

No. 22-60399

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TNT CRANE & RIGGING, INCORPORATED,

Petitioner,

v.

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; MARTIN J.
WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR,**

Respondents.

On Petition for Review of Final Orders of the
Occupational Safety and Health Review Commission (No. 16-1587)

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

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CERTIFICATE OF INTERESTED PERSONS (5TH CIR. R. 28.2.1)

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT (5TH CIR. R. 28.2.3)

The Secretary of Labor believes that this petition for review can be decided on the papers and does not request oral argument.

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STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA)¹ enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). The Commission had jurisdiction pursuant to 29 U.S.C. § 659(c). The Commission first issued a decision and remand order on March 27, 2020, and, on June 2, 2022, the Commission issued a final decision that affirmed the citation and assessed a civil penalty, thus disposing of all parties' claims. TNT filed a timely petition for review with this Court on July 20, 2022.² This Court has jurisdiction over the petition for review under 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

1. Whether the Commission correctly determined that TNT was engaged in a crane disassembly process, and 29 C.F.R. §§ 1926.1407(b)(3) and (d) therefore applied, where the cited standards apply to all steps of a disassembly process, including those that precede the physical dismantling of equipment, and TNT finished using a crane for contracted work tasks, gathered a crew to disassemble the crane, the crew met and

¹ The Secretary's responsibilities under the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651 et seq., have been delegated to an Assistant Secretary who directs OSHA. Secretary's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012); 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; "[l]ike a district court, the Commission has no duty or interest in defending its decision on appeal and it has no stake in the outcome of the litigation." *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991) (citation omitted).

established a disassembly plan, began executing the plan, and as part of that plan, attempted to lay the boom of the crane on a trailer so that the boom could be taken apart in that position.

2. Whether the Commission correctly imputed to TNT the crew supervisor's knowledge of the violations of §§ 1926.1407(b)(3) and (d), where all four crew members, including the supervisor, collectively engaged in the conduct that violated the standards, and under Fifth Circuit precedent, a supervisor's knowledge of a subordinate's violative conduct is automatically imputed to the employer.

3. Whether substantial evidence supports the Commission's determination that TNT did not establish the affirmative defense to its violations of §§ 1926.1407(b)(3) and (d) of unpreventable employee misconduct, where TNT did not have a work rule designed to prevent violations of § 1926.1407(b)(3), and for both (b)(3) and (d), did not offer evidence that it monitored employee compliance with work rules designed to prevent violations of those standards at the worksite where the cited violations occurred or similar worksites, or that it ever used its disciplinary policy to enforce such rules prior to the cited violations.

STATEMENT OF THE CASE

I. Procedural History

OSHA initiated this case after a TNT employee suffered a severe electrical shock while working in a crew that was attempting to disassemble a crane near an

energized power line. Tr. 55-57.³ OSHA opened an inspection and, on August 12, 2016, issued a citation to TNT alleging serious violations of two provisions of OSHA's Cranes Standard, 29 C.F.R. §§ 1926.1407(b)(3) and 1926.1407(d). Vol.5(1). TNT contested the citation to the Commission, Vol.5(2), and a Commission ALJ held a hearing on the merits on December 20 and 21, 2017. Vol.1-2.

On September 14, 2018, the ALJ issued a decision vacating the citation. Vol.6(50). The Secretary filed a petition for discretionary review (PDR), Vol.6(52), and the Commission directed the ALJ's decision for review. Vol.6(53). On March 27, 2020, the Commission issued a decision reversing the ALJ and remanding the case for further proceedings. Vol.7(62).

After the parties submitted supplemental briefs, the ALJ issued a decision on remand on October 15, 2020, vacating the citation. Vol.7(69). The Secretary again filed a PDR, Vol.7(70), and, on November 18, 2020, the Commission directed review of the ALJ's decision. Vol.7(73). On June 2, 2022, the Commission issued a decision that reversed the ALJ, affirmed the citation, and assessed a civil penalty of \$24,942.00. Vol.7(78). TNT filed a petition for review with this Court on July 20, 2022.

³ Record documents are cited to the certified list that the Commission filed with the Court on August 22, 2022, following the format "Vol.[#](Item #)] at [page #]," except citations to the Commission hearing transcript, Vol.1-2, are abbreviated "Tr. [page #]." Citations to TNT's opening brief are abbreviated "Br. [page #]."

II. Statutory and Regulatory Background

The OSH Act's purpose is "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(b). To advance that purpose, Congress created an "unusual regulatory structure" that divides regulatory, enforcement, and adjudicative functions between two independent administrative actors. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 151 (1991). Congress gave the Secretary, acting through OSHA, regulatory, policymaking, and enforcement responsibilities, and conferred on the Commission, an independent body that is not part of the U.S. Department of Labor, purely adjudicative responsibilities. *Id.* at 147, 152-54.

OSHA's regulatory responsibilities include promulgating "mandatory occupational safety and health standards," 29 U.S.C. § 651(b)(3), and OSHA enforces its standards by conducting inspections and issuing citations for discovered violations. *See id.* §§ 654, 657-659. If an employer contests a citation, the matter is adjudicated by the Commission. *Id.* §§ 659, 661. Initially, an ALJ appointed by the Commission adjudicates the dispute, and once the ALJ issues a decision, a party may petition the Commission to review it. *Id.* §§ 659(c), 661(j); 29 C.F.R. § 2200.91. A party adversely affected or aggrieved by the Commission's final order may seek review in the appropriate court of appeals. *Id.* § 660(a), (b). Absent extraordinary circumstances, "no objection that has not been urged before the Commission shall be considered by the court" on judicial review. *Id.* § 660(a).

OSHA has promulgated safety and health standards that apply to employers engaged in construction activities, 29 C.F.R. Part 1926, and in 2010, promulgated standards that govern the use of cranes and derricks in construction. 29 C.F.R. Subpart CC, §§ 1400-1442 (collectively referred to as “the Cranes Standard”); Cranes and Derricks in Construction, 75 Fed. Reg. 47906 (August 9, 2010). The Cranes Standard generally applies to “power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load.” 29 C.F.R. § 1926.1400(a).

Several sections of the Cranes Standard apply to the assembly and disassembly of covered equipment. Sections 1926.1403-1406 apply to “[a]ssembly/[d]isassembly,” 29 C.F.R. §§ 1926.1403-1406, and “set out requirements designed to ensure the safety of employees while equipment is assembled and disassembled.” 75 Fed. Reg. at 47936 “Assembly/Disassembly” is defined by the Cranes Standard as follows:

Assembly/Disassembly means the assembly and/or disassembly of equipment covered under this standard. With regard to tower cranes, “erecting and climbing” replaces the term “assembly,” and “dismantling” replaces the term “disassembly.” Regardless of whether the crane is initially erected to its full height or is climbed in stages, the process of increasing the height of the crane is an erection process.

29 C.F.R. § 1926.1401. OSHA included this definition to clarify that the Cranes Standard’s assembly and disassembly provisions are applicable to tower cranes, even though “the terms ‘assembly’ and ‘disassembly’ are not commonly used ... in referring to tower cranes.” 75 Fed. Reg. at 47937.

Section 1926.1407, titled “Power line safety (up to 350 [kilovolts (kV)]—assembly and disassembly,” 29 C.F.R. § 1926.1407, specifically “address[es] the hazards of assembling and disassembling equipment near power lines up to 350 kV.” 75 Fed. Reg. at 47945. Section 1926.1407 is one of five sections that, together, “provide a systematic, proactive approach to dealing with the hazard of power lines” for every phase of use of covered equipment at a jobsite. 75 Fed. Reg. at 47944. Section 1926.1407 applies to assembly and disassembly processes, §§ 1926.1408 and 1926.1410 apply to operations, and § 1926.1411 applies to equipment travel.⁴ See 29 C.F.R. §§ 1926.1407-1411. Under these standards, employers must generally “[i]dentify the work zone and assess it for power lines ... [and] [i]f the assessment shows that the crane could get closer than [20 feet] ... then requirements for additional action [are] triggered.” 75 Fed. Reg. at 47945.

Section 1926.1407(a) requires, in relevant part:

Before assembling or disassembling equipment, the employer must determine if any part of the equipment, load line, or load (including rigging and lifting accessories) could get, in the direction or area of assembly/disassembly, closer than 20 feet to a power line during the assembly/disassembly process. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of this section ***

29 C.F.R. § 1926.1407(a). Option 1 is to deenergize and ground the power line. *Id.* § 1926.1407(a)(1). Option 2 is to use the precautions in § 1926.1407(b) to “[e]nsure

⁴ Section 1926.1409 modifies requirements in §§ 1926.1407 and 1926.1408 in certain situations where the power line’s voltage exceeds 350 kV. See 29 C.F.R. § 1926.1409.

that no part of the equipment, load line, or load ... gets closer than 20 feet to the power line.” *Id.* § 1926.1407(a)(2). Option 3 is to “[d]etermine if any part of the equipment, load line, or load ... could get closer than the minimum clearance distance to the power line permitted under Table A” of § 1926.1408, and if so, use the precautions in § 1926.1407(b) to maintain that distance from the power line. *Id.* § 1926.1407(a)(3)(ii).

The employer’s assessment must account for the fact that assembly and disassembly processes may not be confined to a “fixed portion of the worksite.” 75 Fed. Reg. at 47945. For example, because “in most but not all cases, the boom is lowered to the ground for the disassembly process,” the employer’s § 1926.1407(a) assessment must include “the proximity that the boom will be [] to the power line in its path of travel to (and on) the ground.” *Id.* at 47946.

Section 1926.1407(b) provides the precautions that employers must use when they choose Option 2 or 3 to comply with § 1926.1407(a). In addition to other requirements, § 1926.1407(b)(3) requires that the employer use “[a]t least one” of five “additional measures” to prevent encroachment on the power line: use a dedicated spotter; a “proximity alarm”; a “device that automatically warns the operator when to stop movement, such as a range control warning device”; a “device that automatically limits range of movement ...”; or, “[a]n elevated warning line, barricade, or line of signs,” in view of the operator” 29 C.F.R. § 1926.1407(b)(3)(i)-(v).

Section 1926.1407(d) subsequently provides:

Assembly/disassembly inside Table A clearance prohibited. No part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, is allowed closer than the minimum approach distance under Table A (see § 1926.1408) to a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line.

29 C.F.R. § 1926.1407(d). This provision reflects that “[e]ngaging in assembly/disassembly activity closer to an energized power line than the Table A distance ... [is] too hazardous to be permitted under any circumstances.” 75 Fed. Reg. at 47949.

III. Statement of Facts

A. A TNT Employee Suffers a Severe Electrical Shock While Disassembling a Crane.

TNT, a crane and rigging company, contracted to place three new antennas on top of a communications tower near Georgetown, Texas. Tr. 312-13. TNT assigned a two-man crew, consisting of crane operator Jeff Benson and crane rigger Mark Ryan, to complete the project using a 275-ton mobile crane. Tr. 311-13, 315. On May 15, 2016, Benson and Ryan completed the week-long antenna project, after which the next task was to disassemble the crane for transport off the worksite. Tr. 210, 313-14. That morning, TNT dispatched to the worksite two additional employees, Freddie Ray and Joseph Larison, to assist with the crane disassembly effort. Tr. 202, 314. Benson acted as the crew’s supervisor. *See* Vol.7(69) at 12-14; Vol.7(78) at 3-4 n.2.

Benson met with the crew and they made a plan to “rig down” (*i.e.*, disassemble) the crane’s boom. Tr. 321-25. Soggy ground conditions from recent rainfall made the task more challenging. Tr. 90, 95-96, 137, 166, 206, 240-41, 315-16, 323, 325, 333. Ray and Larison expressed concern about Benson’s proposal to disassemble the crane near an energized 14,400-volt power line but acquiesced to the plan based on Benson and Ryan’s assurances that they had assembled the crane in the same location. Tr. 108, 214-17.

The rig down plan called for Benson to first lower the boom to allow Larison to remove the “block,” the mechanism that allowed the crane’s rigging to be attached to an item for lifting, from the “becket,” a metal connection device at the end of the crane’s hoist line. Tr. 88, 199, 209, 315, 328, 368. Once the block was removed, Larison would hold the becket with his hands to keep the hoist line taut while Benson reeled in the hoist line and further lowered the boom to lay it on the bed of a trailer. Tr. 206, 211, 315, 354. Ray would drive the truck and trailer into position to receive the boom, with Ryan guiding him. Tr. 206, 211. Lowering the boom down to “zero degrees” before taking it apart removes the potential for pieces to fall on something while the boom is being dismantled. Tr. 315, 349. Once the boom was on the bed of the trailer, the crew would continue the process by disconnecting the jib from the boom by removing metal pins. Tr. 206-08, 315, 349-50.

Just after meeting to discuss the plan, the crew began executing it. Tr. 210, 218, 321-26. Larison removed the block from the becket, and Ray and Ryan began

moving the truck and trailer into position. Tr. 88, 210, 315-16. As Benson started lowering the boom and reeling in the hoist line and Larison held the becket, Tr. 88, Larison noticed that the hoist line was getting close to the power line and “gave the signal to swing right, [and] then started yelling.” Tr. 90. Benson did not see Larison take his hands off the becket to give him a signal and could not hear Larison from the crane operator’s cabin. Tr. 88-89, 316-17, 331-32, 353-54, 368-69. Moments later, the hoist line contacted the energized power line, which sent electricity through the hoist line and gave Larison a severe electrical shock. Tr. 90-91, 211-13, 315-16. Larison was hospitalized with serious injuries. Tr. 90-91.

B. OSHA Issues a Citation to TNT, the ALJ Issues a Decision Vacating the Citation, and the Commission Reverses the Decision and Remands the Case to the ALJ.

OSHA opened an inspection in response to the incident. Tr. 58-59. OSHA’s compliance officer (CSHO) Darren Beck went to the worksite where the incident occurred, but the site had been cleared and he could not gain access to it. Tr. 57, 109. He then went to a TNT facility in Marshall, Texas, to view the crane involved in the incident, interviewed Benson, Ryan, and Ray at TNT’s headquarters in Houston, and interviewed Larison, who was still in the hospital, by telephone. Tr. 59-61, 98-99; Vol.3(C-20).

On August 12, 2016, OSHA cited TNT for a serious violation of 29 C.F.R. § 1926.1407(b)(3) for failing to implement a listed measure to prevent encroachment on an energized power line during crane disassembly, and a serious violation of §

1926.1407(d) for engaging in crane disassembly while part of the equipment was closer than the minimum approach distance to an energized power line. Vol.5(1). OSHA proposed a total penalty of \$24,942.00 for both violations. *Id.*

TNT contested the citation, and following a two-day hearing, the ALJ issued a decision on September 14, 2018, vacating the citation. Vol.6(50). The ALJ determined that the cited standards did not apply because TNT's crew "had not begun to alter the structure of the crane" and therefore were not engaged in "disassembly." *Id.* at 11.

The Secretary filed a PDR, and the Commission directed the ALJ's decision for review. Vol.7(52). On March 27, 2020, a three-member Commission unanimously reversed the ALJ's decision and remanded the case for further proceedings. Vol.7(62). The Commission determined that it was unambiguous from "the text and structure of the crane standard" that "disassembly" is "not limited to the time during which crane components are being physically separated," *id.* at 5, and the cited standards applied because "the steps TNT took here were part of the disassembly process." *Id.* at 6. The Commission also determined that, even if the applicability of the cited standards was ambiguous, the Secretary's interpretation that the standards applied when TNT's crew lowered the boom was reasonable and entitled to deference. *Id.* at 6-10.

C. The ALJ Issues a Decision on Remand Vacating the Citation, and the Commission Reverses the Decision, Affirms the Citation, and Assesses a Civil Penalty.

After supplemental briefing, the ALJ issued a decision, on October 15, 2020, vacating the citation. Vol.7(69). The ALJ determined that TNT violated both §§ 1926.1407(b)(3) and (d) but did not have knowledge of the violations. *Id.* at 12-20. The ALJ determined that Benson, who served as the crew’s supervisor, was “the only individual engaged in violative conduct” because he created the disassembly plan and operated the crane. *Id.* at 16. The ALJ therefore construed Fifth Circuit precedent as precluding the imputation of Benson’s knowledge of the violations to TNT unless the Secretary proved that Benson’s conduct was foreseeable. *Id.* at 14 (citing *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006) (*Yates*)). The ALJ then found that the Secretary had not proven that Benson’s conduct was foreseeable. *Id.* at 16-22.

The Secretary filed another PDR, Vol.7(70), and the Commission again directed the ALJ’s decision for review. Vol.7(72). On June 2, 2022, the Commission issued a decision and order reversing the ALJ, affirming the citation, and assessing a \$24,942.00 penalty. Vol.7(78) at 13. The Commission explained that Benson alone did not violate the cited standards, but rather the violations concerned “the work activities the entire crew collectively engaged in on the day of the incident.” *Id.* at 4. The Commission therefore determined that Benson’s “knowledge of the other crew

members' conduct is imputed to TNT without a showing of foreseeability" and establishes TNT's knowledge of the violations. *Id.* at 5.

The Commission also determined that TNT failed to establish its affirmative defense that the violations resulted from unpreventable employee misconduct. Vol.7(78) at 6-13. The Commission determined that TNT did not have a work rule designed to prevent violations of § 1926.1407(b)(3), *id.* at 7, and with respect to both §§ 1926.1407(b)(3) and (d), did not reasonably monitor employees' compliance with power line safety rules, *id.* at 10-12, and did not establish that it used its disciplinary policy to effectively enforce those rules when violations were discovered. *Id.* at 12-13.

IV. Standard of Review

This Court's review of the Commission's decision is "narrow and highly deferential to the agency." *Medina County Envtl. Action Assoc. v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). The Court "must accept factual findings of the Commission if they are supported by 'substantial evidence on the record considered as a whole,'" and "if a reasonable person could have found what the [Commission] found, even if the appellate court might have reached a different conclusion." *Angel Bros.* 18 F.4th 827, 830 (5th Cir. 2021) (citations omitted). The Commission's legal conclusions must be upheld unless "they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Id.* (citations omitted).

SUMMARY OF THE ARGUMENT

The Commission correctly determined that 29 C.F.R. §§ 1926.1407(b)(3) and (d) applied. It is unambiguous from the text and structure of the Cranes Standard that the cited standards apply to all steps in a crane disassembly process, including preliminary steps that occur before any equipment is actually taken apart, and therefore applied when TNT's crew attempted to lay the boom on a trailer to allow the boom to be physically dismantled. The Cranes Standard's regulatory history confirms that § 1926.1407 applies when a boom is lowered as part of a disassembly process, and that reading also furthers § 1926.1407's intent to protect employees from electric shock throughout the disassembly process. But even if the standards' meaning was ambiguous, the Secretary's reasonable interpretation is entitled to deference. Additionally, the Commission's factual determination that the TNT crew's lowering of the boom was part of the process for disassembling the crane is supported by substantial evidence in the record.

The Commission also correctly imputed Benson's knowledge of his subordinate employees' conduct violating §§ 1926.1407(b)(3) and (d) to TNT. The ordinary imputation rule, not the narrow *Yates* exception, applies where, as here, a supervisor and one or more employees simultaneously engage in the conduct that violated the cited standards. Moreover, even if the *Yates* exception applied, the Commission's determination that TNT's safety program was insufficient to establish

the unpreventable employee misconduct affirmative defense also means that Benson's violative conduct was foreseeable.

Substantial evidence likewise supports the Commission's determination that TNT did not establish that unpreventable employee misconduct affirmative defense. TNT did not have a work rule designed to prevent violations of § 1926.1407(b)(3), and with respect to both §§ 1926.1407(b)(3) and (d), did not reasonably monitor employee compliance with its power line safety rules, and offered no proof that it enforced those rules by disciplining employees when it discovered violations. The Court should therefore deny the petition for review.

ARGUMENT

The Secretary establishes a violation of an OSHA standard by demonstrating that: (1) the cited standard applied; (2) the employer did not comply with the terms of the cited standard; (3) one or more employees had access to violative condition; and (4) the employer knew, or with the exercise of reasonable diligence should have known, of the violative condition. *Angel Bros.*, 18 F.4th at 830. Here, TNT challenges the Commission's determinations that the Secretary established the first and fourth elements, *i.e.*, that 29 C.F.R. §§ 1926.1407(b)(3) and (d) applied and that TNT had knowledge of the conduct that violated those standards. Br. 20-43. TNT also challenges the Commission's rejection of its affirmative defense that the violations were attributable to unpreventable employee misconduct. *Id.* at 43-49.

As discussed below, the Commission correctly determined that §§

1926.1407(b)(3) and (d) applied to TNT's work because those standards apply to the process of disassembling a crane, and TNT's crew was carrying out a step of a disassembly process when it attempted to lay a boom on a trailer so that the boom could be physically dismantled. The Commission also correctly determined that TNT had knowledge of the violations because crew supervisor Benson's actual knowledge of his subordinates' conduct violating the standards is imputed to TNT. Even if it were necessary to show that Benson's violative conduct was foreseeable, the Commission's determination with respect to the unpreventable employee misconduct defense that TNT's safety program was inadequate to prevent the violations establishes that Benson's conduct was foreseeable. Finally, substantial evidence supports the Commission's determination that the violations were not attributable to unpreventable employee misconduct because TNT lacked a work rule designed to prevent violations of § 1926.1407(b)(3), did not show that it reasonably monitored employee compliance with power line safety rules at worksite where the violations occurred or other remote worksites, and offered no evidence that it enforced those rules when it discovered violations.

I. The Commission Correctly Determined that 29 C.F.R. §§ 1926.1407(b)(3) and (d) Applied When TNT's Crew Attempted to Lay a Boom on a Trailer to Position the Boom For Dismantling.

The Commission correctly determined that 29 C.F.R. §§ 1926.1407(b)(3) and (d) applied. To determine the meaning of the standards, the Court first reviews the text, and if the meaning is clear, the Court must give the standards that plain meaning.

Kisor v. Wilkie, 139 S.Ct. 2400, 2415 (2019). If the Court finds that the standards are “genuinely susceptible to multiple reasonable meanings,” *Kisor*, 139 S.Ct. at 2419, the Court must defer to the Secretary’s reasonable interpretation of the standards. *Id.* at 2415-18; *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 152, 158 (1991) (courts must defer to the Secretary’s reasonable interpretations of ambiguous standards); *accord Delek Refining, Ltd v. OSHRC*, 845 F.3d 170, 175 (5th Cir. 2017). However, the Court must use “all the traditional tools of construction,” *i.e.*, carefully consider the standards’ “text, structure, history, and purpose,” before determining that the standards’ meaning is ambiguous. *Kisor*, 139 S.Ct. at 2415 (2019); *see also Delek*, 845 F.3d at 175. Here, the standards’ meaning and applicability to TNT’s conduct – attempting to lay a boom on a trailer to position it for dismantling – is unambiguous, but if even if it were not, the Secretary’s interpretation of the standards is reasonable and entitled to deference.

A. Sections §§ 1926.1407(b)(3) and (d) Apply to All Steps of the Process of Disassembling a Crane, Including Steps that Precede the Physical Dismantling of Equipment.

The Commission correctly determined from the language and structure of the Cranes Standard that §§ 1926.1407(b)(3) and (d) unambiguously applied when TNT’s crew lowered a boom in an attempt to lay it on the bed of a trailer for dismantling. *See Vol.7(62)* at 3-6. Section § 1926.1407 generally applies to “assembly and disassembly” and is designed to protect employees from power lines throughout that phase of work. 29 C.F.R. § 1926.1407; *see supra* p. 6. The definition of

“Assembly/Disassembly” in § 1926.1401 does not “attempt to substantively define either ‘assembly’ or ‘disassembly,’” Vo.7(62) at 4, and is thus ambiguous as to the scope of work covered by § 1926.1407. However, the cited standards, §§ 1926.1407(b)(3) and (d), when read in context, unambiguously apply to the process of disassembling a crane near a power line, including steps in the process that occur before equipment is physically taken apart.

The language of the cited standards, and of other standards with which they interact, establish their applicability to steps in the process of disassembling a crane that occur before equipment is physically dismantled. *See United States v. Moss*, 872 F.3d 304, 308 (“This court interprets regulations in the same manner as statutes, looking first to the regulation’s plain language.”). Section 1926.1407(a) first requires the employer to assess whether “any part of the equipment, load line, or load ... could get ... closer than 20 feet to a power line during the [] disassembly process,” 29 C.F.R. § 1926.1407(a), and if so, the employer must choose one of three compliance options, *see id.* §§ 1926.1407(a)(1)-(3), all of which “involve actions that must take place before any actual dismantling [of equipment] takes place.” Vol.7(62) at 5. When the employer’s chosen option requires it to use § 1926.1407(b)’s encroachment precautions, more actions are necessary before any equipment is taken apart: in addition to holding a planning meeting to discuss the encroachment precautions that will be implemented, 29 C.F.R. § 1926.1407(b)(1), and ensuring that any “tag lines” used during the process are “nonconductive,” *id.* § 1926.1407(b)(2), the employer

must implement at least one of five “additional measures,” such as using a dedicated spotter, to ensure that the minimum clearance distance is not breached during the work. *Id.* §§ 1926.1407(b)(3), (b)(3)(i).

Additionally, where the power line in the work area has not been deenergized and grounded, § 1926.1407(d) prohibits the employer from conducting any disassembly work while part of the equipment, load line, or load, “whether partially or fully assembled,” is within the minimum clearance distance permitted for the power line’s voltage level under Table A. 29 C.F.R. § 1926.1407(d). As the Commission recognized, Vol.7(62) at 5, the standard expressly applies to “fully assembled” equipment, thus indicating that its prohibition on disassembly work within the minimum clearance distance includes disassembly work that occurs before any part of the equipment is physically dismantled. Accordingly, the text of the cited standards makes clear that they are applicable to steps in a disassembly process that precede the physical dismantling of equipment.

This meaning is even clearer when the standards are read in context with the Crane Standard’s other assembly and disassembly provisions. *See Moss*, 872 F.3d at 310 (provisions that are “part of the same regulatory framework ... must be read together”). Every other provision in § 1926.1407 also concerns actions that may occur before equipment is physically dismantled.⁵ And, as the Commission pointed

⁵ Section 1926.1407(c) prohibits disassembly work below an energized power line, and, like § 1926.1407(d), expressly applies to “fully assembled” equipment. 29 C.F.R.

out, most of the assembly/disassembly requirements in other sections, *see generally* 29 C.F.R. §§ 1926.1403-1406, “are phrased broadly and by their nature require actions that must be initiated as part of the assembly/disassembly process before pin or component removal even begins.” Vol.7(62) at 5 (citing five examples).⁶

Because it is clear from the text that §§ 1926.1407(b)(3) and (d) apply to steps in a disassembly process that precede the physical dismantling of equipment, the Court should give the standards that plain meaning and apply it to the work in which TNT was engaged when it violated the standards, *i.e.*, a crew gathered for the express purpose of disassembling a crane, having just met to discuss the plan for disassembling the crane and executed the first step of the plan, attempting to lay the

§ 1926.1407(c). Sections 1926.1407(e) requires utility owners or operators to provide power line voltage information to employers within a certain timeframe to permit the employer to use Option 3 for complying with 1926.1407(a)(1), and § 1926.1407(g) requires the posting of electrocution warnings, 29 C.F.R. §§ 1926.1407(e) and (f), both of which must necessarily occur before equipment is dismantled. Section 1926.1407(f)’s requirement that employers “assume that all power lines are energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded” contemplates that the employer will adopt that assumption before any equipment is dismantled and maintain it throughout the disassembly process. 29 C.F.R. § 1926.1407(f).

⁶ *See, e.g.*, 29 C.F.R. § 1926.1404(h)(1) (“A[ssembly]/D[isassembly] director” must assess the ground conditions before beginning the disassembly process and make a determination that the conditions are adequate to support the equipment); *id.* § 1926.1404(h)(4) (any loads imposed on an assist crane during the process must be verified “before assembly/disassembly begins”); *id.* § 1926.1404(h)(11) (Assembly/Disassembly director must address the hazards associated with backward stability “before swinging the upperworks, travel, *and* when attaching or removing equipment components”) (emphasis added).

boom of the crane on a trailer to position the boom for dismantling. *See infra* section II.C.

Any assertion that ambiguity remains is dispelled by the Cranes Standard’s regulatory history and purpose. As the Commission explained, the preamble to the Cranes Standard “describes the precise activity at issue in this case – lowering a boom to position it for dismantling – as an example” of a step of the disassembly process to which § 1926.1407(a) applies. Vol.7(62) at 7. OSHA stated in the preamble:

For example, when disassembling a crane, the disassembly process takes place in an area that includes the area under and around the boom’s path as it is lowered to the ground (in most, but not all cases, the boom is lowered to the ground for the disassembly process). Under [§1926.1407(a)], the employer must assess the proximity that the boom will be in [sic] to the power line in its path of travel to (and on) the ground.

75 Fed. Reg. at 47945-46. This passage confirms that, when a boom is lowered to allow it to be dismantled, the action of lowering the boom is part of the disassembly process to which § 1926.1407 applies. Additionally, when discussing § 1926.1407(c)’s prohibition of assembling or disassembling equipment below power lines, OSHA clarified that moving a crane that is about to be disassembled into position for dismantling is also part of the disassembly process and work to which § 1926.1407 applies. *Id.* at 47949 (§ 1926.1407(c) is necessary because “in both assembly and disassembly, maneuvering an assembled crane out from under the power lines, or

maneuvering a crane that is about to be disassembled under them, itself poses a high risk of such contact”).

Reading §§ 1926.1407(b)(3) and (d) as applicable to steps of a disassembly process that precede the physical dismantling of equipment is also consistent with the purpose of the Cranes Standard. Sections 1926.1407-1411 intend to comprehensively protect employees from power lines throughout the three phases of use of a crane at a worksite: assembly and disassembly, operation, and travel. 75 Fed. Reg. at 47944; *see supra* p. 6. Construing the standards in § 1926.1407 as applicable to steps of a disassembly process that precede the physical dismantling of equipment, such as lowering a boom into position for dismantling, comports with OSHA’s intent for § 1926.1407 to protect employees from power lines throughout the entire disassembly phase. Accordingly, the text, structure, history, and purpose of §§ 1926.1407(b)(3) and (d) establish that the standards apply to all steps of a disassembly process, including preliminary steps that precede physically taking equipment apart, and thus plainly applied when TNT’s crew lowered a boom to position it for dismantling. *See infra* sec. II.C.

TNT’s assertion that §§ 1926.1407(b)(3) and (d) only apply to “the physical disassembly of the crane,” Br. 23, is patently untenable. TNT wrongly focuses on the definition of “Assembly/Disassembly” in § 1926.1401, *id.*, which, with respect to non-tower cranes, simply explains that the slash used in “Assembly/Disassembly” means “and/or” and does not substantively define the scope of “assembly” or “disassembly”

work. Vol.7(62) at 4; *see* 75 Fed. Reg. at 47937 (OSHA included the definition to clarify the applicability of assembly/disassembly standards to tower cranes). The definition's reference to "equipment covered under this standard" simply reiterates that the assembly and disassembly standards apply to work involving equipment covered by the Cranes Standard. *See* 29 C.F.R. § 1926.1400. TNT's leap that the definition's reference to "equipment" somehow limits the applicability of the Cranes Standard's assembly/disassembly standards to the steps of assembly/disassembly processes where pieces of equipment are physically connected or taken apart, *see* Br. 23, has no support in the text, the regulatory history, or commonsense.

Nor does the discussion in the Cranes Standard's preamble regarding the definition of "Assembly/Disassembly" indicate that the assembly and disassembly standards only apply to work that causes "changes in the actual structure" of the equipment. Br. 25-26. Responding to a comment regarding the applicability of §§ 1926.1403-1406 to the process of adding sections to a fully assembled tower crane to increase its height (referred to as "jumping" or "climbing"), OSHA stated that "the process of increasing the height of the crane is an assembly/erection process," and OSHA therefore included language in the definition of "Assembly/Disassembly" to clarify that "jumping" is considered assembly work. 75 Fed. Reg. at 47936. This preamble discussion supports that work that changes the height of a crane is covered by the assembly/disassembly standards, but there is no support for TNT's extrapolation that this discussion means that "assembly/disassembly standards *only*

apply when the structural height of any type of crane is modified.” Vol.7(62) at 8 (emphasis added).

Similarly illogical is TNT’s insinuation that because provisions in §§ 1926.1404(f), (h) and 1926.1405 concern the removal of pins during a disassembly process, *all* assembly/disassembly standards apply *only* where structural components are removed. Br. 25-26. The fact that removing pins may be *part of* the process of disassembling equipment does not mean that pin removal is the *only* step in the process to which OSHA’s assembly and disassembly standards apply. As the Commission explained, “[m]ost of the other assembly/disassembly requirements ... do not even mention pin or component removal,” *id.*, and given that the provisions in § 1926.1405 are “expressly identified as ‘additional requirements’ for dismantling ... ‘booms and jibs,’” Vol.7(62) at 6 (citing and quoting title of 29 C.F.R. § 1926.1405), they are clearly “supplemental requirements” that “cannot be construed as defining the scope of the other assembly/disassembly requirements.” *Id.* TNT does not attempt to refute the Commission’s reasoning, *see* Br. 25-26, nor could it.

Also meritless is TNT’s claim that assembly and disassembly provisions like § 1926.1407(a) and § 1926.1404(h)(4), which require actions “[b]efore assembling or disassembling equipment and “before assembly/disassembly begins,” respectively, “distinguish the actions needed to be taken before ‘disassembly,’” and thus indicate that disassembly standards only apply when equipment is physically taken apart. Br. 23-24. TNT overlooks that those standards requiring action before equipment is

physically dismantled are *themselves* assembly and disassembly standards. *See* 29 C.F.R. §§ 1926.1404 (titled “Assembly/Disassembly--general requirements (applies to all assembly and disassembly operations)”) and 1926.1407 (titled “Power line safety (up to 350 kV)--assembly and disassembly”). Accepting TNT’s reading would require a finding that the many assembly and disassembly standards in §§ 1926.1403-1407 that require action before any equipment is physically disconnected are not *actually* applicable to assembly and disassembly processes. Neither the traditional tools of construction nor basic logic supports such a finding.

Glaringly absent from TNT’s argument is any attempt to reconcile its interpretation with the text of §§ 1926.1407(b)(3) and (d) and the role that they play in § 1926.1407’s scheme for protecting employees from power lines during disassembly processes. No explanation is given, for example, for how § 1926.1407(b)(3), which plainly requires an employer to implement at least one measure *before* any equipment is dismantled, would function if it only applied to the segments of disassembly processes when pieces of equipment are physically taken apart. Nor does TNT make any attempt to explain how narrowly construing §§ 1926.1407(b)(3) or (d) as only applicable to such steps would be consistent with the standards’ purpose of protecting employees from electric shock hazards for the entirety of the process of assembling or disassembling equipment near a power line. *See* 75 Fed. Reg. at 47944. Indeed, as the Commission explained, the risk of contact with a power line is *greater* “when the boom is still extended and/or being lowered in preparation for removing the crane’s

components” than when it is “already laying on the ground or is on the bed of a helper truck.” Vol.7(62) at 8.

Also unmoving is TNT’s complaint that the Commission did not appropriately consider *Steel Constructors, Inc.*, 8 BNA OSHC 2146, 1980 WL 10389 (No. 78-3839, 1980) (ALJ), an unreviewed ALJ decision that has no precedential value, which concerned an alleged violation of the OSH Act’s general duty clause, 29 U.S.C. § 654(a)(1), and was issued three decades before the Cranes Standard was promulgated. *See* Vol.7(62) at 8-9; Br. 26-27. The Commission rightly explained that *Steel Constructors* “did not involve the term ‘disassembly’ within the context of [the Cranes Standard] or even an analogous standard,” *id.*, and the ALJ’s fact-bound determinations have no relevance to the scope of work to which the Cranes Standard’s disassembly provisions apply. Furthermore, the facts of *Steel Constructors* are not analogous to this case; unlike here, where here TNT’s crew gathered to disassemble a crane, set a plan for doing so, and then collectively put the plan into motion, the employer in *Steel Constructors* was still acquiring materials necessary to disassemble the equipment when a rogue employee began removing pins from a boom on his own initiative. *See Steel Constructors*, 1980 WL 10389 at *4-7; Vol.7(62) at 9. *Steel Constructors* is thus unhelpful in determining whether §§ 1926.1407(b)(3) and (d) applied to TNT’s work.

B. Even if §§ 1926.1407(b)(3) and (d) Were Ambiguous, the Court Should Defer to the Secretary’s Reasonable Interpretation of the Standards.

Even if the Court were to find it unclear from the traditional tools of construction that §§ 1926.1407(b)(3) and (d) apply to steps of a disassembly process that precede the physical dismantling of equipment, that would only mean that the standards are “genuinely susceptible to multiple reasonable meanings” and are therefore “ambiguous.” *Kisor*, 139 S.Ct. at 2419. In such case, the Court must defer to the Secretary’s reasonable interpretation of the standards. *Kisor*, 139 S.Ct. at 2415-18; *Delek*, 845 F.3d at 175; *see* Vol.7(62) at 6-10.

To begin with, there is no question that the Secretary’s interpretation – that §§ 1926.1407(b)(3) and (d) apply to all steps of a disassembly process, and thus apply where an employer has completed its use of a crane for contracted work, a crew has gathered at the worksite to disassemble the crane and set a plan for doing so, the crew begins executing that plan, and then attempts to lay a boom on a trailer for the purpose of positioning the boom for dismantling – “sensibly conforms to the purpose and wording of the regulations.” *Martin*, 499 U.S. at 151. Indeed, that interpretation is compelled by the text of the cited standards, the other assembly/disassembly standards in the Cranes Standard, the Cranes Standard’s regulatory history, and § 1926.1407’s intent to comprehensively protect workers throughout the process of disassembling equipment near power lines. *See infra* section I.A.

Deference to this reasonable interpretation is appropriate because the 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 2416-17. The applicability of the cited standards implicates the Secretary’s expertise as the author of the Cranes Standard, and the Secretary’s interpretation that §§ 1926.1407(b)(3) and (d) applied in this case is both “embodied in [the] citation” that OSHA issued to TNT, thus “assum[ing] a form expressly provided for by Congress,” and in the Secretary’s litigating position before the Commission. *Martin*, 499 U.S. at 157 (citations omitted). “The Secretary is entitled to use the citation process to provide the initial publication of a previously unannounced interpretation of an OSH regulation . . .,” *Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 430 (5th Cir. 2001), and such an interpretation “in an administrative adjudication ‘is as much an exercise of delegated lawmaking powers as is the Secretary’s promulgation of a workplace health and safety standard.’” *Acosta v. Hensel Phelps Constr.*, 909 F.3d 723, 737 (5th Cir. 2018) (quoting *Martin*, 499 U.S. at 157).

Failing for this reason is TNT’s complaint that the Secretary’s interpretation is unreasonable because it provides “no clear rule” for other employers regarding when the disassembly standards apply. Br. 29. Both the Supreme Court and this Court have affirmed that the Secretary may use the citation process to interpret its standards, and the Secretary is not obliged in this enforcement proceeding to offer sweeping interpretations that will clarify every possible circumstance or action to which the

Cranes Standard's many assembly and disassembly standards apply. TNT points to no authority suggesting otherwise.

Nor is the Secretary's interpretation unreasonable because it requires employers to distinguish situations where a boom is lowered as part of a disassembly process from situations where a boom is lowered during crane operations. *See* Br. 31 (alleging that this would cause "confusion"). As it did before the Commission, *see* Vol.7(62) at 10, TNT has failed to offer a cogent explanation for why an employer would not reasonably know, in situations like the instant one – where a crew gathered at a worksite for the purpose of disassembling the crane, met and set a plan for doing so, began executing that plan, and then lowered a boom in an attempt to lay it on a trailer so the boom could be dismantled – that lowering the boom was part of the disassembly process. OSHA made the decision when it promulgated the Cranes Standard that it should have different power line safety rules for assembly/disassembly, operations, and equipment travel, *see supra* p. 6, and TNT's apparent disagreement with the "wisdom" of that approach is of no matter to this enforcement proceeding. *See Maxim Crane Works*, No. 17-1894, 2021 WL 2311880, *8 (OSHRC May 20, 2021).

To the extent that TNT is claiming that deference is inappropriate because it lacked adequate notice of the Secretary's interpretation, the claim is meritless. *See Kisor*, 139 S.Ct. at 2417-18 (deference is inappropriate if it would cause "unfair surprise"); *cf. Echo Powerline, LLC v. OSHRC*, 968 F.3d 471, 477 (5th Cir. 2020)

(standard need only provide “fair and reasonable warning” of requirements) (citing *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec’y of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982)). The text of §§ 1926.1407(b)(3) and (d) provided clear notice to TNT of its obligations, as the standards plainly apply to all steps of a disassembly process, including preliminary steps that precede the physical dismantling of equipment. *See supra* section I.A; *Faultless*, 674 F.2d at 1185. Additionally, the preamble to the Cranes Standard specifically identified the conduct at issue – lowering a boom into position for dismantling – as disassembly work to which § 1926.1407 applies. 75 Fed. Reg. at 47945-46; *see General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (agency’s pre-enforcement statements about regulatory requirements may provide notice of agency interpretation of regulation).

Any notice concerns that may remain are cured by TNT’s “actual knowledge of its obligations.” *Echo*, 968 F.3d at 477. Benson, the crew’s supervisor and thus an agent of TNT, *see Angel Bros.*, 18 F.4th at 830, understood that lowering the boom was part of the “rig-down” process, Tr. 88, 315-16, 321-26, 371, 373, assigned Larison to serve as a spotter during the process, Tr. 340; *see* Vol.4(R-4) (pre-work JSA form indicating that a spotter was needed), and intended to maintain a 20-foot clearance distance from power line during the work. Tr. 345-46. Additionally, TNT Vice President for Health, Safety and Environment Troy Pierce’ testified that Larison served as a spotter when the boom was lowered, Tr. 460, and understood that the crew had to remain beyond the minimum clearance distance to the power line during

the work. *See* Tr. 437, 469. Indeed, by arguing that it had work rules that, if followed, would have prevented the cited violations of §§ 1926.1407(b)(3) and (d), *see* Vol.7(78) at 6-9; *infra* section III., TNT admitted awareness of what the crew needed to do when it lowered the boom. *Cf. Echo*, 968 F.3d at 477 (employer’s safety rules evinced actual notice of standard’s requirements).

TNT also appears to claim that the Secretary’s interpretation conflicts with an OSHA enforcement directive, Br. 29-30, but the Commission correctly debunked that argument below. Vol.7(62) at 8 n.5. That directive stated that the assembly and disassembly standards do not apply to “equipment set-up,” *i.e.*, “the procedures conducted to deploy an assembled crane,” such as “merely unfold[ing] and pin[ning] the boom of a fully assembled truck crane.” Vol.4(R-34) at TNT000578. The Commission rightly explained that this statement is “irrelevant” because it is undisputed that “equipment set-up was not at issue here,” Vol.7(62) at 8 n.5, and TNT has not argued otherwise in its brief. Indeed, there is no conflict between the directive and the interpretation advanced in this case, which is reasonable and entitled to deference.

C. Substantial Evidence Supports the Commission’s Determination that the TNT Crew’s Lowering of the Boom Was Part of the Disassembly Process.

Substantial evidence supports the Commission’s determination that, when TNT’s crew lowered the boom in an attempt to lay it on the trailer for dismantling, that action was part of the crane disassembly process. *See* Vol.7(62) at 6. As

discussed *supra* pp. 9-10, after Benson and Ryan finished using the crane for the antenna project, they met with Ray and Larison, who were specifically dispatched to the worksite to help with crane disassembly, and made a disassembly plan. Tr. 202, 210, 313-14, 321-25. The plan included the steps of removing the block from the becket, and then laying the boom on the bed of a trailer for dismantling. Tr. 206, 315, 349, 368. The crew then put this plan into action; Larison removed the block, after which Benson began lowering the boom while Larison held the becket and Ray and Ryan positioned the truck to receive the lowered boom. Tr. 88, 210, 315-16. The process stopped when the hoist line contacted the power line, Tr. 90-91, 211-13, 315-16, which occurred “less than 10 minutes” after the crew had met to discuss the disassembly plan. Tr. 324-25.

TNT does not dispute this sequence of events or that the purpose of lowering the boom was to position it for dismantling; indeed, TNT admits that the “plan to lower and disassemble the boom of the crane” involved lowering the boom and “lay[ing] it on the trailer.” Br. 12-13. Given that it is undisputed that lowering the boom onto the trailer was part of the plan for disassembling the boom, and the sole purpose of lowering the boom was to position it for dismantling, the Commission’s determination that lowering the boom was disassembly work to which §§ 1926.1407(b)(3) and (d) applied is unquestionably supported by substantial evidence.

The fact that some trial witnesses believed that “disassembly” would only start once pins were removed from the boom, *see* Br. 32 (citing Tr. 207, 227, 264 (Ray); Tr.

467 (Pierce); and Tr. 536 (TNT's expert witness Matt Gardiner⁷)), is irrelevant to whether OSHA's Cranes Standard's disassembly standards applied when TNT lowered the boom. *See* Vol.7(62) at 9-10. Even if such opinions were relevant, all four crew members gave statements to OSHA during the inspection indicating that the disassembly process had begun when the boom was lowered.⁸ Notwithstanding TNT's unsubstantiated and irrelevant complaints about CSHO Beck, TNT Br. 16-17, 33-35, the Commission favorably cited to two of those statements, Vol.7(62) at 10, and TNT has not pointed to "uncontrovertible documentary evidence" to overturn the Commission's implicit determination that those statements are credible. *Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 322 n.6 (5th Cir. 1984). Moreover, Benson confirmed in his hearing testimony that he viewed the lowering of the boom to be part of the "rig-down" process. Tr. 315, 321-26, 371, 373.

⁷ The Commission rightly determined that the ALJ erred in qualifying Gardiner as an expert with respect to "compliance with OSHA crane standards," Vol.7(62) at 9-10 n.6, and TNT has not challenged that determination on appeal.

⁸ *See* Vol.3(C-20); Tr. 87-88 (Benson's signed statement stated, "We were done and began to disassemble the crane. I boomed down."), Tr. 90 (Larison's phone interview statement included the sentence, "Because the ground conditions were bad we had to use the road to disassemble."), Tr. 92 (Ray's signed statement stated, "Then we started breaking down the crane. As they were lowering the boom ..."), Tr. 94 (Ryan's signed statement stated, "We started disassembling the crane. We started booming down.").

II. The Commission Correctly Determined that TNT Had Knowledge of the Conditions that Violated 29 C.F.R. §§ 1926.1407(b)(3) and (d).

Employer knowledge of a violation of an OSHA standard concerns the employer's awareness of "the physical conditions constituting the violation." *Southern Hens, Inc., v. OSHRC*, 930 F.3d 667, 678 (5th Cir. 2019). Because "a corporation can only act through its agents," employers are "usually liable for acts of its supervisors in the performance of their assigned duties" and are charged with "the supervisor's knowledge ... of non-complying conduct of a subordinate." *Yates*, 459 F.3d at 607. However, in *Yates*, this Court carved out a narrow exception to the ordinary imputation rule: "[w]hen "a supervisor's 'own conduct is the OSHA violation,' the supervisor's knowledge should be imputed to the employer only if the supervisor's misconduct was foreseeable." *Angel Bros.*, 18 F.4th at 830-31 (quoting *Yates*, 459 F.3d at 607, 609).

Here, the Commission correctly determined that the *Yates* exception did not apply and Benson's knowledge of his subordinates' conduct violating §§ 1926.1407(b)(3) and (d) is automatically imputed to TNT. Vol.7(78) at 3-6. But, even if it were necessary to show that Benson's violative conduct was foreseeable, the Commission's determinations with respect to TNT's unpreventable employee misconduct defense establish that Benson's violative conduct was foreseeable.

A. Benson’s Knowledge of His Subordinates’ Violative Conduct Is Imputed to TNT Regardless of Whether His Conduct Was Foreseeable.

The Commission correctly determined that the *Yates* exception did not apply and Benson’s knowledge of the violations is imputed to TNT because the entire crew, not Benson alone, engaged in the conduct that violated the cited standards.

Employers violate § 1926.1407(b)(3) when employees engage in disassembly work without at least one of the five-listed encroachment prevention measures in place, and violate § 1926.1407(d) when employees engage in disassembly work closer than the Table A minimum approach distance to an energized power line. *See supra* pp. 8-9. Here, all four TNT employees collectively worked to disassemble a crane without a measure in place to prevent encroachment on the energized power line and when the hoist line was closer than 10 feet from the power line: Benson operated the crane; after removing the block, Larison held the becket while Benson lowered the boom and reeled in the hoist line; Ray drove the truck and trailer onto which Benson was attempting to lower the boom; and Ryan guided Ray’s positioning of the truck. *See supra* p. 10; Vol.7(78) at 2-5.

The Commission thus correctly determined that the four-man crew collectively violated § 1926.1407(b)(3) when they “disassembled the crane without a required protective measure in place to prevent encroachment” Vol.7(78) at 4, and collectively violated § 1926.1407(d) by “fail[ing] to maintain the required Table A clearance during the disassembly process.” *Id.* at 5-6. Because the entire crew engaged in conduct that

violated the standards, this is not a case where the supervisor’s “own conduct is the OSHA violation.” *Yates*, 459 F.3d at 607. Accordingly, Benson’s “knowledge of the other crew members’ conduct is imputed to TNT without a showing of foreseeability.” Vol.7(78) at 5.

TNT’s claim that Benson alone violated the cited standards because he created the plan for the disassembly work and operated the crane in a manner that caused the hoist line to contact the power line, Br. 37, cannot be squared with the text of the standards, which, as explained above, are violated when employees engage in a disassembly process without a measure in place to prevent encroachment on an energized power line, and when part of the equipment, load line, or load is closer to an energized power line than Table A permits. The conduct of which TNT must have knowledge is *not* Benson’s plans for the work, his instructions to his crew, or the manner in which he operated the crane, but rather the crew’s engagement in a crane disassembly process without an encroachment prevention measure in place and while the hoist line was closer than ten feet from the power line. *See* Vol.7(78) at 4. Benson *and* his three subordinates working together violated the standards, and Benson’s knowledge of his subordinates’ violative conduct is imputed to TNT.

TNT also fails to paint this case as “dissimilar to *Angel Brothers* and more akin to *Yates*.” Br. 38. *Yates* involved a situation where a supervisor’s “own conduct” (and only his conduct) violated an OSHA standard. 459 F.3d at 607. The Court contrasted that situation – where the supervisor was “himself the malfeasant [and]

personally act[ed] contrary to instructions” – to the “ordinary context” where a subordinate violates a standard and “the supervisor’s knowledge of [the] employee’s unsafe conduct is imputable to his ‘master’, the employer.” *Id.* at 609 n.7. In the former (*Yates*) situation, the Court determined that it would unfairly relieve the Secretary of his burden of proving employer knowledge if a supervisor’s knowledge of his own misconduct was automatically imputed to the employer. *Id.* at 607-09. That concern does not exist where, as here, a supervisor’s knowledge of three subordinates’ unsafe conduct is imputed to the employer.

This Court recently confirmed this in *Angel Bros.*, 18 F.4th at 830-32, which (like this case) concerned a situation where a supervisor had actual knowledge of a subordinate employee’s conduct violating an OSHA standard (working in an unguarded trench). *Id.* at 829. Similar to TNT, the employer in *Angel Bros.* argued that the *Yates* exception applied because the supervisor authorized the subordinate to work in the unguarded trench and was therefore responsible for the violative conduct. *Id.* at 831. *Angel Bros.* explained that *Yates* “emphasize[d]” that its exception extends “only [to] the situation in which it is the supervisor himself who engages in unsafe conduct and who does so contrary to policies of the employer.” *Id.* (quoting *Yates*, 459 F.3d. at 609 n.8). The *Yates* exception was not applicable in *Angel Bros.* because the supervisor’s actions did not constitute the cited violation; rather, “the safety violation was the presence of [the subordinate] in the unsafe trench.” *Id.* at 832. The Court explained that any claim “that a supervisor’s knowledge cannot be imputed

to the employer when the supervisor authorizes, or takes some other active role in, a subordinate's safety violation" has "no support in *Yates*, in agency principles, or in other caselaw." *Id.*

Angel Bros. differs from this case in that the *Angel Bros.* supervisor did not personally engage in conduct that violated the cited standard, while here, Benson participated in violative conduct along with three subordinates. For purposes of the *Yates* exception, that is a distinction without difference. In both this case and *Angel Bros.*, a subordinate employee engaged in conduct that violated the standard(s), a supervisor had knowledge of the subordinate's conduct, and that knowledge is imputed to the employer under "ordinary imputation principles." *Angel Bros.*, 18 F.4th at 832.

This understanding is confirmed by *Angel Bros.*'s endorsement of *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832 (11th Cir. 2016). "The Eleventh Circuit also limits its *Yates*-like exception to violations citing the supervisor's own misconduct," *Angel Bros.*, 18 F.4th at 831 (citing *ComTran Group, Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1317-18 (11th Cir. 2013)), and in *Quinlan*, the Eleventh Circuit considered whether the exception applied where a foreman and a subordinate simultaneously engaged in conduct that violated OSHA standards. *Quinlan*, 812 F.3d at 835. The Eleventh Circuit held that, where a supervisor and a subordinate simultaneously engage in violative conduct, "the general rule should apply ... *i.e.*, [] the knowledge of a supervisor of a subordinate employee's violation should be imputed to the

employer,” as there is “no meaningful difference” between that scenario and “the classic situation” in which the supervisor sees a subordinate’s violative conduct but allows it to continue. *Id.* at 841. Approving of *Quinlan’s* reasoning, *Angel Bros.* explained that “[d]espite the differing levels of involvement by the supervisor, both of those scenarios involve a subordinate’s violation of safety rules so ‘it is reasonable to charge the employer with the supervisor’s knowledge of the subordinate’s misconduct.’” *Angel Bros.*, 18 F.4th at 831 (quoting *Yates*, 459 F.3d at 607).

Angel Bros. also explained the absurdity of the position that TNT now adopts – that a supervisor’s knowledge of a violation can be automatically imputed to the employer if the supervisor merely happens upon a subordinate violating a standard, but not if the supervisor was personally involved in the violative conduct. *See Angel Bros.*, 18 F.4th at 831-32. Because this Court has long held that “an employer has if anything a heightened duty to ensure the proper conduct of [supervisors],” *id.* at 831 (quoting *Floyd S. Pike Elec. Contractor, Inc. v. OSHRC*, 576 F.2d 72, 77 (5th Cir. 1978)), “there is a stronger case for holding the employer liable” where a supervisor was actively involved in violative conduct than where a supervisor merely happened upon it. *Id.* TNT’s contrary position that Benson’s involvement in the violative conduct should make it *more* difficult to hold TNT liable for the violations of §§ 1926.1407(b)(3) and (d) would “upend agency principles.” *Id.* at 831-32. Accordingly, the Commission correctly determined that Benson’s knowledge of his subordinates’

conduct violating §§ 1926.1407(b)(3) and (3) establishes TNT's knowledge of the violations.

B. Even if a Foreseeability Showing Were Necessary to Impute Benson's Knowledge to TNT, Substantial Evidence Supports the Commission's Determination that TNT's Safety Program was Inadequate and Benson's Conduct Was Therefore Foreseeable.

Because the *Yates* exception does not apply, the Commission did not specifically decide whether the Secretary proved that Benson's conduct violating the standards was foreseeable. *See* Vol.7(78) at 3-6. The Commission did decide, however, that TNT failed to establish as an affirmative defense that the violations resulted from unpreventable employee misconduct. Vol.7(78) at 6-14. The foreseeability finding required by *Yates* and the unpreventable employee misconduct defense concern the same inquiry – whether the employer had an adequate safety program to reasonably prevent the violations – with the only difference being the party that carries the burden of proof. *Yates*, 459 F.3d at 608-09, 609 n.7 (the foreseeability inquiry and unpreventable employee misconduct defense “closely mirror” each other). Vol.7(78) at 6 n.5. Accordingly, even if the *Yates* exception applied and a foreseeability finding was necessary to impute Benson's knowledge of the violations to TNT, the Court could “dispose[] of both issues by examining the Commission's factual finding that [TNT] had an inadequate safety program under the circumstances ... [and] must only determine whether that finding regarding the inadequacy of the safety program is supported by substantial evidence in the record as

a whole.” *Sm. Bell Tele. Co. v. Chao*, 277 F.3d 1374, 2001 WL 1485847 (5th Cir. 2011) (unpublished).

As discussed *infra* section III., substantial evidence supports the Commission’s determination that TNT failed to prove that its safety program was adequate to reasonably prevent the violations. TNT did not have a work rule designed to prevent violations of § 1926.1407(b)(3), did not monitor employee compliance with safety rules at the Georgetown worksite, and did not provide any evidence that it used its audit program to oversee employees’ compliance with its power line safety rules at remote worksites, or that it ever disciplined an employee for violating those rules prior to May 15, 2016. In fact, TNT has waived the issue of whether it effectively enforced its power line safety rules. Accordingly, even if the *Yates* exception applied, the Commission’s determination with respect to the unpreventable employee misconduct affirmative defense that TNT’s safety program was inadequate to prevent the violations also establishes that Benson’s violative conduct was foreseeable.⁹

⁹ In *ComTran*, the Eleventh Circuit determined that remand to the Commission was necessary to determine if the Secretary established the inadequacy of the employer’s safety program even though the Commission had already rejected the employer’s unpreventable employee misconduct defense, 722 F.3d at 1318, but *ComTran* is not binding on this Court and rests on flawed reasoning. *ComTran* made that decision in part due to an apparent belief that it is relevant which party introduces evidence into the record, *see id.* (“the Secretary is the one who must provide [] evidence” of a lax safety program), but this Court has long-held that a party’s “burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence.” *Aetna Ins. Co. of Hartford, Conn., v. Taylor*, 86 F.2d 225, 227 (5th Cir. 1936). *ComTran* is also distinguishable, as the Court remanded the case “for further development of the record” due to the employer’s assertion that it had

III. Substantial Evidence Supports the Commission’s Determination that TNT Failed to Establish the Affirmative Defense of Unpreventable Employee Misconduct.

TNT can avoid liability for its violations of §§ 1926.1407(b)(3) and (d) if TNT proves “that the violation resulted from unpreventable employee misconduct.” *Angel Bros.*, 18 F.4th at 832. TNT must prove, for each violation, that it: “1) ha[d] established work rules designed to prevent the violation, 2) ha[d] adequately communicated these rules to its employees, 3) ha[d] taken steps to discover violations, and 4) ha[d] effectively enforced the rules when violations have been discovered.” *Angel Bros.*, 18 F.4th at 831 (quoting *Yates*, 459 F.3d at 609 n.7). Failure to establish any one element defeats the defense. *See, e.g., Id.* at 833. TNT’s burden is a high one because employers have a “heightened duty to ensure the proper conduct of [supervisory] personnel,” and Benson’s participation in the violative conduct “is strong evidence that implementation of [the safety] policy was lax.” *Floyd*, 576 F.2d at 77. Here, substantial evidence supports the Commission’s determination that TNT did not establish the defense because TNT did not have a work rule designed prevent violations of § 1926.1407(b)(3), and with respect to both §§ 1926.1407(b)(3) and (d),

withheld evidence regarding the efficacy of its safety program because the Secretary had not affirmatively challenged it. *ComTran*, 722 F.3d at 1318 n.12. TNT has made no similar assertion here.

did not reasonably monitor employees' compliance with power line safety rules or effectively enforce those rules when violations were discovered.¹⁰ Vol.7(78) at 6-13.

First, substantial evidence supports the Commission's determination that TNT did not have a work rule designed to prevent violations of § 1926.1407(b)(3). Vol.7(78) at 6-8. "[A] work rule is an employer directive that requires or prescribes certain conduct," and to be adequate, must "specifically match the violation at issue." *Southern Hens*, 930 F.3d at 678 (citation and internal quotation marks omitted). In section 13 of TNT's Safety Operating Procedures, TNT had rules addressing "Electrical Hazards and Warnings (1926.1411)" that shared "some similarities with § 1926.1407," but did not contain rules to match § 1926.1407(b)(3)'s express mandate that an employer implement at least one of the five-listed measures to prevent encroachment on an energized power line during a disassembly process. Vol.7(78) at 7. TNT's rules stated that, when "any part of the equipment, load line or load could get closer than 20 feet to a power line," the employer must deenergize and ground the line, maintain a 20-foot clearance distance, or maintain the minimum distance

¹⁰ TNT's failure to establish the other three elements of the defense renders it irrelevant, but TNT is wrong in claiming that the Commission's determination that TNT adequately communicated its work rules related to § 1926.1407(d) based on evidence that is also germane to communication of rules related to § 1926.1407(b)(3) means that TNT adequately communicated work rules related to § 1926.1407(b)(3). *See* Br. 46-47; Vol.7(78) at 9-10. Determining whether TNT adequately communicated work rules related to § 1926.1407(b)(3) would require consideration of evidence that was not relevant to TNT's communication of rules related to § 1926.1407(d), such as the evidence indicating that Benson did not understand the requirements of § 1926.1407(b)(3). *See* Vol.7(75) at 29-30.

permitted for a power line of that voltage, but, unlike §§ 1926.1407(a)(2) and (a)(3), TNT's rules did not require the use of an encroachment precaution listed in § 1926.1407(b)(3) if the power line is not deenergized. *See* Vol.4(R-2) at TNT000132.

TNT's rules later stated that a spotter should be designated to monitor the distance from a power line "if necessary," but did not "identify when a spotter is 'necessary' or otherwise required," Vol.7(78) at 7-8, and did not mention any of the four other options for compliance with § 1926.1407(b)(3). *Id.* at 8. Furthermore, TNT rules "reference[d] a different OSHA provision," § 1926.1411, that applies only to equipment *travel* under or near power lines. Vol.7(78) at 7 n.8.¹¹ Accordingly, TNT's rules were insufficient to prevent violations of § 1926.1407(b)(3).¹²

¹¹ The Commission indicated that this fact took a secondary role in its determination that TNT's work rules were inadequate to prevent violations of § 1926.1407(b)(3), but to be sure, it is significant that the rules that TNT claims to be designed to prevent violations of § 1916.1407(b)(3) reference a section of the Cranes Standard that would not be applicable to assembly/disassembly work. The equipment travel requirements in § 1926.1411 are substantively distinct from the requirements of § 1926.1407; for example, unlike § 1926.1407, § 1926.1411 does not require dedicated spotters to "[b]e equipped with a visual aid to assist in identifying the minimum clearance distance." *Compare* 29 C.F.R. § 1926.1407(b)(3)(i)(A)-(D) with § 1926.1411(b)(4).

¹² TNT also points to its general rules requiring crane operators to read and implement "the JSA," perform tasks in safe and proper manner, and take responsibility for the safe operation of equipment, Br. 46 (citing Vol.4(R-1) at TNT000125), but makes no argument as to how they relate to the Commission's determination that TNT did not have sufficient rules to prevent violations of § 1926.1407(b)(3). To be sure, those rules are irrelevant, as they are not designed to prevent violations of § 1926.1407 and are too general and ambiguous to reasonably prevent employees from violating § 1926.1407(b)(3). *See Southern Hens*, 930 F.3d at 678; *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020-21 (No. 94-200, 1997), *aff'd*, 158 F.3d 583 (5th Cir. 1998) (unpublished) (general instruction insufficient

TNT claims that, because its rules stated that “[f]or lines rated 50kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet,” and later stated that “[w]hen moving cranes around electrical equipment a spotter must be in place to assist Operator or have a back up alarm that is audible above the surrounding noise level,” the rules required employees to either use a spotter or a back up alarm “when operating a crane near lines rated 50kV or below.” Br. 45-46; Vol.4(R-2) at TNT000132. That reading, which TNT did not argue to the Commission, *see* Vol.7(76) at 14-15, cannot be squared with the text of TNT’s rules; the first sentence establishes a minimum clearance distance for work near power lines of a certain voltage, while the second sentence states that a spotter or back up alarm must be used “when moving cranes around electrical equipment.” There is no support for TNT’s claim that the former sentence interacts with the latter, or that the sentence concerning “moving cranes around electrical equipment” is relevant to the processes of assembling and disassembling cranes near power lines.

Moreover, even accepting TNT’s flawed reading of its rules, it does not cure the critical problem that the Commission identified – that, unlike § 1926.1407, which requires employers to implement at least one measure listed in § 1926.1407(b)(3) whenever part of equipment, load line, or load could come closer than 20 feet to the power line during an assembly or disassembly process (if using Option 2 to comply

because it was not modeled on the applicable standard and gave “employees too much discretion ... to be effective”).

with § 1926.1407(a)) or closer than the Table A minimum clearance distance (if using Option 3 to comply with § 1926.1407(a)), *see supra* p. 7, TNT's rules do not clearly establish "when a spotter is 'necessary' or otherwise required." Vol.7(78) at 8. Under TNT's new reading, its rules would vaguely require the use of a spotter (or back up alarm) when a crane is "moving ... around electrical equipment," which is no substitute for § 1926.1407's clear criteria for when a § 1926.1407(b)(3) measure must be used.

Additionally, a work rule offering employees a choice between using a spotter or a "back up alarm" would not prevent violations of § 1926.1407(b)(3) because a "back up alarm" is not one of the measures listed in § 1926.1407(b)(3). The standard permits employers to use "[a] proximity alarm," 29 C.F.R. § 1926.1407(b)(3)(ii), but there is no suggestion in TNT's rules or elsewhere in the record that the term "back up alarm" refers to a proximity alarm, *i.e.*, "a device that provides a warning of proximity to a power line and that has been listed, labeled, or accepted by a Nationally Recognized Testing Laboratory [(NRTL)] in accordance with 29 CFR 1910.7." 29 C.F.R. § 1926.1401 (defining "proximity alarm"). The Commission thus correctly found that TNT's rules did not mention any options for complying with § 1926.1407(b)(3) other than the use of a spotter.¹³ Vol.7(78) at 8.

¹³ Even assuming *arguendo* that "back up alarm" referred to a proximity alarm, TNT employees would still have violated § 1926.1407(b)(3) if they used a proximity alarm but none of the other four measures listed in the standard; as OSHA's enforcement directive explained, "employers [could] not rely solely on proximity alarms to comply

Also supported by substantial evidence is the Commission’s determination that TNT did not adequately monitor employee compliance with its power line safety rules. Vol.7(78) at 8 n.9, 10-12; *see Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999) (employers must make “a diligent effort to discover ... violations of safety rules by employees”). TNT claimed that it monitored employee compliance with safety rules by “conduct[ing] surprise and planned audits of various worksites,” Vol.7(78) at 10, but admitted that it did not audit the Georgetown worksite and did not offer evidence indicating that it used its audit program to monitor employee compliance with its power line safety rules at other remote worksites.

The Commission explained that TNT provided “insufficient evidence” regarding the frequency of its audits to find them sufficient for monitoring employee compliance with safety rules. Vol.7(78) at 11. Indeed, TNT management could not articulate how often audits occurred. *See* Tr. 416-18 (Pierce testifying that there was “no set schedule” for when and where TNT’s safety audits occurred and expressing inability to estimate on how often audits were conducted).

TNT also did not provide evidence that it used the audit program to monitor compliance with its power line safety rules at remote worksites like the Georgetown worksite. Vol.7(78) at 11; *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000), *aff’d*, 277 F.3d 1374 (5th Cir. 2001) (monitoring insufficient where no evidence

with the requirements of the cranes standard” because no proximity alarms met NRTL requirements. Vol.4(R-34) at TNT000595.

showed that the employer monitored employee compliance with the rules pertaining to the specific conduct at issue in the citation during site visits). TNT produced four sample inspection forms, Vol.4(R-49), but “none concerned overhead power lines and the record does not show whether any of those audits occurred at a remote worksite like the one at issue here.” Vol.7(78) at 11.

Moreover, the Commission found it unreasonable that TNT declined to audit or otherwise oversee the crew’s work at the Georgetown worksite given the conditions and absence of a formal supervisor at the worksite.¹⁴ Vol.7(78) at 11. Rainy weather delayed TNT’s antenna work at the Georgetown worksite, Tr. 313, 390-91, and the resulting soggy ground conditions complicated the disassembly process on May 15, 2016. *See, e.g.*, Tr. 315-16 (Benson had to “rig down differently because of the weather and what it had done” and had to look down at the crane’s level while lowering the boom “to make sure I wasn’t sinking”). The Commission reasonably found it “troubling” that TNT did not attempt “to verify that the crew was working safely” under those conditions. Vol.7(78) at 11. Taken all together, the Commission’s determination that TNT did not establish that it reasonably monitored employee compliance with its power line safety rules is well-reasoned and supported by the record.

¹⁴ TNT argued to the ALJ that Benson was not a supervisor, but the ALJ determined that Benson had supervisory status over the other crew members at the Georgetown worksite, Vol.7(69) at 14-16, and TNT did not challenge that determination to the Commission.

TNT's claim that the Commission "ignored" that TNT "deploys branch managers, project managers, and safety professionals to conduct surprise and planned audits of various worksites," Br. 47, overlooks that the Commission quoted that very language word-for-word, Vol.7(78) at 10, and then discussed the inadequacy of the evidence regarding TNT's audit program. *Id.* at 11. Also unmoving is TNT's claim that declining to audit the Georgetown worksite did not *alone* render its audit program deficient, Br. 48, as the Commission made no such determination; rather, the Commission reasonably determined that TNT's failure to audit the Georgetown worksite combined with the insufficient evidence regarding the frequency of audits and the lack of evidence indicating that TNT used audits to monitor compliance with power line safety rules at remote worksites precluded finding that TNT sufficiently monitored employee compliance with power line safety rules. Vol.7(78) at 10-12.

Lastly, substantial evidence supports the Commission's determination that TNT did not prove that it effectively enforced its power line safety rules when it discovered violations. *See* Vol.7(78) at 12-13. To establish this element, the employer must present evidence of having a disciplinary program that was effectively administered when the work rule violations occurred," *GEM Indus., Inc.*, No. 93-1122, 1996 WL 710982, *3 (OSHRC Dec. 6, 1996), including evidence that it "effectively ... enforced the specific rule or rules that are at issue." *Sw. Bell Tele.*, 19 BNA OSHC at 1099 n.4. TNT provided a sample of eight disciplinary actions taken under its program, including its termination of Benson after the May 15, 2016 violations,

Vol.4(R-27, R-29); *see* Tr. 436-38, but provided no evidence “that it ever previously disciplined an employee for violating its power line safety rules.” Vol.7(78) at 12.

Given that TNT is a large employer, the Commission found it unreasonable to assume that no violations of power line safety rules ever occurred prior to the cited violations. *Id.* (citing *Angel Bros.*, 18 F.4th at 832) (effective enforcement not established where large employer performed many excavations but had “only documented two instances of disciplining employees for rules violations,” both of which “came after OSHA inspectors uncovered the violations”). Additionally, the Commission rightly identified that Benson’s participation in the violative conduct is strong evidence that TNT’s enforcement of power line safety rules was lax. Vol.7(78) at 12 (citing cases, *e.g.*, *Floyd*, 576 F.2d at 77). Taken together, substantial evidence supports the Commission’s determination that TNT did not effectively enforce violations of power line safety standards.

TNT repeatedly claims that it disciplines employees when they violate safety rules, Br. 15, 43, 44, but makes no substantive argument that the Commission erred in determining that TNT did not prove that it effectively enforced its power line safety rules. Accordingly, not only is the Commission’s determination supported by substantial evidence, but TNT has abandoned the issue. *See U.S. v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) (issue not “adequately presented” and therefore waived where it was only “mention[ed] it in conclusory sentences” and “the body of the brief [did]

not discuss it in any depth”). The Commission’s determination that TNT failed to establish the unpreventable employee misconduct defense must be upheld.

CONCLUSION

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

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NOVEMBER 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of November, 2022, the foregoing Brief for Respondent the Secretary of Labor was served on all registered counsel through the Court's CM/ECF filing system.

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(g) and 5th Cir. R. 32.3)

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