.

The OSH Act is intended “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” 29 U.S.C. § 651(b). To achieve the OSH Act’s purposes, Congress authorized the Secretary of Labor “to set mandatory occupational safety and health standards.” *Id.* §§ 651(b)(3), 655.

In subpart I of part 1910 of the Code of Federal Regulations, OSHA has promulgated PPE standards for general industry employers, including “[g]eneral requirements” related to PPE. 29 C.F.R. § 1910.132. Section 1910.132 “appl[ies] to all [PPE], including personal fall protection systems.” Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494, 82617 (Nov. 18, 2016). Section 1910.132(d) requires that employers “assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of [PPE].” *Id.* § 1910.132(d)(1). If “such hazards are present, or likely to be present,” *id.*, the employer must “select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.” *Id.* § 1910.132(d)(1)(i).

In 2016, OSHA added § 1910.140 to subpart I, which provides “performance, care, and use criteria for all personal fall protection systems”⁴ and obliges employers to “ensure that each personal fall protection system used to comply with [part 1910] *** meet[s] [its] requirements.” 29 C.F.R. § 1910.140(a); *see also* 81 Fed. Reg. at 82644 (§ 1910.140 “applies to existing requirements in part 1910 that mandate or allow employers to protect workers

⁴ A “[p]ersonal fall protection system” is “a system (including all components) an employer uses to provide protection from falling or to safely arrest an employee’s fall if one occurs.” 29 C.F.R. § 1910.140(b).

from fall hazards using personal fall protection systems ***”). OSHA promulgated § 1910.140 because it “believe[d] that without establishing design and performance criteria, there is risk that personal fall protection systems, particularly personal fall arrest systems, may fail and put workers at risk of harm.” 81 Fed. Reg. at 82644.

OSHA also has standards in subpart D of part 1910 that apply to “walking-working surfaces.” 29 C.F.R. §§ 1910.21-30. Subpart D contains fall protection requirements; for example, § 1910.28(a)(1) “requires employers to provide protection for each employee exposed to fall and falling object hazards” while on a walking-working surface. 29 C.F.R. § 1910.28(a)(1).

An OSHA regulation explicates situations where multiple OSHA standards apply to the same hazardous condition. 29 C.F.R. § 1910.5(c). Section 1910.5(c)(1) provides, in relevant part, that “[i]f a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.” *Id.* § 1910.5(c)(1). OSHA promulgated this provision to codify the well-settled rule that “the specific takes precedence over the general.” *Adams Steel Erection, Inc.*, No. 77–4238, 1984 WL 34887, *3 (OSHRC July 20, 1984).

OSHA enforces its standards by issuing citations requiring the employer to abate violations and, where appropriate, pay a civil penalty. 29 U.S.C. §§ 658-659, 666. If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body. *Id.* §§ 659, 661. Initially, an ALJ appointed by the Commission adjudicates the dispute. *Id.* §§ 659(c), 661(j). A party adversely affected by the ALJ's decision may petition the Commission for discretionary review of the decision. *Id.* § 661(j); 29 C.F.R. § 2200.91(a). If review is not granted, the ALJ's decision becomes the final order of the Commission thirty days after its issuance. 29 U.S.C. § 661(j). Parties may seek review of Commission final orders in an appropriate court of appeals. *Id.* § 660(a), (b).

2. OSHA's Regulation of Employee Exposure to Fall Hazards While Working Atop Railcars.

In 1996, OSHA issued a memorandum that communicated to the regulated community⁵ OSHA's enforcement policy with respect to employee exposure to fall hazards on the tops of "rolling stock," such as "rail tank or hopper cars." A-184-87 (A.R.(Vol.4(J-1)) ("Miles Memo"). The Miles Memo stated that OSHA's standards in subpart D regulating walking-working

⁵ OSHA issued the Miles Memo at the request of the National Grain and Food Association, of which MFA is a member. S.A-19-20 (Tr. 503-04).

surfaces did not “specifically address fall hazards from the tops of rolling stock,” and OSHA had proposed in a 1990 proposed rule to “explicitly exclude[] rolling stock” from subpart D. *Id.* (citing Walking Working Surfaces, 55 Fed. Reg. 13360, 13396 (Apr. 10, 1990)). OSHA stated that “falls from rolling stock [] will not be cited under [s]ubpart D.” A-185 (A.R.Vol.4(J-1) at 2). With respect to OSHA’s PPE standards in subpart I, OSHA further stated that

it would not be appropriate to use the personal protection equipment standard, 29 CFR 1910.132(d), to cite exposure to fall hazards from the tops of rolling stock, unless employees are working atop stock that is positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible. In such cases, fall protection systems often can be and, in fact, are used in many facilities in the industry.

Id. (emphasis added).

The policy articulated in the Miles Memo has been, since its issuance, OSHA’s enforcement policy regarding employee exposure to fall hazards when working atop rolling stock, and OSHA has reiterated the policy’s continued effectiveness in subsequent public statements. For example, in 2002, in response to an inquiry regarding OSHA’s regulation of work atop trucks, OSHA pointed the inquirer to the Miles Memo, explaining that it “state[d] that falls from rolling stock would not be cited under [s]ubpart D” but “there could

be instances where 29 CFR 1910.132” may be cited. OSHA, Letter to Ms. Jennifer LeFevre, “Fall protection requirements for commercial motor vehicles,” 2002 WL 32829968 (March 4, 2002) (“LeFevre Letter”).

Although OSHA considered changing its approach to regulating employee exposure to fall hazards on the tops of rolling stock, OSHA ultimately decided against such action and left undisturbed the policy articulated in the Miles Memo. In 2003, OSHA reopened the rulemaking record for the 1990 proposed rule and requested “additional comment on whether rolling stock *** should be covered or excluded from subpart D.” *Id.* at 23530. Walking and Working Surfaces; Personal Protective Equipment (Fall Protection Systems), 68 Fed. Reg. 23528, 23530 (May 2, 2003). In that notice, OSHA stated that the Miles Memo had interpreted the 1990 proposed rule “as excluding rolling stock from subpart D” and “directed OSHA inspectors not to cite rolling stock under subpart D” “[i]n anticipation of a final revised rule,” but permitted OSHA to cite employers under § 1910.132(d) for “employee exposure to fall hazards on the tops of rolling stock” if “the rolling stock was positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible.” *Id.*

In 2010, OSHA replaced the 1990 proposed rule with a new proposed rule. Walking-Working Surfaces and Personal Protective Equipment (Fall

Protection Systems), 75 Fed. Reg. 28862 (May 24, 2010). OSHA again explained that the Miles Memo had “direct[ed] OSHA inspectors not to cite rolling stock under subpart D” for exposing employees to fall hazards on rolling stock but permitted them to cite employers under § 1910.132(d) where “the rolling stock was positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible.” *Id.* at 28867.

OSHA stated that the agency “plan[ned]to continue gathering information and evidence” on fall hazards from rolling stock and therefore had “not include[ed] any specific requirements pertinent to rolling stock and motor vehicles” in the proposed rule. *Id.* OSHA “request[ed] additional comment on whether specific regulations are needed to cover falls from rolling stock ***.” *Id.*

In 2016, OSHA issued a final rule in which OSHA explained that “[s]ince the [a]gency [had] not propose[d] any specific fall protection requirements for rolling stock or motor vehicles [in the proposed rule], OSHA ha[d] not included any in th[e] final rule.” *Id.* at 82509. OSHA further explained that, although OSHA found that “it is sometimes feasible to provide fall protection” to employees working on rolling stock even when the stock “is *not* contiguous or next to a structure,” *id.* at 82925 (emphasis added), the agency needed more “information” and “analysis” before it added any new regulations concerning fall hazards on rolling stock. *Id.* at 82926. OSHA

therefore stated that its “current existing enforcement policies on rolling stock and motor vehicles will remain in effect.”⁶ *Id.*

⁶ Contrary to MFA’s assumption, *see* Br. i, 11, 17, 20, OSHA did not adopt the policy stated in the Miles Memo, or decline to promulgate new standards specifically addressing fall hazards on rolling stock, because of the potential preemptive effect of Federal Railroad Administration (FRA) regulations. *See* 29 U.S.C. § 653(b)(1) (the OSH Act does not “apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health”). The Miles Memo does not mention preemption, *see* A-184-87 (A.R.Vol.4(J-1)), but instead articulated OSHA’s enforcement policy regarding employee exposure to fall hazards when working on all types of “rolling stock,” including not just railcars, but also “hopper trucks [and] trailers.” A-184 (A.R.Vol.4(J-1) at 1).

OSHA did not suggest otherwise in the above-discussed walking-working surfaces rulemaking. Neither the 1990 proposal nor the 2003 notice mentioned FRA preemption. *See* 55 Fed. Reg. at 13396; 68 Fed. Reg. at 23530. When OSHA requested additional comment regarding fall hazards from rolling stock in 2010, OSHA explained that it was *not* seeking comment on fall hazards arising in “railroad operations,” which are governed by the FRA, but *was* seeking “information regarding rolling stock not involved in railroad operations, such as, but not limited to, when rolling stock is being loaded or unloaded off railroad property by non-railroad employees***.” 75 Fed. Reg. at 28867. When OSHA ultimately declined to add standards specifically addressing rolling stock in the 2016 final rule, it did so because OSHA had not proposed any such provisions and because OSHA needed more information and analysis on the issue. 81 Fed. Reg. at 82509, 82926. OSHA reaffirmed in that final rule that “OSHA has authority over working conditions that do not constitute ‘railroad operations,’ such as loading/unloading rolling stock by non-railroad employees off railroad property.” *Id.* at 82509.

B. MFA Provides a Personal Fall Protection System to Employees to Protect Them from Falling Off Railcars but Does Not Require Employees to Use It in Practice.

MFA is a corporation engaged in bulk farm product warehousing and storage that has a facility in Adrian, Missouri. ADD-2-3 (A.R.Vol.6(71) at 2-3). At the facility, MFA stored grain in large bins near a grain elevator and shipped grain from the worksite. ADD-3 (A.R.Vol.6(71) at 2). Shipping grain involved a process called “railcar loadout” in which grain was transferred, via grain spouts, from the grain storage bins into railcars. *Id.* This process occurred on two sets of rail tracks that were separate from the main railroad line and ran parallel to each other near the facility’s grain elevator. *Id.*

To “loadout” railcars, employees would park several railcars on the rail tracks near the bins and elevator, after which an employee would walk along the tops of the stationary railcars to open the lids on their roofs by hand. *Id.* Each railcar had several lids. *Id.* On MFA’s busiest days, the crew would do this for up to twenty railcars.⁷ ADD-4 (A.R.Vol.6(71) at 4). While atop a railcar, the MFA employee would be approximately 15 feet above the ground with no physical barriers or railings to protect them from falling off. *Id.* After

⁷ All 20 railcars could not be lined up on a single track. *See* Br. 4, 30, 31. Only 14 or 15 railcars could fit on a single track and any additional railcars would be parked on the other track. A-79, 82 (Tr. 110, 122).

all the lids were opened, each railcar would receive grain from the grain spouts via the open lids, after which employees would close, latch, and seal each lid by hand. *Id.*

Since at least 2016, MFA provided a personal fall protection system to protect employees when they performed this work. ADD-5 (A.R.Vol.6(71) at 5). The system consisted of beams, which ran overhead and parallel to each of the tracks on which railcar loadout occurred, and a trolley that was attached to and ran along each beam. *Id.* An employee would wear a body harness and connect a self-retracting lifeline to the trolley on the beam above the track on which they were working. *Id.* The trolley would slide along the beam as the employee moved atop the railcars. *Id.* If the employee fell off the railcar, the fall protection system would prevent the employee from hitting the ground. S.A-4 (Tr. 349).

The beams ran the length of three-to-four railcars. ADD-5 (A.R.Vol.6(71) at 5). When the line of railcars parked on the track exceeded that length, employees could not, in one pass, process all of the railcar lids in the line while remaining attached to the fall protection system. *Id.* It was possible, however, to work on the railcars in groups of three or four, and thereby ensure that the employee atop the railcars was connected to the fall

protection system when working on all of the railcars. A-71, 111 (Tr. 77-78, 236); *see also* A-170 (Tr. 746-47).

MFA's formal policy was that employees were required to use the fall protection system during railcar loadout; specifically, MFA's employee handbook stated that "[f]ailure to wear safety equipment or to comply with any safety regulation will result in disciplinary action, up to and including termination even for a first offense," ADD-6 (A.R.Vol.6(71) at 6); S.A-24 (A.R.Vol.4(R-18) at MFA000592), and MFA provided an annual training to employees in which it instructed that "[i]f there is railcar fall protection present, you must use it every time." ADD-7 (A.R.Vol.6(71) at 7); S.A-24 (A.R.Vol.4(R-5) at MFA001364). MFA managers understood that employees were supposed to use the fall protection system during railcar loadout to protect against falls and that such a fall could result in serious injury or death. A-41, 44, 71 (Tr. 156, 168-69, 748), S.A-1-3, 7, 8, 22 (Tr. 346-48, 352, 395; A.R.Vol.4(C-35) at 7).

Nonetheless, during at least 2019 and 2020, MFA employees' normal practice was to *not* use the fall protection system during railcar loadout. ADD-8-10, 19, 21, 26-27 (A.R.Vol.6(71) at 8-10, 19, 21, 26-27). Two employees who routinely conducted railcar loadout, Bill John Umstattd and Andrew Schmitt, generally did not use the fall protection system during railcar loadout. ADD-8-

9 (A.R.Vol.6(71) at 8-9). Schmitt never used the fall protection system during railcar loadout and was told by supervisors that using the system was optional.

ADD-8 (A.R.Vol.6(71) at 8); A-71, 72, 73, 78 (Tr. 75-76, 81-82, 84, 105).

Umstattd only used the fall protection system in 2019 and 2020 if the tops of the railcars were “slick” or if the weather was “very windy”, which was “not very often.” ADD-9 (A.R.Vol.6(71) at 9); A-113, 120-21 (Tr. 243, 274-75).

MFA managers permitted this hazardous conduct and even engaged in it themselves. ADD-8-10, 20-21, 26 (A.R.Vol.6(71) at 8-10, 20-21, 26). For example, Elevator Manager Corey McMullen never saw Umstattd or anyone else use the fall protection system during railcar loadout, and never used the fall protection system when he participated in railcar loadout. ADD-8, 26 (A.R.Vol.6(71) at 8, 26); A-91, 92, 97, 98, 100 (Tr. 157-58, 160, 181, 185-86, 192). Shortly after he began working at MFA, McMullen asked his boss, Manager Dale Guss, why employees were not using the fall protection system, and Guss responded that not using fall protection was just the way they did things at the Adrian facility. ADD-8, 21, 26 (A.R.Vol.6(71) at 8, 21, 26); A-92-93 (Tr. 162-165). McMullen accepted that using the fall protection system “wasn’t a thing that was done” at the workplace. A-102-03 (Tr. 202-03).

Guss participated in railcar loadout a few times each month and he too declined to use the fall protection system. ADD-9, 21 (A.R.Vol.6(71) at 9, 21);

A-72-73, 92 (Tr. 82-84, 160, 246). Guss also directly communicated to subordinates that using the fall protection system was optional. ADD-8, 26 (A.R.Vol.6(71) at 8, 26); A-73, 92-93 (Tr. 84, 162-65).

Another manager, Randy Morris, also saw employees working atop railcars without fall protection numerous times in 2020. ADD-9, 11, 26 (A.R.Vol.6(71) at 9, 11, 26); S.A-21 (A.R.Vol.4(C-35) at 7). On one occasion, Morris reported his observations to Guss, but Morris did not discipline any of the employees involved or follow up with Guss to see if any corrective action was taken. *Id.*

MFA did not discipline anyone for failing to use the fall protection system during railcar loadout. ADD-21, 23, 26, 27-28 (A.R.Vol.6(71) at 21, 23, 26, 27-28). MFA had a progressive discipline policy under which even an employees' first violation of a rule must be addressed with documented discipline. ADD-6 (A.R.Vol.6(71) at 6); S.A-24 (A.R.Vol.4(R-18) at MFA000592). There is no evidence that MFA ever disciplined an employee for failing to use the fall protection system. ADD-21, 23, 26-28 (A.R.Vol.6(71) at 21, 23, 26-28); A-95, 178 (Tr. 174, 779); S.A-14, 18 (Tr. 425, 484).

C. OSHA Discovers that an MFA Employee Worked Atop a Railcar Without Using the Personal Fall Protection System and Issues Citations to MFA.

On December 31, 2020, there was an explosion at the concrete grain elevator, and OSHA opened an inspection in response. ADD-5 (A.R.Vol.6(71) at 5). OSHA discovered that, just before the explosion, Umstattd had been conducting railcar loadout and was not using the fall protection system, including when he was working directly underneath the beams. *Id.*; A-115 (Tr. 251-52). In fact, the trolley had been missing from the fall protection system on the track where Umstattd had been working.⁸ ADD-5 (A.R.Vol.6(71) at 5). On June 21, 2021, OSHA issued MFA citations alleging several violations of OSHA standards, including a willful violation of 29 C.F.R. § 1910.132(d)(1)(i) for failing to have employees use the personal fall protection system. ADD-1 (A.R.Vol.6(71) at 1); A-22 (A.R.Vol.5(1) at 7).

D. A Commission ALJ Affirms that MFA Willfully Violated 29 C.F.R. § 1910.132(d)(1)(i).

MFA contested the citations and an ALJ held a hearing on April 3-5, 2023. ADD-2 (A.R.Vol.6(71) at 2). On July 9, 2024, the ALJ affirmed the

⁸ Guss had a conversation with Umstattd a few months after the explosion about the missing trolley, but Guss did not discipline Umstattd for failing to use the fall protection system prior to the explosion. ADD-9, 28 (A.R.Vol.6(71) at 9, 28); A-171, 175-76 (Tr. 751, 767-68).

cited violation of § 1910.132(d)(1)(i), including its characterization as “willful,” and assessed a penalty of \$122,878.80.⁹ ADD-1-32 (A.R.Vol.6(71)). The ALJ determined that the Secretary established that MFA violated § 1910.132(d)(1)(i),¹⁰ ADD-13-21 (A.R.Vol.6(71) at 13-21), including finding that MFA failed to comply with the standard’s terms when Umstatt performed railcar loadout without using the fall protection system on December 31, 2020. ADD-19, 25 (A.R.Vol.6(71) at 19, 25).

The ALJ rejected MFA’s defense that it did not have fair notice of its obligation under § 1910.132(d)(1)(i) to have employees use the fall protection system.¹¹ ADD-16-17 (A.R.Vol.6(71) at 16-17). Given that MFA had

⁹ The parties resolved all other violations alleged in the citations prior to trial. ADD-10 n.8 (A.R.Vol.6(71) at 10 n.8).

¹⁰ To establish a violation of an OSHA standard, “the Secretary must prove that the cited standard applies and that its requirements were not met, that employees were exposed to, or had access to, the violative condition, and that the employer knew or, through the exercise of reasonable diligence, could have known of this condition.” *Omaha Paper Stock Co. v. Sec’y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). MFA does not challenge the ALJ’s determination that the Secretary established each of these elements, and contests only the ALJ’s rejection of MFA’s “fair notice” affirmative defense and the ALJ’s characterization of the violation as “willful.” *See* Br. 2.

¹¹ The ALJ also rejected MFA’s additional affirmative defenses, including (1) that, pursuant to § 1910.5(c)(1), OSHA was precluded from citing MFA under § 1910.132(d)(1)(i) because § 1910.140 also applied and is a “more specific” standard, *see* ADD-17-19 (A.R.Vol.6(71) at 17-19), and (2) that, pursuant to 29 U.S.C. § 653(b), the FRA’s regulation of railroad operations preempted OSHA from regulating MFA employees’ work atop stationary railcars. *See* ADD-13-

“installed [the] fall protection system” and “had training and work rules in place that required [its] use,” the ALJ deemed MFA’s defense “disingenuous.” ADD-17 (A.R.Vol.6(71) at 17). The ALJ further found that the Miles Memo had notified employers that OSHA may cite them for violations of § 1910.132(d) if they did not protect employees from falling off the tops of rolling stock in these specific circumstances, *i.e.*, where the stock was “positioned adjacent to a structure where installation of fall protection was feasible.” ADD-16 (A.R.Vol.6(71) at 16).

The ALJ also affirmed that MFA’s violation of § 1910.132(d)(1)(i) was “willful.” ADD-23-28 (A.R.Vol.6(71) at 23-28). MFA “had a heightened awareness that fall protection was required in the railcar loadout area,” as evidenced by its installation of the fall protection system, its work rule requiring employees to use the system, and its “annual safety training on using the fall protection system.” ADD-24 (A.R.Vol.6(71) at 24). MFA demonstrated plain indifference to its employees’ failure to use the system, and

16 (A.R.Vol.6(71) at 13-16). MFA’s opening brief discusses the former defense as part of its argument that it did not have fair notice of its obligation under § 1910.132(d)(1)(i), *see infra* sec. I.B., and also discusses the topic of FRA preemption, *see, e.g.*, Br. 8-10, but MFA does not directly challenge the ALJ’s rejection of those affirmative defenses. *See* Br. 2 (identifying issues on appeal). Consequently, MFA has waived any argument that the ALJ’s rejection of either defense provides independent grounds for reversal. *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008). (“Claims not raised in an opening brief are deemed waived.”) (citations omitted); Fed. R. App. P. 28(a).

their resulting exposure to a serious fall hazard, because MFA knew that employees commonly forwent using the fall protection system during railcar loadout and did nothing to compel them to use it. ADD-26-27 (A.R.Vol.6(71) at 2). Although the record did not confirm that MFA actually knew that “Umstattd [was] performing railcar loadout without wearing fall protection specifically on December 31, 2020,” ADD-25 (A.R.Vol.6(71) at 25), the evidence established that, even if MFA did know about that hazardous conduct, it would not have cared. *Id.*

SUMMARY OF THE ARGUMENT

The ALJ correctly rejected MFA’s argument that it did not have constitutionally fair notice of its obligation to have employees use the fall protection system during railcar loadout. MFA was actually aware of the conduct that § 1910.132(d)(1)(i) required, *i.e.*, that employees must use the fall protection system that MFA selected and provided to protect employees from falls. Additionally, MFA had fair notice of its duty from the text of the standard, OSHA’s public statements, including the Miles Memo, and a recent Commission decision. OSHA’s promulgation of § 1910.140 to provide technical criteria for personal fall protection systems did not affect MFA’s notice of its unaffected obligation to have employees use the fall protection system that it provided to protect employees from dangerous falls.

Additionally, substantial evidence supports the ALJ's determination that MFA willfully violated § 1910.132(d)(1)(i) because MFA was plainly indifferent to its employees' exposure to a serious fall hazard during railcar loadout. The ALJ's determination that MFA demonstrated plain indifference because it permitted employees to conduct railcar loadout without using the fall protection system, and thereby allowed them to be exposed to a potentially fatal fall hazard on a regular basis, is fully consistent with the precedent of this Court and the Commission. So too is the ALJ's determination that MFA's other "efforts" to prevent employees from falling off railcars did not negate that MFA managers would not have cared if they actually observed Umstattd conducting railcar loadout without using the fall protection system on December 31, 2020. The Court should therefore deny the petition for review.

ARGUMENT

Standard of Review

This Court "must uphold the ALJ's factual findings so long as they are 'supported by substantial evidence on the record considered as a whole.'" *Wal-Mart Stores E., LP v. Acosta*, 919 F.3d 1073, 1076 (8th Cir. 2019) (quoting 29 U.S.C. § 660(a)). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion." *Omaha*, 304 F.3d at 782. The Court will uphold the ALJ's legal conclusions "unless they are

‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)(A)).

I. The ALJ Correctly Rejected MFA’s Claim that It Lacked Fair Notice of its Obligation under 29 C.F.R. § 1910.132(d)(1)(i) to Have Employees Use the Personal Fall Protection System that It Provided to Protect Employees from Falls.

The Fifth Amendment’s Due Process Clause assures “that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *BHC Nw. Psychiatric Hosp., LLC v. Sec’y of Labor*, 951 F.3d 558, 566 (D.C. Cir. 2020) (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). To determine if an employer had fair notice, the Court considers “whether an employer familiar with the circumstances of the industry could reasonably be expected to have had adequate warning of the conduct required by the regulation.” *Nat’l Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1054 (8th Cir. 1978). “[A]ll that due process requires is a fair and reasonable warning,” and whether an OSHA standard gave such a warning is “judged not on its face but rather in the light of its application to the facts of the case.” *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec’y of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982).

As explained below, the ALJ correctly rejected MFA’s defense that it did not have fair notice of its obligation under § 1910.132(d)(1)(i) to have

employees to use the fall protection system that MFA provided to protect employees from falls during railcar loadout. ADD-16-17 (A.R.Vol.6(71) at 16-17). MFA was actually aware of the conduct that the standard required, and also had fair notice of its obligation from the text of the standard, OSHA's public statements, and a recent Commission decision. In addition, OSHA's promulgation of § 1910.140 to provide technical requirements for personal fall protection systems did not affect MFA's notice of its compliance obligations under § 1910.132(d)(1)(i).

A. MFA Had Actual and Constructive Notice of its Obligation to Have Employees Use the PPE that it Provided to Protect Them from a Serious Fall Hazard.

First, MFA's fair notice argument fails because MFA actually knew of "the conduct required by the regulation," *Nat'l Indus.*, 583 F.2d at 1054, *i.e.*, to have employees use the PPE that MFA provided to protect employees from falls during railcar loadout. As the ALJ pointed out, MFA installed the fall protection system after conducting a hazard assessment and "had training and work rules in place that required the use of the fall protection system when it was available." ADD-17 (A.R.Vol.6(71) at 17); *see* S.A-2-3, 13, 23, 24 (Tr. 347-48,¹² 404; A.R.Vol.4(R-5) at MFA001364, A.R.Vol.4(R-18) at

¹² The ALJ did not simply "assume[]" that a hazard assessment occurred. Br. 27 n.5. Corporate Safety Director Stanley Thessen testified that MFA installed

MFA000592). MFA understood that using the fall protection system was necessary to protect employees from potentially fatal falls. A-91 (Tr. 156); S.A-1-13, 7, 8, 22 (Tr. 346-48, 352, 395; A.R.Vol.4(C-35) at 7). Thus, contrary to its “disingenuous” complaints, ADD-17 (A.R.Vol.6(71) at 17), MFA knew what it was obliged to do, which defeats its fair notice defense. *See, e.g., Echo Powerline LLC v. OSHRC*, 968 F.3d 471, 477 (5th Cir. 2020) (fair notice defense rejected where employer’s “own safety rules” required employees to take precautions “quite similar to the OSHA provision”); *New England Tel. & Tel. Co.*, No. 80–6519, 1983 WL 23883, *6 (OSHRC Apr. 27, 1983) (fair notice defense rejected where employer’s safety policy required employees to take one of the compliance options listed in the standard).

Whether MFA knew that OSHA would specifically cite it under § 1910.132(d)(1)(i) for failing to have employees use the fall protection system that it provided, *see, e.g.,* Br. 2 (alleging lack of notice “that OSHA’s PPE

the fall protection system because it identified the fall hazard in an assessment. S.A-2 (Tr. 347).

MFA wrongly asserts that OSHA’s citation was “predicated on a written assessment.” Br. 7. As the ALJ recognized, ADD-13 n.10, “it is not necessary for employers to prepare and retain a formal written hazard assessment” to comply with § 1910.132(d)(1), although § 1910.132(d)(2) separately requires that the employer verify that an assessment was performed in a “written certification.” Personal Protective Equipment for General Industry, 59 Fed. Reg. 16334, 16336 (Apr. 6, 1994). In any event, this case does not concern § 1910.132(d)(2).

standard would apply to the conduct at issue”), is inconsequential. “The [U.S.] [C]onstitution does not demand that the employer be actually aware that *the regulation is applicable* to his conduct.” *Faultless*, 674 F.2d at 1185 (emphasis added). The pertinent question is whether MFA had fair warning of *the conduct* that OSHA’s standard required, *Nat’l Indus.*, 583 F.2d at 1054, and MFA clearly did here, as it knew that its employees needed to use the fall protection system during railcar loadout to be protected from falls.

Second, MFA had ample warning of the required conduct from the text of the standard, which presents “a clearly applicable, unarguable and specific regulation on the subject in question.” *Faultless*, 674 F.2d at 1186; *see also AJP Const., Inc. v. Sec’y of Labor*, 357 F.3d 70, 76 (D.C. Cir. 2004) (the Court reviews “whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations”) (citation omitted). Section 1910.132(d) requires general industry employers to conduct a workplace hazard assessment, § 1910.132(d)(1), and, if hazards or potential hazards are found, to “[s]elect, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.” 29 C.F.R. § 1910.132(d)(1)(i). The text of the standard thus plainly warned MFA to “have

each affected employee use” any PPE that it selected to protect employees from identified hazards, such as the personal fall protection system.

Third, MFA also had notice of its compliance obligations from OSHA’s public statements. *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573, 576 (5th Cir. 1994) (if “the language [of the standard] is not specific enough, other sources ... may provide adequate constructive notice” of its requirements); *AJP*, 357 F.3d at 76 (fair notice review may consider “the regulations and other public statements issued by the agency”). Since § 1910.132(d) was promulgated in 1994, OSHA has repeatedly and consistently informed employers in publicly available guidance documents that OSHA’s PPE standards oblige them to select appropriate PPE for their employees *and* require them to use it.¹³

¹³ See, e.g., OSHA, *OSHA Fact Sheet: Personal Protective Equipment*, p. 1, available at: <https://www.osha.gov/sites/default/files/publications/ppe-factsheet.pdf> (“As an employer, you must assess your workplace to determine if hazards are present that require the use of personal protective equipment. If such hazards are present, you must select protective equipment and require workers to use it ***.”); OSHA, Publication No. 3151, *Personal Protective Equipment*, p. 3, available at: <https://www.osha.gov/sites/default/files/publications/osha3151.pdf> (“When engineering, work practice, and administrative controls are not feasible or do not provide sufficient protection, employers must provide personal protective equipment (PPE) to their employees and ensure its use.”).

Furthermore, the Miles Memo, another publicly available document,¹⁴ provided notice that OSHA may cite employers under § 1910.132(d) if they fail to protect employees from falls in the specific factual circumstances under which MFA was cited, *i.e.*, when employees “work[] atop [rolling] stock that is positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible.” A-185 (A.R.Vol.4(J-1) at 2). As the ALJ explained, “the Miles [Memo] has—for 30 years—articulated OSHA’s enforcement policy with regard to fall hazards from atop rolling stock.” ADD-17 (A.R.Vol.6(71) at 17). MFA does not dispute that the specific hazardous conduct for which it was cited “fall[s] squarely within the Miles [Memo] exception” for when OSHA may issue a citation under § 1910.132(d) for employee exposure to fall hazards atop rolling stock.¹⁵ ADD-17 (A.R.Vol.6(71) at 17). The Miles Memo thus provided additional warning to

¹⁴ The Miles Memo is not an “internal” document, Br. 7, 11, 17, 21, 28, and has long-been available to employers on OSHA’s website. Available at: <https://www.osha.gov/laws-regs/standardinterpretations/1996-10-18>; *see also* 1996 WL 33674463. The parties jointly submitted a printed copy of that webpage into evidence. A-184-87 (A.R.Vol.4(J-1)).

¹⁵ Nor could it. Undisputed evidence established that Umstattd worked atop a railcar positioned directly underneath the beams of a personal fall protection system that MFA had installed contiguous to the grain bins. A-114-15 (Tr. 250-52); S.A-21 (A.R.Vol.4(C-25)).

MFA that it was obliged to have employees use the fall protection system that it provided, in accordance with § 1910.132(d), in these specific circumstances.¹⁶

Additional notice of MFA's compliance obligation was provided when OSHA repeatedly restated in the walking-working surfaces rulemaking that OSHA may, in accordance with the Miles Memo, cite employers under § 1910.132(d) if they expose employees to fall hazards while working atop rolling stock "that is positioned inside of or contiguous to a building or other

¹⁶ As explained *supra* p. 11 n.6, OSHA did not adopt the enforcement policy stated in the Miles Memo because of the potential preemptive effect of FRA regulations, and when asserting otherwise, MFA makes numerous false statements. For example, nowhere did the ALJ "acknowledge[] that, for employee safety on rolling stock *** OSHA's fall-protection regulations under [s]ubpart D were preempted by FRA regulations." Br. 7; *see* ADD-13 (A.R.Vol.6(71) at 13) (acknowledging only that "the 1978 FRA Policy Statement *** set[s] forth three exceptions when OSHA could not cite violations under Subpart D").

Nor is it true that OSHA does not "dispute" that "work atop railcars is a working condition unique to railroad operations," Br. 10, or that "because of preemption by the FRA, OSHA's fall-protection standards [do] not apply to work atop railcars." Br. 17; *see also* Br. 20. OSHA has never taken such positions, and in fact, reaffirmed in the 2016 final rule that OSHA is *not* preempted from regulating "conditions not rooted in railroad operations," including "loading/unloading rolling stock by non-railroad employees off railroad property." 81 Fed. Reg. at 82508-09.

MFA also incorrectly states that "[t]he FRA only allows OSHA PPE requirements for 'hazards growing out of railroad operations.'" Br. 11 (quoting 43 Fed. Reg. 10583, 10588 (Mar. 14, 1978)). The opposite is true; in the FRA policy statement to which MFA refers, the FRA stated that OSHA's PPE standards are applicable *unless* they "require protective equipment responsive to hazards growing out of railroad operations," such as PPE that might be needed to protect workers when "uncoupling cars or operating a locomotive." 43 Fed. Reg. at 10588.

structure where the installation of fall protection is feasible.” A-185 (A.R.Vol.4(J-1) at 2); *see supra* pp. 9-11. OSHA restated this in the 2003 reopening of the rulemaking record, 68 Fed. Reg. at 23530, and the 2010 proposed rule. 75 Fed. Reg. at 28867. It also made clear in the 2016 final rule that this “existing enforcement polic[y] *** remain[ed] in effect.” 81 Fed. Reg. at 82926.

Fourth, the Commission’s decision in *Erickson Air-Crane, Inc.* provided notice that MFA was obliged to protect employees from falls in these circumstances. No. 07-0645, 2012 WL 762001 (OSHRC Mar. 2, 2012); *see, e.g., Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5th Cir. 1991) (Commission decisions provided notice of OSHA standard’s requirements). *Erickson* concerned a citation alleging that the employer violated the OSH Act’s general duty clause, 29 U.S.C. § 654(a)(1), by exposing employees “to a fall hazard when they were working on top of a fuel tanker truck,” 2012 WL 762001, *1, and the Commission determined that the employer lacked fair notice because the Miles Memo had indicated that OSHA would *not* cite employee exposure to fall hazards atop rolling stock where the stock “is not adjacent to a building or structure.” *Id.* at *4. The Commission recognized that the Miles Memo indicated that OSHA may cite employers in “the very specifically described circumstance regarding rolling stock located inside or next to a building or

structure,” but that circumstance was “inapplicable” to the citation at hand. *Id.* at *5. Here, the facts fit “squarely,” ADD-15, 17 (A.R.Vol.6(71) at 15, 17), within that “very specifically described circumstance,” and *Erickson* thus provided additional notice to MFA that OSHA may cite it under § 1910.132(d) for exposing employees to a fall hazard.

MFA ignores the ALJ’s determination that it had actual knowledge of the required conduct, even though that knowledge alone defeats its fair notice defense, *Echo*, 968 F.3d at 477, before reaching the notice provided by the text of § 1910.132(d)(1)(i) and OSHA’s public statements interpreting it. Instead, MFA focuses on criticizing the Miles Memo, *see* Br. 20-31, but none of MFA’s arguments are persuasive, let alone sufficient to salvage its fair notice defense.

MFA complains that the Miles Memo’s explanation of when employers may be cited under § 1910.132(d) is “vague,” Br. 18, 20, and does not provide a “clear or reasonable standard,” Br. 31, but even Corporate Safety Director Thessen agreed that the Miles Memo is “clear” that OSHA may cite employers for exposing employees to fall hazards from rolling stock under § 1910.132(d), and states that OSHA may specifically cite employers where employees are working atop railcars contiguous to a structure where fall protection is feasible. S.A-11-12 (Tr. 398-99). The Commission also disagrees with MFA, as it has characterized the Miles Memo’s description of when a citation may be issued

under § 1910.132(d) as “very specifically described.” *Erickson*, 2012 WL 762001 at *5. Moreover, MFA’s complaints about the clarity of the Miles Memo – such as its supposedly insufficient detail regarding when OSHA considers “the installation of fall protection” to be “feasible,” *see* Br. 17-18 – are merely academic given that MFA does not contest that it *was* feasible for employees to use the fall protection system that it installed at the Adrian facility, *see, e.g.*, S.A-6-7 (Tr. 351-52), and that the factual circumstances under which MFA was cited fit those described in the Miles Memo for when OSHA may issue a citation under § 1910.132(d).

MFA’s related criticisms of the policy articulated in the Miles Memo, *see, e.g.*, Br. 21 (claiming that OSHA’s policy produces “absurd situation[s]”), are also irrelevant because the Miles Memo is an unreviewable agency statement describing how OSHA has decided to enforce its standards when employees are exposed to fall hazards from the tops of rolling stock. *See In re Nat’l Nurses United*, 47 F.4th 746, 757 (D.C. Cir. 2022) (“OSHA’s determination of whether, when, and how vigorously to enforce a particular standard is committed to the agency’s discretion and not subject to judicial review.”); *Nat’l Roofing Contractors Ass’n v. U.S. Dept. of Labor*, 639 F.3d 339, 341-42 (7th Cir. 2011) (OSHA exercised prosecutorial discretion when it issued a directive that “told officials *** not to commence enforcement proceedings”

under a standard in certain circumstances). Regardless of whether MFA agrees with OSHA's policy choices, the Miles Memo provides express notice to employers that OSHA may issue citations for violations of § 1910.132(d) where, as here, employees were exposed to a fall hazard on rolling stock "that [was] positioned *** contiguous to a building or other structure where the installation of fall protection [was] feasible." A-185 (A.R.Vol.4(J-1) at 2).

Also meritless is MFA's concern that the Miles Memo was not issued through "rulemaking processes." Br. 21. OSHA is obliged to use rulemaking procedures when it "promulgate[s], modif[ies], or revoke[s] any occupational safety or health standard," 29 U.S.C. § 655(b), but *not* when it "adopt[s], modif[ies], or rescind[s] directives (or equivalent documents) that inform the public how prosecutorial discretion will be exercised." *Nat'l Roofing*, 639 F.3d at 343. The Miles Memo did not modify any standards, but rather notified the regulated community when OSHA intends to cite employers in situations involving employee exposure to fall hazards on rolling stock.¹⁷ A-184

¹⁷ The unreviewed ALJ's decision in *Davey Tree Expert Co.*, No. 11-2556, 2013 WL 11263360 (OSHRC July 1, 2013) (ALJ) has no precedential value, *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985), and does not support finding otherwise. See Br. 28-29. *Davey Tree* did not concern fair notice; rather, after declining to defer to the Secretary's interpretation of when an ambiguous logging standard applied, *see id.* at **32-41, the ALJ determined that OSHA could not expand the applicability of the standard through a directive that was not promulgated via notice and comment rulemaking. *Id.* at **41-43. Here,

(A.R.Vol.4(J-1) at 1) (Miles Memo “clarif[ies] the Agency’s enforcement policy relating to fall hazards from the tops of ‘rolling stock’”); *Nat’l Roofing*, 639 F.3d at 341 (directive explaining how OSHA would enforce a standard “did not alter the [applicable] regulation,” but rather “exercised the prosecutorial discretion that agencies possess”).

Failing for similar reasons is MFA’s complaint that OSHA’s citation alleged that it violated § 1910.132(d)(1)(i) when Umstattd worked atop railcars positioned underneath the fall protection system, but did not *also* allege that violations occurred when employees worked atop railcars that were parked beyond the reach of the fall protection system. *See* Br. 21, 30, 31-32; A-153 (Tr. 677) (OSHA Area Director confirming that the citation does not concern work performed outside of the structure of fall protection system). OSHA has prosecutorial discretion to choose what conditions and conduct to address with citations. *See, e.g., Nat’l Nurses United*, 47 F.4th at 757; *Nat’l Roofing*, 639 F.3d at 342 (“Administrative discretion may be exercised by formal policies as well as one case at a time.”); *Chao v. OSHRC*, 480 F.3d 320, 324 n.3 (5th Cir. 2007) (recognizing OSHA’s prosecutorial discretion to cite only one violation even

the Miles Memo did not alter the applicability of any standards that apply to fall hazards on rolling stock, but rather narrowed the circumstances in which OSHA will actually cite employers for exposing employees to that hazard under applicable standards.

though “the facts alleged would support numerous willful violations”). By alleging that MFA violated § 1910.132(d)(1)(1) by not having employees, such as Umstattd, use the fall protection system when working atop railcars positioned where the fall protection system was available, OSHA did not make any determination as to whether MFA complied with OSHA standards when employees worked atop railcars at other locations. *Cf. Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1238 (11th Cir. 2002) (employers cannot infer compliance from the fact that OSHA did not cite a particular condition in an inspection). Simply put, this case does not concern that conduct.

Likewise unavailing is MFA’s claim that various OSHA statements have created “confusion about the policy articulated in the Miles [Memo].” Br. 21. The fact that OSHA mentioned plans to issue a compliance directive concerning fall hazards on rolling stock in the LeFevre Letter but never issued one, *see* Br. 13, 23, did not signal any change in OSHA’s enforcement policy. In fact, the LeFevre Letter referred the inquirer to the Miles Memo, thus indicating that the policy that it articulated was still in effect. 2002 WL 32829968 at *1.

Nor did OSHA signal any policy change in the walking-working surfaces rulemaking. In the 2003 reopening of the rulemaking record, *See* Br. 13-14, 23-24, OSHA simply “ask[ed] for additional comment on *** issues that relate to

the appropriate scope of subpart D” with respect to fall hazards on rolling stock, while also restating the Miles Memo’s description of when OSHA may cite employers under § 1910.132(d). 68 Fed. Reg. at 23530. Likewise, in the 2010 proposed rule, OSHA stated that it had requested additional comment in 2003 on the issue of rolling stock because the Miles Memo had “not resulted in clear direction to the public or to OSHA’s field staff,” 75 Fed. Reg. at 28867, *see* Br. 14, 18, 20, 23, but OSHA again recounted that employers may be cited under § 1910.132(d) when “the rolling stock was positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible.” 75 Fed. Reg. at 28867. Far from announcing a policy change, OSHA stated that the agency “plan[ned]to continue gathering information and evidence” on rolling stock issues. *Id.*

The 2016 final rule also did not create any confusion. *See* Br. 15-16. OSHA explained that, although the agency had received feedback from stakeholders regarding the hazard of falling from the top of rolling stock, OSHA had decided *not* to include specific requirements concerning those hazards in the final rule, both because no such provisions had been proposed in the 2010 proposed rule and because the agency needed more information and analysis. 81 Fed. Reg. at 82509, 82926. OSHA plainly stated that, as a consequence, “OSHA’s current existing enforcement policies on rolling stock

and motor vehicles will remain in effect.” *Id.* at 82926. This gave clear notice to employers that “the enforcement policy articulated in the Miles Memo[] remain[ed]” in effect. ADD-17 n.11 (A.R.Vol.6(71) at 17 n.11). Accordingly, there is no merit to MFA’s pleas of confusion about whether the Miles Memo remained in effect following the rulemaking.

B. OSHA’s Promulgation of Standards Providing Technical Requirements for Personal Fall Protection Systems Did Not Affect MFA’s Notice of its Obligation to Have Employees Use the PPE that it Provided.

Alongside its unpersuasive argument that the 2016 final rule somehow deprived MFA of fair notice of its obligations under § 1910.132(d)(1)(i), MFA claims that OSHA should have cited MFA under § 1910.140 rather than § 1910.132(d). Br. 25-27. In doing so, MFA references its “regulatory preemption” affirmative defense, which the ALJ rejected below, ADD-17-19 (A.R.Vol.6(71) at 17-19), in which MFA argued that § 1910.5(c)(1) precluded OSHA from citing MFA under § 1910.132(d)(1)(i) because § 1910.140 also applied and is a “more specific” standard.¹⁸ As noted *supra* pp. 18-19 n.11,

¹⁸ MFA incorrectly states that, to establish its violation of § 1910.132(d)(1)(i), OSHA was “required to prove that the need for employees to be provided and use particular PPE was objectively foreseeable.” Br. 26. Such a showing may be relevant to establishing a violation of § 1910.132(a), which broadly requires employers to provide and ensure the use of PPE “wherever it is necessary by reason of hazards,” 29 C.F.R. § 1910.132(a); *see Arkansas-Best Freight System, Inc. v. OSHRC*, 529 F.2d 649, 655 (8th Cir. 1978), but it is not relevant to

MFA does not directly challenge the ALJ's rejection of that defense in its opening brief, *see* Br. 2, and has therefore waived any claim that the ALJ's rejection of the defense provides independent grounds for reversal. *Jenkins*, 540 F.3d at 751.

Assuming *arguendo* that MFA's argument is nonetheless relevant to its fair notice defense, it clearly fails. First, as discussed *supra* sec. I.A., MFA had actual and constructive knowledge of its obligation to have its employees use the fall protection system that it provided to protect them from falls, and MFA offers no rational explanation for why the mere existence of § 1910.140 would affect MFA's notice of the conduct required by § 1910.132(d)(1)(i).

Second, the ALJ correctly rejected MFA's defense that § 1910.140 superseded § 1910.132(d)(1)(i) in the cited circumstances. To establish regulatory preemption under § 1910.5(c), the employer must prove that the cited "standard [was] effectively 'displaced' by another standard that is *more* specifically applicable" to the hazardous condition or conduct at issue in the citation. *Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, *2 (OSHRC Dec. 31, 2020). Even where a more specific standard applies to the

violations of § 1910.132(d)(1)(i) because, in such cases, the cited employer has already determined in a hazard assessment that the PPE was necessary to protect employees from a hazard.

cited condition or conduct, “[g]eneral standards remain applicable where they provide meaningful protection to employees beyond the protection afforded by specific standards.” *County Concrete Corp.*, No. 93–1201, 1994 WL 416693, *1 (OSHRC Aug. 9, 1994); *see also Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1234 (3d Cir. 1980) (no preemption where “general safety standards complement the specific safety standards ... by filling the interstices necessarily remaining after promulgation of the specific standards”). Here, MFA’s argument fails because § 1910.140 expressly does *not* supersede § 1910.132(d) or any other standard in part 1910 that permits or requires employers to have employees use a personal fall protection system. Rather, § 1910.140 complements those standards by ensuring that, when such systems are used to protect employees from fall hazards, they actually work.

The text of § 1910.140 makes this clear. Section 1910.140’s “[s]cope and application” provision states that the section provides “performance, care, and use criteria for all personal fall protection systems” and obliges employers to “ensure that each personal fall protection system *used to comply with this part*” meet those criteria. 29 C.F.R. § 1910.140(a) (emphasis added). 29 C.F.R. § 1910.140(a). “This part” refers to OSHA’s general industry standards in part 1910, including § 1910.132.

Furthermore, none of the provisions in § 1910.140 impose a duty on employers to have employees use personal fall protection systems. Rather, the standards in § 1910.140 provide *technical criteria* for personal fall protection systems, such as material and strength requirements for system components, *see, e.g.*, § 1910.140(c)(1) (“Connectors must be drop forged, pressed or formed steel, or made of equivalent materials.”), as well as “system performance criteria,” § 1910.140(d)(1), and “system use criteria,” § 1910.140(d)(2), for personal fall arrest systems. There is no provision in § 1910.140 that displaces § 1910.132(d)(1)(i)’s requirement for employers to have each affected employee use a personal fall protection system where the employer has selected such a system to protect employees from an identified fall hazard. Section 1910.140 was thus *not* applicable to the hazardous conduct at issue in the citation, and even if it were, § 1910.132(d)(1)(i) provided “meaningful protection to employees beyond the protection afforded by” § 1910.140. *County Concrete*, 1994 WL 416693 at *1.

The regulatory history of § 1910.140 confirms this. *See Lowe Constr. Co.*, No. 85-1388, 1989 WL 223356, *2 (OSHRC April 20, 1989) (“standards should be applied so as to effectuate the Secretary’s rulemaking intent”). When it promulgated § 1910.140, OSHA explained that “§ 1910.140 establishes personal fall protection system criteria and work practice requirements, while §

1910.132 establishes provisions that apply to all [PPE], including personal fall protection systems.” 81 Fed. Reg. at 82617. OSHA further explained that the technical criteria in § 1910.140 apply to all personal fall protection systems that employers use to comply with OSHA’s “existing requirements in part 1910 that mandate or allow employers to protect workers from fall hazards using personal fall protection systems.” *Id.* at 82644. OSHA did not promulgate § 1910.140 to displace those standards, but rather to address the risk that, when used, “personal fall protection systems *** may fail and put workers at risk of harm.” *Id.*

And, as the ALJ pointed out, ADD-19 (A.R.Vol.6(71) at 19), OSHA expressly stated that it had not added any specific fall protection requirements for rolling stock. 81 Fed. Reg. at 82505. So, not only did OSHA make plain that § 1910.140 *generally* does not displace existing standards in part 1910 that require or permit the use of personal fall protection systems to protect employees from falls, OSHA also made clear that, by promulgating § 1910.140, OSHA did not create any new duty for employers to require employees to use a personal fall protection system to protect employees from falls from the tops of rolling stock.

Reading § 1910.140 as complementary of § 1910.132(d)(1)(i) and the other standards in part 1910 that permit or require the use of personal fall

protection systems is also necessary to effectuate the purpose of the standards. To interpret § 1910.140, as MFA would, as superseding all OSHA standards in part 1910 that require or permit the use of a personal fall protection system to protect employees from falls would leave OSHA with no standard to cite to address an employer's failure to have employees *use* a personal fall protection system, even where (as here) the employer knew that such use was necessary to protect employees from a serious fall hazard. This absurd outcome would dismantle OSHA's regulatory scheme for protecting workers in general industry employment from falls and contravene the protective purpose of the OSH Act.¹⁹ *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th

¹⁹ It is clear from the traditional tools of construction that § 1910.140 does not supersede § 1910.132(d)(1)(i) in these circumstances, but even if it were not, the Court would be obliged to defer to the Secretary's reasonable interpretation of its standards. *See Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-51 (1991) (courts must defer to the Secretary's interpretation of an ambiguous standard if it "sensibly conforms to the purpose and wording" of the standard); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415, 2419 (2019) (if, after using "all the traditional tools of construction," the meaning of a regulation is genuinely ambiguous, the court defers to the agency's reasonable interpretation unless special circumstances render deference inappropriate). Deference would be appropriate here because the Secretary's interpretation was "actually made by the agency," reflects the agency's "fair and considered judgment," and "implicates [the agency's] substantive expertise." *Kisor*, 139 S.Ct. at 2416, 2147. The Secretary's interpretation is compelled by text of the standards and § 1910.140's regulatory history, and is also embodied in the citation that OSHA issued to MFA, which is an official agency interpretation to which deference is owed. *CF&I*, 499 U.S. at 156-57. The Secretary's interpretation is also consistent with a 2021 letter of interpretation in which OSHA explained

Cir. 1979) (“Being remedial and preventative in nature, the [OSH] Act must be construed liberally in favor of the workers whom it was designed to protect.”).

The unreviewed ALJ decision in *Fabarc Steel Supply, Inc.*, No. 18-1859, 2019 WL 4786889 (OSHRC Aug. 20, 2019) (ALJ), which “does not bind the [Commission] or the courts as precedent,” *In re Cerro*, 752 F.2d at 284, is inapposite. *See* Br. 27. The citation in *Fabarc* addressed an employee’s misuse of a personal fall protection system that occurred when the employee “connected his lanyard ... at foot level,” which exposed him “to a free fall of more than 6 feet.” 2019 WL 4786889 at *6. The ALJ determined that the PPE training standard that OSHA cited (§ 1910.132(f)(i)(iv)) was “not applicable to the alleged violative conditions,” *id.* at *7, while § 1910.140(d)(2)(ii), which requires that “[p]ersonal fall arrest systems [be] rigged in such a manner that the employee cannot free fall more than 6 feet (1.8m) or contact a lower level,” specifically addressed the hazardous conduct. *Id.* In contrast to *Fabarc*, § 1910.132(d)(1)(i) specifically addressed the hazardous conduct at issue in the instant citation (MFA’s failure to have

that “[s]ome OSHA standards contain specific requirements for ensuring that *** equipment meets certain specifications or are free from defect,” such as § 1910.140, which “establishes performance, care, and use criteria for all personal fall protection systems ... used to comply with [29 C.F.R. Pt. 1910].” OSHA, Letter to John M. Dugan, “NRTL Certification for New Product Design,” 2021 WL 9979270, *1 (Aug. 4, 2021) (brackets in original).

employees use the PPE that it provided) and no standard in § 1910.140 addresses such conduct.²⁰

II. Substantial Evidence Supports the ALJ’s Determination that MFA Willfully Violated 29 C.F.R. § 1910.132(d)(1)(i) Because it Regularly Permitted Employees to Be Exposed to a Known and Serious Fall Hazard.

An employer willfully violates an OSHA standard when it acts “with either an intentional disregard of, or plain indifference to, the [OSH] Act’s requirements.” *Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1469 (8th Cir. 1996). “This state of mind is evident when the employer was actually aware, at the time of the violative act, that the act was unlawful, or when the employer possessed a state of mind such that if it were informed of the standard, it would not care.” *First Marine, LLC*, Nos. 18-1287 & 18-1288, 2023 WL 2951422, *6 (OSHRC Apr. 6, 2023); accord *Brock v. Morello Bros. Const., Inc.*, 809 F.2d 161, 164 (1st Cir. 1987). Here, substantial evidence supports the ALJ’s determination that MFA’s violation of § 1910.132(d)(1)(i) was willful because MFA was plainly indifferent to its employees’ exposure to a serious fall hazard

²⁰ To the extent that the ALJ suggested in *Fabarc* that § 1910.140 preempts all citations under § 1910.132 relating to personal fall protection systems, *see id.* at *6, the ALJ was mistaken. As discussed *supra*, § 1910.140 complements, and does not supersede, standards in part 1910, such as § 1910.132(d)(1)(i), that permit or require employers to use personal fall protection systems to protect employees against falls.

when they performed railcar loadout without using the fall protection system.²¹ ADD-23-28 (A.R.Vol.6(71) at 23-28). Ample evidence demonstrates that even if MFA actually knew that Umstattd was not using the fall protection system when he worked atop railcars prior to the explosion on December 31, 2020, MFA would not have cared. ADD-25-27 (A.R.Vol.6(71) at 25-27).

To start, substantial evidence supports the ALJ's determination that MFA "had a heightened awareness that fall protection was required" when employees conducted railcar loadout. ADD-24 (A.R.Vol.6(71) at 24). MFA conducted a hazard assessment, identified that fall protection was necessary to protect employees from falls during railcar loadout, provided a fall protection system for that purpose, and instructed employees to use that system in its handbook and during annual safety trainings. ADD-6, 17, 24 (A.R.Vol.6(71) at 6, 17, 24); *supra* pp. 23-24; *see, e.g., A.E. Staley Mfg. Co.*, Nos. 91-0637 & 91-0638, 2000 WL 1535899, *2, *4 (OSHRC Oct. 18, 2000) (heightened awareness established where employer was aware of the hazards and had a policy "which, if followed, would have abated the hazards"). Supervisory employees acknowledged that employees were supposed to use the fall

²¹ The Secretary argued below that MFA also "intentionally disregarded" its obligations under the OSH Act, but because the ALJ did not find willfulness on those grounds, *see* ADD-25 (A.R.Vol.6(71) at 25), the Secretary does not address that theory of willfulness in this brief.

protection system during railcar loadout, and that, if an employee fell from the top of a railcar, it could result in serious injury or death. A-91, 171, 178 (Tr. 156, 748, 776); S.A-1-3, 7, 8, 22 (Tr. 346-48, 352, 395; A.R.Vol.4 (C-35) at 7); *see Branham Sign Co.*, No. 98-752, 2000 WL 675530, at *2 (OSHRC May 15, 2000) (“The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful.”). MFA thus had heightened awareness that employees needed to use fall protection in the railcar loadout area to protect employees from a serious fall hazard.²²

Substantial evidence also supports the ALJ’s determination that MFA demonstrated plain indifference because it regularly allowed employees to be exposed to a known and serious fall hazard. *See* ADD-25-27 (A.R.Vol.6(71) at 25-27). One way that an employer acts with plain indifference is when it repeatedly permits employees to engage in conduct that the employer knows to be hazardous. *See, e.g., Valdak*, 73 F.3d at 1469 (an employer exhibits plain

²² Because the above-discussed evidence established MFA’s heightened awareness, it is inconsequential that MFA was not specifically warned by OSHA or a prior employee injury that working atop railcars without fall protection exposed employees to a serious fall hazard. *See* Br. 34-35; *Valdak*, 73 F.3d at 1469 (“a prior warning is not a necessary condition to finding willfulness”); *A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1347 (D.C. Cir. 2002) (“[A]n employer cannot contend that it was entitled to rely on its lack of prior violations to undermine a finding of willfulness ***”).

indifference when it “fails to correct a known hazard” or “knowingly permits a serious hazard to exist”); *Altor, Inc.*, No. 99-0958, 2011 WL 1682629, *10 (OSHRC Apr. 26, 2011) (plain indifference established where employer’s safety policy “was openly disobeyed by employees” and employer “persisted in failing to enforce [it]”). Such was the case here, where MFA routinely permitted employees to forgo using the fall protection system during railcar loadout. *See, e.g.*, ADD-26-27 (A.R.Vol.6(71) at 26-27).

MFA knew that employees rarely used the fall protection system during railcar loadout, *see* ADD- 20 (A.R.Vol.6(71) at 20) (“management at every level was aware of employees’ failure to wear fall protection while atop railcars”), and did not take meaningful action to fix the problem.²³ ADD-26-27 (A.R.Vol.6(71) at 26-27); *see, e.g.*, *Morrison-Knudsen Co.*, No. 88–572, 1993 WL 127946, *25 (OSHRC Apr. 20, 1993) (violation willful where employer’s response to warnings of employee exposure to hazard was “unreasonably

²³ McMullen never told his subordinates that they were required to use the fall protection system and accepted that using the fall protection system “wasn’t a thing that was done” at the Adrian facility. A-72, 95, 103 (Tr. 81-82, 174, 203). Morris reported his observation of workers declining to use the fall protection system to Guss, but did not personally discipline the employees nor follow up with Guss to see if any correction action was taken. S.A-22 (A.R.Vol.4(C-35) at 7). Guss communicated to McMullen and Schmitt that using the fall protection system was not required, and after McMullen and Morris reported noncompliance to him, Guss did not take corrective action to fix the problem. A-73, 92-93 (Tr. 84, 161-65).

limited”); *AJP*, 357 F.3d at 75 (willfulness established where “prior *** warnings coupled with [employer’s] failure to act demonstrated that it was aware of the unsafe conditions and yet chose not to correct them”). Supervisory employees also personally worked atop railcars without using the fall protection system, ADD-8-9, 21, 26 (A.R.Vol.6(71) at 8-9, 21, 26); A-72-73, 91, 97, 113 (Tr. 82-84, 157, 181, 246), which further communicated to subordinates that using the fall protection system was not required. *See V.I.P. Structures, Inc.*, No. 91–1167, 1994 WL 362276, *2 (OSHRC July 8, 1994) (“Willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer ***”).

MFA’s permissiveness regarding employee exposure to serious fall hazards is further evinced by the company’s failure to *ever* use its disciplinary policy to compel employees to use the fall protection system. *See* ADD-27-28 (A.R.Vol.6(71) at 27-28); *AJP*, 357 F.3d at 75 (willfulness supported employer’s inability to “point[] to [any] instance in which it actually enforced fall-protection requirements”). Railcar loadout was performed “almost daily,” A-90 (Tr. 154), and the employees involved rarely used the fall protection system, *see, e.g.*, A-71, 113 (Tr. 75-77, 243-44), but MFA never disciplined anyone for failing to use the fall protection system. A-73, 95-96 (Tr. 85-86, 174-75); S.A-16-18 (Tr. 427-28, 484). “[E]ven after the incident at issue,

[Guss] did not formally reprimand Umstattd” for conducting railcar loadout without using the fall protection system. ADD-28 (A.R.Vol.6(71) at 28). This is not a case of “imperfect enforcement,” Br. 35, but rather one where MFA made no attempt to compel employees to use the fall protection system.

MFA questions how much of the violative conduct of which MFA managers were aware occurred atop railcars positioned underneath the fall protection system, as opposed to on railcars positioned beyond the fall protection system’s reach, Br. 35, but the record is clear that the employees who conducted railcar loadout almost never used the fall protection system during such work, *see, e.g.*, A-71, 72, 112-13, 114 (Tr. 76, 80-81, 240-44, 247), and supervisors were well-aware of this practice. *See, e.g.*, A-73, 91-93, 97 (Tr. 83-84, 157-58, 160-64, 181). And, that quibble aside, MFA does not dispute that “the Adrian facility harbored a culture of allowing employees to perform railcar loadout without wearing fall protection,” “employees understood wearing fall protection to be optional,” but “[n]o one was disciplined” for failing to use the fall protection system, ADD-26 (A.R.Vol.6(71) at 26), which establishes that MFA permitted employees to be exposed to a known and serious hazard.

MFA alleges that these facts do not establish that it was plainly indifferent to employee safety, *see* Br. 35-36, but the ALJ’s contrary

determination is fully consistent with this Court's precedent.²⁴ Particularly, in *Valdak*, this Court explained that “[a]n employer who *** fails to correct a known hazard commits a willful violation even if the employer does so in good faith,” and that if “an employer knowingly permits a serious hazard to exist, it has acted willfully even if the workplace is otherwise safe.” *Id.* at 1469. The Court affirmed that the cited employer demonstrated plain indifference because the employer knew that a machine had a safety defect but continued to allow employees to use the machine and be exposed to a serious hazard. *Id.* Similar to the employer in *Valdak*, MFA regularly permitted employees to forgo using the fall protection system and thereby be exposed to a serious hazard, which establishes MFA's plain indifference.²⁵ *See also McKie Ford, Inc.*

²⁴ The determination is also fully consistent with Commission precedent. *See, e.g., Gen. Motors Corp., CPGC Okla. City Plant*, Nos. 91-2834E & 91-2950, 2007 WL 4350896, *34 (OSHRC Dec. 4, 2007) (although employer lacked actual knowledge of particular instance in which safety procedures were not used, its permissiveness of employees' non-use of such procedures supported that the employer had “an attitude of plain indifference from which [the Commission] infer[red] that, had [the employer] known of its employees' noncompliance with the standard's requirements, it would not have cared”); *Altor*, 2011 WL 1682629 at *10 (employers' persistent failure to enforce safety policy despite warnings of noncompliance “evidence[d] a cavalier attitude towards employee safety” and permitted the inference that, even if employer did not know about a particular instance of noncompliance, “they would not have cared”).

²⁵ *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840 (8th Cir. 1981) does not indicate otherwise. *See* Br. 35. Unlike this case, which concerns a willful violation of an OSHA standard, *St. Joe Minerals* concerned an allegedly willful

v. Sec’y of Labor, 191 F.3d 853, 857 (8th Cir. 1999) (employer demonstrated plain indifference where it was aware that employees “habitually” engaged in conduct that the employer knew was hazardous, but “did nothing of substance to prevent th[e] dangerous practice”).

Valdak also defeats MFA’s argument that other “efforts” that it made to protect employees from falls, such as “buil[ding] the I-beam structure, conduct[ing] trainings, [and] ke[ep]ing railcars stationary,” negate the willfulness finding. Br. 36. Even if MFA did not completely ignore the potential for employees to fall off railcars, the fact that MFA routinely permitted employees to work atop railcars without using the fall protection system, which MFA knew exposed them to a serious fall hazard, establishes that MFA “fail[ed] to correct a known hazard” and “knowingly permit[ted] a serious hazard to exist.” *Valdak*, 73 F.3d at 1469. That establishes MFA’s

violation of the OSH Act’s general duty clause, and the Secretary was therefore obliged to make “a more concrete evidentiary showing” of willfulness and establish “the employer’s intentional disregard of, or plain indifference to the very broad duty to ‘furnish a place of employment free from recognized hazards.’” 647 F.2d at 848-49. Applying that heightened evidentiary standard, the Court determined that the employer’s “failure over time to abandon” a hazardous procedure, in which it used an elevator with a safety feature temporarily “bypassed,” was not “*alone* sufficient to prove willfulness.” *Id.* at 848 (emphasis added). And, unlike MFA, which routinely permitted employees to work atop railcars without using any fall protection, the employer in *St. Joe Minerals* only engaged in the hazardous procedure “[o]n occasion” and “until repairs could be made” to the elevator. *Id.*

plain indifference “even if [MFA] acted in good faith” and “the workplace [was] otherwise safe.” *Id.*

Moreover, the ALJ correctly determined that MFA did *not* make an objectively reasonable and good faith effort to protect employees who worked atop railcars during railcar loadout from falls. ADD-27-28 (A.R.Vol.6(71) at 27-28); *see* Br. 37-38; *Jim Boyd Constr., Inc.*, No. 11-2559, 2016 WL 8201805, *3 (OSHRC Nov. 16, 2016) (under Commission precedent, an employer may defend against a willfulness characterization by showing that it “exhibited a good faith, reasonable belief that its conduct conformed to law, *** or [] it made a good faith effort to comply with a standard or eliminate a hazard”). Although MFA had “installed a fall protection system to be used during railcar loadout and had rules mandating its use,” the “culture of not wearing fall protection during railcar loadout” at the Adrian facility, and MFA’s failure to ever discipline an employee for failing to use the fall protection system, established that MFA did not make a good faith effort to eliminate employee exposure to the fall hazard. ADD-27-28 (A.R.Vol.6(71) at 27-28). That determination is fully consistent with Commission precedent. *See, e.g., Weirton Steel Corp.*, No. 98-0701, 1999 WL 34813785, *8 (OSHRC July 31, 2008) (although employer provided respirators and carbon monoxide monitors to employees and adequately communicated related safety rules, willfulness not

negated because employer “knowingly allowed its employees to be exposed to hazardous concentrations of [carbon monoxide”]; *Altor*, 2011 WL 1682629 at *11 (employers’ good faith efforts did not negate willfulness where “employees routinely did not wear” PPE, supervisors also failed to wear it, and no employees at the worksite had been disciplined for failing to wear the PPE); *A.E. Staley*, 2000 WL 1535899 at **5-6 (employer’s efforts to address hazards did not negate willfulness because efforts were “sporadic and incomplete” and did not eliminate exposure to the hazardous condition).²⁶

MFA further argues that, because OSHA did not have standards that specifically addressed employee exposure to fall hazards on rolling stock, MFA “had [a] good faith and reasonable belief that its efforts did conform to the law.” Br. 37-38. MFA did not argue this theory for negating the willfulness

²⁶ *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249 (D.C. Cir. 2012) is inapposite. See Br. 39. There, the Court found insufficient evidence to affirm that a safety manager, who had adopted a predecessor safety manager’s determination that OSHA’s lockout-tagout standards had limited application to their employees, demonstrated plain indifference in how she responded to incidents that (in the Commission’s view) should have prompted her to reassess that determination. *Id.* at 1255-57. The Court found that the manager had taken action to assess the employer’s compliance with OSHA’s standards and relied on a “good faith opinion” that the employer’s safety program was compliant. *Id.* at 1257. In contrast, MFA’s formal policy required employees to use the fall protection system during railcar loadout, but managers habitually permitted non-compliance with that policy, and none claimed that they did so due to a good faith belief that employees were adequately protected from falls when they conducted railcar loadout without using the fall protection system.

characterization to the Commission in its PDR, *see generally* S.A-25-35 (A.R.Vol.6(73) at 23-33), and this Court therefore lacks jurisdiction to consider it. 29 U.S.C. § 660(a) (absent “extraordinary circumstances,” “[n]o objection that has not been urged before the Commission shall be considered by the court”); *Wal-Mart*, 919 F.3d at 1078 (limiting judicial review to the specific arguments raised in the employer’s PDR).

But, even if the Court had jurisdiction to consider this theory, it is meritless. “The test of good faith is an objective one—whether the employer’s belief concerning the factual matters in question was reasonable under all of the circumstances and therefore nonfrivolous.” *N. Landing Line Constr. Co.*, No. 96-721, 2001 WL 826759, *13 (OSHRC July 20, 2001). First, the evidence does not support that MFA actually held such a belief. *See, e.g.*, A-94 (Tr. 168-69) (McMullen acknowledging that MFA’s annual training communicated that they were supposed to use the fall protection system); A-71, 178 (Tr. 748, 776) (Guss stating that using the fall protection system “wasn’t optional” and should be used “when you’re underneath the fall protection [system] adjacent to a facility”); S.A-1, 8 (Tr. 346, 395) (Thessen acknowledging that employees were exposed to a fall hazard when they “were on top of railcars” and MFA had a duty to use the fall protection system “to

make sure that the employees were safe”); *see also supra* sec. I.A. (discussing MFA’s awareness of the need for employees to use the PPE).

Second, given that MFA identified that employees were exposed to a fall hazard while conducting railcar loadout, provided a fall protection system to protect them from that hazard, and had a rule requiring employees to use it, any alleged belief that that employees were protected from that fall hazard when they worked atop railcars *without* using that fall protection system would be objectively unreasonable. Accordingly, MFA’s alleged belief that its employees’ routine noncompliance with its own safety rule was safe and compliant with OSHA requirements is both unreasonable and “disingenuous,” ADD-17 (A.R.Vol.6(71) at 17), and had MFA presented that theory to the Commission, the Commission would have rightly rejected it.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of January, 2025, I filed a copy of the foregoing brief via the Court's CM/ECF Electronic Filing System, providing service on counsel for Petitioner, listed below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Secretary of Labor's brief contains 12,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The font used was Calisto MT 14-point proportional spaced type. The brief was prepared using Microsoft Word 2016.

I further certify that the brief has been scanned for viruses and that the brief is virus-free.

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