UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UNITED PARCEL SERVICE, INC., Respondent, and SAMUEL J. BUCALO, Affected Employee.	OSHRC Docket No. 05-1115

OSHRC-RECEIVED 2007 AUG 31 P 4: 0 OFFICE OF EXECUTIVE SECRETARY

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* SUBMISSION IN SUPPORT OF THE RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW AND FOR LEAVE TO PARTICIPATE AS AN *AMICUS CURIAE* SHOULD THAT PETITION BE GRANTED

On June 6, 2005, the Secretary of Labor (the "Secretary") issued a citation to United Parcel Service ("UPS") based on a new and radically different interpretation of 29 C.F.R. § 1910.37(a)(3). The upshot was that UPS—the world's largest package delivery company and a cornerstone of the U.S. economy—could not place a package on a platform, or stop a cart that carries heavy and irregularly shaped packages (the "irregular train") for loading or unloading, even for an instant, because any such action that reduced an area's width below 28 inches would create an "obstruction" in violation of the standard.

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Such an interpretation of the standard was unheard of until now, and would severely impair business operations in the United States. Yet the Secretary's interpretation was upheld by Administrative Law Judge Ken Welsch on August 14, 2007.

On August 20, 2007, Respondent United Parcel Service, Inc. ("UPS" or "Respondent") filed a petition for discretionary review of Judge Welsch's decision. Under 29 C.F.R. § 2200.24, the Chamber of Commerce of the United States of America ("Chamber") now moves for leave to file the attached Submission in Support of Respondent's Petition for Discretionary Review ("Submission") and for leave to participate as an *amicus curiae* should UPS's petition be granted.

The Chamber Has A Compelling Interest In This Case And Its Participation Would Assist the Commission In Assessing The Impact Of Judge Welsch's Decision On U.S. Businesses

The Chamber is the world's largest business federation with an underlying membership of more than three million businesses of all sizes, sectors, and regions. Its members include businesses of all sizes and sectors, from large Fortune 500 companies to home-based, one-person operations, and 96% of the Chamber's membership encompasses businesses with fewer than 100 employees. Moreover, many associations and local chambers of commerce are also members. Simply put, the Chamber serves as the voice of American businesses. An integral part of the Chamber's mission is to protect its members from unwarranted, overbroad interpretations of federal statutes and regulations. To that end, the Chamber frequently participates as an *amicus curiae* before federal tribunals in litigation that has a significant negative impact upon American business.

The impact of Judge Welsch's decision on the Chamber's members would be significantly detrimental. When designing and constructing their hallways and passageways, American businesses logically refer to the section of the egress regulations entitled "Design and construction requirements for exit routes," 29 C.F.R. § 1910.36. Specifically, § 1910.36(g)(2) states that an exit access—illustrated as a hallway in § 1910.34—must be 28 inches wide at all points. And once these hallways are built, American businesses rightly refer to the section of the egress regulations entitled "Maintenance, safeguards, and operational features for exit routes," § 1910.37, to determine how to maintain these exit routes: "free and unobstructed." § 1910.37(a)(3). The maintenance rule makes no mention of keeping 28 inches at all times.

Before this decision, American businesses knew what this rule meant—that once built with at least 28 inches of width, hallways and passageways need only be maintained free and unobstructed. Judge Welsch's decision, however, would not only require that every hallway and passageway *always* have 28 inches of object-free width, but also that *every place in the building* must be kept object-free to have 28 inches of width, including platforms, offices, and cubicles. There is simply no possible way the Chamber's members could comply with this reason-defying mandate: from janitorial carts to food carts, from package-sorting to shelf-stocking, from plumbers to painters, American businesses understand that their employees occasionally, by necessity, may not be immediately next to a clear 28" of width. And yet, these employees are at no greater risk of injury from fire than anyone else, because they can quickly walk past the cart, package, or stepladder. Judge Welsch's formalistic decision considers none of these workplace practicalities.

Because Judge Welsch's decision may have such a profound impact upon each and every American business, the Chamber has a compelling interest in seeing that decision reversed, and the Chamber is uniquely well-suited to inform the Commission of what will happen to American businesses—and the U.S. economy—if that decision is upheld.

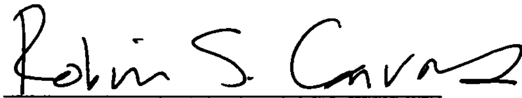
CONCLUSION

The Chamber respectfully requests that:

- It be granted leave to file the attached Submission.
- If the Commission grants UPS's petition for discretionary review, the Chamber be granted leave to participate as an *amicus curiae*.

Respectfully submitted,

Dated: August 31, 2007



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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UNITED PARCEL SERVICE, INC., Respondent, and SAMUEL J. BUCALO, Affected Employee.	OSHRC Docket No. 05-1115

SUBMISSION OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW

Given the finite number of hours in the workday, each and every American business must accomplish enough profitable tasks within those hours in order to remain viable. As a result, American businesses must operate efficiently. A carpenter repairing a ceiling in an office-building hallway would not place his toolbox around the corner. A retail-store clerk does not place her shelf-stocking cart many feet away, outside of the aisle. And a UPS package-sorter, when wading though a sea of packages going to every conceivable location in the country, cannot stop each time he encounters a damaged or mislabeled package to walk it over to a designated location—he must simply set it aside. This efficiency is what American businesses require in order to remain viable.

The Secretary of Labor (the "Secretary"), however, seeks to make American businesses less efficient by embracing a rigid and impracticable interpretation of her

egress regulations. On June 6, 2005, the Secretary of Labor (the "Secretary") issued a citation to United Parcel Service ("UPS") based on a new and radically different interpretation of 29 C.F.R § 1910.37(a)(3); this interpretation was upheld by Administrative Law Judge Ken Welsch on August 14, 2007.

The result of the decision adopting this new and radical interpretation is that UPS, and every other American employer, cannot allow the placement of any object in a hallway or passageway—no matter how fleeting—if the placement would reduce the width to less than 28 inches. So much for mail carts, or any other intra-building delivery system. But that is not all. Because the decision refused to make the distinction that a person's work area is not part of the exit route, the decision would apply not just to hallways, but to *every location in the building*. Thus, the box of files on the floor next to the cubicle occupant, the hinged fold-down bartop in front of the bartender, and the two shopping carts abreast in the grocery aisle would all violate this new draconian interpretation. Such an interpretation of the standard, which would have absolutely no measurable or appreciable effect on employee safety, and would be impossible to follow or enforce, would be fatal to many businesses—if not the economy.

REASONS FOR GRANTING REVIEW

In its petition for discretionary review filed on August 20, UPS highlighted many of the wrong turns that led Judge Welsch to his unprecedented and erroneous conclusion. The Chamber of Commerce of the United States of America ("Chamber") believes that three errors in particular warrant this Commission's review.

1. Judge Welsch held that the rigid 28" requirement contained in 29 C.F.R. § 1910.36(g)(2) (a *design* standard) also applies to 29 C.F.R. § 1910.37(a)(3) (a

maintenance standard), even though the latter contains *no* specific width requirement. Not only is it unreasonable to read the requirements of a *design* standard into a *maintenance* standard, but implying rigid requirements throughout Subpart E contradicts the Secretary's avowed purpose of using performance-oriented standards in the egress regulations whenever possible. *See* 67 Fed. Reg. 67,949 (2002). Judge Welsch's interpretation conflicts with the plain language and purpose of Subpart E and should be reversed.

2. Judge Welsch essentially ignored expert testimony on the meaning of the Life Safety Code. To our knowledge, this is the first decision to address 29 C.F.R. § 1910.35, which provides that an employer who complies with the Life Safety Code is deemed to be in compliance with OSHA's egress regulations. The Secretary adopted Section 1910.35 so that employers could rely on Life Safety Code experts in designing and operating their businesses without fear that they would be second-guessed by overzealous OSHA compliance officers. The Life Safety Code itself is an intricate system of rules and standards that properly relies on context-specific judgments about how to balance employee safety with business necessity. Judge Welsch, however, dismissed out of hand the testimony of UPS's Life Safety Code expert and even ignored the Secretary's expert because, in his view, "the Code is not complicated." Op. at 13. Judge Welsch's dismissive view of expert opinion on the Life Safety Code puts in jeopardy every business that has relied on the able advice of Life Safety Code experts to design and structure its operations.

3. Judge Welsch's decision, creating a strict, no-exception 28-inch rule in every hallway, passageway, workspace, office, or cubicle is *de facto* rulemaking without

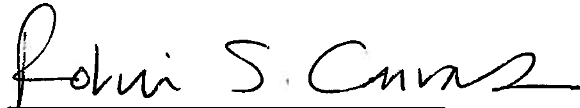
notice or comment. Indeed, if the Chamber had been on notice of such a rule, it likely would have strongly objected. Simply put, its members would not be able to comply. OSHA need not look far to find violations: the maid's cart in the hotel hallway; the shopping carts at the grocery store; and, as here, the box placed on the ground momentarily next to the employee, whether she is a computer programmer, paralegal, or UPS sorter, while other pressing matters demand her attention. Regulations should be written so that compliance is at least possible; Judge Welsch's decision makes compliance impossible for American businesses.

CONCLUSION

The Commission should grant UPS's petition for discretionary review.

Respectfully submitted,

Dated: August 31, 2007



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RULE 35 DISCLOSURE STATEMENT

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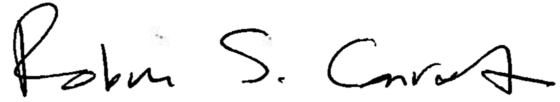

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CERTIFICATE OF SERVICE

I certify that on August 31, 2007, I caused a copy of the foregoing Motion for Leave to File an *Amicus Curiae* Submission in Support of the Respondent's Petition for Discretionary Review and for Leave to Participate as an *Amicus Curiae* Should That Petition be Granted to be sent via facsimile to counsel for Complainant and Affected Employee Samuel J. Bucalo and counsel for Respondent as follows:

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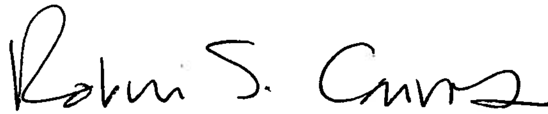

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