

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CATERPILLAR INC.)	
)	
Respondent,)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	Case No. 30-CA-064314
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO/CLC,)	
)	
Charging Party.)	

**CATERPILLAR INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER**

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Respondent, CATERPILLAR INC. (“Caterpillar” or the “Company”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.46, submits the following brief in support of its exceptions to the recommended decision and order of Administrative Law Judge Robert A. Ringler.

INTRODUCTION AND STATEMENT OF THE CASE

This is *not* a request for information case. That is, there is no allegation or finding that Caterpillar failed or refused to provide relevant requested information to the Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW” or “Union”) following an unfortunate workplace accident that occurred at the Company’s South Milwaukee, Wisconsin production facility on September 8, 2011. Nor could there be, as the undisputed record reveals that the Company provided an abundance of information to the Union, and made additional offers to provide still more information (which the Union never accepted), about the accident and the work process that was being performed when the accident occurred.

Rather, this is a denial of access case. The General Counsel alleges that notwithstanding the wealth and variety of information Caterpillar provided the Union concerning the accident, and regardless of the fact that Local Union officials had wide-ranging access to the facility and the accident site, the Company nevertheless violated Section 8(a)(5) of the Act because it denied Ms. Sharon Thompson, a USW International representative, on-site access to its property.

This distinction—between an employer’s obligations vis-à-vis responding to union requests for information and requests for on-site access to the employer’s property—is critical under the Board’s jurisprudence. Yet, in the decision under review, the ALJ improperly blended these two different analyses, and in so doing, he failed to give proper consideration to the undisputed evidence establishing a myriad of alternative measures, other than on-site access, that

were available and would have allowed the Union to fully execute its representational function. The ALJ also failed to give proper consideration to the fact that the Union never, at the time in question, substantively considered or discussed any of the alternate means Caterpillar proposed, nor did it otherwise accept Caterpillar's repeated proposals to meet and discuss same. As a result, the ALJ erred by failing to give appropriate protection to Caterpillar's legitimate interests under the law to control access to its property.

The legal standard governing this case stems from the Board's 1985 decision in *Holyoke Water Power Co.*, 273 NLRB 1369. In *Holyoke*, the Board held that when a union seeks access to an employer's premises, the mere fact that the union's on-site presence may be relevant to its representational duties is not enough to obligate the employer to open its doors. *Id.* at 1370. Rather, the Board instructed that in access cases, "an employer's right to control its property . . . must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property." *Id.* (citation omitted).

Thus, unlike the standard for information request cases—where, with few limited exceptions (e.g., waiver), a union is entitled to receive requested information upon showing that the information is "relevant"—in access cases, the union is entitled to enter the employer's property only where it can be shown that access is relevant *and necessary* to the union's representational duties. "[W]here it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access." *Id.*; *see also Brown Shoe Co. v. NLRB*, 33 F.3d 1019, 1023 (8th Cir. 1994).

The justification for a higher standard in access cases, as compared to information request cases, comes from the well-established principle in federal labor law that an employer has a

significant interest in protecting its property, including against unnecessary access by non-employee union agents. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992). Even in the critical organizing context, the Supreme Court has held that employer property rights are sufficiently strong so as to support the exclusion of nonemployee union agents from the employer’s premises except in unique circumstances where only “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.” *Lechmere*, 502 U.S. at 539 (1992), *quoting, NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

Indeed, the Court’s examples of the sort of unique circumstances that might compel access—logging camps, mining camps, and mountain resort hotels—speak to the weightiness of the law’s protection of employer property rights. *Id.*

What is, therefore, of critical significance in an access dispute is the availability of alternative measures by which the union could discharge its representational duties without trespassing on the employer’s property. In this case, the ALJ committed reversible error by presuming the USW’s request for on-site access by International representative Thompson was “relevant”—as might be done in an information request case—while failing to give appropriate consideration to the significant alternatives that the Union possessed in order to represent its members concerning safety issues arising from the September 8, 2011 accident. These alternatives included:

- Access to the site by Local Union officials, both immediately following the accident and at all times thereafter;
- DVD recordings of a reenactment of the part-turning procedure that was taking place when the accident occurred;
- Written explanations of various aspects of the part-turning operation;

- Detailed standard work protocols of the new versions of the work procedures;
- An offer to videotape the new procedure as it was performed and to facilitate a conversation between the Company's and the Union's safety representatives to discuss any questions;
- A copy of the investigatory file compiled by law enforcement officers and continued participation in all aspects of OSHA's investigation; and
- Access to witnesses for the purpose of conducting interviews.

Despite these alternatives, the undisputed evidence shows the USW made no effort to engage Caterpillar in any substantive discussions to explore whether the Company has or could provide additional information the Union might deem important in representing its members. Nor did the Union provide any explanation, prior to the hearing in this case, as to the reasons why any of the various alternatives that Caterpillar proposed and made available to the Union were somehow insufficient. Instead, the Union repeatedly and steadfastly demanded one thing, and one thing only—that International representative Thompson be permitted on-site access to Caterpillar's property—all the while admittedly taking no other actions whatsoever to conduct any further investigation of the matters at issue.

The Union's candid acknowledgement that it did nothing at the time in question to engage Caterpillar in a meaningful discussion of the information that was provided, raised no concerns about the information's purported inadequacy and offered nothing at trial but *post-hoc* justifications should have figured prominently into the ALJ's decision under the relevant balancing test.

Instead, the ALJ simply accepted the Union's claim that access was relevant (in fact, he presumed as much), while failing altogether to determine whether access was necessary. In this regard, the ALJ misapplied governing Board precedent that requires due consideration and protection of Caterpillar's legitimate property interests. The ALJ also erred by mischaracterizing

the scope of these interests as limited to proprietary or confidentiality concerns. The decision below should, therefore, be reversed, and the Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

I. CATERPILLAR'S SOUTH MILWAUKEE FACILITY

This case arises from Caterpillar's manufacturing facility at 1100 Milwaukee Avenue in South Milwaukee, Wisconsin, which the Company acquired on July 9, 2011, from Bucyrus International. Prior to this acquisition, Bucyrus had owned and operated the facility for over 100 years, since the early 1900s. Tr. 32, 109-10.

The South Milwaukee facility manufactures various strip-mining equipment, including large strip-mining shovels, blast-hole drills, and drag lines. Tr. 32, 110, 141. This equipment, when fully manufactured, is extremely large. As a result, it is generally manufactured in sections, which are fully machined and assembled at the facility, only to be taken apart again in order to be shipped in pieces on rail cars and semi-trucks.¹ Tr. 33, 110.

In total, the facility is four to five city blocks long by three blocks wide, and is split into north and south halves by Rawson Avenue. Tr. 33-34. The fabrication area, weld shops, a small staging area, and a small machining shop all are located north of Rawson Avenue; the assembly department, warehouse, a larger machining shop, maintenance area, and business offices, including classrooms, are located south of Rawson Avenue. Tr. 33-34, 111. Just over half of the facility's employees are represented by Steelworkers Local 1343, which is affiliated with the

¹ More specifically, the manufacturing process begins with raw material brought into the facility, taken to the fabrication shop, and cut into various parts or sections of the piece of equipment being produced. Tr. 33, 141. After fabrication, the parts are transported to the weld shop, where they are assembled by fitters, tacked together, and set up on the weld floor to be welded complete. Tr. 33, 141. After welding, the parts are taken to the machine shop so all surfaces and bores can be machined before moving to the assembly shop, where the parts are assembled into sub-assemblies and tested. Tr. 33. The sub-assemblies are then taken apart, painted, prepared for packaging, and shipped to customers. Tr. 33, 141.

USW. Tr. 34, 36-37, 110, 114, 143. Caterpillar and the USW are parties to a collective bargaining agreement, which expires on April 30, 2013. This labor agreement was in effect at all times relevant to this case. Tr. 38-39, GC Ex. 26.

II. THE SEPTEMBER 8, 2011 ACCIDENT AND IMMEDIATE POST-ACCIDENT INVESTIGATION

On September 8, 2011, a workplace accident occurred at the South Milwaukee facility at approximately 1:30 p.m. Tr. 44-45, 116, 157, 309. At that time, in the north welding bay area of the facility, several employees were engaged in a part-turning operation on a large weldment referred to as a “crawler” or a crawler frame.² Tr. 36, 113, 145. During the operation, the crawler was rigged to a crane so that it could be lifted and repositioned. The crane is operated from the floor by a radio-control box, which is strapped around the neck of the crane operator. Tr. 145-46. The accident occurred when the crawler frame pivoted unexpectedly, causing fatal injuries to an operator who was positioned underneath it. Tr. 45, 116, 157, 309, GC Ex. 14(c).

Beginning almost immediately after the accident and continuing throughout the afternoon and into the evening of September 8, representatives from Caterpillar, the USW, OSHA, and local law enforcement participated in a multi-faceted investigation of the accident. *See generally* Tr. 54-58, 120-21, 158-63, 309-311, 314-15, 373-74, 383. More specifically, OSHA inspector Luis Ramos-Morales and local law enforcement officers conducted independent investigations, both of which included interviews of employees who were in the weld shop area at the time of the accident and witnessed some or all of the events. Tr. 54-55, 120-21, 159, 373.

Company managers assisted with facilitating these investigations and interviews. Tr. 59, 161, 307. And, Local 1343 officers, including President Kevin Jaskie, Vice President Mike Dobrzynski, grievance committeeman John Dwyer, and weld shop grievance committeeman

² The crawler is the part of a machine that propels the machine forward and backward, enabling it to move. Tr. 36, 113, 145.

Dave Uebele, all were on-site at the accident scene throughout the afternoon and actively assisted or participated in the investigations. Tr. 54-58, 157-59, 310. In fact, the OSHA inspector allowed the USW representatives (but not Company representatives) to sit in during each of his interviews of employee witnesses. Tr. 55-57, 121, 159.

At approximately 7:00 p.m. on September 8, a reenactment³ of certain of the crawler-turning movements that had precipitated the accident was staged. Tr. 161-62, 171-73, 330. At OSHA inspector Ramos-Morales' direction, Union Committeeman Uebele operated the crane⁴ that was involved in the accident to lift and reposition the crawler frame that was involved in the accident. Tr. 160-62, 171-73. While this exercise was performed, Caterpillar managers videotaped the operation and subsequently produced the recordings to the Union.⁵ Tr. 99, GC Exs. 14(a), 24; Joint Exs. 1, 2.

After the reenactment, the OSHA investigator concluded his investigation for the day and released the factory to resume normal operations. Tr. 314-15. However, Caterpillar did not actually resume operations at the South Milwaukee facility until the following day, September 9, 2012. Tr. 315-16.

³ The General Counsel and the Union take issue with the term "reenactment" to describe this part of the investigation. Tr. 271-74. Their objection is purely an exercise in semantics, as there is no dispute as to what actually occurred.

⁴ Keith Soto, the crane operator at the time of the accident, was no longer on site, as he had already been interviewed by OSHA and law enforcement and released. Tr. 127, 160, 174-75, GC Ex. 14(c).

⁵ Three DVD recordings of the September 8 reenactment were prepared. 4/17/12 Joint Stip. Caterpillar produced one recording, marked as Joint Exhibit 1, directly to the USW's counsel on January 28, 2012. *Id.*, GC Ex. 24. Caterpillar produced a second recording, marked as Joint Exhibit 2, directly to Local 1343 President Jaskie on February 14, 2012. *Id.*, GC Ex. 14. The third DVD recording, received into the record as GC Ex. 32, was not produced to the Union prior to the hearing. 4/17/12 Joint Stip. All three DVD recordings show substantially the same information as they all depict the reenactment that was performed on September 8, 2011.

III. FURTHER INVESTIGATION OF THE ACCIDENT AND CATERPILLAR'S REVISION OF THE STANDARD WORK PROTOCOLS FOR THE CRAWLER TURNING OPERATION

During the weeks following September 8, 2011, Caterpillar continued to cooperate with OSHA's investigation of the accident. *See generally* Tr. 81-82, 222-23, 383, GC Ex 5. The Company also took steps to evaluate the crawler turning procedure at issue. Tr. at 163-64, 177-78, 341-43, 345, 385-92. Local Union representatives continued to be apprised and involved in all facets of these events. *Id.* at 79-82, 163-64, 177-78, 223-23, 341-43, 345, 383, 385-92.

For instance, a few days after the accident, safety manager Colleen Klaiber, together with members of her safety committee and the facility's crane committee, staged another reenactment of the crawler turning operation. Tr. 163-64, 177, 309. During that subsequent reenactment, Bill Frahman, a crane operator who is a member of the USW Local 1343 bargaining unit, operated the crane. Tr. 164, 177, 388.

In addition, the Company put together a committee to evaluate the "standard work" protocols for turning the crawler frame. This committee, which included management representatives from the Company's process engineering and safety departments, as well as bargaining unit operators Frahman and Dave Klein, began their work within a few days of the accident. Tr. 385, 388-90; GC Ex. 34. More specifically, the committee was tasked with evaluating and seeking consensus on an optimal process for turning the crawler frame. *See generally, id.*

The committee began producing results within a week of the accident. On September 16, 2011, the facility implemented a revised set of standard work protocols to govern the procedure of rotating a crawler frame that does not yet have an attached "bell housing." Tr. 341-42, 345; GC Exs. 25, 34. The specific individuals who signed off on the new protocols included operator Frahman, supervisor Rick Reading, Mark McVay, an Environmental Health and Safety ("EHS")

professional at the facility, and Ken Starrett, who works in the facility's manufacturing engineering group. Tr. 342, 388-389; GC Ex. 25. Thereafter, on November 29, 2011, the committee completed a second set of revised standard work protocols for rotating those crawler frames that do include an attached bell housing. Tr. 343; GC Ex. 25. Color copies of the revised standard work protocols were posted in the facility at all work stations where the crawler frame rotation process is performed. Tr. 343.

In addition to evaluating and revising the standard work protocols, Caterpillar also continued to cooperate with OSHA's continuing investigation during the weeks following the accident. And, the Company continued to involve Local Union representatives in these ongoing meetings. On September 9, 2011, Ramos-Morales emailed McVay to request a return visit to the site. Tr. 379-81; GC Ex. 35. McVay informed Steve Dobrzynski, the Local 1343 safety representative for the South Milwaukee facility, of that request. Tr. 381. In addition, Ramos-Morales gave his contact information to Jaskie directly, and Jaskie called him from time-to-time to follow up on any developments with the investigations. Tr. 79-80. Jaskie and Vice President Mike Dobrzynski also participated in OSHA's closing conference, which took place at the South Milwaukee facility in February. Tr. 81-82.

IV. THE USW'S REQUEST FOR ON-SITE ACCESS BY INTERNATIONAL REPRESENTATIVE SHARON THOMPSON

A. The September 8 Conversations Between Kevin Jaskie and Rod Bolhous Regarding the Possibility of a Visit by a USW International Representative

As noted above, the General Counsel's Complaint is premised on the claim that Caterpillar violated Section 8(a)(1) by denying the USW's demand that Sharon Thompson, a safety representative for the International Union, be permitted on-site access to the South Milwaukee facility in the aftermath of the September 8 accident. Compl. ¶¶ 7-8. This issue of possible access to the site by a USW International representative first arose on September 8 in a

conversation between Local 1343 President Jaskie and Rod Bolhaus, the General Manager of Caterpillar's Milwaukee and Eastern Manufacturing Group, which includes the South Milwaukee facility.

Bolhaus testified that he was not at the South Milwaukee facility, but was traveling in Northern Wisconsin, on September 8, when he first learned about the accident. Tr. 309. He drove to the facility immediately upon learning the news, arriving on-site at about 3:30 p.m. *Id.* Union officials Jaskie, Dobrzynski, Dwyer, and Uebele were all present at the accident site when Bolhaus arrived and, over the course of the afternoon and evening, Bolhaus had several conversations with them. Tr. 310-11. They discussed the tragedy generally, the well-being of the crane operator, and the talking points that Bolhaus planned to communicate to the general workforce about the accident during safety stand-down meetings to be held the following day. Tr. 311-14.

In addition, at one point during the afternoon, Jaskie told Bolhaus that the International USW wanted to send a representative to the site. Tr. 57-58, 311. Jaskie did not identify the purpose for the proposed visit, the name of any specific individual that might be coming, or the proposed date of the visit. Tr. 311-12. Rather, he just said that the International would want to send someone. *Id.* Bolhaus responded, "I thought that would be fine." Tr. 311.

Within an hour of that discussion, however, Bolhaus again talked to Jaskie and Dobrzynski about the issue. Specifically, he told Jaskie and Dobrzynski "that I had reconsidered that position and said that that was a conversation that needed to take place between the national office [of the USW] and Caterpillar's legal department to gain access to the property." Tr. 312. As Bolhaus testified, he explained to Jaskie and Dobrzynski, "Let this be a discussion between

the lawyers.” Tr. 312-13. Neither Jaskie nor Dobrzynski objected, but rather nodded in acknowledgement and understanding of Bolhous’ statement.⁶ Tr. 313.

B. Sharon Thompson’s Unannounced Visit to the Facility on September 9

On September 9, facility management conducted mandatory safety meetings with all employees to discuss the accident. Tr. 315. These meetings began at approximately 6:00 a.m. and were repeated at various times and locations throughout the day to assure attendance by every employee, every shift, and every building. *Id.* Bolhous led the meetings, during which he explained to employees what had occurred and reminded them to stay vigilant about safety. At the end of each meeting, employees were given a choice of returning to work, taking the day off, or meeting with counselors who were on-site. Tr. 65, 130-31, 315-16. About 30 percent of the employees chose to return to work on September 9. Tr. 316. Local Union representatives also attended the meetings. Tr. 315. At the 7:00 a.m. meeting held in the Heritage Building for employees from the weld shop, Union representatives Jaskie, Dobrzynski, Brad Dorff, and John Dwyer all attended. Tr. 63-64. Jaskie also attended many of the other meetings held on September 9. Tr. 315-16.

At one point in the early afternoon on September 9, Bolhous, who was in between safety meetings, was walking with Plant Manager Dan Barich, Processing Engineering Manager Tom Davis, and Manufacturing Manager Willi Schultz toward one end of the alleyway that separates the Heritage building and the main manufacturing building. They encountered Jaskie,

⁶ Jaskie and Dobrzynski also testified about these conversations. Both recalled the first discussion with Bolhous, where he said he “thought it would be fine” for an International representative to visit the site, but neither recalled the second, where Bolhous explained that he had reconsidered his position and that any proposed visit needed to be addressed between the USW and Caterpillar’s legal department. Tr. 58, 123. The ALJ did not endeavor to resolve this discrepancy in the witnesses’ testimony regarding these September 8 conversations, and ultimately, any differences are immaterial as there is no dispute that: (1) Jaskie never identified an individual, a date, or a purpose for the proposed visit, and (2) Caterpillar did not allow the visit on September 9.

Committeeman John Dwyer, and USW International representative Sharon Thompson approaching from the other end of the alley. Tr. 59, 68-69, 316-17. The two groups stopped to talk, and Jaskie introduced Thompson as a representative from the International USW. Tr. 69, 317. Bolhaus asked whether Thompson had permission from Caterpillar's legal department to be on the premises. Tr. 317. Thompson responded by starting to explain what she intended to do while on the property, but Bolhaus interjected and said, "I understand . . . what you're saying, but unless you have permission from Cat legal to be on the premises, you are not welcome here." Tr. 317. Bolhaus then offered to provide access to a conference room, so that "[i]f she wanted to have that conversation with Cat legal, we would provide a space for her to do that." *Id.*

Jaskie, Dwyer, Thompson, and later Dobrzynski were given access to a conference room in the Human Resources building at the facility, where Human Resources Manager Brian Stone met them. Tr. 70-71, 317. Thompson asked Stone to whom, at Caterpillar, she could speak concerning gaining access to the shop floor. Stone identified Brad Butler, one of Caterpillar's in-house attorneys. Tr. 213-14. Stone also provided Thompson with Butler's office telephone number and advised that she could call him at that time, if she chose. Tr. 214. Thompson did not call Butler herself, but instead called her supervisor at the International Union in Pittsburgh, Jim Frederick, and gave Butler's telephone number to Frederick. *Id.* Shortly thereafter, Frederick called Thompson back in the conference room and advised that he had spoken with Butler and that she was not going to get into the facility that day and she "might as well just head back." Tr. 215.

After she left the facility, Thompson went to the Local 1343 Union hall, where she called Frederick again, collected one person's name and phone number, then left to return home to Pittsburgh. Tr. 215-17. She did not, before leaving Milwaukee, attempt to conduct any

interviews of employees, speak with the OSHA investigators or law enforcement officers who were investigating the accident, or meet with anyone in the Local Union leadership for the purpose of discovering how the part-turning operation worked. Tr. 232-35. In short, after leaving Milwaukee, Thompson did nothing to investigate the accident. Tr. 236.

C. Correspondence between Caterpillar and the USW Regarding the Union's Request for Access and Caterpillar's Provision of Information Regarding the Accident and the Crawler Turning Operation

After Frederick spoke with Butler by telephone on September 9, 2012, he sent Butler an email message, attaching NLRB cases that he believed supported the USW's demand that Thompson be allowed on-site access at the South Milwaukee facility. Tr. 214-15; GC Exs. 2(a) and 2(b). In his email message, Frederick wrote that he "look[ed] forward to [Butler's] response." GC Ex. 2(a). Despite the fact that Frederick's email message was sent late in the day on Friday, September 9, the USW allowed no time for Butler's response before filing an unfair labor practice charge against Caterpillar on Monday, September 12. GC Ex. 1(a).

Butler nevertheless responded to Frederick by letter dated September 16, 2011, where he recapped their telephone conversation from September 9, noting that Frederick had described the union's request for access to the site as a request for a "joint investigation." GC Ex. 3. Butler explained that at that juncture, the Company did "not believe that an on-site visit and joint investigation of this event are warranted" because: (1) OSHA and law enforcement had already conducted on-site investigations of the accident and local union officials were present and participated in those investigations; (2) Caterpillar was committed to continuing its cooperation with OSHA's investigation and would continue to share information with the Union; and (3) the facility had since resumed normal operations, meaning that no additional relevant information could be gleaned from viewing the accident scene, which was no longer in the same condition as at the time of the incident. *Id.* at 2.

However, Butler closed his letter by inviting further discussion of the matter, expressly stating that “the issue is more appropriately addressed through [] further discussions, rather than in administrative proceedings or litigation.” *Id.* at 3.

Frederick never responded to Butler’s September 16 letter. Instead, the USW’s outside counsel wrote Butler on September 26, 2011, repeating the Union’s demand that Thompson be permitted to access the site. GC Ex. 4 at 3-4. Subsequently, the parties exchanged a significant amount of correspondence and material, either directly or through counsel, continuing up to the week before trial. GC Exs. 5-25. The parties’ initial exchange involved a discussion of the Union’s request to conduct a “joint investigation.” GC Exs. 3-5. As the discussion progressed, the Union continued to offer additional reasons and purported justifications for needing access. GC Exs. 4-5. Throughout this time, however, Caterpillar also shared and offered to share an abundance of information with the USW relating to both the September 8 accident and the crawler turning operation at the South Milwaukee facility:

1. Video Recordings of the Reenactment

Beginning on October 10, 2011, and repeated on multiple occasions in the weeks that followed, Caterpillar offered to provide the Union with copies of the recordings that were done of the accident reenactment on September 8, 2011. However, before providing those recordings, which the Company explained contained (in its view) confidential and proprietary business information, Caterpillar asked that the parties agree to an appropriate confidentiality agreement. GC Ex. 5.

In that regard, Caterpillar emphasized that it did not object to Thompson’s use of the video in connection with any off-site interviews she might conduct with facility employees. GC Ex. 5 at 4.

One week later, the USW's attorney responded by requesting the copy of the video and again reiterating its request for a date for on-site investigation. GC Ex. 6 at 3-4. Thereafter, between November 15, 2011 and January 24, 2012 the parties, by counsel, corresponded regarding the terms and conditions of a confidentiality agreement. GC Exs. 7, 8, 9(a), 9(b), 10, 21, 22, 23, 24. In the meantime, John Hubert, Labor Relations Manager for the South Milwaukee facility, also corresponded directly with Jaskie. In a letter dated January 12, 2012, Hubert offered to produce directly to Jaskie the recordings of the post-accident reenactment (among other items) subject to entry of an appropriate confidentiality agreement. GC Ex. 11.

The parties ultimately reached a mutually acceptable confidentiality agreement on January 26, 2012. On January 28, Caterpillar's counsel promptly sent the USW's attorney a DVD of the reenactment recording. GC Ex. 24; Joint Ex. 1. Then, on February 14, 2012, Hubert gave Jaskie a DVD recording of the accident reenactment. Tr. 90-91, GC Ex. 14(a), 14(b), Joint Ex. 2. Jaskie did not thereafter provide this DVD to the International Union, but rather kept it for himself. Tr. 99.

2. Written Explanations of Various Aspects of the Crawler Turning Operation

Hubert also responded directly to Jaskie in writing, in an effort to provide additional detailed explanations of various aspects of the crawler turning operation. Specifically, on January 12, 2012, Hubert wrote to Jaskie: "As you may know, attorneys for Caterpillar and the Union are working on a confidentiality agreement related to the Company's disclosure of certain additional information related to the accident that occurred on September 8. In the meantime, prior letters from the Union's counsel raised certain factual assertions that the Company felt might be better addressed between individuals more familiar with the South Milwaukee

operations. If, after reviewing this letter, you have further questions concerning these matters, please let me know.” GC Ex. 11.

Hubert’s letter then proceeded to give details as to the crane operator’s function during the reenactment, the usage of wood cribbing during the operation on September 8 and more generally at the facility, the facility’s use of rotating fixtures, or clamps, to turn the crawler frames, and the development of new standard work protocols for the procedure. Hubert closed his letter by inviting Jaskie to bring any additional questions to his attention. *Id.*

3. Standard Work Protocols, Police Report and Photographs

In his January 12 letter to Jaskie, Hubert also offered to provide the Union copies of the investigatory file prepared by the local law enforcement officers who investigated the September 8 accident, photographs taken by management representatives during the post-accident investigation, and copies of the old and new standard work protocols for the crawler frame turning procedure subject to entry of an appropriate confidentiality agreement. GC Ex. 11. Then, on February 14, 2012, when Hubert gave Jaskie a DVD recording of the reenactment, he also gave him a copy of the investigation file compiled by local law enforcement. GC Exs. 14(a), 14(c). In his cover letter accompanying these materials, Hubert repeated that the Company was prepared to provide copies of the old and new standard work protocols and photographs:

In addition to the materials produced with this letter, we have compiled and are prepared to produce to the Union a number of additional materials that the Company considers to be confidential. Caterpillar’s counsel has proposed to the Union’s counsel that the enclosed Confidential Information Agreement also apply to these additional materials, but we have not yet received a response. Therefore, we propose to make these additional materials available for your inspection and review at the facility. Please call me to arrange a day and time for this review. Alternatively, we can produce copies of these materials to you via overnight mail as soon as we receive written confirmation from the Union that you are

willing to treat these materials as confidential and subject to the Confidential Information Agreement.

GC Exs. 14(a), 14(b); Tr. 101-102.

Ten days later, on February 24, 2012, Hubert sent Jaskie another letter, again reiterating his offer to produce copies of the old and new standard work protocols. GC Ex. 15. Hubert stated, “We remain prepared to produce these materials to you just as soon as you will confirm that the Union will treat them as confidential and subject to the Confidentiality Agreement we have previously executed.” GC Ex. 15; Tr. 101-102. Hubert also offered that if, after reviewing the new standard work protocols the Union still had questions about the procedure, “we can arrange to video the procedure as it is currently being performed under the new protocols, followed by a discussion to include Ms. Thompson and safety representatives from the facility, so that we may answer any such questions.” *Id.* The USW never responded to this offer. Tr. 339.

On March 14, 2012, the USW’s attorney wrote to Caterpillar’s counsel, advising that the Union would agree to treat the standard work protocols as confidential, provided that the Company allowed the materials to be entered as exhibits in any arbitration or NLRB hearing and provided that the Company had previously shared the protocols with OSHA. GC Ex. 20. Caterpillar’s counsel confirmed these terms on March 16, and Hubert hand-delivered copies of the standard work protocols to the Union hall that same day. GC Exs. 20, 25; Tr. 102.

D. Sharon Thompson Discontinues Her Investigation and Fails to Follow Up on Any of the Materials Offered to the Union by Caterpillar

Notwithstanding the access that Local Union representatives had to the site (both on September 8 and thereafter) and despite the materials that Caterpillar produced to the Union in the weeks that followed, the USW continued to demand that its chosen designee—Thompson—also be provided on-site access to Caterpillar’s property. GC Exs. 4, 6, 8, 13. However,

Thompson never attempted to communicate with Caterpillar to discuss any of the materials the Company had produced. Tr. 223-26, 339. Instead, during her trial testimony Thompson sought to explain (for the first time) why, in her view, the materials the Company had provided were not adequate substitutes for actual on-site access. For example, Thompson reviewed the DVD of the accident reenactment but found it insufficient, explaining:

Again, it's only – it's only – it doesn't give me the depth, the angle, the – I can't see – I can't even see the mats in the picture. I have no idea what the mats look like. I can't feel – see the compression, hear the compression. See the chains. I can see the chain, but I can't hear the chains. I can't see what the crane is doing. While this is moving, I can't see what this is doing. I can't see what this is doing while that's – you know what I mean? There is not – I can't see a whole picture at any time. You know, I can't look from over here to over there or from over here to over there. I have – I can't see, hear, feel everything. I can't do anything. I'm looking at something that isn't a complete picture. That's all I see is something that goes like this, and that's it. That's all I have as a video that lasts I think it's 45 seconds.

Tr. 217-218. Thompson also reviewed the police report, again claiming it was insufficient⁷ because she could not actually look at what they were talking about:

Well, again, I can't see what the actual – what they're talking about – you know, to be able to take it and to look again and see that, that what they're talking about – you know, the two chains, the three chains, the two trolleys, the one trolley, the put cribbings here, put the mats here, the extra mats here, you know – and it misses the mat, it's on a wood floor, then it's on the cement, then it's lifted up. Now he's talking about that, you know, there's policy – you know, there's these – there's a lot that you can't get the whole image going when you can't hear it, you can't – there's so much that's happening. You know, if you really would sit and look at a process, there is more than just somebody just going like this and, you know, hooking it, turning it, you know, putting a

⁷ Even with respect to materials that had not been provided, Thompson testified that they would not be sufficient. For example, when asked if she could have requested that the Company take a picture of every area of the room from every angle, Thompson rejected this offer as insufficient, stating “But I still can't see the lighting on the – I still can't see how – hear it. I still can't understand the angle. I still can't – there's still things you that can't get the depth. You still can't get that 3D perspective.” Tr. 230.

chain on, somebody going like this with the remote crane, you know, welding it. You know, there's a lot more than that really going on. You know, there's the compression, there's the movement, there's – you know, there's the slight turning, there's the noise, there's the creak. You know, you got – there's a lot of pressure of things going on. And to understand the pressure on the chains and just a lot of things that are going on, you really need to be there to observe.

Tr. 218-19.

Despite these claimed “insufficiencies” with the materials the Company had provided, Thompson and the USW never sought to follow up with Caterpillar for any additional information. Specifically, despite Caterpillar’s provision of materials and repeated invitations to discuss the matter further, other than requesting on-the-ground access, the USW and Thompson:

- did not ask the Company for any other information regarding the accident (Tr. 223);
- did not ask the Company to provide any other videotape (Tr. 224);
- did not ask the Company to provide a videotape showing different angles (Tr. 224);
- did not ask the Company for videos of the crane operation, hitching process or unhitching process (Tr. 224);
- did not ask the Company for a video with sound so she could hear what was happening when the process was taking place (Tr. 224);
- did not ask the Company to amplify the sound of the video (Tr. 225);
- did not ask to meet with the Company to have them describe the processes of the crawler operation (Tr. 225);
- did not ask the Company to describe the materials the mats are made up of (Tr. 225);
- did not ask the Company for information regarding how much pressure the mats can withstand (Tr. 225);
- did not ask the Company for a sample piece of the mats that are used (Tr. 225);

- did not ask the Company for tolerances that the chains that are used in the turning operation can bear (Tr. 225);
- did not ask the Company to provide information regarding lighting in the facility (Tr. 225.);
- did not ask the Company for still pictures (Tr. 225);
- did not ask the Company for information regarding the dimensions of the room, sightlines of the room or angles that exist around the turning operation (Tr. 226); and
- did not ask the Company for any videotapes of reenactments of the turning operation that would allow her to see things that she thinks are important to understanding how the process works. (Tr. 226).

And finally, while Thompson herself never conducted a single interview of any witness or Local Union official concerning the operations at the South Milwaukee facility, the USW (through another representative) has managed to conduct witness interviews and render conclusions concerning the cause of the accident, even without Thompson being permitted on the property. Tr. 235-37, 240, 242; R. Ex. 1.

V. THE ADMINISTRATIVE LAW JUDGE'S DECISION

Following a two-day hearing and the parties' submission of post-hearing briefs, the ALJ Robert Ringler issued his decision and recommended order on September 5, 2012, holding that "Caterpillar violated 8(a)(5), when it failed to grant the Union access to the facility in connection with the September 8 fatality." ALJD at 7, lines 24-25. Significantly, the ALJ did not base his decision on credibility determinations or disputed factual findings. And, he agreed with Caterpillar's position that the Company "held a significant . . . interest in protecting against the potential dissemination of its confidential manufacturing procedures, as well as an interest in preventing visitors from interfering with its operations." *Id.* at 8, lines 35-38. However, the ALJ did not recognize any greater property interest unrelated to confidentiality or proprietary considerations. *Id.*

As a result, the ALJ held that Caterpillar's acknowledged property interests must yield to the Union's claimed need for its designated International representative to visit the site. *Id.* at 8, lines 20-21, 35-37. More specifically, he concluded: (1) "[g]enerally, an employer must provide requested information to a union representing its employees, whenever there is a probability that such information is necessary and relevant to its representational duties," *id.* at 7, lines 25-28; (2) that information concerning health and safety matters is of "vital interest to the employees and . . . thus, generally relevant and necessary for the union to carry out its bargaining obligations," *id.* at 7, lines 35-40 (citations omitted); (3) in order to justify its rejection of the Union's request for on-site access, therefore, Caterpillar bore the burden of showing there were adequate alternative means available by which the Union could effectively represent employees vis-à-vis the safety issue at hand, and the Company failed to meet that burden, *id.* at 8, lines 39-41; (4) USW International representative Thompson credibly testified that she would not have interfered with production during her survey, *id.* at 8, lines 41-42; and (5) Caterpillar's proprietary interests were lessened by a history of permitting non-employee visitors to access the facility, and those interests could have been addressed in a confidentiality agreement in any event. *Id.* at 8-9, lines 42-43 and 1-6.

Because the ALJ's legal conclusions flow from a fundamental misapplication of governing precedent and ignore undisputed record evidence establishing that the Union had ample alternative means of representing its members without infringing on Caterpillar's property interests, the ALJ's decision should be reversed.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the ALJ erred evaluating the current dispute under the legal standard applicable to information requests, as opposed to the standard applicable to requests for access. Exception Nos. 49-82.

2. Whether the ALJ erred by failing to give appropriate consideration to undisputed record evidence establishing a multitude of alternatives, other than access, that were available to the Union and would have enabled it to fully discharge its representational function concerning safety issues related to the September 8, 2011 accident. Exception Nos. 1-49.
3. Whether the ALJ erred in concluding that Caterpillar's property rights were diminished because of prior instances in which access was permitted in dissimilar circumstances and by a predecessor employer. Exception Nos. 40-46, 61, 71, 73-76, 79.

ARGUMENT

I. THE ALJ'S DECISION RESTS SOLELY ON LEGAL DETERMINATIONS AND IS THEREFORE SUBJECT TO *DE NOVO* REVIEW

The Board reviews an ALJ's legal determinations *de novo*. See *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950) (“[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner’s findings.”). When considering credibility determinations, the Board gives deference to the ALJ’s findings if based on the demeanor of the witness. *Id.* If the credibility determinations are based on factors other than demeanor, the Board examines the record independently. See *Dannor Co.*, 260 NLRB 816, 817 n.2 (1982). Further, an ALJ “cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolution by uttering the magic word ‘demeanor.’” *Permaneer Corp.*, 214 NLRB 367, 389 (1974).

II. THE ADMINISTRATIVE LAW JUDGE’S DECISION MISAPPLIES BOARD PRECEDENT AND ERRONEOUSLY EVALUATES THE UNION’S REQUEST FOR ACCESS UNDER THE WRONG LEGAL STANDARD

A. The Relevant Legal Standard by Which to Evaluate the Union’s Request for Access in this Case is the Balancing Test Articulated by the Board in *Holyoke Water Power Co.*

The collective bargaining agreement between Caterpillar and the USW for the South Milwaukee facility contains no contractual right of access. GC Ex. 26; Tr. 40. Accordingly, the relevant legal standard by which to evaluate the Union’s request for access is under the balancing test articulated by the Board in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985). In *Holyoke*, the Board considered a union’s request for its industrial hygienist to enter an employer’s facility. Initially, the Board instructed that even though “the presence of a union representative on the employer’s premises may be relevant to the union’s proper performance of its representative duties,” that did not mean, *ipso facto*, the employer was obligated to open its doors. *Id.* at 1370.

Rather, the Board instructed that the rights of employees to be responsibly represented by the labor organization of their choosing must be balanced against the rights of their employers to control their property and ensure their operations are free from unwanted interference:

Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. 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. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, *where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.*

In sum, the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision.

Id. at 1370 (emphasis added).

Further, the Board instructed that "alternative means" does not require that the union have an alternative means of conducting its own inspection or study. Rather, access to information about which the union is inquiring may be sufficient to satisfy the "alternative means" standard. *Id.*; *Brown Shoe Co. v. NLRB*, 33 F.3d 1019, 1023 (8th Cir. 1994). In this regard, *Holyoke* makes explicit that request for access cases place a higher burden on the union than do request for information cases insofar as the union must establish more than just the relevance of its request. *Holyoke*, 273 NLRB at 1370. Indeed, the claimed relevance of the union's request is only the initial hurdle to be cleared in access cases, it is not the determining factor. If a union seeks access for a relevant purpose, its request then must be balanced against the employer's property rights, as developed in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105,

112 (1956), *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and their progeny. Only where it is shown that alternative measures do not exist, such that the union simply could not represent its employees absent access, will the union's request prevail over the employer's property rights. *Holyoke*, 273 NLRB at 1370.

B. The ALJ's Decision Improperly Evaluates the Union's Request for Access Under the General Relevance Standard Applicable to Information Requests

The ALJ's decision fundamentally misapplies *Holyoke*. To be sure, the ALJ purported to apply the requisite balancing test, concluding that "the Union's right to access the facility outweighed Caterpillar's property interests." ALJD at 8, lines 20-21. But, the actual analysis surrounding the ALJ's conclusion demonstrates that he began, and ended, his evaluation of this dispute with the Union's conclusory assertion that actual on-site access was needed and no alternative would suffice. *Id.* at 8 and n.18.

Thus, the ALJ started his "balancing" with a heavy thumb on the scales in favor of the Union's claimed need for access, observing at the outset that:

- "Generally, an employer must provide requested information to a union representing its employees, whenever there is a probability that such information is necessary and relevant to its representational duties," *id.* at 7, lines 25-28;
- "The standard for relevancy is a 'liberal discovery-type standard,' and the sought-after evidence should solely have a bearing upon the disputed issue," *id.* at 7, lines 30-32;
- "Information, which concerns unit terms and conditions of employment is 'so intrinsic to the core of the employer-employee relationship' that it is presumptively relevant," *id.* at 7, lines 34-36;
- "Health and safety matters regarding the unit employees' workplaces are of vital interest to the employees and are, thus, generally relevant and necessary for the union to carry out its bargaining obligations . . . Few matters can be of greater legitimate concern," *id.* at 7, lines 38-41; and
- "When material is presumptively relevant, the burden shifts to the company to establish a lack of relevance." *Id.* at 7-8, lines 44 and 1-2.

Having outlined these principles concerning the obligation to provide certain information, the ALJ moves to a discussion of the *Holyoke* balancing test. *Id.* at 8, lines 4-18. However, the ALJ's description of *Holyoke* improperly carries with it the gloss of the "presumptively relevant" standard. According to the ALJ, the Board "frequently" has found access is warranted. *Id.*, p. 8, lines 8-9. In addition, in considering the "relatively unparalleled value of an onsite health and safety inspection," the ALJ also notes that the Board has said in a prior case that "there can be no adequate substitute" for on site access. *Id.*, p. 8, lines 14-15 (citation omitted).

These prior holdings, divorced from their facts, show the ALJ proceeded from the presumption that access has "unparalleled value" for which no "adequate substitute" exists. This clearly misstates *Holyoke*, and establishes a presumption that improperly tracks the information request jurisprudence specifically rejected in *Holyoke*.⁸ See discussion *supra*. Thus, whatever may be said about these principles in the context of an information request dispute, they have no application here, where the Union has not merely asked for information about safety issues, but has demanded on-site access to the employer's property. As *Holyoke* makes clear, in a request for access dispute, a different, higher standard applies. Contrary to the ALJ's view, there is no presumption of relevance that prevails unless and until the employer proves otherwise. Rather, there is a balancing of competing interests that stand on equal footing.

Moreover, *Holyoke* recognizes that under well-established law, an employer is considered to have a legitimate interest in controlling its property. Indeed, it is for that reason that an

⁸ The ALJ's proposed remedy further reveals his improper use of the "presumptively relevant" standard to evaluate the Union's request for access. The ALJ orders the parties to negotiate over the facilitation of a "comprehensive onsite safety survey." ALJD, p. 9, lines 10-11. But the only issue in this case is a request for access related to a specific accident. While unions may have a broader right to information concerning health and safety issues, such principles have no application to the *Holyoke* balancing test, which, as discussed above, considers access in the context of specific issues, not as a general, ongoing right or obligation.

employer may, as a general rule, exclude non-employee union organizers from its property. *Babcock*, 351 U.S. at 112 (1956); *see also Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (“We start from the proposition that employers may control activities that occur in the workplace, both as a matter of property rights (the employer owns the building) and of contract (employees agree to abide by the employer’s rules as a condition of employment).”) (citations omitted).

In 1992, the Supreme Court emphasized the significance of an employer’s rights in this regard in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). There, the Court instructed that unless a union can show no reasonable alternative means of reaching employees other than through on-site access, an employer’s property rights will predominate, allowing the exclusion of non-employee representatives. *Id.* at 538 (holding that “[s]o long as nonemployee union organizers have reasonable access to employees outside an employer’s property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level” and reaffirming the general rule of *Babcock*). The Court further emphasized that the union’s burden in showing that it has no alternative means available is a heavy one, and would require proof akin to employees who are sequestered away in logging camps. *Id.* at 535 (“While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.”) (quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)).

Contrary to *Babcock* and *Lechmere*, and the influence of those authorities on the Board's decision in *Holyoke*, the ALJ in this case subordinated Caterpillar's property rights to the Union's alleged representational interests without any reasoned analysis. In so doing, he misapplied *Holyoke* and failed to give appropriate weight to the undisputed evidence, discussed *infra*, demonstrating that Caterpillar provided abundant information to the Union to more than meet its representational needs.

III. CONSIDERING THE ISSUE UNDER THE APPROPRIATE LEGAL STANDARD, THE UNDISPUTED EVIDENCE DEMONSTRATES THAT THE UNION HAD NO LEGITIMATE REPRESENTATIONAL INTEREST FOR ACCESS TO CATERPILLAR'S PROPERTY

A. Given the Wealth of Information that Caterpillar Provided and Offered, the Union had Sufficient Alternate Means, Other than Entrance to Caterpillar's Property, to Effectively Represent Employees

The overwhelming evidence of record supports the conclusion that notwithstanding Sharon Thompson's inability to visit the South Milwaukee facility, the USW had ample information and opportunity to fully and effectively represent its members with respect to the September 8 accident and the work procedures that were involved in that accident.

While the ALJ found the information Caterpillar provided to be inadequate, his "after the fact" evaluation did not consider the Union's failure to engage in any substantive discussion of the information when it was provided. *See* discussion *supra*. Caterpillar's obligation to identify alternative means is not a solo endeavor. The Union has an obligation to engage in a good faith discussion concerning these alternative means. *Holyoke, supra*. That clearly did not happen in this case. *See* discussion *supra*. Thus, in addition to presuming the Union was entitled to access, the ALJ further erred by failing to consider the Union's inaction and the fact that any explanations were offered for the first time at trial.

Viewed within the proper context, it is clear the Union was offered a significant amount of alternate means to meet its representational concerns. In the first instance, while Thompson individually may not have had access to the site, the Union *did have* on-site access and presence throughout the entirety of the post-accident investigation and follow-up steps. Thus, Local Union officials *were present* throughout the post-accident investigation on September 8, and even arguably had more access to the investigation than the Company. Jaskie, Mike Dobrzynski, Dwyer, and Uebele all were present at the accident scene and were permitted to participate in the OSHA interviews such that one of them was present during the OSHA interviews at all times for the purpose of representing bargaining unit employees. Tr. 54-58, 120-21, 157-59, 310. Indeed, Local 1343 president Jaskie testified that he and Dobrzynski (who was not on site immediately after the accident) went back to the accident site for the express purpose of “represent[ing] some of our members.” Tr. 54. Further, through Local 1343 grievance committeeman Uebele, the Union was also involved in the accident reenactment that took place that evening during which Uebele served as the crane operator. Tr. 160-62, 171, 330.

Similarly, during the weeks following the accident, bargaining unit member and crane operator Bill Frahman also participated in another reenactment of the crawler turning procedure. Tr. 163-64, 177. And, when a committee was convened to develop new standard work protocols for the crawler turning procedure, Frahman and Dave Klein, another crane operator and bargaining unit member, were key participants. Tr. 385, 388-89; GC Ex. 34.

The Union also was kept apprised of OSHA’s continued investigation of the accident, both directly by OSHA and by the Company. When OSHA wanted to make a follow up visit to the site, McVay informed the union’s safety representative, Steve Dobrzynski, of that request. Tr. 381. The OSHA inspector on site directly provided his card to Jaskie on the day of the

accident, and Jaskie testified that from time to time he called the investigator to follow up on any developments with the investigations. Tr. 79-80. Jaskie and Mike Dobrzynski also participated in OSHA's closing conference which took place at the South Milwaukee facility in February. Tr. 81. Thompson, too, participated in an informal conference with Caterpillar and OSHA representatives on March 20, 2012, to discuss actions taken by the facility in abatement of any issues identified in connection with OSHA's post-accident investigation. Tr. 222. In short, there was literally no part of the post-accident investigation to which the Union was not privy in some form or fashion.

In the months following September 8, Caterpillar also provided or offered to provide the Union with a wealth of additional information about the accident and the crawler turning operation. Caterpillar provided a DVD of the reenactment to the International through its counsel, and another DVD of the reenactment (with two video segments) to its Local President Jaskie. GC Exs. 14, 24; Joint Exs. 1, 2; Tr. 90-91.⁹ Caterpillar provided the Union with a copy of the police report and the standard work protocols, which give a detailed step-by-step explanation of the part-turning procedure, complete with photographs of the process. GC Exs. 14(a), 14(c); GC Ex. 25; Tr. 339. In addition, Caterpillar gave a written explanation of various aspects of the operation, including details concerning the crane operator's function during the September 8 reenactment, the usage of wood cribbing during the operation on September 8 and generally, and the plant's use of rotating fixtures for crawler frames. GC Ex. 11.

⁹ The ALJ refused to receive Joint Exhibits 1 and 2 (copies of two DVD recordings that Caterpillar gave to the USW) into the record, despite the parties' stipulation to their admission, because they were offered after the hearing had ended, and because he was not able to get either of the DVDs to play on his computer. ALJD at 5 n.13. Notwithstanding the ALJ's refusal to receive copies of the recordings into the record, there is no dispute that Caterpillar actually provided these DVD recordings to the Union showing various depictions of the post-accident reconstruction.

Moreover, Caterpillar offered the Union information related to the accident to which the union never responded. For example, Caterpillar repeatedly offered photographs of the post-accident investigation to the Union upon receipt of a confidentiality agreement related to such materials. GC Exs. 14(a), 14(b), 15; Tr. 101-102. Caterpillar also offered to arrange a videotape of the crawler and to facilitate a discussion about that process with Thompson to answer any of her questions. GC Ex. 25; Tr. 102. The Union never took Caterpillar up on this offer. Indeed, Thompson candidly admitted that once she was denied access to the South Milwaukee facility on September 9, she did nothing to engage Caterpillar in any dialogue concerning the accident and, in fact, did nothing whatsoever to investigate the matter. Tr. 215-17, 232-36.

Under these circumstances—*i.e.*, where Thompson and the Union chose not to avail themselves of Caterpillar's various offers to discuss the accident or its operations, or the information the Company had provided or could provide to the Union—there can be no finding of a violation of the Act when the governing standard requires a balancing of interests to determine whether adequate alternate means of representation were available. *Holyoke*, 273 NLRB at 1370.

Similarly, the Union has always had the opportunity to interview its own members—both those who may have been witnesses to the accident and those who have special knowledge or expertise to share concerning the Company's operations. To that end, the USW's safety representative acknowledged on cross-examination that Local Union committeeman Uebele is very knowledgeable regarding the crawler turning operation at issue. Tr. 234-35. Yet, Thompson has never interviewed Mr. Uebele concerning these matters. *Id.*

As significant as Thompson's failure to interview any Union members or Local Union representatives concerning these matters is the fact that her colleague, Jim Novak, *was* able to

conduct multiple witness interviews without the necessity of actually entering the South Milwaukee facility.¹⁰ Tr. 235-37. Novak, like Thompson, is a safety representative for the International USW who is experienced in post-accident investigations. Tr. 260-61, 270. And, despite the USW's argument that it was unable to effectively represent members because Thompson was denied access to the site, Novak interviewed witnesses and prepared an investigation report, including identifying potential causes of the accident. Tr. 242-43, R. Ex. 1.¹¹

¹⁰ Even Thompson herself conceded on cross-examination that it would not have been necessary for her to enter the facility in order to interview witnesses. Tr. 232. The Local Union hall, for instance, is only a few blocks from the facility. Tr. 210.

¹¹ The overwhelming evidence demonstrating the Union's alternate means of representation is precisely what distinguishes this case from others in which the Board has concluded that access should have been granted. The ALJ observed that in applying the *Holyoke* test, the Board has "frequently found that a union's right to access a plant to inspect or survey for hazardous health and safety conditions outweighs the employer's property interests." ALJD at 8. However, each of these cases is factually distinguishable. In *ASARCO, Inc.*, 276 NLRB 1367 (1985), *enf'd*, 805 F.2d 194 (6th Cir. 1986), key to the ALJ's findings (affirmed by the Board) that the employer violated the Act by denying International Union representation access to a mining facility following a fatal accident was the fact that access was particularly critical because there were no witnesses to the accident. *Id.* at 1369-70. By contrast, there were witnesses to the accident in this case (including the crane operator and union member Keith Soto), the Union was aware of those witnesses, and Local 1343 representatives were present during the post-accident investigation witness interviews conducted by OSHA. In addition, *ASARCO* involved an accident with a single employee who drove into a shaft. *Id.* at 1367. There is no indication that there was a procedure with equipment involved that the employer and union could revise and change, as they did here. Further, there is simply no evidence that the employee took the numerous steps that Caterpillar has taken in this case.

C.C.E., Inc., 318 NLRB 977 (1995), the other case cited by the ALJ, arises under entirely different circumstances. In that case, the Union had recently been certified as the unit representative and sought access so the Union's representative could gather information "vital to the process of collective bargaining" for the parties' first contract; specifically, information about the skill levels of employees and possible health and safety problems. *Id.* at 979. The ALJ concluded (and the Board agreed) that the employer violated the Act by denying access because the gathering of information from direct observation of the premises is presumptively relevant and necessary for the union's role in the collective bargaining process, particularly as it relates to observation of skills performed for job classifications. *Id.* at 978, 980. Significantly, the ALJ in

Yet, despite the wealth of information available to the Union concerning the accident, the South Milwaukee operations generally, and the crawler turning operation specifically, the General Counsel's and the USW's position is that on-site access for Thompson was absolutely required in order for the Union to be able to fulfill its representational purpose. Contrary to their arguments, as Caterpillar has repeatedly explained to the USW, after September 8, there was no possible benefit to be gained by Thompson accessing the site to view the "accident site," because after September 8, the accident site itself ceased to exist—OSHA gave the Company permission to resume operations on the evening of September 8, and operations resumed the following day. Tr. 315-16. Thus, the best evidence of what the accident looked like immediately after it occurred are the photographs that Caterpillar has already offered to the Union.

Additionally, within a week of the accident, a revised set of standard work protocols was implemented for the procedure of rotating a crawler frame. Tr. 345. These protocols were provided to the Union, and copies of the protocols are located in the weld shop work stations where Union members work every day. Tr. 343. The process that is currently in place for the crawler turning operation is very different from the one that was in use at the time of the accident. Caterpillar offered to both videotape that procedure and facilitate a discussion with Sharon Thompson. GC Ex. 25; Tr. 339. The Union never responded to this offer. Nor has the Union ever provided any legitimate explanation to Caterpillar as to why, in addition to all of the other information available, Thompson needs access to the factory property.

Even at the hearing, Thompson was unable to articulate any legitimate reason for needing access to the site. Indeed, when the ALJ asked Thompson directly what she would have done

C.C.E., Inc. noted that the employer in that case "proposed no alternatives" for its denial of access. *Id.* at 980.

had she been permitted access to the site on September 9, her response was illuminating for its lack of substance:

If I would have gotten in on the 9th, had I walked down the street and walked in, I would have noted all my observations of the area – you know, the room, the actual – if everything would still have been in position. I’m not sure – excuse me for not remembering right now if everything was still in position or if it was already back in operation. Don’t remember that at this exact moment. If it – say it would have all been in – no, he already moved it. Dave [Uebele] testified that he moved it. Okay. But I still would have wanted then to – I would have requested then, if possible that we could have gone through it. Okay? And since – if it – unless it was already in operation. Then I could have just watched what was operating at the time. Okay? But if it would just be sitting there, then I’d ask if we could try the test that they did the night before – if I would have learned of that. Do you know what I’m saying? Because if they – like now I’m learning that they tested it the night before. Okay? I didn’t know that when I came on the 9th. But had I known that on the 9th when I came in, I would have said, “Well, then can I see that reenactment?” Or I would say, you know, “It’s sitting there.” Then I would have just gone with what it is. I would never have asked them to start it up. Okay? But if the whole system was all cleaned up and back in operation, I would have said, “Can I stay here and watch this operation?” And I would watch what’s happening and how it’s movement and ask if I can be in the area.

Tr. 197-98.

In essence, Thompson testified that if she had been permitted on site, she would have asked to see the reenactment that was done on September 8—the very reenactment that was recorded and provided to the Union. And, the very reenactment that was conducted with the Local Union’s committeeman serving as crane operator—an individual to whom Thompson had ready access, but never interviewed.

Thompson also testified that she would have looked at the following aspects of the crawler turning operation:

But I would observe from different angles and watch what’s happening and watch, you know, different crawlers being made,

taking notes, watching the pressure of the crawler going down, watching how it lands in the back – you know, how it hits the floor – how it turns, how you hook it on, how it unhooks – you know, how far do you have to go under it. Does each time he go under it does he have to go under as far? Not as far? Do you know what I’m – you know, as it turns each time. And the next time a new one is brought in, does he still have to crawl under that far, or is it less the next time? Do you know what I mean? Is it always consistent or is it different?

Tr. 198-99.

Again, even if Thompson considered these aspects of the operation to be worthy of review, it was not necessary for her to access Caterpillar’s property to understand them. Caterpillar provided video recordings, photographs, and detailed written explanations of the procedure. The Company also offered to video tape the procedure again and facilitate a conversation between Thompson and a facility safety representative. Thompson and the Union never asked questions about the information that was provided, never complained that it was inadequate in any fashion, or took the Company up on its offer to provide requested follow-up information.¹² Tr. 223-26.

Thus, the record demonstrates that Caterpillar met all of Thompson’s claimed reasons for access but one: Thompson’s Zen-like desire to “see, hear, [and] feel everything.” Tr. 217-19, 224, 257-59. According to Thompson, any information short of actually being on-site would be insufficient because it would not provide “3D depth of the situation that you see, feel, hear, you

¹² And, again, Thompson failed even to take advantage of her access to the Union’s own leaders and members. For example, the Union elicited testimony that no one told Uebele where to stand or how to position the crawler assembly when he operated the crane during the accident reenactment. Tr. 165-66. However, Uebele also testified that the only person who would have been able to tell him where to stand to actually recreate what happened was the crane operator himself, Keith Soto, who had left for the day. Tr. 174-75. Notwithstanding the fact that Soto is the only person who could truly recount what happened with the crane during the accident, Thompson never interviewed Soto, or even Uebele, the committeeman who operated the crane during the reenactment. Tr. 234-35. Instead, Thompson got the name and phone number of one person (who she did not identify) and went home. Tr. 215-17.

know – you know, all of that that you need to be a part of in order to understand something. You have to be a part of something to be able to comprehend it.” Tr. 259.

By selectively quoting and characterizing the parties’ exchange of correspondence concerning this dispute, the ALJ ignored the information and explanations Caterpillar provided, as well as its repeated offers to discuss any questions or concerns the Union had. *See* discussion *supra*. Also ignored was the Union safety representative’s candid admission that she did nothing to investigate the matter and made no effort to substantively assess or discuss the information Caterpillar provided. *Id.* Instead, the ALJ simply accepted Thompson’s *post-hoc* explanation that having a physical presence on the property—being able to “see, feel, hear” and “be” the property, in three-dimensions—could never be satisfactorily replicated by any other means. Based on that finding, he concluded that access was necessary and the USW’s request therefore trumped the Company’s competing property interests. ALJD at 8 & n.18.

The ALJ’s analysis in this regard completely strips *Holyoke* from its moorings, because if the ALJ is correct that Thompson’s request to visit the site must be provided because no alternative will allow her to commune with the property itself, no employer will ever be able to provide a reasonable alternative to a Union’s request for access. *Holyoke*, 273 NLRB at 1370. In other words, under the ALJ’s faulty process, there would never be a circumstance in which the supposed balance of interests would sway in favor of an employer’s property rights because no matter the strength of the alternative means that are available to the union, those alternatives remain, by definition, inadequate because they are not access.

Contrary to the ALJ’s flawed analysis, the Board’s *Holyoke* standard requires consideration of the following undisputed facts:

- Local Union officials *did have access* to the site, both immediately following the accident and at all times thereafter;

- Caterpillar provided substantial information to the USW concerning the accident and the part-turning operation that was being performed when the accident occurred, including DVD recordings of a reenactment of the procedure, written explanations of various aspects of the operation, and detailed standard work protocols of the old and new versions of the work procedures;
- Caterpillar also offered to videotape the new procedure as it was performed and facilitate a conversation between the Company's and the Union's safety representatives to discuss any questions;
- The Union was provided a copy of the investigatory file compiled by law enforcement officers and the Union participated in all aspects of OSHA's investigation;
- The Union had ready access to witnesses for the purpose of conducting interviews;
- The Union never asked for any additional information outside of its repeated demand for on-site access; and
- After September 8, there was no further information to be gleaned from on-site review of the accident scene, because the equipment had been moved, the area cleaned, and operations resumed. And, after September 16, the process was changed.

It may be that had the Union actually engaged in meaningful discussions and raised the concerns it identified for the first time at trial, Caterpillar might have been able to satisfy the Union's concerns. But its decision to hold its breath until it was granted access does not give it the ability to "draw a foul" simply by refusing to discuss the alternate means identified by Caterpillar. Viewed in the proper context, these facts establish that the Union had a myriad of viable alternatives and no legitimate representational need for Thompson's request to access Caterpillar's South Milwaukee facility. Therefore, "[Caterpillar's] property rights will predominate, and the union [was] properly . . . denied access." *Holyoke*, 273 NLRB at 1370.

B. Contrary to the Administrative Law Judge's Conclusion, Caterpillar's Property Interests Were Not Diminished by Instances of Prior Access by Political, Charitable, or School Groups

The ALJ compounded his error in failing to consider alternative means available to the Union by concluding that Caterpillar's property interests were somehow diminished by the actions of a predecessor employer, which arguably allowed greater access to other third-parties in unrelated circumstances. ALJD at 8-9.

In the first place, the ALJ erred by proceeding from the assumption that Caterpillar's property interests were limited to concerns regarding the protection of confidential or proprietary interests. ALJ., p. 8, lines 35-38. It is true that Caterpillar invoked those concerns when discussing the disclosure of the DVD of the accident reenactment. GC Ex. 5, 7(a). But there is no evidence that Caterpillar's interests in its property as it related to the Union's request for onsite access were limited to these concerns. The parties' correspondence makes this point clear. *See discussion supra.*

Moreover, under the case law outlined above, the Supreme Court in *Lechmere* and *Babcock* recognized a much more broad-based property right entitled to substantial weight in balancing competing interests. Properly viewed as such, it is clear the ALJ erred in balancing the Union's representational interests against the more limited interests the ALJ identified. *Id.*; *Holyoke, supra.*

The ALJ also erred in trying to minimize Caterpillar's property interests by citing evidence regarding third-party access granted by a prior owner of the South Milwaukee facility. But this argument fails for several additional reasons. At trial, the General Counsel and the Union elicited testimony about past instances of non-employees accessing the South Milwaukee facility, including politicians and groups of high school students who were potential recruits as future employees and customers. Tr. 76-79, 331. Any arguments relating to Caterpillar's

allowance of access by these politicians or school groups are irrelevant to the issue of access by the Union's International representative. In addition the Complaint in this case does not allege that Caterpillar violated Section 8(a)(3) of the Act by discriminating against Thompson's request on account of her union affiliation or activity. *See* 29 U.S.C. §158(a)(3). Therefore, evidence of allegedly discriminatory animus is irrelevant. However, even viewed under the *Babcock* "discrimination" standard applicable in Section 8(a)(1) cases, evidence that Caterpillar treated politicians, students and customers differently than it treated Thompson does not establish a violation of the Act, as those groups are not of a similar character.

1. This Case Does Not Involve a Section 8(a)(3) Claim of Discrimination

The Complaint in this case alleges that by denying access to the USW's International representative, Caterpillar violated Sections 8(a)(1) and 8(a)(5) of the Act. Thus, the General Counsel did not allege that Caterpillar violated Section 8(a)(3), and never sought to amend its pleading to add such a claim. It is axiomatic that where, as here, there is no claim of discrimination, evidence of alleged discriminatory treatment is irrelevant. *R.L. Polk & Co.*, 313 NLRB 1069, 1071, 1077 (1994) (adopting ALJ's denial of motions to reopen record and to reinstate and amend complaint based in part on finding that "antiunion comments [] would have done little to support the General Counsel's case. There was no 8(a)(3) issue to be litigated, thus evidence of animus was irrelevant. The underlying case was tried solely on 8(a)(5) theories."); *Waco, Inc.*, 273 NLRB 746, 748 (1984) ("Union animus is an element in 8(a)(3) cases, but generally is not an element in 8(a)(1) cases. 'It is too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion.[]' Accordingly, the absence of union animus on the part of the Respondent . . . would be irrelevant to the issue of whether the Respondent violated Section 8(a)(1)") (citation omitted). Accordingly, the ALJ's reliance on

Caterpillar's purported allowance of access for political figures or school groups was misplaced as those alleged incidents have no bearing on the General Counsel's claims in this case.

2. The Alleged Access that the ALJ Erroneously Considered is of a Fundamentally Different Type and Character than the International Union Access Sought Here

Even if prior third-party access was potentially relevant, here the ALJ erroneously attributed the actions of a prior owner, Bucyrus, to Caterpillar. Contrary to the ALJ, there is no evidence that any such access was granted after the Caterpillar acquisition. Tr. 331-34. And even if the processes Caterpillar sought to protect when discussing a confidentiality agreement had not changed, the rights Caterpillar was entitled to protect were much broader and in no way diminished by access granted by a prior owner. The ALJ certainly cites no evidence for this erroneous proposition.

But even if such limited third-party access was granted by Caterpillar, it still does not diminish Caterpillar's broad property rights under Board precedent. Under *Babcock*, an employer can validly post its property against non-employee distribution of union literature so long as it does not discriminate against the union by selectively enforcing its own policies in order to prohibit union solicitation while permitting other distribution. *Babcock*, 351 U.S. at 112. Since *Babcock*, the Board has recognized certain "exceptions" to an employer's enforcement of non-solicitation/distribution policies, permitting employers to differentiate in their treatment of different groups. For example, the Board has held that an employer does not undermine its policy by allowing a "small number of isolated 'beneficent acts,'" such as a United Way campaign, at the employer site. See *Hammary Mfg. Corp.*, 265 NLRB 57, 57 n.4 (1982) (citations omitted).

More recent Board and federal law has gone even further in relaxing the interpretation of what constitutes discriminatory enforcement of employer policies. In *Register-Guard*, 351

NLRB 1110 (2007), the Board considered the employer's enforcement of its Communications Systems Policy ("CSP"), under which it prohibited use of company communications for solicitation of commercial ventures, religious or political causes, outside organizations or other non-job related solicitations. *Id.* at 1111. The ALJ found that the employer violated Section 8(a)(5) and (1) of the Act by discriminatorily enforcing its own CSP policy to prohibit union-related e-mails while allowing other non-work emails, such as jokes, baby announcements, party invitations, occasional offers of sports tickets and requests for services such as dog-walking. *Id.* at 1116-17. The Board reversed the ALJ, holding that discrimination means the unequal treatment of equals, thus "unlawful discrimination consists of disparate treatment of activities or communications of a *similar character* because of their union or other Section 7-protected status." *Id.* at 1117-18 (emphasis added) (citations omitted). The Board explained:

an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or it if permitted solicitation by antiunion employees but not by prounion employees.[] In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.[] For example, a rule that permitted charitable solutions but not noncharitable solicitations would permit solicitations for the Red Cross and the Salvation Army, but it would prohibit solicitations for Avon and the union.

Id. at 1118 (citations omitted).

In reaching its holding, the Board relied on the Seventh Circuit's decisions in *Guardian Indus. Corp. v. N.L.R.B.*, 49 F.3d 317, 319, 321-22 (7th Cir. 1995) and *Fleming Cos., Inc. v. N.L.R.B.*, 349 F.3d 968, 974-76 (7th Cir. 2003). In *Guardian Indus. Corp.*, the court instructed that discrimination involves the unequal treatment of equals, and held that an employer's denial of access to the company bulletin board to post union notices while permitting employees to post "swap and shop" for-sale notices was permissible because the distinction did not "discriminate against the employees' right of self-organization." 49 F.3d at 321-22. Similarly, in *Fleming*, the court concluded an employer did not violate the Act where it permitted an exception for certain personal postings (such as wedding and birth notices) to its company-use-only rule for bulletin boards, but disallowed union postings. 349 F.3d at 975-76. As the court held, these categories of postings were not of similar character and could not support a finding of unlawful disparate enforcement. *Id.*

The Board expressly adopted this view in *Register-Guard*:

We therefore adopt the position of the court in *Guardian* and *Fleming* that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and we shall apply this view in the present case and in future cases.

351 NLRB at 1119.

Indeed, the Seventh and other Circuits have held that *Babcock*-type discrimination only occurs when the employer is discriminating against activity of a similar character. *See Salmon Run Shopping Center LLC v. N.L.R.B.*, 534 F.3d 108, 116-17 (2d Cir. 2008) ("To amount to *Babcock*-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a subject protected by a section 7 less favorably than another person communicating on the same subject."); *Albertson's Inc. v. N.L.R.B.*, 301 F.3d 441, 442-43, 451 (6th Cir. 2002) (employer's allowance of charitable and civic/educational groups such as the Girl

Scouts and Salvation Army bell ringers to access and solicit on, in and around its properties but denial of same right to non-employee union representatives was not discrimination where there was “no evidence . . . that during the time [employer] refused to allow [union] non-employee organizers to distribute literature on its property, [employer] allowed distribution by another union”).

Thus, governing law expressly establishes that an employer can recognize categories of exceptions to its solicitation and access policies where those categories are distinct in character from requested access by non-employee union agents. It follows that even 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 as against access by others. Allowance of access by groups that are not of a similar character to the union is not discriminatory for the simple reason that those groups are not “equals” to the union.¹³ *Register-Guard*, 351 NLRB at 1117-18. Caterpillar has not drawn any lines for access along Section 7 grounds, and “nothing in the Act prohibits an employer from drawing lines on non-Section 7 basis.” *Id.* at 1118.

3. Any Alleged Access Concerning Past Practices by a Predecessor Employer at the Site is Irrelevant

Before the ALJ, the General Counsel and the Union also argued that prior to September 8, 2011, District 2 International Union representatives were permitted to access the Bucyrus facility when required by the grievance process. Tr. 74-75. The ALJ made no factual findings based on these claims, but to the extent that the General Counsel or the Union continue to assert

¹³ Any argument that the facility has permitted access to International representatives from District 2 is inapposite, as these representatives were permitted to access the facility through contractual right pursuant to the grievance procedures in the parties’ collective bargaining agreement. Tr. 74-75, 96-97.

that the denial of access in this case was a departure from a more lenient “past practice” of permitting international representatives to access the site, such argument fails.

A “past practice” of conduct is established where evidence exists to demonstrate a consistent and long-standing course of conduct between the parties. *See Fashion Furniture Mfg.*, 279 NLRB 705, 715 (1986). Once established, past practices can still be changed, and the statutory bargaining obligation does not arise, in situations where the change is not “material, substantial and significant.” *United Technologies Corp.*, 278 NLRB 306, 308 (1986) (citing *Peerless Food Products*, 236 NLRB 161 (1978)); *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991).

It is undisputed that there is no provision in the parties’ collective bargaining agreement providing access to the facility by non-employee Union agents. Thus, to establish a violation of its bargaining obligations the General Counsel would have to establish that there was a past practice of access in situations similar to the instant case. As a threshold matter, nothing at trial established that there was a past practice at the facility of permitting access by the Union’s International representatives under circumstances similar to those at issue in this case. The only evidence adduced at trial about access to the facility by International representatives revealed that the Union’s District 2 International representatives accessed the facility on infrequent occasions for third step grievance meetings, pursuant to the terms of the parties’ collective bargaining agreement. Tr. 74-75, 96-97. Evidence of such limited access by International representatives pursuant to the contractual grievance process does not establish an extra-contractual past practice of universal access. There is no evidence of International representatives accessing the site under circumstances similar to those at issue in this case, where the Union seeks access for an International safety representative to investigate an on-site

accident. Indeed, no factual circumstances similar to this case, which involves a request for access in the wake of an industrial accident, have arisen at the facility for at least two decades. Indeed, Jaskie, Dobrzynski, and Uebele, who have worked at the Bucyrus facility for 17, 17, and 22 years respectively, testified that there has never been a fatal accident at the facility during their terms of employment there. Tr. 32, 47, 109, 120, 140, 157. Simply put, no past practice can be established as there is no evidence that a factual scenario even similar to the one in this case has ever occurred at the Bucyrus facility, either before or after Caterpillar's acquisition.

Even if the General Counsel or the Union could establish that Bucyrus had a prior practice of permitting access more freely in a different context before Caterpillar took over the facility (which it cannot), any "change" or departure from that practice as between Bucyrus and Caterpillar was not material, substantial or significant. "[N]ot every unilateral change in [] access[] rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one." *Peerless Food Products*, 236 NLRB at 161 (citation omitted) (finding that the "net effect" of the change in access rules did not materially, substantially or significantly reduce that value of employee access to union business representatives, even where undisputed past practice allowed a union representative "virtually unlimited" plant access). "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co.*, 284 NLRB 1205, 1205 n.1 (1987), *enf'd. mem.*, 852 F.2d 572 (9th Cir. 1988).

As a threshold matter and as discussed *supra*, there is no evidence that establishes that any past practice existed relating to access in a similar context, thus there is no way to establish that any "change" from such practice represents material, substantial or significant departure from any existing terms and conditions. However, even if the General Counsel or the Union had

a colorable argument that Bucyrus's more lenient practices established a past practice (which they do not), any alleged change in practice here is not material, substantial or significant. A change in access practice has been found to be "material, substantial, and significant" where there were findings that, *inter alia*, the company made no showing of a reasonable alternative channel of communication and did not allege that its actions were taken in protection of its property right. *Fashion Furniture*, 279 NLRB at 705, 714-716 (adopting relevant portions of ALJ's findings and conclusions).

Here, Caterpillar made available abundant reasonable alternatives to access and asserts that its actions were taken in protection of its property rights. Caterpillar provided the union with ample information about the accident, including videos of the reenactment, the police report and standard work protocols for the crawler frame-turning operation. Tr. 90-91; GC Exs. 11, 14, 24; Joint Exs. 1, 2. Caterpillar also offered to videotape the current crawler rotation process and facilitate a discussion with the union about that process. GC Ex. 25; Tr. 339. Even assuming that Bucyrus would have allowed access had such a situation arisen (a proposition for which there was no evidence at trial), Caterpillar's denial of access under these very narrow circumstances, while offering numerous alternative channels of information, did not remove a "real and substantial benefit." *See Fashion Furniture*, 279 NLRB at 715-16. As a result, Caterpillar's actions were not a "material, substantial, and significant" change to any alleged past access practice. *See id.*

CONCLUSION

Caterpillar respectfully requests that for the foregoing reasons the ALJ's findings that the Company violated Sections 8(a)(5) and (1) be reversed and the complaint be dismissed in its entirety.

Dated: October 17, 2012

Respectfully submitted,

CATERPILLAR INC.

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CERTIFICATE OF SERVICE

Elizabeth J. Kappakas one of the attorneys for Respondent, hereby certifies that she has caused a true and correct copy of the foregoing Brief in Support of Respondent's Exceptions to be served upon:

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