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

CATERPILLAR INC.,

Respondent,

and

Case No. 30-CA-064314

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

Charging Party.

CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT CATERPILLAR'S EXCEPTIONS

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INTRODUCTION

Charging Party United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW" or "Union") is the exclusive bargaining representative of production and maintenance employees of Respondent Caterpillar, Inc. ("Caterpillar" or "Company") at its South Milwaukee and Milwaukee facilities. The present case arose when Caterpillar denied the Union's Health & Safety Specialist Sharon Thompson access to its South Milwaukee facility to investigate the cause of a tragic accident which occurred on September 8, 2011, killing Jeffrey Smith, a 30-year old crane operator (Decision p.3 lines 3-4; TR157; G.C. Exh. 14(c), p. 1).

Caterpillar has filed 82 exceptions to the Recommended Decision and Order of the Administrative Law Judge ("ALJ"). As set forth below, Caterpillar's exceptions are contrary to the record evidence in this case and seek to override the ALJ's credibility determinations without any, let alone the requisite, showing of a clear preponderance of all relevant evidence. Contrary to Respondent's Exceptions, the ALJ properly applied the Holyoke Water Power Co., 273 NLRB 1369 (1985) balancing test in reaching his conclusion that the Company had violated Sections 8(a)(1) and (5) of the Act.

I. THE RESPONDENT'S EXCEPTIONS ARE CONTRARY TO THE RECORD EVIDENCE.

A. The Accident

"On September 8, 2011, Jeffrey Smith, a unit employee was crushed to death by a multi-ton crawler while working in the welding area" of the South Milwaukee facility owned by Respondent Caterpillar Inc. (Decision, p. 3, line 3). The International USW has established an Emergency Response Team ("ERT") (TR50). As described in

posters at the South Milwaukee facility, the purpose of the ERT is "to investigate all fatalities and catastrophic injuries." (TR41, 43; G.C. Exh. 27). Upon learning of the tragic accident, USW Local 1343 President Kevin Jaskie contacted the ERT and Health & Safety Specialist Sharon Thompson, a member of the ERT, made arrangements to visit the plant the following day (Decision p.3 lines 8-11; TR53).

Contrary to Caterpillar's exception 14, the ALJ's finding that Jaskie relayed Local 1343's plan to have an ERT conduct an on-site investigation is fully supported by the record (Decision, p. 3, fn. 12). Jaskie and Local Union Vice President Mike Dobrzynski told the General Manager of the Milwaukee and Eastern Manufacturing Group of Caterpillar, Inc., Rod Bolhous, "the Emergency Response Team from Pittsburgh was flying in, that they would be there in the morning. They do an investigation and they help us out." (Decision, p. 3, line13; TR123). Bolhous confirmed that "Kevin indicated that the National would like to send someone in and I communicated that I thought that would be fine." [1] (TR311)

B. Denial of Access

On September 9, 2011, Health & Safety Specialist Sharon Thompson arrived to investigate the fatal accident of the day before (Decision, p. 3, lines 23-24). She signed in and received a visitor's pass as other non-employee visitors, including customers, high school students and politicians had on prior occasions (TR75-78, 210, 329, 331-332). She, however, was confronted by four management representatives, who were admittedly "not overly polite."(TR317). She was informed, "You are not welcome here." (TR317). "You can go home." (TR212). "You can't come in." (TR70).

[1] The ALJ noted that Bolhous stated he reversed his position (Decision, p. 3, fn. 12). Jaskie denies that Bolhous ever informed him that he had reversed his position on ERT access (TR397).

Caterpillar acquired Bucyrus International Inc. ("Bucyrus") through the purchase of Bucyrus stock on July 9, 2011 (Decision, p. 2, line 23; TR32, 104, 110). Following the sale, the South Milwaukee facility continued to make the same mining equipment, using the same methods, as prior to the sale (Decision, p. 6, line 13; TR332-333). Contrary to Caterpillar's exceptions (nos. 40 to 44), the undisputed evidence in the record establishes that tours of the South Milwaukee facility continued to occur following Caterpillar's acquisition of the South Milwaukee facility. Local Union President Kevin Jaskie testified that the South Milwaukee facility had been toured by high school students during working hours while work was in progress and the most recent tour had occurred two weeks before the hearing in this case (TR79). Jaskie testified that recently the tours occurred "pretty regularly"; "we are getting ready to do some hiring so they are ramping it up." (TR79).

In support of its exceptions 40-45 Caterpillar cites the testimony of Rod Bolhous (TR331-334). On those pages, Bolhous was asked if there were high school students who toured the facility from time to time (TR330-331). Bolhous confirmed, "We offer tours, guided tours. Yes." The ALJ asked follow-up questions of Bolhous concerning the tours:

Judge Ringler: Now, how often do you have these tours come in?

The Witness: How often do we have tours?

Judge Ringler: Yes.

The Witness: Frequently.

Judge Ringler: Okay. What is frequently? Is it once a month? Is it five times a month?

The Witness: We probably average one or two tours a week.

Judge Ringler: Okay. And who would be part of the tour group? What is the population of the tour group?

The Witness: Typically, tours are customers, dealers, technical groups within Caterpillar -- or Bucyrus previously.

(TR331).[2] There is no testimony that tours ceased at the time Caterpillar took possession of the facility.

Bolhous claimed he informed his superiors on September 9, that "without CAT legal approval, we would not allow access to the International Union expert and that they agreed." (TR326). Bolhous acknowledged that he had no personal concern about having the USW Specialist on the premises; under Bucyrus, International Union representatives came into the facility; there was no greater risk at the time of the accident than previously (TR329, 333). His concern was from the perspective of the new owner, Caterpillar (TR329). Yet, Bolhous stated, he did not base his concern on any information or policy or directives he had from the new owner (TR329). The new owner had not communicated any reason why an International representative should not be able to come onto the South Milwaukee premises without talking to CAT legal (TR330). Bolhous was the only Caterpillar decision maker to testify and he articulated no reason for denying access.

C. The Importance Of On-Site Access

[2] Judge Ringler went on to ask about student tours and specifically "and has it [student tours] occurred since Caterpillar took over in July of 2011?" Bolhous replied, "I couldn't say for sure." (TR332). John Hubert, Labor Relations Manager of the Caterpillar South Milwaukee facility, was also aware that school groups from a welding school had come through the facility (TR356). He knew that Pulaski High School welding students had been through the facilities, but did not know whether it was before or after he had come to the facility in September of 2011 (TR358).

The ALJ credited the testimony of Health & Safety Specialist Sharon Thompson concerning the Union's need for an on-site investigation in order to be able to determine the root cause of the accident which took Jeffrey Smith's life. The ALJ explained:

> Thompson explained that, although Caterpillar ultimately provided the Union with limited information about the accident (i.e., a short DVD recording of its operations, photos and other documents), these materials were deficient.... She noted that the DVD recording was deficient because it: failed to cover several vantage points; did not sufficiently demonstrate depth, distance, sound, material properties or other key characteristics; and omitted a panoramic view of the relevant welding operations. She indicated that the police investigatory report similarly had failed to identify the root cause of fatality and Local 1343 staff was unqualified to perform an independent accident examination.

(Decision, p. 6, lines 28-37). All of these findings are supported by Sharon Thompson's testimony.

Thompson explained that an on-site visit would allow her to observe the crane operation from many perspectives, to observe the lighting, how the crane was hooked to the crawler, how the crawler leaned on the mats, the composition of the rubber mats, and the use, advantages and disadvantages of wooden cribbing (TR195-196). Thompson explained that even after the accident was cleaned up she would be able to view the operation of hooking up the crane and then turning the crawler, again from various perspectives, how the crawler hits the floor; she would watch the stages in which the crawler was turned and how far an employee had to go under the assembly when hooking up the crane (TR198-199).

The ALJ credited Sharon Thompson's testimony that the available alternate information, without an on-site inspection, was inadequate to determine the root cause of the accident and means of preventing another accident (Decision, p. 6, lines 28-35). Thompson testified that the DVD recording failed to cover various vantage points, "it

doesn't give me the depth, the angle… 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." (TR217-218). Thompson also explained the police reports were insufficient because she could not view the equipment and operations to which the witnesses refer: the various methods of hitching the assembly using one or multiple trolleys, the composition of the mats and how the mats are used in the turning operation, the pressure exerted on the equipment used and the interaction of the components of the operation (TR218-219). The police witness interviews did not disclose the cause of the accident (G.C. Exh. 14(c)). None of the witnesses could explain why the accident had occurred. Id.

In its exceptions (3 and 22) Caterpillar seeks findings that Local Union representatives were present during the OSHA inspector's interviews of employees on the day of the accident. According to Thompson's credited testimony none of these Union representatives had any training in the investigation of industrial accidents. (Decision, p. 6, line 36; TR219). This finding is consistent with the testimony of Local Union President Kevin Jaskie that he had no safety or accident investigation training (TR47), nor did Vice-President Mike Dobrzynski or Committeeman David Uebele (TR116, 120, 144, 158, 163).

It is well established that the Board will accept an ALJ's credibility determinations unless the clear preponderance of all relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). Here, the ALJ credited Sharon Thompson's testimony that an on-site inspection was needed. Thompson's testimony was confirmed by that of Local Union

representatives and documentary evidence. There was no countervailing evidence presented, let alone a clear preponderance of such evidence.

Caterpillar presented no rebuttal testimony that accident investigation could be accomplished without an on-site inspection. It is noteworthy that in performing its own investigation Caterpillar did a second re-enactment some time the following week without involving the Union (TR163, 177, 393; G.C. Exh. 34). Caterpillar did not perform its investigation by reviewing videotapes and looking at work protocols.

D. The Aftermath

Caterpillar's exceptions 8, 9 and 13, that it involved the Local Union in the investigation and preparation of the new standard work protocol, are wrong. Notwithstanding OSHA Representative Lewis Ramos-Morales' indication that the Local Union was to be involved in any further investigation after September 8, Local 1343 President Kevin Jaskie was never informed that any further investigation was scheduled (TR79-80). The new standard work protocol was developed without any input from the Local or the International Union. When Safety Manager Colleen Klaiber and her staff re-enacted the accident, no Union representative was involved (TR163, 164, 177; G.C. Exh. 34). The only bargaining unit employees involved were lead William Frahman and David Klein, neither held any position with the Union (TR90, 164, 396; G.C. Exh. 34). Caterpillar did not provide Local Union President Kevin Jaskie with a copy of the standard work protocol when it was prepared nor when he requested it on January 19, 2012 because, the Company claimed, it needed a confidentiality agreement (G.C. Exh. 12, 14(a)). No such agreement or protective order was sought when the work protocol was entered into evidence at hearing or when provided to OSHA or the police and

thereby accessible to the public (G.C. Exh. 14(a); TR31, 223; G.C. Exh. 14(a); G.C. Exh. 25).

Caterpillar's exceptions (10, 11, 12, 13, 31, 32, 34 and 67) focus on the new standard work protocols. The standard work protocols however do not obviate the need for an onsite inspection. First, the new protocols are not followed on a regular basis. The standard work protocols do not include the use of the rubber mats, but the testimony at hearing establishes that the mats are being regularly used to turn the crawler after, as well as before, the accident (TR167). Although the new protocol calls for using two trolleys, Union Committeeman David Uebele had observed on at least a half dozen occasions since the accident that operators turn the crawler assembly using only one trolley (TR168). Although Uebele may operate a crane in the weld area, he was not trained on the use of the new standard protocol (TR166). Given that the new standard protocol frequently is not used, its existence does not alter the Union's need for access. The Union also has an interest in viewing the operation of the new work protocol to determine its safety and why it frequently is not used.

Contrary to Caterpillar's exception 38, the Union explained the reasons an on-site inspection was needed shortly after the denial of access. In its September 26, 2011 letter, the Union explained, "The Union representatives have not had adequate training to be able to identify the root causes of the accident.... The Union's Safety & Health expert needs to view the process of turning the crawler assembly while it is being performed…and have access to the materials used at the time to understand how the process occurred on September 8..." (G.C. Exh. 4, pp. 2-3). "The Union wants the opportunity to review the location of the crane operator and the crane hitcher as well as

any materials used to brace the crawler assembly as it is turned." Id. p 3. When Caterpillar offered a video taken the night of the accident, the Union explained its deficiency, pointing out there was no ability to view the location of the crane operator at the time of the accident and "there was no reenactment of the hitching process", a point acknowledged by the Company, "nor an identification of what factors led to the accident" (G.C. Exhs. 6, 11)

The USW also pursued its investigation off-premises. Witnesses were not available after work hours on Friday September 9; employees were distraught with Jeffrey Smith's funeral the following Monday (TR216-217). Thompson, however, forwarded the names and phone numbers of witnesses she obtained to Health & Safety Trainer James Novak who was also a member of the ERT and who performed witness interviews (TR235, 261-267; Charging Party Exh. 1; Resp. Exh. 1).[3] Novak's file confirms that without an on-site investigation, it was impossible to do an adequate investigation of the fatal accident. "No hazard analysis for changes to the crane and hooking procedures." "Not verified why crawler shifted. It may have been the rubber mats or maybe not -- after the fatality the Company has again allowed the use of rubber mats." (Resp. Exh. 1, pp. 26-28).

II. THE ALJ PROPERLY APPLIED THE BALANCING TEST ESTABLISHED BY HOLYOKE WATER POWER COMPANY IN REACHING HIS DECISION THAT CATERPILLAR VIOLATED THE ACT.

Caterpillar concurs with the ALJ's analysis that the evidence in the present case should be evaluated utilizing the balancing test first found applicable to a bargaining

[3] Caterpillar's exception 36 that the Union safety representative did not do interviews is false. James Novak is a safety trainer and a member of the ERT and did do interviews (TR237; Resp. Exh. 1). He received the assignment because he is located in Wisconsin (TR260).

representative's right to access in Holyoke Water Power Company, 273 NLRB 1369 (1985). [4]

Contrary to Caterpillar's exception 72, case law under Holyoke supports the ALJ's finding that information concerning health and safety is presumptively relevant to the Union's bargaining obligations. This holding applies not only when identifying subjects of bargaining or evaluating the relevance of information requests, but also applies in work place access cases. "The information, regarding safety conditions, which the Union seeks to obtain from direct observation of the premises, is presumptively relevant and necessary to its role as bargaining unit employees' exclusive representative." Washington Beef Inc., 328 NLRB 612 (1999), citing C.C.E. Inc. 318 NLRB 977, 978 (1995).

As the Board found in ASARCO Inc., 276 NLRB 1367, 1369 (1995), "access to an accident site by an experienced investigator is fundamental to an accurate, authoritative, and comprehensive report on an accident. As explained in Hercules, Inc., 281 NLRB 961 (1986), "it is elementary that here, as with accident investigation, a verifiable, fair, accurate and complete investigation necessitates the Union have access…" Id. at 968. As the foregoing citations indicate, the ALJ properly noted "that the Board heavily favored access rights, where such rights are being exercised in a Union in order to promote a Union's legitimate health and safety interest." (Decision, p. 8, lines 21-23).

Caterpillar's reliance on NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) is misplaced. The balancing test applied in Babcock was intended to address the access

[4] Charging party has excepted to the application of the Holyoke balancing test in favor of the prior analysis of bargaining representative access in Winona Industries, Inc., 257 NLRB 695 (1981).

of non-employee organizers to the property of an employer for the purpose of soliciting an unorganized work force. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), upon which Caterpillar relies, also addresses access by non-employee organizers of a union which was not the bargaining representative. These cases arise under Section 8(a)(1) of the Act. They are not analogous to an exclusive bargaining representative's request for access under Section 8(a)(5) of the Act to investigate the health and safety of its members, a paramount concern of an exclusive bargaining representative.

The First Circuit, in enforcing the Board's order in Holyoke Water Power Co. noted that Babcock & Wilcox was not applicable to the request of a bargaining representative.

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

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

> Babcock...discusses the employer's duty to refrain from interfering with protected employee activities. That duty is imposed by section 8(a)(1) of the National Labor Relations Act. This case, by contrast, is based on the employer's affirmative duty to bargain under section 8(a)(5) and 8(d) of that Act. Less weight may be due the employer's property rights when the employer is subject to a duty to bargain.

Id.

The only case upon which Caterpillar relies involving access by the exclusive bargaining representative is Brown Shoe Co. v. NLRB, 33 F.3d 1019 (8th Cir. 1994). The case is inapposite first because it does not deal with access for a health and safety investigation and secondly because it does not establish Board precedent. Just as importantly, the decision in Brown Shoe Co. is based in substantial part on evidence that the Union had alternative means of obtaining the information it needed, including use of a joint investigation and the availability of time studies already available for the relevant machines. Here, by contrast, Caterpillar rejected the Union's request for a joint investigation and the ALJ found Sharon Thompson "persuasively demonstrated that the accident investigation materials that Caterpillar previously submitted to the Union were deficient and that an onsite survey remained necessary." (Decision, p. 8, lines 29-31; G.C. Exh. 3, p.3). As the ALJ explained,

> While Caterpillar provided photographs, reports, standard work protocols and DVD evidence, this material is a poor substitute for the information that might have been obtained during an onsite survey.

(Decision, p. 8, fn. 18). The ALJ went on to observe that the DVD was two dimensional and limited to the angles, distance and duration that the non-expert filmmaker considered relevant and, thus, a poor substitute for three dimensional on-site inspection. Id.

Caterpillar offered absolutely no evidence which would contradict the ALJ's straightforward analysis of the inadequacies involved in the information provided. Indeed, when Caterpillar performed its own evaluation of the accident, it utilized onsite inspection and additional re-enactment in the workplace; it did not rely on DVDs or work

protocols. The present case is easily distinguishable from Brown Shoe Co. where alternative available information had not been evaluated.

The ALJ also allocated the burdens of proof consistent with the Holyoke balancing test when he found "Caterpillar failed to carry its burden of showing that there were no alternative means available to the Union which would have permitted it to effectively represent the unit in its key safety issue contrary to Caterpillar's exception 72. It is Caterpillar's burden to show that there are alternative means available to the Union to effectively represent the bargaining unit. "[Although] it is the General Counsel's burden to establish the relevance of the information sought by the Union, it is the employer's burden to show there is an alternative means other than access that would satisfy the Union's need." Nestle Purina Petcare Co., 347 NLRB 891 (2006).

Notably, the Eighth Circuit in Brown Shoe Co., 33 F.3d 1019 (8th Cir. 1994) was disturbed by the absence of precisely the evidence found in this case, that the requested inspection would not disrupt its operations. Id. at 1024. Here, in evaluating Caterpillar's property interest, the ALJ specifically credited Sharon Thompson, an experienced ERT member, finding that she "credibly testified that she would not have interfered with production during her survey." Caterpillar provided absolutely no evidence contradicting Thompson's testimony let alone a clear preponderance of evidence as required under Standard Dry Wall Products, 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3d Cir. 1951).

Finally the ALJ relied upon the overwhelming evidence that there was a considerable history of permitting non-employee visitors to access the facility. "Although most of these visitors entered under Bucyrus' regime, there is uncontradicted

testimony that the visits by high school students and by customers have continued since Caterpillar's takeover on a weekly or bi-weekly basis." (Decision, p. 9, fn. 19; TR 331-332). The ALJ's finding is supported by the testimony of Kevin Jaskie that there had been high school groups through the facility two weeks before the hearing and the tours occurred regularly (TR79). Bolhous himself confirmed that there had been tours of customers and dealers virtually every week (TR331-332).

Contrary to Caterpillar's suggestion, the fact that it has provided access to its facilities to many other individuals in groups is relevant in a Section (8)(a)(5) case involving access of a non-employee union representative. Thus, in CCE, Inc., 318 NLRB 977 (1995), in evaluating the employer's property interest, the Board considered that the respondent had provided access to its facilities to many individuals and groups including school children and potential customers before concluding that the respondent's interest in keeping union representatives off its property was weak, while the Union's interest in obtaining information for collective bargaining was substantial. Id. at 977-978. Here, Caterpillar's property interest in excluding non-employee health and safety specialist from its premises is similarly weak. As the ALJ found, it has granted access to customers, school groups and politicians. Tours have included the area in which the accident occurred (TR334).

Indeed, the Company never identified the property interest upon which it denied Thompson access to perform an onsite investigation. While Bolhous suggested to his superiors that Ms. Thompson not be allowed on premises without Cat legal approval, he did not base his direction on any information, policy or directives that he had received from the new owner (TR329). The new owner had not communicated to Bolhous any

reason why the International representative should not have been able to come onto the South Milwaukee premises without talking to CAT legal (TR 330). There is no policy or judgment which Bolhous was aware that provided the facility access to International union representatives was beyond Bolhous' control and must go to CAT legal (TR 331). Bolhous stated that he had no personal concern about having an International representative on premises (TR 329). In sum, Caterpillar provided absolutely no explanation of what its property interest was which caused it to deny a Union Health & Safety Specialist access following a fatal accident.

The ALJ properly applied the Holyoke balancing test to find that Caterpillar violated Sections 8(a)(1) and (5) of the Act by refusing non-employee representatives of the Union access to its South Milwaukee facility to investigate a fatal accident.

CONCLUSION

For the foregoing reasons, Charging Party USW respectfully requests that the Board deny Respondent's exceptions and affirm the Judge's findings of fact, conclusions of law and remedy as modified by the exceptions filed by General Counsel and the Charging Party.

Dated: October 31, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 31, 2012, the CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT CATERPILLAR'S EXCEPTIONS were electronically filed by using the NLRB's website and copies were served via electronic mail and by U.S. First Class Mail, postage prepaid, upon the following:

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