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

SECRETARY OF LABOR, Complainant,	:	
v.	:	
HERCULES, INC.,	:	OSHRC Docket No. 95-1483
and	:	
ALLIANT TECHSYSTEMS, INC.[1], Respondents.	:	
UNITED STEELWORKERS OF AMERICA, Authorized Employee Representative.	:	

DECISION

Before: RAILTON, Chairman, STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Before the Commission for review are two notifications of failure-to-abate (NFTA's)[2]

[1] Subsequent to the commencement of the October 1994 hearing in this case, Alliant Techsystems, Inc. purchased part of Hercules' business, taking over operations at the Hercules facility in question. Upon motion by the Secretary, Alliant was added as a party to this case.

[2] Both of these failure-to-abate notifications were originally part of Docket No. 93-2790. The judge severed the notification for failure-to-abate the certification issue, which became

issued under section 17(d)[3] of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The notifications allege that Hercules, which manufactures explosives at its facility in Kenvil, N.J., failed to comply with earlier citations requiring that it record occupational injuries and illnesses on the OSHA 200 logs[4] and that summaries of the logs be properly certified. Administrative Law Judge Richard DeBenedetto vacated the recording notification and affirmed the certification notification. For the reasons set forth below we affirm the judge's decision to vacate the recording notification but, contrary to the judge, we vacate the certification notification as well.

Background

The underlying citations, which were issued in 1989, alleged violations of three recordkeeping regulations: 29 C.F.R. §1904.2(a)[5] for Hercules' failure to record 189

Docket No. 95-1483. Because of the similarity of the recordkeeping and certification issues, the Commission, on review, severed the recordkeeping issues from Docket No. 93-2790 and consolidated it with the certification issue here in Docket No. 95-1483. *Hercules, Inc.*, 20 BNA OSHC 1653, n.2, 2004 CCH OSHD ¶ 32,713, p. 51,818, n.2 (No. 93-2790, 2004)

[3] Section 17(d) of the Act, 29 U.S.C. § 666(d) states that:

> Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

[4] Since the issuance of these NFTAs, the recordkeeping standards have been substantially revised.

[5] Former section 1904.2(a) provided:

> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable

instances of occupational injuries on its OSHA 200 logs for 1987, 1988 and 1989; §1904.4[6] for its failure to maintain a supplementary equivalent to the OSHA 101 form for each of the injuries, and §1904.5(c)[7] for its failure to properly certify the annual summary of injuries and illnesses. The parties settled these citations on November 5, 1991. As part of that agreement, Hercules withdrew its notice of contest and agreed to abate the violations by Dec. 5, 1991. The agreement did not specify an abatement method for these violations. On Feb. 20, 1992, Hercules notified OSHA that the violations were abated.

> injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

[6] Former section 1904.4 provided:

> In addition to the log of occupational injuries and illnesses provided for under §1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

[7] Former section 1904.5(c) provided:

> (c) Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employee of the employer who supervises the preparation of the annual summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete.

The Secretary conducted a follow-up inspection in March 1993 and issued two notifications of failure-to-abate in September 1993. The first notification alleged that Hercules failed to add 121 injuries to its 1988 and 1989 OSHA 200 logs[8] and to supply the OSHA 101 forms to OSHA for those injuries. The notification alleged that injuries were not entered on the logs for 440 days. The Secretary proposed a penalty of $7,000 per day for the recording violations, for a total of $3,080,000. The second notification alleged that Hercules failed to have the annual summary of occupational injuries and illnesses for 1987 and 1988 certified by "the management official whose sole decision is ultimately responsible for recording and reporting on the OSHA 200 log." The Secretary proposed a penalty of $60,000 for this certification violation, which the judge affirmed.

I. Burden of Proof

A failure-to-abate is shown when the Secretary establishes that (1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which respondent was originally cited. *Braswell Motor Freight Lines, Inc.*, 5 BNA OSHC 1469, 1470, 1977-1978 CCH OSHD ¶ 21,881, p. 26,390 (No. 9480, 1977). However, an employer must receive adequate notice of the nature of the violations for which it is being cited. Section 9(a) of the Act requires that a citation "describe *with particularity* the nature of the violation…". 29 U.S.C. § 658(a) (emphasis added.) *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002). The description of the violation charged need not be "elaborate or technical or drafted in a particular form[,]" but it must "fairly characterize the violative condition so that the citation is adequate both to inform the employer of what must be changed and to allow the Commission, in a subsequent failure-to-

[8] According to the Secretary, because 29 C.F.R. §1904.6 required that records be retained for only five years, she did not include in the failure-to-abate notice the 68 instances that occurred in 1987.

correct action, to determine whether the condition was changed." *Id., citing Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1308 (5th Cir. 1978).

On the record before us, with respect to the failure to record violation, we find that the underlying citation failed to describe the violative conditions in a manner adequate to inform Hercules what it was required to change to bring itself into compliance. The record further demonstrates that, with respect to both the failure to record and the failure to certify violations, after issuance of the underlying citations, the Secretary's evaluation of what was required of Hercules was both erratic and impossible to implement. Accordingly, we vacate both notifications for failure-to-abate.

II. The Recording and Supplemental Record Items

The citation the Secretary issued to Hercules in 1989 alleged that the company failed to record 189 instances of occupational illness and injuries on the OSHA 200 logs for 1987, 1988 and 1989. The citation did not identify the individuals whose injuries were not recorded or the specific injuries or illnesses that were not recorded. The citation listed only broad categories of injuries and the number of injuries within those categories.[9] In response to the citation, Hercules made several attempts to have the Secretary provide it with the information that would enable it to identify the unrecorded instances and to correctly fill out the OSHA 200 logs. Hercules' first attempt at obtaining this information came at an informal conference held before it filed its notice of contest to the 1989 citation. At this informal conference, Hercules representatives asked OSHA Area Director Robert Kulick for the names of the employees who suffered the 189 unrecorded injuries. Kulick declined to provide the information and advised them to find the information in Hercules' own records. According to notes taken by one of Hercules' attendees at that conference, Kulick stated that: "Giving you

[9] The citation listed: "(19) Lacerations; (83) Sprains and strains (back, cervical, abdomen, ribs[,] shoulder[,] and extremities); (6) Eye Injuries; (7) Burns; (22) Contusions; (52) Other (crushing, inhalation of acids and fumes)."

the specifics today will not aid you in having a better safety record. We got all the data directly from you and we put it all together so I don't think you should have any problem doing the same thing."

We note that the Secretary's reticence at providing the requested identifying information was contrary to her usual practice in recordkeeping cases of informing the employer of what it was required to record in order to bring itself in compliance with the recordkeeping regulations. *See Kohler Co.*, 16 BNA OSHC 1769, 1993-95 CCH OSHD ¶ 30,457 (No. 88-237, 1994 (over one hundred instance-by-instance recordkeeping items with individual penalties); *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-922, 1993)(same); *General Dynamics Corp.*, 15 BNA OSHC 2122, 1991-93 CCH OSHD ¶ 29,952 (No. 87-1195, 1993) (over 174 instances specified in three citation items.) Where the pleadings have been unspecific and insufficient, there has been particularization through discovery. *See Wyman-Gordon Co.*, 15 BNA OSHC 1433, 1991-93 CCH OSHD ¶ 29,550 (No. 84-785, 1991), *vac'd on other grounds*, 15 BNA OSHC 1728 (1st Cir. 1992)(agreement between the parties at second prehearing conference as to which specific documents were at issue in litigation involving access to employee exposure and medical records).

Here, however, the parties dispute whether the Secretary was forthcoming even in discovery. On November 6, 1990, during discovery in the earlier case, Hercules filed an interrogatory asking the Secretary to produce the information that would allow it to identify the 189 injuries that it was alleged not to have entered on the OSHA 200 log. In her brief on review, the Secretary asserts that she responded to that discovery request, by providing sixteen sub-files to Hercules, including the documents, known as "ledger sheets," containing

the specific names associated with each injury. Hercules, however, claims that this information was not found in any of the sub-files provided by the Secretary.[10]

Hercules fared no better after OSHA issued the NFTA's before us, when it asked for the information during an informal conference on September 21, 1993. The Secretary initially agreed to turn over the information, but on the advice of counsel, refused to provide it, indicating that she would do so at some future time. It was not until November 1993, two months after issuing the NFTAs, that the Secretary finally provided the names and Hercules added them to the logs.

The difficulties encountered by Hercules in its attempts to obtain the information that would enable it to abate were compounded by the Secretary's inability to determine which incidents she believed should have been recorded. Compliance Officer Jane Secor gave deposition testimony that "there has always been a dispute, even within OSHA itself, as to what the right number of [unrecorded recordable injuries] is." During the reinspection, Secor reexamined the 121 instances of injuries and illnesses that occurred between 1988 and 1989 that she had documented on her ledger sheets during the original inspection, but determined that only 93 of them were recordable. When the Secretary forwarded the ledger sheets to her recordkeeping expert, he had considerable difficulty interpreting them and found that only 63 of the 93 injuries identified by Secor were recordable. He later concluded that only 54 were recordable; 46 of the 63 injuries that he had identified at first, plus eight others from among the 121 that Secor had originally identified for 1988 and 1989. In a response to an interrogatory from Hercules filed during this NFTA proceeding, the Secretary admitted that she could not "conclusively demonstrate" the recordability of all 121 injuries that

[10] The parties dispute whether these ledger sheets, which the parties agree were eventually turned over to Hercules, were sufficiently legible to be of any use to Hercules in aiding it to identify the 189 unrecorded incidents. The judge did not resolve this factual dispute. Given the Secretary's subsequent inability to determine what incidents should have been recorded,

Compliance Officer Secor originally identified for 1988 and 1989. Then, at the failure-to-abate hearing, the Secretary's attorney stated that the "bottom line" is that there were only 54 "recordable events."

In his decision, the judge noted that there were still outstanding questions surrounding the recordability of 15 of these remaining 54 incidents. He concluded that "[g]iven the limited nature and questionable accuracy of the available information about the employee injuries and illnesses treated at the Kenvil plant during 1988 and 1989, it is virtually impossible to piece together what may or may not legitimately be missing from the OSHA records."

On this record, it is clear that despite the protracted nature of these proceedings, the Secretary was never able to provide Hercules with the minimum information that would allow it to abate the recordkeeping citations. Despite a practice of issuing recordkeeping citations containing detailed information about what was not recorded, the Secretary did not provide Hercules with the identity of those who had suffered occupational injuries or illnesses in either the citation or the complaint. The Secretary also failed to provide the information when requested at the informal conference for the original citation. Most telling, at the time the Secretary issued this failure to abate notification and during her prosecution of this case she could not say with any great level of certainty what it was that Hercules failed to record. The recordkeeping notification is vacated.[11]

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we find also find it unnecessary to resolve whether the Secretary timely provided legible copies of the ledger sheets.

[11] Our holding is not meant to imply that Hercules did not fail to properly record recordable injuries and illnesses in its OSHA 200 logs or that the underlying citation is otherwise invalid. Our holding is limited strictly to the failure of the Secretary to inform Hercules of the nature of the charge in a manner sufficient to enable it to determine what it was required to abate and to avoid a notification of failure-to-abate.

III. The Certification Item

In the original citation, the Secretary alleged that Hercules violated 29 C.F.R. §1904.5(c)[12] on the ground that the certification of log entries were "not made by the Plant Manager who sole decision is ultimately responsible for the recording and reporting on the OSHA 200 log." Under the Secretary's theory, John Klobus, the person who certified the logs and summaries for 1987 and 1988 as true and correct, was not eligible to certify them because in disputed instances he did not exercise final decision-making authority over what injuries and illnesses were entered in the OSHA 200 logs. After the parties settled the matter, the summaries were recertified by Klobus' successor, Roger Dunbar. The Secretary alleges in this NFTA that Dunbar was ineligible to certify the 1987 and 1988 logs and summaries.

During the two years in question, Hercules allowed its employees to receive treatment for both work-related and non-work-related injuries and illnesses at its medical center. To determine which of these injuries and illnesses were work-related and therefore recordable on the OSHA 200 log, Hercules set up a committee comprised of the plant manager, safety director Klobus, the injured employee's supervisor, and the nurse who supervised the plant's medical department. In the event of a dispute as to what was recordable on the OSHA 200, the plant manager made the final determination. The summary of the logs for 1987 and 1988

[12] Former section 1904.5(c) provided:

> (c) Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employee of the employer who supervises the preparation of the annual summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete.

were originally prepared and certified by safety director Klobus.[13]

[13]The judge concluded that the evidentiary record did not support Hercules' contention that Klobus supervised the preparation of the logs and summaries in the manner contemplated by the regulation. He based this conclusion on two inferences from the record. First, he inferred that, at least prior to the fall of 1989, there was a lack of any appropriate supervision over Hercules' recordkeeping procedures based on the judge's finding that those procedures contained serious deficiencies. Second, he inferred that Klobus lacked the requisite supervisory authority in view of his role on the four-person committee that participated in making the recordkeeping determinations. The judge stated, "one would expect to see clear evidence demonstrating Mr. Klobus playing a major part in committee deliberations instead of being simply a team member." (Decision and Order at 10). However, the Secretary never disputed that Hercules had assigned to safety officials such as Klobus and his successor Roger Dunbar the responsibility of preparing, maintaining, and certifying the annual summaries. Moreover, the fact that there were flaws in the procedures through 1989, which led to the underreporting of injuries and illnesses, does not nullify the supervisory authority that Klobus did have with respect to the preparation of the summaries. Similarly, the role of the four-person committee does not as a matter of law negate Klobus' authority, for as the judge himself recognized a certification could be made by a committee member who did not have the prevailing vote during deliberations by the committee over when and how to record a certain injury or illness. (Decision and Order at 9). It seems quite illogical to us that the judge, having made that observation, would then conclude that the perceived level of Klobus' participation in the committee meetings somehow refuted Klobus' authority. Nor did the judge cite any authority to support his conclusion. Accordingly, we think that the judge's conclusion as to Klobus' status was erroneous. Although described by the dissent as a "factual finding," we think it is more in the nature of a mixed finding of fact and law. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980)(question of whether university faculty members are exempt "managerial" employees under the NLRA "is a mixed question of fact and law"). It is the product of the application of law to factual inferences drawn from the record. Where we conclude that the judge's finding is not supported by the law or that a contrary inference must be drawn from the evidence, or is a combination of the two, the judge's finding may be set aside.

The judge apparently opted for this alternative approach because he found that the Secretary's approach was "seriously flawed." The gist of the Secretary's theory was not that Klobus lacked the authority to certify, but rather that the plant manager's decisional input in determining the recordability of disputed injuries and illnesses effectively displaced Klobus' otherwise lawful authority to certify. Rather than attempt to reconcile the legal question posed by the respective exercises of supervisory authority in the

As was the situation with the NFTA for failure to record, the record demonstrates that the Secretary's opinion of who was eligible to certify the summaries underwent frequent and inconsistent change. Moreover, the Secretary's determination regarding who was eligible to certify often came after Hercules no longer employed those the Secretary considered eligible and therefore were unavailable to certify the summaries.

The Secretary's position taken when issuing the original citation was that the plant manager must execute the certification because he exercised final decision-making authority in determining what injuries or illnesses were entered into the OSHA 200 log. In the NFTA, the Secretary adhered to this position but substituted "Management Official" for "Plant Manager" as the individual "whose sole decision is ultimately responsible for the recording and reporting on the OSHA 200 log." Before the judge, however, the Secretary modified her position and maintained that the summaries could be certified by anyone in the corporation who has a good faith belief that the contents of the logs are accurate and complete based on their examination of the logs.[14] Although she took this position, the Secretary, for some unexplained reason, continued to maintain that Klobus, despite his position as safety director, his place on the committee that created the logs, and his responsibilities in preparing the

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corporate hierarchy by the safety supervisor and by the plant manager, the judge simply concluded that Klobus lacked supervisory authority over recordkeeping.

[14] This position is at odds with the language of §1904.5(c) and with the Secretary's interpretation of the certification requirements set forth in the Secretary's March 1994 Report to the House Appropriations Committee. At that time, Section 1904.5(c) required that certification be accomplished by "the employer, or the officer or employer who supervises the preparation of the annual summary of occupational injuries and illnesses. . . ." In the Secretary's report, she discussed proposed changes to the certification requirements:

> CEO Certification of the Log. Another way to improve the veracity of the OSHA records is to increase the level of corporate accountability for their content by having a top corporate official certify in writing that they are accurate and complete. *Currently the OSHA log can be certified by anyone in the corporation.* (Emphasis added).

summaries, was not competent to certify the logs. Now, with this NFTA on review, and still modifying her position, the Secretary represents that, after the settlement agreement was signed, "[I]f John Klobus had been given the task of reexamining the logs and correcting them, then he would have been delegated supervisory authority in fact and could have certified the Logs."

We find the metamorphoses of the Secretary's positions absurd both as a practical and as a legal matter. First, by the time it settled the items with the Secretary in November of 1991, Hercules' management had undergone significant changes. Dick Best, the plant manager who made the final determinations over the 1987 and 1988 records, left Hercules' employ in August of 1989. He was succeeded by Will Martin. Safety director Klobus retired in September of 1992 and was replaced by Roger Dunbar. In 1989, Hercules changed its recording procedures and gave the safety director supervisory authority over the logs instead of the plant manager.[15] After entering into the settlement agreement the summaries were recertified by Klobus' successor, Roger Dunbar.[16.]

These personnel changes made the Secretary's initial theory in the 1993 NFTA action --that only the plant manager who supervised the 1987 and 1988 logs could certify them -- impossible as a practical matter because that person, Best, left the company in 1989. His successor, Will Martin, did not supervise the preparation of the 1987 and 1988 logs, and had no personal knowledge that would enable him to attest that they were true and complete. Indeed, after the settlement agreement, with Best gone, only safety director Klobus was capable of certifying from actual knowledge that the summaries were accurate. Yet, the Secretary continued to maintain that Klobus was not eligible to certify the summaries.

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[15] The Secretary does not dispute that Klobus was qualified to certify the 1989 and later OSHA 200 logs because, after receiving the original citation, Hercules made the safety director the supervisor of the logs.

[16] The Secretary continues to assert that Dunbar, who had no part in creating the logs or summaries in question, was not qualified to certify them.

The Secretary now contends that if Klobus, the person who was supposedly not competent to certify the summaries in 1989, but whose supervisory authority over the logs later that same year was subsequently acknowledged, had then gone back and recertified the logs he had already certified in 1987 and 1988, Hercules would have been in compliance. Unfortunately, the Secretary only expressed this view years after Klobus retired. When Klobus still worked for Hercules and even after he left, the Secretary insisted that he was not competent to certify the summaries.[17] Moreover, the Secretary is essentially asking us to affirm the NFTA because Klobus failed to go back and perform essentially a redundant act of certifying summaries that he had already certified as true and complete.

As if the Secretary's vacillation over who should certify the summaries did not create enough problems, the search for a person competent to certify the summaries was further

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[17] As with the recordkeeping item, the validity of the underlying citation is not before us and our decision is limited to the failure-to-abate notice. Without passing on whether Klobus should have been allowed to certify the summaries in the first instance, our holding is limited to the failure of the hearing record to establish either that it was possible for anyone acceptable to the Secretary to certify the truth and completeness of the logs or that the certification that was done by Klobus was legally deficient.

Our dissenting colleague faults Hercules for not interpreting the settlement agreement as allowing an individual who was not present at the time of creation of the logs to certify the logs. Citing *U.S. v. Ladish Malting Co.*, 135 F.3d 484, 492 (7th Cir. 1998), ("[c]orporations do not record knowledge in neural pathways; they record it in file cabinets"), our colleague maintains that under the settlement "Hercules could have ensured a new certifying official had the information necessary to reexamine and certify the logs" but it failed to do so. However, throughout most of this litigation, the Secretary steadfastly refused to recognize the applicability of the *Ladish Malting* principle. She embraced a theory that even the judge deemed was "seriously flawed": only the plant manager could certify that the log and the summaries were true and complete because in instances of disagreement among the committee he had acted as final arbiter in determining whether an injury or illness was recorded in the OSHA 200 log. Moreover, even under our colleague's interpretation of the settlement agreement, she does not explain why Klobus' certifications of the 1987 and 1988 summaries were in any way deficient, given his responsibilities and access to the information in the company's injury and illness records.

complicated by her refusal or inability to tell Hercules what injuries and illnesses should have been recorded on the OSHA 200's. As we discuss, *supra*, after the Secretary issued the 1989 citations, she had great difficulty deciding which injuries and illnesses were recordable. She only informed Hercules what injuries should have been recorded after issuing both of the NFTA's in this case. This indecision and the accompanying delay in providing the information to Hercules left the OSHA 200's effectively incomplete until after the NFTA's were issued. It would appear that no one, whatever his or her title or responsibilities at Hercules, would have been able to certify the OSHA 200's as "true and complete" until that information was supplied.

We find that the Secretary's shifting theories of who was competent to certify taken together with Hercules' personnel changes and the Secretary's delay in telling Hercules what was recordable made it infeasible for any person to certify that the summaries were true and complete. Moreover, after the parties entered into the settlement agreement, the only person with sufficient knowledge to attest to the truth and completeness of the summaries and logs was Klobus, the person who did certify them. Yet, the Secretary refused to accept Klobus as an eligible person until after he left the employ of Hercules. Under these circumstances, we can only characterize the Secretary's decision to continue prosecuting this matter as an irrational one. We therefore conclude that the Secretary did not establish that Hercules failed to abate the certification requirement.

IV. Responding to Partial Dissent

Our dissenting colleague reads our decision as an unwarranted extension of the *York Metal Finishing Co.*, 1 BNA OSHC 1655, 1973-74 CCH OSHD ¶17,633 (No. 245, 1974). In addition, it is claimed that we have improperly reallocated the burden of proof in NFTA cases so that the Secretary must supposedly reprove the underlying violation. With all due respect, we think that we have not ignored nor changed the import of settled caselaw but instead have correctly applied it to a case that is rife with unusual facts

In *York Metal*, the Commission held that in a NFTA proceeding, an employer could rebut the Secretary's prima facie case by showing that the condition for which the employer was originally cited was not in fact a violation notwithstanding the fact that the employer had not contested the underlying citation. The dissent argues that we have allowed Hercules to invoke *York Metal* to challenge that validity of the original citation after the employer had conceded the merits of that citation by withdrawing its notice of contest and entering into the October 21, 1991, settlement agreement, which became a final Commission order on December 21, 1991.

However, we are willing to assume arguendo that the Secretary's theory of the violation was legally viable[18] at the time of the original inspection and that Hercules, having settled the earlier case, is not in any position to re-litigate the validity of the violation as originally alleged. Still, we find nothing in the reasoning of *York Metal* and its progeny that forecloses the Commission from taking into account, even in cases such as the instant one involving a settlement, whether "the condition or hazard found upon re-inspection is the *identical* one for which respondent was originally cited."[19] It is certainly appropriate in any NFTA proceeding to focus on the nature of conditions leading up to and existing as of the time of the re-inspection, on which the NFTA is based. As recapped briefly below, the facts of this case present a somewhat unique mix of changing circumstances (both factually and

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[18] But see note 13, *supra*, noting that the judge below deemed the Secretary's theory as "seriously flawed;" note 22 *infra*, which suggests that an adverse inference may be drawn from the Secretary's description of the import of the rule under review, which was superseded by the revised regulation promulgated in 2001.

[19] 1 BNA OSHC at 1656, 1973-74 CCH OSHD at p. 22,048 (emphasis added). See *Savina Home Indus., Inc.*, 4 BNA OSHC 1956, 1976-77 CCH OSHD ¶21,469 (No. 12298, 1977), *aff'd on other grounds*, 594 F.2d 1358 (10th Cir. 1979); *Kit Mfg. Co.*, 2 BNA OSHC 1672, 1974-75 CCH OSHD ¶ 19,415 (No. 603,1975)("in a failure to abate case the Secretary's failure to prove that the alleged violative condition was in fact violative at the time of the reinspection was sufficient grounds for vacating the failure to abate citation," *citing Franklin Lumber Co.*, 2 BNA OSHC 1077, 1973-74 CCH OSHD ¶ 18,206 (No. 900, 1974).

legally) that also injected ambiguity into the meaning of settlement agreement. The unusual circumstances, in our view, effectively foreclosed Hercules from certifying retrospectively the 1988 summary in the manner demanded by the original citation and therefore it should not be held liable in this NFTA proceeding. With the record showing the Secretary was eventually willing to concede that Klobus, who did the 1988 certification in issue, was a qualified supervisor under the then-existing regulation, the conclusion must be drawn that there was no failure to abate.

The legal conundrum presented here stems from the confluence of the following facts, one of which is generally characteristic of abating a recordkeeping (including certification) violation and the remainder of which are peculiar to this case.

First, although it has been observed that a recordkeeping violation "does not differ in substance from any other condition that must be abated," *Johnson Controls Inc.*, 15 BNA OSHC 2132, 2136, 1991-93 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993), the abatement of a recordkeeping violation is somewhat different than abating a physically hazardous condition such as an air contaminant violation (under §1910.1000), for example. In remedying the latter, the focus is on correcting a present condition with the abatement having a purely prospective effect. In contrast, the abatement of a recordkeeping violation – or in this instance a certification violation – has not only a prospective but also a retrospective dimension. Prospectively, the employer has to rectify its certification procedures so that going forward the annual summaries are properly certified by a qualified company official. Retrospectively, since at any point in time an employer must maintain its OSHA-mandated records for the previous 5-year period, *id.*, the employer also is faced with investigating historical data in order to ascertain what corrections in existing records are warranted.[20]

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[20] See *Hercules, Inc.*, 1997 OSAHRC LEXIS 42, 1995-97CCH OSHD ¶ 31,308 (digest) (No. 93-2790, 1997)(ALJ)(Judge's decision, which we affirm in the instant review

Second, the Secretary's litigation theory of the original, certification violation was person-specific – only the plant manager (or management official) whose sole decision arbitrated what injuries where recorded in the OSHA 200 logs was qualified to certify the annual summary of the logs. The effect of this interpretation of the certification regulation was to affix personal accountability (backed by potential criminal and civil sanctions[21]) upon the highest-ranking company official who had decisional input in the determination of recordable injuries and illnesses. Its aim was to ensure greater accuracy and completeness of the logs and summaries.[22] What was unusual about this person-specific interpretation of

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proceeding, vacating NFTA citation on recordkeeping violations as to sickness and injury entries). Judge DeBenedetto observed that given Hercules' pre-1989 recordkeeping system deficiencies, a "*retrospective* analysis of recordability [was] nearly impossible" (emphasis added).

[21] See former §1904.9, subsection (a) of which quoted Section 17(g) of the Act imposing criminal sanctions for knowingly making false statements, representations or certifications, and subsection (b) of which provided that "[f]ailure to maintain records or file reports required by this part, or in the details required by forms and instructions issued under this part, may result in issuance of citations and assessment of penalties as provided in sections 9, 10, and 17 of the Act."

[22] Compare Final Rule for Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5,916 (Jan. 19, 2001)(codified at §1904.32(b)(3),(4)), in which this goal was finally made manifest in a revision of the rule. Under the revised recordkeeping and reporting regulations, which superseded the one under review, the Secretary imposed explicit obligations on high-level company executives to certify the annual log and summary. The preamble in the final rulemaking notice explained: "OSHA concludes that the company executive certification process will ensure greater completeness and accuracy of the Summary by raising accountability for OSHA recordkeeping to a higher managerial level than existed under the former rule. OSHA believes that senior management accountability is essential if the Log and Annual Summary are to be accurate and complete." *Id.* at 6,043.

Interestingly, the preamble in comparing the requirements under the new rule to those under the prior rule observed: "The certification requirement *modifies* the certification provision of the former rule (former paragraph 1904.5(c)), which required a certification of the Annual

then-existing §1904.5(c) is that the Secretary treated it as displacing those persons who might otherwise be eligible to certify under the plain words of the regulations, which allowed certification by the employee "who supervises the preparation of the annual summary of occupational injuries and illnesses." At some point during the course of litigation, as evidenced in her briefs in this NFTA proceeding, the Secretary abandoned the person-specific approach and resorted to the plain language of 1904.5(c). She was willing to concede that it was appropriate for a company supervisor below the rank of plant manager to exercise responsibility for the document preparation of the log and summary and for certification of those documents.

Third, by the time the settlement was finally executed two years after the issuance of the November 1989 citation, plant manager Best, who had been involved in deciding the entries for the 1988 injury and illness logs, had long since been replaced. Similarly, along

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Summary by the employer or an officer or employee who supervised the preparation of the Log and Summary. The former rule required that individual to sign and date the year-end summary on the OSHA Form 200 and to certify that the summary was true and complete. Alternatively, the recordkeeper could, under the former rule, sign a separate certification statement rather than signing the OSHA form." *Id.* (emphasis added). This description gives no hint that the former rule could support imposition of an exclusionary-type obligation upon Hercules' plant manager as alleged by Secretary in the original citation. If anything, the preamble's explanation plainly suggests that the new rule "modified" the former rule by significantly changing the category of personnel charged with the certifying the summaries. The revised rule deleted the reference to the employee who supervises the preparation of the annual summary and instead imposed the certification obligation on a "company executive." §1904.32(b)(3). A "company executive" is defined as one of the following: company owner (if sole proprietorship or partnership); corporate officer; highest ranking company official at the establishment, or the immediate supervisor of the highest ranking company official working at the establishment. §1904.32(b)(4)(i)-(iv). That the former §1904.5(c) contained no comparable language or restrictions, in turn, raises serious questions whether the Secretary could enforce the former rule against Hercules' plant manager to the exclusion of other company employees who had supervisory duties in connection with preparation of the logs and summaries. However, as noted, for purposes of deciding this case and the extent of *York Metal*'s application, we are assuming *arguendo* that the Secretary's theory underlying the original 1989 citation was not invalid.

with the change in plant manager, the recordkeeping procedure had been substantially overhauled. Hercules no longer relied upon a committee headed by the plant manager to decide which injuries and illnesses were recordable. Under the new procedures, implemented after the onset of the OSHA inspections but before issuance of the original citation, plant manager Martin exercised no screening responsibilities.

Fourth, despite this intervening change in company practice and personnel, nowhere in the settlement agreement are these circumstances taken into account in defining what performance was expected of Hercules to abate retrospectively the alleged violation in the existing records. Unlike an unrelated violation involving conductive shoes, over which the settlement agreement (in ¶2) spelled out specifically what would satisfy the abatement obligation, the Secretary relies upon the following general language (in ¶8a) to cite Hercules for its alleged failure to abate – "All remaining violations alleged in the complaint will be abated by December 5, 1991 . . .." We know, however, from the record that parties engaged in extensive negotiations over the course of two years to settle the wide array of alleged violations and, considering the record as a whole, it appears that in the course of these negotiations the Secretary's representatives became (or should have reasonably become) aware of Hercules' changes in both personnel and its recordkeeping procedures. Had circumstances remained static between the issuance of the citation and the execution of the settlement, it is arguable that in order to abate the certification violation under the Secretary's theory Hercules would have been obligated to direct that the plant manager who had personally overseen the determination of what injuries and illnesses were to be entered in the 1988 injury and illness logs – Dick Best – review those records and discharge the certification responsibility. However, because the situation was not static, it was no longer practicable, if not impossible, for Hercules to abate the certification violation retrospectively

in accordance with the original citation.[23] Nor can it be said with sufficient confidence that the settlement agreement obligated Hercules to perform something that in fact was impracticable as of execution of the agreement and thereafter.[24]

Although circumstances have rendered untenable a requirement that the plant manager must certify the 1988 summary, this does not mean that the requirements of §1904.5(c) were, or have been, completely ignored. The record does show that the 1988 summary in question was in fact certified by John Klobus, who as Director of Safety had responsibility for preparation of the OSHA logs. Under normal circumstances, Klobus' action would have sufficed to comply with the cited regulation, as confirmed by the fact that in subsequent years during follow-up inspections OSHA made no objection to certifications done by the safety director.

Finally, we fully agree with our colleague that the Commission should not facilitate the ability of recalcitrant employers to undermine the sanctity, integrity, and finality of its

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[23] In light of the potential for imposing criminal sanctions, see note 4 *supra*, it would have been especially problematic to interpret the settlement as requiring plant manager Best's successor, Will Martin, who had no involvement or personal knowledge in the creation of the records in question, to vouch for their accuracy and completeness.

[24] Cf. RESTATEMENT OF CONTRACTS §§ 460, 461 (2000)(addressing nonexistence of specific person, thing, or essential facts as affecting obligation of performance); RESTATEMENT (SECOND) OF CONTRACTS § 270, comment b (1981)(addressing situation where contract obligor's performance is partially impracticable but it is still practicable for obligor to render substantial performance).

The dissent asserts that our analysis is "at odds" with Third Circuit law and that the "clear intent" of the parties here forecloses examination of the relevant circumstances. However, the instant case bears little resemblance to the authority cited by the dissent, which involve the validity of a patent. Moreover, insofar as a consent judgment is involved here, and thus it becomes relevant to consider the parties' intent, we think that the record demonstrates that the intent of the settlement agreement as to the nature of Hercules' abatement obligation was far from clear. In any event, there is nothing in the agreement that would have precluded

orders. Yet, if the remedial purposes of the Act are to be realized, the Secretary in administering it has an equally important role in prosecuting cases in a reasoned, consistent, and clearly enunciated manner. *Cf. Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002). This is so even where the complexity of a case presents daunting challenges in prosecuting or settling it. On the record before us, a convincing case, free of doubts and uncertainties, of a failure to abate the certification violation was not made.

Accordingly, it is ordered that the notifications for failure to abate are vacated.

/s/_____
W. Scott Railton
Chairman

/s/_____
James M. Stephens
Commissioner

Dated: January 21, 2005

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consideration of circumstances that occurred after the conditions and events alleged in the original citation. See *Arizona v. California*, 530 U.S. 392, 414 (2000).

Rogers, Commissioner, concurring in part and dissenting in part:

I agree with my colleagues that the Secretary's inability to clearly set forth those incidents that she expected Hercules to record warrants vacating that Notification for Failure to Abate (NFTA). Under the circumstances, the citation neither "informed[ed] the employer of what must be changed" nor would it "allow the Commission . . . to determine whether the condition was changed."[1] *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3rd Cir. 2002), *citing Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1308 (5th Cir. 1978). However, unlike the majority, I would agree with the judge that the Secretary established that Hercules failed to abate the certification requirements of the recordkeeping standard for the year 1988.[2]

The original citation unambiguously stated that the annual summary of occupational injuries and illnesses, which had been certified by John Klobus, should have been certified by the "Plant Manager whose sole decision is ultimately responsible for the recording and reporting on the OSHA 200 log." As part of the settlement agreement for the original citation, Hercules agreed to abate the violations. In the NFTA, the Secretary clarified the abatement obligation by referring to "Management Official" instead of "Plant Manager." While this change made it easier for Hercules to abate, it did not eliminate Hercules' preexisting abatement obligation under the original citation and the settlement agreement. Thus, unlike the NFTA for failure to record, Hercules' abatement obligations for the

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[1] While Hercules could not have truly believed it abated by only adding one injury to its OSHA 200 log when the underlying citation had listed six different categories of injuries that were not recorded, the burden of describing with "particularity" the nature of the violation in order to prosecute a subsequent failure to abate rests with the Secretary. *See Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3rd Cir. 2002).

[2] Although not reached by my colleagues, I would note that under the former standard found at 29 C.F.R. §1904.6, Hercules was required to retain the 1987 logs for 5 years. At the time of the issuance of this NFTA, that period had expired. Accordingly, I would not hold Hercules responsible for failing to certify records that it was no longer required to maintain. *See Johnson Controls Inc.*, 15 BNA OSHC 2132, 2135, 1991-93 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993)(inaccurate recordkeeping entry violates Act until five year

certification item were clear and unambiguous: have the annual summary certified by the plant manager (or management official) whose sole decision is ultimately responsible for recording and reporting. Yet, Hercules certified that it abated the violation without having the 1988 annual summary recertified *by anyone*.[3]

I fundamentally disagree with my colleagues' assessment of this NFTA as requiring the performance of "essentially a redundant act." This characterization downplays the crucial role that an accurate injury and illness recordkeeping system plays in promoting safe workplaces. As the judge properly noted, Hercules' recordkeeping system had serious deficiencies, one of which was a lack of appropriate supervision over the recordkeeping process. If Hercules had had a proper method of supervising, and certifying, the creation of the logs and summaries, and had taken the effort to review the logs and summaries in the context of the required recertification, it might well have uncovered many of those deficiencies.

My colleagues make much of the fact that Will Martin, the new plant manager at the time of the settlement agreement, had no personal knowledge relevant to the creation of the logs and, therefore, was not an appropriate person to certify the annual summary. However, such a conclusion is speculative. Furthermore, while the settlement agreement may have

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retention requirement of section 1904.6 expires)(*dicta*). *See also* majority opinion *supra* note 8.

[3] The majority alludes to the fact that the annual summary was recertified by Roger Dunbar. However, this is irrelevant to whether there was a failure to abate because it is undisputed that the NFTA was dated in September of 1993, well before Dunbar recertified the 1988 summary in December of 1993. The majority also claims that the certification requirements were not ignored because John Klobus originally certified the annual summary. Be that as it may, it was Klobus' original certification that Hercules admitted did not comply with the Act and agreed to abate. *See* discussion *infra*. Had Klobus recertified after he was given new authority, this would be a different case. But since there was no recertification prior to the NFTA, the condition found upon reinspection is clearly identical to the one for which Hercules was originally cited. *See York Metal Finishing Co.*, 1 BNA OSHC 1655, 1656, 1973-74 CCH OSHD ¶ 17,633, p. 22,048 (No. 245, 1974).

required an individual to certify the annual summary who was not present at the time of the creation of the logs, that does not excuse Hercules' failure to abide by its agreement. After all, "[c]orporations do not record knowledge in neural pathways; they record it in file cabinets . . . .[f]ile cabinets do not 'forget.'" *U.S. v. Ladish Malting Co.*, 135 F.3d 484, 492 (7th Cir. 1998). Having thus agreed to abate the violation, Hercules could have ensured that any new certifying official had the information necessary to take the responsibility to reexamine and certify the logs and annual summary.

Moreover, Martin succeeded Dick Best several years before Hercules entered into the settlement agreement and any problems Hercules had in having the annual summary certified by Martin should have been made clear to the Secretary before Hercules agreed to abate the violation as set forth in the citation and complaint. Further, if the agreed abatement subsequently turned out to be an impossible undertaking, Hercules could at least have raised the issue with the Secretary before it certified abatement. Instead, it (1) chose to enter into a settlement agreement that plainly required abatement and then (2) certified that it had actually abated. Yet, Hercules did not even make a good-faith attempt to have the 1988 summary certified, whether by the plant manager or anyone else.[4] Rather, it chose to do nothing until after the Secretary issued this NFTA, at which time Hercules had the summary recertified by safety supervisor Roger Dunbar.

The majority's argument that "personnel changes" somehow excused Hercules from an obligation it voluntarily assumed in its settlement agreement is unavailing. Hercules cannot evade responsibility for its violative conduct by relying on the change of personnel.

[4] The majority's complaints about the Secretary's "shifting theories" of who should certify and the unusual and changing factual circumstances of this case lack relevance for determining whether Hercules failed to abate under the circumstances here. The fact remains that, despite Hercules' undertaking in the settlement agreement, *no one* recertified prior to the NFTA. However, I do believe that the complicated factual situation here – including the fact that Hercules did substantially revise its recordkeeping procedure – is relevant for

See Caterpillar, Inc., 17 BNA OSHC 1731, 1732, 1995-97 CCH OSHD ¶ 31,134, p. 43,482-83 (No. 93-373, 1996), *aff'd* 122 F.3d 437 (7th Cir. 1997). Hercules had a responsibility to make sure that its personnel had the "relevant and available information it possessed" which they needed to comply with Hercules' undertaking. *See id.*, 1995-97 CCH OSHD at p. 43,483. Despite this responsibility, Hercules took no action to comply with the settlement agreement with respect to the certification of the 1988 annual summary. *See id.* at 1733, 1995-97 CCH OSHD at p. 43,483.

Under these circumstances, then, the Secretary's decision to prosecute can hardly be characterized as "absurd" or "irrational." Rather, Hercules' failure to take *any* action to live up to the clear mandate of its own settlement agreement with respect to the 1988 annual summary --- until after the issuance of the NFTA --- was simply irresponsible.

One other matter raised in the majority opinion requires some elaboration. The majority opinion notes that I do "not explain why Klobus' certifications of the . . . 1988 summaries were in any way deficient . . .." The reason is simple – the fact that Klobus' initial certifications were deficient was effectively resolved in the earlier proceeding. When Hercules settled the underlying citation alleging that Klobus' certifications were deficient, it agreed to a standard non-admission clause, which specifically excepted future OSHA proceedings:

> *Except for purposes of* these proceedings, and *any future proceedings* brought by the Secretary of Labor pursuant to and consistent with the provisions of the Occupational Safety and Health Act of 1970, neither this Settlement Agreement nor the respondent's consent to the entry of a final order pursuant to this agreement shall constitute an admission by the respondent of any violations of the Act or the regulations or standards promulgated thereunder. [emphasis added]

In the settlement, Hercules also withdrew its notice of contest. Thus, in the context of this

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determining the appropriate penalty and would warrant a substantial reduction from the judge's assessment.

failure to abate proceeding, Hercules has admitted that the earlier certifications (by Klobus) did not comply with the Act and were thus deficient. *See Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, pp. 38,819-20 (No. 88-310, 1990) (approval of settlement agreement in which employer withdraws notice of contest establishes existence of violation of cited standard). *See also Ford Development Corp.*, 15 BNA OSHC 2003, 2008, 1991-93 CCH OSHD ¶ 29,900, p. 40,800 (No. 90-1505, 1992), *aff'd*, 16 F.3d 1219 (6th Cir. 1993)(unpublished)(plain language of settlement agreement provides basis for repeat violation in later proceeding).

The Commission's case law has allowed an employer to *defend* an NFTA by arguing the absence of an underlying violation where the original citation was *uncontested*. *York Metal Finishing Co.*, 1 BNA OSHC 1655, 1973-74 CCH OSHD ¶17,633 (No. 245, 1974).[5] However, the Commission has never extended this doctrine to cases such as this, where the citation was contested but settled.[6] If the Commission is indeed extending *York* by allowing settling employers to relitigate the underlying citation in NFTA proceedings, and if it is contravening Commission precedent by placing the burden on the Secretary to reprove the

[5] But even in *York* and the cases that have followed it, it was the burden of the employer to *defend* against the failure to abate on the basis of the invalidity of the underlying, uncontested citation. *See e.g. Scullin Steel Co.*, 6 BNA OSHC 1764, 1768, 1978 CCH OSHD ¶ 22,835, p. 27,608 (No. 13916, 1978); *Vampco Metal Products, Inc.*, 8 BNA OSHC 2189, 2191 n. 8, 1980 CCH OSHD ¶ 24,935, p. 30,751, n. 8 (No. 78-3766, 1980). Here, however, the majority has seemingly put the burden on the Secretary to reprove the legal deficiency of the original certifications, contrary to our precedent.

[6] The only case that even suggests an employer can defend against a subsequent NFTA by challenging the underlying citation where the underlying citation was settled is *Advance Bronze, Inc. v. Dole*, 917 F.2d 944 (6th Cir. 1990). The Court *in dicta* noted that an employer in a failure to abate action had the burden to show the underlying violation was either cited in error or was subsequently corrected. *Id.* at 953. *Compare Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1306-07 (5th Cir. 1978), where the Court held that even in the case of an uncontested underlying citation, objection to the "fact of violation" cannot be raised in a failure to abate action, but lack of particularity of the underlying citation could be.

original citation (*see* n. 5 *supra*), it cannot do so *sub silentio*, but owes a more thorough explanation.[7] *See Brock v. Dun-Par Engd. Form Co.*, 843 F.2d 1135, 1137-38 (8th Cir. 1988)("While the Commission may change its position, it must give adequate reasons for doing so.").

In addition, allowing Hercules to revisit the underlying violation in an NFTA action - after voluntarily conceding a violation for future cases brought by the Secretary under the Act - is inconsistent with the remedial purposes of the Act. The majority is effectively giving Hercules - and any similarly situated employer - a second bite at the apple. The majority is undermining the sanctity, integrity and finality of our final orders. Recalcitrant employers will be less likely to comply with their abatement obligations freely undertaken in their own settlement agreements. The result will be less settlement, more litigation, and less abatement.[8] The real winners from the majority's approach will be lawyers and recalcitrant

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[7] The majority's action is also at odds with the law of the relevant Circuit. *See Interdynamics, Inc. v. Firma Wolf*, 653 F.2d 93 (3rd Cir. 1981), *cert. denied sub nom. Trans Tech, Inc. v. Interdynamics, Inc.*, 454 U.S. 1092 (1981). In *Interdynamics*, the Court held that when an underlying consent decree admitted both validity and infringement of a patent, a defendant in a contempt action "may not reopen the issue of whether the product previously admitted to infringe did in fact infringe." *Id.* at 97. This NFTA action based on a settled citation is similar to a contempt action for violation of a contempt decree. *See also* section 11(b) of the Act, allowing the Secretary to seek enforcement of a Commission final order in a circuit court of appeals and to seek contempt for a subsequent violation of an enforcement decree. Furthermore, even if this question is viewed through the more limited preclusive prism of issue preclusion rather than the seemingly more appropriate prism of claims preclusion (*Cf. United States v. Athlone Indus., Inc.*, 746 F.2d 977 (3rd Cir. 1984)(court looks to whether there is an essential similarity of the underlying events giving rise to various legal claims in determining applicability of claims preclusion)), the touchstone in determining whether issue preclusion is intended as a result of consent judgments is to look at the intent of the parties. *See generally* 18A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4443 (2002). Here, the intent of the parties with respect to future proceedings brought by the Secretary under the Act is clear.

[8] Of course, as an alternative to pursuing NFTA actions before the Commission, the Secretary has the option of more routinely seeking enforcement of Commission final orders

employers.

Finally, even assuming *arguendo* that relitigating the underlying citation here was permissible under Commission and Court precedent, the Commission is nevertheless faced with a factual finding by the judge in the case before us that Klobus was not an appropriate person to certify the logs and summaries for 1988. The majority has effectively reversed this finding by the judge, with an unpersuasive explanation. Under the circumstances of this case, it is hardly fair for the majority to accuse the Secretary of being "irrational."

/s/_____
Thomasina V. Rogers
Commissioner

Dated: January 21, 2005

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in the circuit courts of appeal, pursuant to section 11(b) of the Act, *see* n. 7 *supra*, but that will only shift litigation from the Review Commission to the Circuit Courts, perhaps overburdening the Courts of Appeal. She is already pursuing this option in certain cases as "an effective and speedier alternative to failure-to-abate notices . . . . [Section 11(b) orders] can be used whether the final order results from a Review Commission or ALJ decision, a settlement agreement, or an uncontested citation." OSHA Memorandum, *Interim Implementation of OSHA's Enhanced Enforcement Program (EEP)*, section E.1. (Sept. 30, 2003).

SECRETARY OF LABOR, Complainant	:	
v.	:	OSHRC DOCKET NO. 95-1483
HERCULES, INC., and ALLIANT TECHSYSTEMS, INC., Respondents	:	
UNITED STEEL WORKERS OF AMERICA, Authorized Employee Representative.	:	

Appearances:

William Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Michael J. Connolly, Esq.
Cross Wrock
Detroit, MI
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

This case concerns three failure-to-abate items that were included in and subsequently severed from the case docketed as 93-2790. The three items in the instant case relate to the charges of failing to abate the following violations: ventilating stored explosives pursuant to 29 C.F.R. § 1910.109(c)(3)(vi); provide for decontamination in emergency response plan under § 1910.120(q)(2)(vii), and certifying the annual summary of occupational injuries and illnesses pursuant to § 1904.5(c). The parties entered into a stipulated settlement of the first two items whereby the proposed penalties were reduced from a total of $67,500 to $33,750. The stipulated settlement was filed on April 14, 1997.

The remaining item in issue charges Hercules, Inc. (Hercules)[1] with failure to abate the recordkeeping requirement of certifying the annual summary of occupational injuries and illnesses (the OSHA 200 log). The Secretary spells out the violation as follows:

> Certification of log entries were not made by the Management Official whose sole decision is ultimately responsible for the recording and reporting on the OSHA 200 log for Occupational Injuries and Illnesses for the years 1987 and 1988.

Complaint, ¶ IX, (5). The regulation covering the issue reads as follows:

> *Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses*, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employee of the employer who supervises the preparation of the annual summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete. (Emphasis added.)

29 C.F.R. § 1904.5(c).

The parties stipulated the admission of certain documents into evidence, including: the OSHA 200 log for calendar year 1987 and the amended 1987 log. (Exhs. C-3, C-4); the 1988 log (Exh. C-5); compliance officer Secor's notes of statements purportedly made by nurse Paulette Canfield and John Klobus (both employed by Hercules) during interviews conducted in August 1989 and June 1993 (Exhs. C-6, C-7, C-10, C-11); deposition of John Klobus which was a part of the evidentiary record in the related Hercules recordkeeping case docketed as No. 93-2790 (Exh. C-12). While agreeing that the notes made by compliance officer Secor constituted a "business record," Hercules objected to the information contained therein on the ground of hearsay (Tr. 12). Hercules's posthearing brief at 4-5.

Whether one views the compliance officers' notes as records of regularly conducted activity under Fed. R. Evid. 803(6) or as public investigative reports under Fed. R. Evid. 803(8), either of

[1]Subsequent to the commencement of the hearing in the related case, Docket 93-2790, in October 1994, Alliant Techsystems, Inc. ("Alliant") purchased part of Hercules's business, taking over operations at the Hercules facility in question. Upon motion by the Secretary, Alliant was added as a party to this case.

which is an exception to hearsay, the statements of employees Canfield and Klobus are admissions under Fed. R. Evid. 801(d)(2)(D) and since admissions under the Federal Rules are not hearsay, the double hearsay problem does not arise. Under Fed. R. Evid. 805, "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule..." As the Court of Appeals stated in *United States v. Lang*, 589 F.2d 92, 99 n.2 (2d Cir. 1978):

> Whether admissions are properly an exception to the hearsay rule is a subject which has long intrigued scholars in the field. See *Morgan, Admissions as an Exception to the Hearsay Rule*, 30 Yale L.J. 355 (1921); *McCormick, supra*, at § 262; 4 *Weinstein's Evidence, supra*, at 801(d)(2)[01]; *IV Wigmore, supra*, at § 1048. ....However, whatever logic supports Rule 805 would seemingly apply to the vicarious admission sought to be introduced here. Admissions rightly or wrongly are usually (although not in the Federal Rules of Evidence) regarded as an exception to the hearsay rule. *McCormick, supra*, at § 262.

In any event, the argument over the compliance officers' notes is misguided; the scope if the evidence in this case cannot be confined to those documents expressly stipulated into evidence during the hearing on the log certification issue. The parties do not need reminding that the companion case, docketed as 93-2790 and categorized as a "big case," was fully tried on the merits and a decision was rendered on Hercules's alleged failure to maintain logs and summaries of recordable injuries and illnesses in accordance with § 1904.2(a) and § 1904.4.

The present case was severed from that proceeding to facilitate the adjudicative process by separating the protracted case from the less complex case at hand. The facts and circumstances in proof which formed the basis for the recordkeeping decision in the 93-2790 case are so closely related to this case that they may appropriately be considered in reaching a decision in this case. In fact, the stipulated evidence includes the deposition testimony of John Klobus and Paulette Canfield as well as eight other persons whose discovery depositions were joint exhibits in the 93-2790 case. Moreover, in its brief Hercules incorporates by reference its posthearing brief in the 93-2790 case "to the extent that facts and arguments are relevant to the certification [issue]." Hercules's brief at 5.

The Secretary contends that Hercules's annual summaries of injuries and illnesses for 1987

and 1988, which were originally cited in November 1989 for not being properly certified as true and complete, continued unabated from December 23, 1991, to March 9, 1993. The Secretary further alleges that the 1987 summary was not certified by anyone when presented to the compliance officers during a 1989 OSHA inspection, and, even if the '87 summary had been certified by Hercules's safety supervisor John Klobus or his successor, Roger Dunbar, as Hercules contends, the certification was not made by "the Management Official whose sole decision is ultimately responsible for the recording and reporting on the OSHA 200 log." Citation and complaint; Secretary's posthearing brief at 10-13.

The critical facts which were set forth in the 93-2790 Hercules decision are highlighted here to better fathom the context of the certification issue.[2] Prior to the fall of 1989, the recordability of an employee injury or illness for the purposes of the OSHA 200 log was determined by a "committee" consisting of the plant manager, the safety supervisor/director, the injured employee's supervisor, and Paulette Canfield, the nurse who supervised the plant's medical department (Tr. 50-51, 59; Exhibit C-7 at 3168-69, Exhibit C-8 at 3166, Exhibit C-20 at 1236, Exhibit C-22 at 2, Exhibit J-3 at 16-17, 27, 31, 76-77, Exhibit J-10 at 23-24, 50, 63). According to the safety supervisor, this group reviewed employee incidents on a daily basis, its evaluations initially guided by two sources of information (Exhibit J-10 at 23-25, 50, 59). The first was a daily log (or diary) maintained by the two nurses who staffed the Kenvil medical department documenting employee visits to the department and any treatments given (Tr. 39; Exhibit J-3 at 18-19, Exhibit J-10 at 18). Because Hercules permitted the medical department staff to treat employees suffering from non-occupational injuries, the nurses kept two logs, each labeled accordingly, to differentiate between treatment given for occupational events and that given for non-occupational events (Tr. 38-39, 42-43; Exhibit C-5, Exhibit C-7 at 3170, Exhibit J-2 at 140-41, Exhibit J-3 at 56, 59, 65-66, 79-80, 120, 122, 130).

The second source of information regarding employee injuries and illnesses maintained by the medical department was the "same-day medical referral" form, a report that was occasionally

[2]The decision in 93-2790 was sent to the parties on March 31, 1997, and submitted to the Commission on April 21, 1997. The decision was directed for review by the Commission on May 16, 1997.

completed by an injured employee and the supervisor in order to document a particular incident and indicate the steps taken to address it (Tr. 46-47; Exhibit C-6, Exhibit J-10 at 21). Beyond the information provided by these records, members of the recordkeeping committee, with the exception of the supervising nurse, also conducted "investigations" into the circumstances surrounding an employee injury and illness before deciding its OSHA recordability (Exhibit J-3 at 42, 58-59, 71, 77, 80, 114, 117-18, 125-26, Exhibit J-10 at 23-24, 50, 59). The plant manager served as the final authority on recordability decisions and once a decision was made, the supervising nurse was told whether or not to enter the incident in the OSHA 200 log (Tr. 51; Exhibit C-7 at 3168-69, Exhibit C-8 at 3166, Exhibit C-22 at 3, Exhibit J-3 at 26-27, 114, 124, Exhibit J-10 at 17).

Apparently in consequence of OSHA's inspection and resulting 1989 citation, the Kenvil plant's recordkeeping policy was changed by its new plant manager (Exhibit J-1 at 14). Under the new policy, the supervising nurse was required to record any questionable employee injury or illness in the OSHA 200 log, with final authority for recordability decisions vested in the safety department; this essentially eliminated the need to conduct an investigation into each incident in order to determine recordability (Tr. 235-36; Exhibit J-1 at 42, 55-57, 84-87, 94, Exhibit J-3 at 45-46, 114-16, 119-20, 124, 133, Exhibit J-6 at 74-75, Exhibit J-10 at 55-56, 61, Exhibit C-18 at 889, Exhibit C-19 at 2-3). As a result, virtually every employee injury or illness treated in the plant's medical department was recorded on the corresponding OSHA 200 log (Exhibit J-1 at 85-86, Exhibit J-3 at 115). This policy was in effect at the time of the 1993 OSHA reinspection (Tr. 221-22; Exhibit J-6 at 75-76).

Hercules argues that under 29 C.F.R. § 1904.6, it was not required to keep its OSHA 200 logs beyond December 31, 1992, five years following the end of the year to which they relate;[3] therefore, the 1987 logs became moot after 1992 and cannot form the basis of a 1993 failure-to abate action. This argument has no merit. The Secretary correctly points out that there is no legal ground to sustain the notion that the 5-year limitation for retention of records prohibits the Secretary to bring

[3]29 C.F.R. § 1904.6 reads as follows:

> Records provided for in §§ 1904.2, 1904.4 and 1904.5 (including form OSHA No. 200 and its predecessor forms OSHA No. 100 and OSHA No. 102) shall be retained in each establishment for 5 years following the end of the year to which they relate.

an enforcement action against an employer who has failed to correct a recordkeeping violation for which a citation has been issued and has become a final order, where, as here, the records were available for review by the Secretary.

Hercules also contends that the certifications of the logs by its safety supervisor, John Klobus, met the requirement of the regulation. Hercules claims, in substance, that it is inconsistent for the Secretary to claim in this case that the safety supervisor was not the appropriate management official for certifying the 1987 and 1988 logs when that same official certified logs for the years 1989, 1990 and 1991 without disapproval by OSHA. Hercules's brief at 9.

The Secretary's enforcement approach can be readily attributed to the two different recordkeeping practices established by Hercules for recording the logs before and after the 1989 recordkeeping citations were issued by OSHA. As noted above, prior to the fall of 1989, recordkeeping determinations were made by a committee with the plant manager having final authority to decide whether an event was recordable. In late 1989, a new policy was established which required the supervising nurse to record virtually every employee injury or illness treated in the plant's medical department despite the fact that a particular case may be open to question. Although the responsibility for making the final decision was assigned to the safety department, the need to conduct an investigation to help decide how a particular case should be recorded was virtually eliminated. As discussed in the Hercules 93-2790 decision, the first procedure resulted in underrecording injuries in its logs and the second practice led to overrecording.

In the 93-2790 decision, it was found that Hercules's recordkeeping system, before the fall of 1989, suffered from serious deficiencies in the essential descriptive information needed to determine the recording of specific cases. One of the reasons for this problem was the lack of appropriate supervision of its recordkeeping operation – a factual conclusion expressly reached in this case by way of reasonable inference from the evidence..

In its brief, at 27, Hercules calls our attention to OSHA's March 1994 Report to the House Appropriations Committee which reflects OSHA's proposal to make certain changes in its recordkeeping requirements. Among the changes being considered was certification of the log:

> CEO Certification of the Log. Another way to improve the veracity of the OSHA records is to increase the level of corporate accountability for their content by having a top corporate official

> certify in writing that they are accurate and complete. *Currently the OSHA log can be certified by anyone in the corporation.* (Emphasis added.)

OSHA's statement to the House Appropriations Committee that the current regulation allowed "anyone in the corporation" to certify the OSHA log is strikingly at odds with the language of § 1910.5(c), which requires certification by "*each* [individual] *employer, or the officer* [of the corporation] *or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses."*

A corporate officer is distinguished from an agent or management personnel in general in that the former occupies a position created by the corporate charter and is elected by directors or stockholders, and the officer, together with his fellow officers, constitutes the corporation. It is neither contended nor does the record suggest that certification of the logs in question was made by an officer of the corporation.

According to the regulation, the only other person who may certify the logs is the person "who supervises the preparation of the log and summary of occupational injuries and illnesses." The common meaning of "supervise" is to have charge and direction of, to direct course and oversee details, to manage with authority. The evidence is clear that Hercules's safety supervisor did not in fact supervise the preparation of the logs and summaries, certainly not in the manner contemplated by the recordkeeping regulations.

It is to be noted that the Secretary takes a less stringent approach in enforcing the certification requirement under § 1904.5(c):

> As a threshold matter, the Secretary does not contend that the OSHA log must be certified by the plant manager in all circumstances. Rather, the Secretary submits that the log may be certified by anyone in the corporation who has a good faith belief that the contents of the log are accurate and complete based on their examination of the log.

Secretary's brief at 14.

The Secretary's expansive interpretation of the regulation, which, up to a point, falls within the ambit of prosecutory discretion, places emphasis on the personal knowledge of the certifier that the logs are accurate and complete – an attribute that is implicit in the very use of the term

"certification." To a certain extent, this emphasis is in accord with the proposed revision of 29 C.F.R. Part 1904 dealing with certification:

> § 1904.6 Preparation, certification and posting of the year-end summary.
>
> (a)...
>
> (b) A responsible company official (see the definition of responsible company official for further information) shall sign the summary of occupational injuries and illnesses to certify that he or she has examined the OSHA Injury and Illness Log and Summary and that the entries on the form and the year-end summary are true, accurate and complete.

61 FR 4060 (Feb. 2, 1996). A "responsible company official" is defined as follows:

> *Responsible Company Official* is the person accountable for certifying the accuracy and completeness of the entries on the OSHA Injury and Illness Log and Summary. This person must be either an owner of the company, an officer of the corporation, the highest ranking company official working at the establishment, or the immediate supervisor of the highest ranking company official working at the establishment.

Id. at 4059.

The Secretary contends that under the circumstances of this case, the only legitimate person who could have certified the logs was the plant manager:

> In the instant case, the only person who determined what information would be entered in the log, and presumably the only person who believed that such information was true and complete, was respondent's plant manager, Dick Best. Accordingly, in the instant case, only Mr. Best could certify the 1987 and 1988 logs.

Secretary's brief at 14-15. In a marginal note, the Secretary explains the point further:

> OSHA Compliance Officer Jane Secor testified as to the agency's position regarding certification of the log where decisions are made by a "committee" whose members are not in total agreement as to what should be recorded. Ms. Secor testified that "if two parties [on the committee] disagree with the one person as to what is recordable and he says no, I am not -- I want it on the log and the other two persons disagree[sic], then that person that disagreed is the one who should certify that. What I am referring to exactly is Dick Best" (Tr. 91, Docket No. 93-2790). Ms. Secor further testified that the task of certifying the log may be delegated to any competent person, "but they have to agree [with the contents of the log]" (Tr. 92, Docket No.

93-2790).

Secretary's brief at 15 n.12.

The Secretary's argument is seriously flawed. That there was occasional disagreement among the four-person committee members delegated to consider when and how to record injury and illness cases does not invalidate the certification of the annual summary (under the Secretary's liberal interpretation of the regulation,) when the certification is made by a committee member who did not have the prevailing vote such as the plant manager had in this case. The disagreements could have been over matters that fall entirely within a range of debatable options incident to the regulations, as well as the instructions and guidelines that inform employers in making recordkeeping determinations. Moreover, whatever the disagreements might have been among the committee members, there is no evidence to show that those disagreements persisted and were not resolved by the time the annual summaries were certified. This discussion addresses the Secretary's position expressed in her brief, which is based upon a remarkably broad and liberal reading of § 1904.5(c), previously ascribed herein as being to a certain extent within her prosecutory discretion. The discretion to liberally construe a regulation ends at the citation-issuance stage unless that interpretation is consistent with the regulatory language and is otherwise reasonable. *Martin v. OSHRC*, 499 U.S. 144, 156, 111 S.Ct. 1171, 1179, 113 L.Ed. 2d 117(1991). Once a citation is contested by the employer, then the Secretary's enforcement powers become subject to the adjudicatory process and governed by the regulatory language in issue.

As discussed above, since no officer of the corporation acted as the certifier, § 1904.5(c) clearly calls for certification of the annual summary by the person "who supervises the preparation of the log and summary of occupational injuries and illnesses." Hercules acknowledges this point and argues that its safety supervisor, John Klobus, was assigned "the responsibility to prepare, maintain, and certify that the annual summary for each of the years 1987 and 1988 was true and complete," and that Klobus "participated in the day–to–day activities pertaining to reported injuries to make certain that the 'system' was functioning; and additionally, that individual acted in his oversight capacity so that the 'system' proceeded in analyzing reported injuries and initiating required paperwork associated with OSHA recordability." Hercules's brief at 13-14. If this were in fact the case, one may reasonably ask: Why the need for a four-person committee to make the

recordkeeping determinations? And even if the committee served a useful function over and above the supervisory role of John Klobus in Hercules's recordkeeping system, one would expect to see clear evidence demonstrating Mr. Klobus playing a major part in the committee deliberations instead of being simply a team member, as shown, for example, by Mr. Klobus's own testimony when questioned by Secretary's counsel during discovery deposition:

> **Q**: Now, who made the final decision as to what was recordable on the OSHA 200 back in '89 [including 1987 and 1988]?
> **A**: Well, ultimately I would say that the decision was the plant manager's, but it was all of our efforts in total safety as a team effort, because, you know, *safety was the responsibility of the safety supervisor, or you would never have a safe plant, so it was a team effort.*

Hercules's brief at 8 (Emphasis in original).

The evidentiary record does not support Hercules's claim that its safety supervisor supervised the preparation of the logs and summaries of injuries and illnesses for the years 1987 and 1988. The Secretary has sustained her burden of proving the failure-to-abate charges. Hercules's failure to correct the certification requirement cannot be viewed merely as technical noncompliance having a negligible relationship to employee safety and health. It was observed in the 93-2790 Hercules decision that its method of tracking employee injuries and illnesses for OSHA's recordkeeping requirements had serious deficiencies and needed to be corrected. One of the obvious flaws was the lack of appropriate supervision of the recordkeeping process. An effective mechanism to help ensure the accuracy of the requisite information is strict enforcement of § 1904.5(c).

The Secretary proposes that Hercules be assessed a penalty of $60,000, in accordance with the guidelines set forth in the OSHA Field Operations Manual. Under the guidelines, the Secretary has applied the "unadjusted penalty of $1,000 for each year the [OSHA - 200] form was not maintained"[4] (which would be applicable for an initial violation), and that amount is increased thirtyfold where there is a failure to abate the violation. Secretary's brief at 16-17. Considering all relevant factors in this case, it is believed a $60,000 penalty proposed by the Secretary is supported

[4]An OSHA - 200 form with significant deficiencies is considered as not maintained (Exh. C-13, VI-17).

by section 17 of the OSH Act, 29 U.S.C. § 666.

Based upon the foregoing findings and conclusions, it is

ORDERED that those failure-to-abate items relating to 29 C.F.R. § § 1910.109(c)(3)(vi) and .120(q)(2)(vii) are affirmed and penalties totaling $33,750 are assessed in accordance with the settlement agreement. It is further

ORDERED that the charge of failing to abate the certification requirement for the 1987 and 1988 annual summaries of injuries and illnesses is affirmed and a penalty of $60,000 is assessed.

/s/
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: July 31, 1997
Boston, Massachusetts