

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
(THIRTIETH REGION)**

CATERPILLAR INC.,

Respondent,

and

Case No. 30-CA-064314

**UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC,**

Charging Party.

**BRIEF IN SUPPORT OF CHARGING PARTY'S
EXCEPTIONS TO THE DECISION AND ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

The Recommended Order and Notice of the Administrative Law Judge (“ALJ”) herein fails to provide a clear direct order that the Respondent grant Charging Party Union access to the Respondent’s South Milwaukee, Wisconsin facility for a reasonable period at reasonable times to accomplish its investigation of the causes of a fatal industrial accident and ways to avoid future accidents, in direct contradiction to previous Board orders to remedying denials of access for safety inspections. Instead, the ALJ directs bargaining, citing inapposite case precedent involving access to individual medical records, not investigation of a work-site accident. The ALJ’s analysis supporting the Recommended Order is contrary to the evidence produced at hearing and the ALJ’s findings. The ALJ’s directive that the parties engage in bargaining could thwart the Union’s right to access and its ability to perform an investigation which has already been delayed for a full year.

Charging Party has also excepted to the ALJ’s identification of G.C. Exhibit 32 as the DVD produced to the Union on February 14, 2012. As set forth in the parties’ Joint Motion To Reopen The Record and Stipulation, after the closing of the record all parties had the opportunity to review G.C. Exhibit 32 and discovered “G.C. Exhibit 32 had not been submitted to the Union prior to being received as G.C. Exhibit 32.” (Stipulation, ¶ 2).

Charging Party also renews its position that the balancing test set forth in Holyoke Water Power Co., 273 NLRB 1369 (1985) is not properly applied in cases such as this. The Board should return to the Winona Industries, Inc. 257 NLRB 695 (1981) standard when evaluating denial of access to a bargaining representative.

I. THE ADMINISTRATIVE LAW JUDGE’S RECOMMENDED ORDER AND NOTICE SHOULD BE AMENDED TO CLEARLY DIRECT RESPONDENT TO GRANT THE UNION ACCESS TO THE SOUTH MILWAUKEE, WISCONSIN FACILITY; EXCEPTIONS 5, 6 AND 7 SHOULD BE GRANTED.

A. Case Law Supports A Direct Order To Grant Access.

A series of NLRB decisions and orders over the course of more than twenty years have confirmed that non-employee union representatives must be provided with reasonable access to investigate health and safety conditions of the employees it represents. “Where it is found that responsible representation of employees can be achieved only by the union’s having access to the employer’s premises, the employer’s property rights must yield to the extent necessary to achieve this end.” Holyoke Water Power Co., 273 NLRB 1369, 1370 (1985). “The information, regarding safety conditions which the union seeks to obtain from direct observation of a plant’s premises, is presumptively relevant and necessary to its role as bargaining unit employees’ exclusive representative.” Washington Beef, Inc., 328 NLRB 612 (1999), citing C.C.E., Inc., 318 NLRB 977, 978 (1995). See also, Hercules, Inc., 281 NLRB 961 (1986); ASARCO, Inc., 276 NLRB 1367 (1985) (finding “access to an accident site by an experienced investigator is fundamental to an accurate authoritative and comprehensive report on an accident.”).

In each of the above-cited cases, the NLRB found, as the ALJ did here, that “the union’s right to access the facility outweighed the employer’s property interests.” (Decision, p. 8).

In weighing the Union’s interests, I note that the Board heavily favors access rights, where such rights are being exercised by a union in order to promote a unit’s legitimate health and safety interests. The Union herein critically needed to enter the facility, in order to directly observe the manufacturing area where a fatality occurred. A conclusive finding on

causation would have permitted the Union to enter into an intelligent dialogue with Caterpillar regarding ways to enhance workplace safety, and could have ultimately prevented another senseless tragedy.

(Decision, p. 8).

Where, as here, the Board has found that the Union's interests and on-site access outweigh the employer's property interests, the remedial order has directed the employer to grant the Union access to the facility for a reasonable period at reasonable times. Thus, in Holyoke Water Power Co., 273 NLRB 1369, 1371 (1985), the Board ordered the respondent,

On request, grant access by an industrial hygienist designated by the union to the FD fan room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards.

In Hercules, Inc., 281 NLRB 961 (1986), the Board ordered the respondent,

Upon Local 271's request, grant access to its Parlin, New Jersey facility for reasonable periods and at reasonable times sufficient to allow Local 271's representatives to fully investigate industrial accidents, to conduct health and safety inspections and to conduct tests for determining the presence of toxic or hazardous fumes.

In ASARCO, Inc., 276 NLRB 1367, 1371, the Court adopted the ALJ's Recommended Order that,

Upon request grant access by an industrial hygienist designated by the union to the Young mine and Field accident site for a reasonable period and at a reasonable time sufficient to permit the hygienist to fully investigate the accident site and its approaches.

In Washington Beef, Inc., 328 NLRB 612 (1999), the Board adopted the ALJ's Order insofar as it provided the respondent "grant access to its Toppenish, Washington plant to a union official for a reasonable time in which to inspect plant safety conditions."

Even where non-employee union representatives seek access to an employer's facilities for investigative purposes unrelated to health and safety, the grant of access is

direct and unambiguous. Thus, in C.C.E., Inc., 318 NLRB 977 (1995), the Board granted access to union representatives notwithstanding the employer's articulated concerns about disclosure of proprietary and trade secret information by ordering,

On request of the union grant access to its Norwalk, Ohio facility for reasonable periods and at reasonable working and production times to allow union representatives to fully investigate, inspect and observe plant equipment and conditions and employees' operations and working conditions relevant to the representatives' duty to fulfill the union's bargaining obligation.

Similarly, an order directing that on request the Union Health & Safety Specialist be granted access should be entered in the present case as set forth in the attached draft notice which was filed with the Union's post-hearing brief as an Appendix.

B. The ALJ's Recommended Order And Notice Will Not Provide An Adequate Remedy.

The ALJ's Recommended Order in the present case provides for union access but does so only by using a double negative that the Respondent "cease and desist from a. failing and refusing to bargain in good faith with the union as the exclusive bargaining representative of employees in the unit described below by denying its request to access the facility, in order to conduct a health and safety inspection." While this language is standard in cases involving access for health and safety inspections, in each case the Order also provides a direct affirmative order that the Union Health & Safety expert be granted access for the inspection or investigation at issue.

In the Administrative Law Judge's Recommended Order, instead of the clear directive to grant the Union access to perform its investigation into the cause of the accident and the processes used to turn the crawler assembly, the affirmative order states rather,

Upon request bargain collectively in good faith with the union as the exclusive bargaining representative of the employees in the following appropriate unit concerning their request to access the facility to conduct a health and safety inspection, embody any resulting understanding and a signed agreement and thereafter comply with the terms of such agreement.

(Decision, p. 10). This order creates the very real possibility that the Respondent could continue to thwart the Union's request for access by simply not reaching an agreement through bargaining on the terms of that access. This result is avoided by the Board's standard orders in access cases which direct access while protecting the employer by limiting access to reasonable periods at reasonable times.

The Union's concern that the employer would not reach an agreement granting the Union's access is well founded. The record establishes a long exchange of correspondence between the Respondent and Union in which the Union described and explained its need for access in detail and responded to Respondent's assertions that access was not necessary (G.C. Exh. 3-19). Regardless of the Union's explanations, however, the Respondent refused to enter an agreement allowing the Union access. The exchange of correspondence occurred over a period of seven months and no less than twelve pieces of correspondence before any information was provided. Even then, the Respondent remained steadfast in denying the Union Health & Safety Specialist access to perform an investigation.

C. The Recommended Order And Notice Are Not Supported By The Evidence Or Case Law.

The ALJ's rationale for directing bargaining rather than immediate grant of access is flawed. The Decision states, "The parties shall bargain in good faith concerning appropriate safeguards which will duly protect Caterpillar's confidentiality

concern while also facilitating a comprehensive on-site safety survey.” (Decision p. 9) These considerations are not supported by the record or by the ALJ’s statement of facts. As the ALJ’s statement of facts indicate, the Respondent regularly allowed third parties to tour the facility including the production area to which the Union seeks access:

[Regional Manager] Bolhous acknowledged that Caterpillar conducts customer, employee and student tours at the facility. He recounted politicians and civic groups periodically visiting. He stated that neither the product line made at the facility, nor the underlying manufacturing procedures have changed significantly since Caterpillar purchased the facility from Bucyrus, and reported that the risks associated with outsiders entering the facilities have not changed a great deal over the years. He noted that the area where the fatality occurred is often viewed during tours.

(Decision, p. 6). It was on the basis of these facts that the ALJ concluded, “Caterpillar’s property interest is lessened to a degree by a considerable history of permitting non-employee visitors to access the facility (e.g., politicians, civic groups, high school students and some customers).” (Decision, pp. 8-9).

A review of Respondent’s Post-Hearing Brief to the ALJ establishes that Caterpillar never argued that it was justified in denying the Union access to its facility because it would disclose confidential information. Such an argument would be difficult to make given the ready access allowed by Caterpillar, as well as Bucyrus, for tours by high school students, customers and others. Instead, Caterpillar argued that it could rely on its property interest to deny access without establishing that it would be injured in any way by granting access. Caterpillar argued, “It is not incumbent upon Caterpillar to establish the existence of its property rights in the first instance, as long standing case law recognizes the existence of an employer’s legitimate interest in and right to

control its property.” (Resp. Post-Hearing Br., pp. 28-29). Caterpillar never argued that it barred access of non-employee union representatives because of confidentiality concerns. It acknowledged the access allowed to customers and high school students simply noting, “If Caterpillar has allowed politicians, student groups or customers to have limited and controlled access to its facility, the company has not thereby abdicated its property rights against access by others.” (Resp. Post-Hearing Br., p. 37). While brief testimony indicated some aspects of welding operations might be proprietary, Caterpillar did not argue it denied the Union Health & Safety expert access because of confidentiality concerns (TR335).

Caterpillar did insist that before providing the Union with access to a DVD and operation protocols, the Union enter into confidentiality agreements. Caterpillar’s insistence on confidentiality agreements caused significant delay in the Union receiving even the most basic written information, such as the applicable work protocols which the Union did not receive until March 20, 2012, the Tuesday before the unfair labor practice trial (TR 92). Respondent, however, did not require a confidentiality agreement when providing the same work protocols to the police or OSHA (G.C. Exh. 31, TR31, 223). The work protocol was also introduced into evidence at the NLRB hearing without a protective order (G.C. Exh. 25, TR31). Caterpillar’s inconsistent invocation of a need for confidentiality undercuts its legitimacy.

While the ALJ references a comprehensive on-site safety survey, the Union’s request for access was more limited. As Sharon Thompson explained when she arrived to investigate the fatal accident on September 9, 2011, her desire was to see the site of the accident, not other unrelated portions of the plant. “You can even blindfold me and

take me to the site,' I said, 'because I'm not interested in anything else you've got going on here.'" (TR212). In subsequent correspondence, the Union focused its request for access on viewing the operation and process of turning the crawler assembly and the variations in which the turning is accomplished.

The Union's safety and health expert needs to view the process of turning the crawler assembly while it is being performed and also needs to be able to talk to the witnesses to the accident at the site and have access to the materials used at that time to understand how the process occurred on September 8 so that he or she can recommend appropriate alterations in that process...

(G.C. Exh. 4)

Since the operation of rotating the crawler is on-going, there is no reason that the Union should be deprived of an opportunity to investigate the process...

To the best of our knowledge, there was no reenactment of the hitching process, nor an identification of what factors led to the accident. The Union also has not had an opportunity to view alternate processes used to turn the crawler mechanism so that standard safe practices can be identified and required.

(G.C. Exh. 6.).

The ALJ cites one case in support of his rationale for ordering bargaining, Roseburg Forest Products Co., 331 NLRB 999, 1003 (2000). The case is completely inapposite. It does not involve access of a non-employee union representative to investigate health and safety concerns but rather a union's access to medical records of an individual seeking accommodation under the Americans With Disabilities Act (ADA). The decision focuses on statutory protection of confidentiality under the ADA and the Equal Employment Opportunity Commission's interpretation and application of those statutory provisions specific to that case. These considerations have no relevance in

the present circumstance where individual medical records and statutory provisions for confidentiality are not at issue.

Notably, in directing bargaining concerning confidentiality precautions for the review of medical records, the Board was cognizant of the delay which was likely to result from its Order.

Under this approach, we recognize that if the respondent and the union are unable to reach agreement on the method of protecting their respective interests, the parties may be back before us again. If there is a question as to whether the parties have bargained in good faith, we shall make that determination. If need be, we shall balance the union's right to access to relevant information against the respondent's confidentiality concerns.

Id. at 1003. Here, the parties have presented evidence and the ALJ has already determined the balance of the employer's property interests against the Union's right to access and has determined that the balance tips in favor of Union access. Roseburg Forest Products is inapposite. The delay which will result from the ALJ's order to bargain is contrary to his finding that non-employee union representatives are entitled to access to investigate following the fatal accident on September 8, 2011.

The Board should grant Charging Party's Exceptions and revise the ALJ's Recommended Order and Notice to be consistent with all other access cases to order the Respondent, upon request, to grant the Union access to investigate industrial accidents, perform health and safety inspections and investigate the processes used to turn crawler assemblies and to provide notice that the Respondent will upon request grant access as provided in the order.

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT G.C. EXHIBIT 32 WAS THE DVD PROVIDED TO UNION REPRESENTATIVES PRIOR TO HEARING; EXCEPTIONS 1, 2 AND 4 SHOULD BE GRANTED.

At least twice in his decision, the ALJ refers to G.C. Exhibit 32 as the DVD which the Respondent provided to the Union prior to hearing on the unfair labor practice charge. Page 5 of the ALJ's Decision quotes from a letter sent by Caterpillar on February 14, 2012 enclosing two video recordings but then cites "see (G.C. Exh. 32)." On page 8 of the Decision, footnote 18, the ALJ observes "Caterpillar provided...DVD evidence.... For example the DVD (i.e., G.C. Exh. 32) is two-dimensional and limited to the angles, distance and duration that a non-expert film maker considered relevant..." The Charging Party does not take exception to the fact that G.C. Exhibit 32 is two-dimensional and limited to the angles and distance and duration of the non-expert filmmaker. The Charging Party also does not take exception that on February 14, 2012 a DVD was provided to the Union. G.C. Exhibit 32, however, was not the DVD provided to the Union. A Joint Motion To Reopen The Record was filed by General Counsel, the Respondent and the Charging Party: "For the limited purpose of receiving the parties' Stipulation of Facts, as stated herein, and Joint Exhibits 1 and 2." The ALJ on page 5, footnote 13, denies the motion. His rationale is limited to the reason he denied the motion that Joint Exhibits 1 and 2 be entered into the record stating, "Jt. Exhibits 1 and 2 are neither readable, when played on a standard DVD player, nor readable when played on standard computer applications (e.g., Windows Media Player and Quick Time Player)." (Decision, p. 5, fn. 13). The ALJ goes on to find that Joint Exhibits did not constitute newly-discovered evidence because the Union received the Joint Exhibits prior to hearing (Id.).

The Union takes exception to the ALJ's implicit denial of the motion to receive the parties' Stipulation of Facts which states in relevant part "G.C. Exhibit 32 had not been

previously submitted to the Union prior to it being received as G.C. Exhibit 32.” This stipulation of fact was newly discovered evidence as set forth in the preceding sentence of the stipulation: “At the time G.C. Exhibit 32 was received into the record, the recording on G.C. Exhibit 32 was not played for the Administrative Law Judge or the parties.” (Jt. Motion To Reopen The Record, ¶ 2). Thus, it was not until after the hearing when playing G.C. Exhibit 32 that it was discovered that the DVD presented as G.C. Exhibit 32 was not the video recording provided to the Union prior to hearing.

G.C. Exhibit 32 as explained by Counsel for the General Counsel “was provided to General Counsel pursuant to subpoena by the employer.” (TR295). The ALJ very appropriately asked whether Exhibit 32 was sent to the International or Local Union. Counsel for the General Counsel explained, “Your honor, I do not know because I have not viewed what the Union has received. They have a confidentiality agreement, so I don’t know. The Union at this time has not viewed what I have received pursuant to subpoena.” (TR296). Counsel for the ALJ asked counsel for Respondent, “And this was the DVD you provided to them, correct, that we’re talking about right now?” Counsel for the Respondent inaccurately replied, “yes, your honor.” (TR297) It was only after the hearing when the parties viewed G.C. Exhibit 32 that they discovered it was not the copy provided to the Union previously.

The DVD’s provided to the Union prior to the hearing were offered into evidence with the Joint Motion To Reopen The Record as Joint Exhibits 1 and 2. When the ALJ denied the parties’ Joint Motion To Reopen The Record, he indirectly acknowledged that G.C. Exhibit 32 is not the DVD provided to the Union since he found that Joint Exhibits 1 and 2 were the DVD’s provided to the Union before hearing and therefore

were not newly discovered evidence (Decision, p. 5, fn. 13). Whether or not Joint Exhibits 1 and 2 are accepted into the record, the stipulation indicating that G.C. Exhibit 32 was not provided to the Union prior to the hearing should have been accepted into the record by the ALJ since it was newly discovered evidence and does not require any special program to be understood. Regardless of whether or not Joint Exhibits 1 and 2, the DVD's initially provided to the Union are entered into the record, because of their formatting, there is no basis for identifying G.C. Exhibit 32 as the DVD presented to the Union when the parties have all stipulated that based on review of the DVD after hearing it is not the DVD provided to the Union prior to hearing. To find that it is, is a factual error.

III. THE BABCOCK AND WILCOX BALANCING TEST IS NOT PROPERLY APPLIED IN CASES INVOLVING ACCESS BY A BARGAINING REPRESENTATIVE; EXCEPTION 3 SHOULD BE GRANTED.

On page 8 of his Decision, the ALJ finds that “where a union seeks access to an employer’s plant, the Board employs a two-part balancing test, which balances the right of employees to be responsibly represented by their union, against the right of the employer to control its property and ensure its operations are unhindered. Holyoke Water Power Co., 273 NLRB 1369, 1370 (1985).” (Decision p. 8) Here, the Union’s need for access to the South Milwaukee facility to investigate the fatal accident on September 8, 2011 clearly takes precedence over the employer’s insubstantial property interest under the Holyoke standard.

The Union, however, takes exception to the application of the Holyoke balancing test to the present case. As the Union submitted in its post-hearing brief to the ALJ, it is appropriate to evaluate Caterpillar’s denial of access to the Union as any other request

for information by returning to the holding in Winona Industries, Inc., 257 NLRB 695, 697 (1981).

It is important to recognize that the rationale behind Holyoke is seriously flawed because it is based on case precedent, which is not applicable to the rights and obligations of an exclusive representative of employees. Where, as here, there is an established bargaining representative the appropriate standard for granting access is set forth in Winona Industries, Inc., 257 NLRB 695 (1981), which evaluates the request for access as it would for any other union request for information by assessing the relevance of the union's request and the hardship placed on the employer in responding to that request. Under Winona Industries, Inc. there is no question that Caterpillar's denial of access to Health and Safety Specialist Sharon Thompson violated its obligations under Section 8(a)(5) of the Act.

A. The Appropriate Standard For Evaluating The Union's Right And The Employer's Obligation To Provide Access To Its Facility Is That Applied To All Information Requests Of An Exclusive Bargaining Representative.

In Winona Industries, Inc., 257 NLRB 695 (1981), the employer refused access to an industrial hygienist of the union because OSHA had inspected the plant and members of the local unit had been present during the closing meeting with OSHA. The Board found a violation of the employer's duty to bargain noting:

It is well established that an employer is obligated by the statute to provide upon request, from the exclusive representative of its employees in a bargaining unit, information relevant to the representative's proper performance of its duty to represent such employees with respect to the terms and conditions of their employment.

Id. at 697. The Board approved the Administrative Law Judge's conclusion,

That by effectively denying the union's request for an in-plant inspection by an industrial hygienist designated by the union for investigation of health and safety conditions which was relevant to the union's discharge of its bargaining obligation, respondent refused to bargain in good faith and violated section 8(a)(5) and (1) of the Act.

Id. at 698.

While the Administrative Law Judge applied Winona Industries in reaching his decision in Holyoke Water Power Co., 273 NLRB 1369 (1985), the Board altered the applicable standard by applying wholly inapposite decision, NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). In Babcock the Supreme Court balanced property rights of an employer against the rights of access by organizers of a union that did not represent its employees. Holyoke's digression from the standard evaluation of requests for information by an exclusive bargaining representative has been criticized from its inception. The First Circuit, in enforcing the Board's order in Holyoke noted that its rationale was flawed:

Babcock & Wilcox and its progeny do not obviously govern this case. The balancing cases typically arise out of union requests for access posing a significant threat to the employer's rights. ...Clearly the potential for disruption is not as great where, as here, the union already represents the employees and seeks access only to study a possible threat to health and safety of its members.

NLRB v. Holyoke Water Power Co., 778 F.2d 49, 52 (1st Cir. 1985). The First Circuit went on to note that the statutory rights involved in an organizing drive as in Babcock and the rights and obligations of an exclusive bargaining representative in Holyoke were derived from different parts of the Act.

Babcock...discusses the employer's duty to refrain from interfering with protected employee activities. That duty is imposed by section 8(a)(1) of the National Labor Relations Act. This case, by contrast, is based on the employer's affirmative duty to bargain under section 8(a)(5) and 8(d) of

that Act. Less weight may be due the employer's property rights when the employer is subject to a duty to bargain.

Id.

In her concurring opinion, in C.C.E., Inc. 318 NLRB 977 (1995), Board member Margaret Browning explained that where a union is the exclusive bargaining representative of employees, it is the employees' agent for bargaining and stands in the employees' shoes in its ability to engage in protected activity on the employer's premises.

In my view, however, the Holyoke standard is unduly restrictive of a union's right of access in circumstances where it already represents the employer's employees. I believe that, as the employees' exclusive representative for collective bargaining purposes, the union stands in the shoes of the employees because it is their agent for purpose of bargaining. Therefore, the union's right to enter an employer's premises can be limited only to the same extent that an employer may limit its employees' right to engage in section 7 activity on its premises.

C.C.E., Inc., 318 NLRB 977, 978 (1995).

Holyoke's reliance on Babcock is misplaced. The balancing test applied in Babcock was intended to address the access of non-employee organizers to the property of an employer for the purpose of soliciting an unorganized work force. This circumstance is not analogous to an exclusive bargaining representative's request for access to investigate the health and safety of its members, a paramount concern of an exclusive bargaining representative. Holyoke's flawed logic should be rejected and Caterpillar's denial of access to USW Health and Safety Specialist Sharon Thompson should be evaluated as any other request for relevant information under Winona Industries, Inc.

B. Under Winona Industries, Inc. Caterpillar's Denial Of Access To The USW Health And Safety Specialist Violated Section 8(a)(5) of the Act.

Under Winona Industries, Inc., as in other cases in which the exclusive bargaining representative of employees requests information, the initial inquiry is whether the requested information is "relevant to the representative's proper performance of its duty to represent such employees with respect to terms and conditions of their employment." 257 NLRB at 697. There is no question that an exclusive bargaining representative's request for information relating to employees' safety and health on the job is relevant. "Clearly health and safety data is relevant to a union's representation obligation." Holyoke Water Power Co., 273 NLRB 1369 (1985), citing Minnesota Mining & Mfg. Co., 261 NLRB 27, at 29 (1982). "In view of the work environment...the involved employees need a bargaining representative which has their interests, especially safety and health, at heart." Armco, Inc., 279 NLRB 1184, 1219 fn. 32 (1986). There is also no question investigation to determine the cause of a fatal accident and how future accidents could be prevented is relevant to the Union's role as exclusive bargaining representative. See, ASARCO, Inc., 276 NLRB at 1369 (1985) (finding that the access sought by the union for its hygienist after a fatal accident at a mine was "clearly relevant to the union's performance of its representative duties.").

The Union's right to relevant information does have limits but those limits do not involve abstract property interests Caterpillar relies on here. Rather, "under Winona the company was free to argue that allowing access would cause it undue hardship or inconvenience, or interfere with its business operations." NLRB v. Holyoke, 778 F.2d 49, 53 (1st Cir. 1985). Here, Caterpillar has not identified any undue hardship, inconvenience or interference with its business operations which would occur by

providing access to the USW's Health and Safety Specialist. The employer allows tours of its facilities on a weekly basis and those tours include the areas in which the crawler assembly is turned and occur while work is in progress (Decision, p. 6, line 14). Indeed, Regional Manager Rod Bolhous saw no problem with Thompson's access when first asked (TR58, 123, 311). While Bolhous claims he changed his mind because there was a new owner, neither he nor any other representative of Caterpillar has identified any policy or information that explains the basis for Bolhous' change of mind (TR329-330). Admittedly the product line has not changed (TR332-333; Decision, p. 6 lines 11-13). Moreover, Thompson has explained the procedures she uses to view accident scenes or industrial processes in operation without interfering with production (Decision, p. 8, lines 41-42). The Company has presented no evidence that Thompson's request for access to view the turning of the crawler assembly will present undue hardship, inconvenience or interfere with its business operations.

Under the appropriate standard set forth by Winona Industries, Inc., Caterpillar violated Section 8(a)(5) of the Act by denying access to Health & Safety Specialist Sharon Thompson.

CONCLUSION

For the foregoing reasons, Charging Party respectfully excepts to the Decision and Order of the Administrative Law Judge as set forth in its Exceptions which are filed herewith and respectfully requests that the Board issue a revised decision, order and notice in accordance with the these exceptions.

Dated: October 17, 2012.

Respectfully submitted,

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APPENDIX

Notice to Employees Posted By Order Of The National Labor Relations Board, An Agency Of The United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT refuse to bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (“USW”) by refusing to grant its request for access to our South Milwaukee, Wisconsin facility in order to allow one of its Health and Safety Specialists to investigate industrial accidents, and to conduct health and safety inspections, and to investigate all the processes used to turn crawler assemblies.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on the USW’s request, grant access to our South Milwaukee, Wisconsin facility at reasonable times for reasonable periods of time sufficient to allow USW’s Health and Safety Specialist to fully investigate industrial accidents, to conduct health and safety inspections, and to investigate all of the processes used to turn crawler assemblies.¹

¹ The above language follows the language utilized in Hercules Inc., 281 NLRB 961 (1986).

CERTIFICATE OF SERVICE

On October 17, 2012, the EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE and supporting BRIEF were electronically filed by using the NLRB's website and copies were served via electronic mail and by U.S. First Class Mail, postage prepaid, upon the following:

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