

**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 ANSWERING BRIEF TO THE EXCEPTIONS FILED  
BY THE COUNSEL FOR THE ACTING GENERAL COUNSEL 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(d) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.46, submits the following answering brief to the exceptions filed by the Counsel for Acting General Counsel (“CAGC”) to the recommended decision and order of Administrative Law Judge (“ALJ”) Robert A. Ringler.

## ARGUMENT

### **I. ASSUMING A VIOLATION OCCURRED, THE ALJ CORRECTLY ORDERED THE PARTIES TO MEET AND CONFER REGARDING ACCESS**

#### **A. Regardless of the ALJ’s General Citation to *Roseburg*, a Meet and Confer Requirement for Access Cases is Well Established and Supported**

Having ostensibly “won” the case before the ALJ, the CAGC nevertheless excepts from the ALJ’s decision, arguing that he erred in fashioning a remedy requiring Caterpillar and the USW to bargain over the Union’s request for access, as opposed to simply ordering the Company to “grant access” to the Union’s designated international representative. CAGC Br. at 1 & Proposed Order at ¶ 2(a). According to the CAGC, the ALJ’s error stems from his misapplication of Board precedent in information request disputes (namely, *Roseburg Forest Prods. Co.*, 331 NLRB 999 (2000)), which, the CAGC asserts is “inapposite” to the case at bar. CAGC Ex. Br. at 3.

As explained in Caterpillar’s exceptions and supporting brief, the Company agrees that the ALJ committed reversible error by failing to apply the Board’s governing standard for access cases, *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), and instead treating this matter as if it were an information request dispute, which it is not. Caterpillar Ex. Br. at 25-28. As the CAGC acknowledges, the ALJ’s misapplication of precedent is of critical significance because “the Board has held in *Holyoke* and its progeny that access cases are *not* akin to information request

cases and thus warrant a balancing test as opposed to a ‘broad relevancy’ standard.” CAGC Br. at 2 (emphasis in original). Indeed, the Board made the distinction between access and information request cases abundantly clear in *Holyoke*, instructing:

[W]e disagree with the judge’s analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union’s proper performance of its representation duties. While the presence of a union representative on the employer’s premises may be relevant to the union’s performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors. Rather, each of the two conflicting rights must be accommodated.

*Holyoke*, 273 NLRB at 1370.

Contrary to *Holyoke*’s instruction, the ALJ’s analysis in this case is premised on his “presumption” that access has “unparalleled value” for which no “adequate substitute” exists. ALJD at p. 7, lines 34-41 & p. 8, lines 11-15. In this regard, the ALJ’s decision, while paying lip service to *Holyoke*, in fact spurns the balancing of interests that *Holyoke* requires in favor of a presumption of relevance standard tracking the Board’s information request jurisprudence (an approach that *Holyoke* specifically rejects).

However, while the ALJ erred by failing to apply *Holyoke* in finding a violation, he did, contrary to the CAGC’s protestations, properly require that the parties meet and confer for the purposes of reaching an agreement over the contours of how and when access may be required. Thus, while the ALJ’s citation to *Roseburg* (despite the fact that, as explained below, there are many *Holyoke* cases more directly on point) highlights the error in his approach to liability, it does not support the CAGC’s exceptions to his proposed order. Rather, assuming Caterpillar is

found to have violated the Act by denying access,<sup>1</sup> the ALJ's targeted remedy, at least, is wholly in accordance with *Holyoke* and its progeny.

**B. Contrary to the CAGC's Exceptions, All Post-*Holyoke* Cases Require Bargaining Over the Scope of Access**

In support of its argument that the ALJ erred in ordering the parties to bargain over access, the CAGC boldly asserts, “none of the Board access case decisions set forth a remedy other than requiring the employer to grant access to the union. . . . Instead, the decisions consistently require only that the employer grant access . . . .” CAGC Br. at 5. This is incorrect. In *Circuit-Wise, Inc.*, 306 NLRB 766 (1992), for instance, an access case, the Board ordered the employer to “meet with the Union to decide on reasonable times and places when the Union can have its designated health and safety expert visit and inspect the plant.”

Similarly, *Holyoke* and its progeny (string-cited in the CAGC's brief at page 5), all involved orders requiring access for “reasonable periods” and at “reasonable times” to permit investigation of specific issues or concerns. So, while these orders did not necessarily spell out a requirement that the parties preliminarily engage in “bargaining” prior to access, the terms “reasonable times” and “reasonable periods” are not self-defining. *A fortiori*, the caveat in these orders—that access need only be permitted at “reasonable” times and places—necessarily presupposes that the parties meet and confer to reach an understanding on the contours of the visit. *See, e.g., Holyoke Water Power Co.*, 273 NLRB 1369, 1371 (order employer to, “on request, grant access, by an industrial hygienist designated by the Union, to the FD fan room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards . . . .”); *Nat'l Broadcasting Co.*, 276 NLRB 118 (1985) (similarly ordering access “at

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<sup>1</sup> Caterpillar clearly does not concede this point, as reflected by its exceptions to the ALJ's decision.

reasonable times and places”); *Hercules, Inc.*, 281 NLRB 961 (1986) (same); *Gilberton Coal Co.*, 291 NLRB 344 (1988) (same).

Thus, contrary to the CAGC’s exceptions, in those access cases where the Board has determined access must be allowed, it has generally restricted such access to “reasonable” times, places, and locations, consistent with the union’s actual need. Indeed, even the CAGC’s own proposed order appears to recognize this fact to the extent that it would require Caterpillar to “grant access to the Union’s health and safety specialist designated by the Union to Respondent’s facility for *reasonable* periods and at *reasonable* times . . . .” CAGC Br. at 1 & Proposed Order at ¶ 2(a) (emphasis added).

The problem with the CAGC’s proposed order, however, is that while it recognizes, on the one hand, that *Holyoke* and its progeny require only “reasonable” access (in those situations where a violation is sustained), it is also patently overbroad inasmuch as it is wholly divorced from the specific incident underlying the parties’ dispute. The discrete allegation that forms the crux of the CAGC’s complaint is that Caterpillar violated Sections 8(a)(5) and (1) of the Act by denying on-site access to USW international representative Sharon Thompson in the aftermath of a September 8, 2011 accident at the Company’s South Milwaukee facility. Compl. ¶¶ 7-8. Yet, while the CAGC’s complaint and the ALJ’s factual findings are premised on this specific request for access, the CAGC’s proposed order would require access for an unidentified Union “health and safety specialist” to conduct “health and safety inspections” and to “fully investigate industrial accidents,” generally. There is nothing in *Holyoke* that sanctions this type of open-ended, non-specific access, unrelated to the incident upon which the initial request was purportedly based. Similarly, there is nothing in *Holyoke* that supports the CAGC’s argument (contrary to its own proposed order) that the parties need not reach agreement on the

“reasonable” terms of access. Therefore, assuming a violation occurred (*but see* footnote 1, *supra*), the ALJ’s remedy is entirely consistent with *Holyoke* and its progeny.

More fundamentally, for the reasons explained above and in Caterpillar’s exceptions brief, *no remedy* is warranted in this case because the undisputed facts, viewed under the governing legal standard in *Holyoke*, demonstrate that: (1) the Company provided a wealth and variety of information to the Union concerning the accident and the part-turning operation that was involved in the accident; (2) the Company offered additional information to the Union that the Union never took advantage of; and (3) the Union made no effort to engage Caterpillar in any substantive discussions concerning alternatives to access that could satisfy the Union’s claimed needs. On this record, therefore, the Union had no legitimate representational need for Sharon Thompson to access Caterpillar’s facility, and the complaint should be dismissed in its entirety.

**II. THE ALJ’S FINDING THAT CATERPILLAR HAD A “LEGITIMATE AND SUBSTANTIAL” INTEREST IN MAINTAINING CONFIDENTIALITY DOES NOT SUPPORT THE CAGC’S EXCEPTIONS TO HIS PROPOSED REMEDY**

The CAGC also argues that the ALJ erred by finding, on the one hand, that Caterpillar “held a significant competing interest” in protecting the confidentiality of its manufacturing process, while on the other hand finding that the Company’s “property interest was lessened to a degree by a *considerable* history of permitting non-employees visitors to access the facility . . . .” CAGC Ex. Br. at 6 (emphasis in original). This argument is not well founded for two reasons.

First, contrary to CAGC’s assertion, the evidence does not support the ALJ’s non-specific factual finding that “Caterpillar and its predecessor, Bucyrus, frequently allowed” such visitors as public groups, campaigning politicians, and high school recruiting tours. ALJD at p. 6, lines 3-14. Nor does Caterpillar admit any such point, as stated in its exceptions. Caterpillar Ex. Br. at 22, 38-46. Rather, the record demonstrates that since Caterpillar acquired the facility from

Bucyrus, those instances in which access has been allowed to third-parties have been extremely limited, and have only involved select customers or student groups (i.e., potential future job applicants). Tr. 330-32. Thus, to the extent Caterpillar (as distinguished from its predecessor) has allowed some limited access by third-parties, those visitors, and the purpose of their visits, have been fundamentally different in character to the USW. Accordingly, those alleged prior occurrences have no bearing on the discrete access claim at issue here, as there is no evidence to suggest Caterpillar has drawn lines for access along Section 7 grounds, and “nothing in the Act prohibits an employer from drawing lines on non-Section 7 basis.” *See, e.g., Register-Guard.*, 351 NLRB 1110, 1117-18 (2007) (holding, in solicitation context, 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.”); *Fleming Cos., Inc. v. NLRB*, 349 F.3d 968 974-76 (7th Cir. 2003) (same); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319, 321-22 (7th Cir. 1995) (same); *Salmon Run Shopping Center LLC v. NLRB*, 554 F.3d 108, 116-17 (2d Cir. 2008) (same); *Albertson’s Inc. v. NLRB*, 301 F.3d 441, 442-43, 451 (6th Cir. 2002).

Second, while Caterpillar disputes the ALJ’s finding of a “considerable” history of allowing third-party access, that purported finding is not *per se* inconsistent with his further determination that the Company maintained a “significant competing interest in protecting against the potential dissemination of its confidential manufacturing procedures . . . .” ALJD, p. 8 at 35-37. More fundamentally, the CAGC fails to identify any evidence to suggest otherwise. That is, aside from complaining about an alleged inconsistency that does not exist, the CAGC does not point to any facts in the record that in any way undermine the ALJ’s conclusion that Caterpillar had substantial and legitimate concerns about the confidential and proprietary nature

of its manufacturing processes. *See* 29 C.F.R. § 102.49(b)(1)(iii) (providing that each exception “shall designate by precise citation of page the portions of the record relied on”).

The CAGC’s exceptions should, therefore, be denied.

Dated: October 31, 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 Answering Brief to the Counsel for the Acting General Counsel's Exceptions to be served upon:

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