UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, United States Department of Labor Complainant, v. IMPERIAL SUGAR COMPANY; IMPERIAL-SAVANNAH, L.P., and its successors Respondents.	)	OSHRC Docket No. 08-1104 OSHA Inspection No. 310988712
and		
Secretary of Labor, United States Department of Labor Complainant, v. IMPERIAL SUGAR COMPANY; IMPERIAL SAVANNAH, L.P.; IMPERIAL DISTRIBUTION, INC., and its successors Respondents, UFCW, LOCAL 1167-P, Authorized Employee Representative	)	OSHRC Docket Nos. 08-1195 08-0533 OSHA Inspection No. 311522858

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO CONSOLIDATE

COMES NOW Complainant, Secretary of Labor, United States Department of Labor, and files Complainant's Response to Respondents' Motion to Consolidate. In support thereof, Complainant states the following:

I. Introduction.

1. Docket Nos. 08-1195 and 08-0533 relate to OSHA Citations issued in conjunction with Region VI's inspection of Respondent Imperial Sugar Company's ("Imperial") Gramercy, Louisiana sugar refinery (the "Gramercy Case"). Docket No. 08-1104 is based upon the Citations issued following OSHA Region IV's inspection of Imperial's Port Wentworth, Georgia facility (the "Port Wentworth Case").

2. Commission Rule 2200.9 sets forth the standard for consolidation:

> Cases may be consolidated on the motion of any party, on the Judge's own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act requires.

3. Respondents' Motion to Consolidate ("Motion") asserted under 29 C.F.R. 2200.9 should in all things be denied for the following reasons:

a. There is insufficient commonality between the parties/facilities in these matters to warrant consolidation;

b. There is insufficient commonality of issues of law or fact to warrant consolidation; and

c. There are no other special circumstances as justice or the administration of the Act require.

II. Argument

A. There is insufficient commonality between the parties in these matters to warrant consolidation.

4. Although certain of the corporate entities named in the caption of the subject cases are common (Imperial Distribution, Inc. was cited in the Gramercy Case and not in the Port Wentworth matter), in point of fact Imperial's two refinery facilities located in Louisiana and

Georgia and the attendant Citations issued to each are quite distinct in several respects. For instance, while there unquestionably will be testimony at hearing or in oral deposition by select Imperial corporate officers who do not work at either facility, the overwhelming majority of witness testimony in both cases will come from Respondents' multiple managers and employees from the respective sites in Port Wentworth and Gramercy.

5. Also significant is the fact that, on the face of the record, there is no commonality amongst the attorneys and/or party representatives for either Complainant or Respondents. OSHA Region IV personnel investigated the Port Wentworth explosion and resulting fatalities and issued Citations, including a significant number of items and proposed penalties. Respondents contested the Citations and thereafter, the resulting litigation was docketed by the Commission as 08-1104, which is prosecuted entirely by the Atlanta Regional Solicitor's Office. Conversely, Region VI OSHA personnel investigated the Gramercy facility and ultimately issued two Citations to Respondents. Upon notice of contest of these Citations, the Commission docketed such cases as 08-0533 and 08-1195, which are prosecuted solely by the Dallas Regional Solicitor's Office. Apart from the handful of Imperial corporate officers whose presence or testimony may overlap in these matters, Respondents cannot demonstrate any meaningful identity between the parties and/or representatives in either of these separate proceedings.

6. Notable also is the fact the Gramercy facility has union representation, which has appeared and elected party status in Docket No. 08-0533.[1] There is not presently any local union presence at Imperial's Port Wentworth facility. Therefore, the union cannot make such an election in Docket No. 08-1104, the Port Wentworth litigation. Interestingly, no mention is

[1] Although the union can elect party status in Docket No. 08-1195, it has not to date done so.

made by Respondents as to whether, in context of the pending Motion, the Union was ever consulted, conferred with or even copied on the filing in order to determine whether the Union might be opposed to the proposed consolidation and/or whether consolidation might prejudice its rights or interests in such proceedings. Indeed, the Certificate of Service accompanying the Motion clearly indicates the Union was not served with the Motion.

7. In sum, Complainant contends that there is an insufficient commonality of parties to warrant consolidation under Rule 2200.9. To the contrary, these cases reflect the very essence of uncommon parties and militate in favor of maintaining separate proceedings.

B. There is insufficient commonality of issues of law or fact to warrant consolidation.

8. Respondents are correct insofar as the Citations issued in both cases include some items based upon the same regulatory standards. However, without question the facts relating to specific items are unique in each instance. For instance, the specific area(s) of each facility relating to Citation items are different, the number and identity of exposed employees is different, the equipment, machinery, and systems at the Port Wentworth and Gramercy locations vary and, perhaps most significant, the supporting evidence (i.e., testimonial, documentary, photographic and/or other materials) is considerably different in each case. And not only is the qualitative difference in the foregoing compelling, but the shear quantity of such evidence likewise demands separate proceedings to avoid confusion, unnecessary delay, and potential prejudice to the parties as they present evidence unique to each case.

9. For example, OSHA's inspection at the Gramercy facility resulted in a large number of photographs which, by either the articles depicted and/or their relationship to a particular Citation item, have absolutely nothing to do with the Port Wentworth inspection.

However, while OSHA inspectors took hundreds of photographs of specific conditions at the Port Wentworth facility, major portions of that facility were destroyed by the explosions and fires on February 7, 2008. Thus, Complainant anticipates that numerous fact witnesses, including hourly and management employees who worked at Port Wentworth, may be called to testify regarding the nature of the working conditions as they existed before the catastrophe. Admittedly, certain questions of law will be uniformly addressed and consistently applied in both cases because of judicial review by the same administrative law judge (e.g. whether Respondents willfully violated the Act as alleged in multiple items in each Citation). Nonetheless, the underlying facts that will be introduced by the prosecution and/or defense as to whether Respondents were indifferent or consciously disregarded the Act will differ greatly in scope, nature, and number with respect to each facility. For example, the facts related to the Willful Citations at the facilities are different given that Respondents allegedly allowed violations at the Gramercy facility to continue unabated after the Port Wentworth explosion.

10. The same also hold true for the serious violations issued in each case. A close review of the subject Citations confirms that there are many differently cited standards; hence, there will be a significant divergence of supporting fact witnesses and/or accompanying evidence that will be relied upon by the parties in these proceedings. For example, the Port Wentworth Citation alleges 51 Serious violations ranging from missing safety latches on hoist hooks, fall and trip hazards and lead paint exposure. The Gramercy case involved 49 Serious items with certain allegations addressing unguarded machines, Respondents' failure to conduct hazard assessments, and lack of personal protective equipment. Clearly then, there is little commonality of factual and/or legal issues in regards to many of the Serious items in each case.

11. From a geographical and logistical perspective, the cases also should be kept separate. Should this Court order that these matters be consolidated, many legitimate logistical concerns will almost certainly arise, including, but not limited to, the length of hearing, the location of the hearing, the unwieldy number and order of witnesses, problematic evidentiary questions of relevance and admissibility, and post-hearing issues related to transcripts, briefing, and possible appeal.

12. Commission Rule 2200.60 provides for a hearing location "that involves as little inconvenience and expense to the parties as is practicable." If a single hearing for both cases is ordered to take place, it necessarily follows that a great number of persons, both governmental and Imperial personnel residing in the Gramercy and Port Wentworth areas, will be significantly burdened and inconvenienced as to time, travel and expense to attend or otherwise participate in the hearing. A single hearing will effectively preclude Complainant from presenting eye witness employee testimony in each of the cases and is contrary to Commission precedent. *See* Bethlehem Steel Corp., 6 OSHC (BNA) 1912-13 (No. 77-2876, 1978) (hearing must be held as close to site of alleged violations as possible; location 50 miles away deemed too far). Further, given the distance between Gramercy, Louisiana and Port Wentworth, Georgia is approximately 690 miles, there is no city where one hearing can be held where Complainant and/or Respondents can subpoena witnesses to testify and this Court can legally compel their appearance pursuant to Rule 2200.57 and Fed. R. Civ. P. 45. Complainant respectfully submits that little will be gained by such a consolidated approach, significant complications will necessarily arise, and prejudice will result. Instead, both logic and judicial economy suggest that two separate hearings occur in sequential order (i.e., the Port Wentworth case followed immediately or soon thereafter by the Gramercy case) at locations central to each matter.

13. For the foregoing reasons, Complainant submits that there does not exist a commonality of fact or law issues to justify consolidation of these cases.

C. There are no other special circumstances as justice or the administration of the Act require.

14. Respondents cite several cases in which the Commission did determine that, for reasons particular to each matter, consolidation was appropriate under the applicable rule. Nevertheless, Complainant respectfully submits that these cases bear no meaningful resemblance to the present cases in character, content, or scope.

15. Here, Complainant contends that the Port Wentworth and Gramercy cases are unique, entirely independent in nature, and that due regard must be given to case-specific distinctions including, but not limited to, the following: (1) the geographical and managerial separateness of the Port Wentworth and Gramercy locations; (2) the complexity of the standards and issues involved coupled with anticipated supporting facts for each; (3) the amount of proposed penalties in each case; (4) the distinct differences in the identity and number of fact witnesses for each case; (4) the breadth of documentary evidence that will be involved for each case; (5) the diverse legal representation for both Complainant and Respondents in each case; (6) the appearance as a party by the local union in only one matter relating to the Gramercy case; (7) the significant likelihood that these matters will, in fact, proceed to hearing on the merits; (8) the scheduling and location of oral discovery to be conducted in these matters; and (9) the unavoidable impact on and probable prejudice to each party (i.e., availability of fact witnesses, financial, time, travel, etc.) of a single hearing for both cases.

16. Further, although Respondents state in conclusory fashion that they will be "prejudiced" if the matters are not consolidated, Respondents fail to state with any degree of

particularity how and/or in what manner they will be prejudiced. In contrast, Complainant has set forth how it will be prejudiced by consolidation. Complainant contends that in light of the enumerated concerns set forth herein, the parties would be disproportionately prejudiced and valuable resources needlessly wasted if the cases were consolidated.

17. Consequently, in lieu of formal, Court-ordered consolidation under Rule 2200.9, Complainant submits that based upon the limited facial similarities between the two cases, more informal coordination and cooperation is favored and preferred. For example, oral and/or written discovery in these matters is quite likely to be time consuming and will generate a significant amount of documents, time investment by counsel for each party, a large number of depositions and potential disputes along the way. It is quite unnecessary for both parties' counsel and representatives in the Gramercy case to be concerned with matters relating solely to the Port Wentworth case, and vice versa. Rather, the parties can by limited written agreement and/or under the direction of the Court specifically identify and depose those select individuals who by position or status will appear in both cases, e.g., some Imperial corporate personnel, expert witnesses, certain OSHA personnel, etc. The same agreements would also allow counsel for each party to determine when and/or how to share in the fruits of written discovery.

III. Conclusion

18. Because there do not exist within the spirit and meaning of Rule 2200.9 common parties, common questions of law or fact, or such other circumstances as justice or the administration of the Act requires, Complainant contends that Respondents' Motion for Consolidation is wholly without merit and that it should in all be denied.

Respectfully Submitted,

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Docket No. 08-1104

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Docket Nos. 08-0533 and 08-1195

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2009, a true and correct copy of the foregoing *Complainant's Response to Respondents' Motion to Consolidate* was served upon the attorney of record, all parties or party representatives in the above entitled and numbered cause via regular, first class mail and or via email in accordance with applicable rules of procedure and by order of Administrative Law Judge Covette Rooney, to:

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ORDER ON RESPONDENTS' MOTION TO CONSOLIDATE

The Court, having considered Respondents' Motion to Consolidate ("Motion"), Complainant's Response thereto, and all papers and records on file in each of the above-styled matters, is of the opinion that Respondents' Motion is not well-taken and should in all things be DENIED.

It is therefore, ORDERED that OSHRC Docket No. 08-1104 shall remain separately docketed from OSHRC Docket Nos. 08-0533 and 08-1195. This Order does not prevent or preclude the parties in either case from reaching agreements to participate in, or otherwise share in matters of written and/or oral discovery.

Signed on this _____ day of _____, 2009.

_____
Administrative Law Judge
Covette Rooney