

**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 CHARGING PARTY USW TO THE
ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER**

Joseph J. Torres
Derek G. Barella
Elizabeth J. Kappakas

Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
jtorres@winston.com
dbarella@winston.com
ekappakas@winston.com
Attorneys for Respondent

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 Charging Party United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW” or “Union”) 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

Like the Counsel for the Acting General Counsel (“CAGC”), the USW argues the ALJ erred in fashioning a remedy requiring the parties 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. USW Ex. Br. at 2-9. And, like the CAGC, the Union asserts that the ALJ’s remedy is based on “completely inapposite” case law involving union information requests, not requests for access. USW Ex. Br. at 8. However, as explained below, none of the Union’s arguments support granting the broad, non-specific access right that it seeks. Rather, assuming Caterpillar is found to have violated the Act by denying access,¹ the ALJ’s targeted remedy directing the parties to meet and confer is wholly in accordance with the Board’s decision in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), and its progeny.

A. The Union Ignores the Fact that All Post-*Holyoke* Cases Require Bargaining Over the Scope of Access

According to the Union, the ALJ erred in ordering bargaining because, allegedly, the Board’s *Holyoke* line of cases simply require a prevailing union to be granted access without

¹ Caterpillar clearly does not concede this point, as reflected by its exceptions to the ALJ’s decision.

further discussion. USW Ex. Br. at 2-4. However, the Union’s position in this regard is inconsistent with the relief entered in the very cases it cites in support of its argument. Each of them ordered access at “reasonable times” and/or for “reasonable periods.” *Id.* at 2-3 (citations omitted).

These terms, “reasonable times” and “reasonable periods,” are not self-defining. Rather, in these circumstances, it is clear that access must be preceded by some requirement that the parties reach agreement on the “reasonable” scope of such access.

Indeed, the Union’s convenient failure to acknowledge this limitation in the very cases it cites is simply reflective of the fact that, in reality, it seeks broad, non-specific access to Caterpillar’s facility.² The Union’s proposed notice does not seek access only to investigate the singular accident that precipitated the unannounced visit of its safety representative. Instead, its notice seeks access “to investigate industrial accidents, and to conduct health and safety inspections, and to investigate all the processes used to turn crawler assemblies.” USW Ex. Br., App.

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 Union’s argument that the parties need not reach agreement on the “reasonable” terms of access. Thus, assuming a violation occurred (*but see* footnote 1, *supra*), the ALJ’s remedy is entirely consistent with *Holyoke* and its progeny.

² While the Union at pages 7-8 of its brief suggests it seeks limited access—or at least previously sought limited access—its proposed remedy contains no such limits.

B. The Union’s Speculation Concerning the Potential Outcome of the Parties’ Discussion is Not a Basis for Dispensing With the Meet and Confer Obligation

The Union also argues that the ALJ’s order “creates the very real possibility that the Respondent will continue to thwart the Union’s request for access by simply not reaching an agreement through bargaining on the terms of that access.” USW Ex. Br. at 5. This argument, too, is unfounded. To begin with, the undisputed record of the parties’ correspondence on this issue demonstrates beyond any real question that *the Union*, not Caterpillar, “thwarted” discussions concerning information that might be provided to satisfy any alleged representational needs vis-à-vis the accident. Indeed, even after the Company offered to make additional video recordings of its operations and to facilitate a discussion between International representative Thompson and safety representatives at the South Milwaukee facility, the Union never responded. GC Ex. 25; Tr. 339.

In this regard, the Union’s current opposition to engaging in discussions with the Company prior to any access is telling insofar as it is entirely consistent with its approach since September, 2011—namely, it has stubbornly continued to demand on-site access, all the while refusing even to discuss alternatives that might equally serve its purposes. GC Exs. 4, 6, 8, 13. As outlined above, *Holyoke* clearly requires the parties to reach agreement on the “reasonable” scope of access, and unfounded speculation regarding the possible outcome of such discussions is no basis for dispensing with that established requirement.

C. Regardless of Which Company Interests are to be Balanced, the Union Provides No Other Bases for Dispensing with the Parties’ Meet and Confer Obligation

The Union also argues the ALJ’s remedy is in error because he referenced Caterpillar’s confidentiality concerns in directing the parties to meet and confer. USW Ex. Br. at 5-6.

According to the Union, this finding was flawed because the ALJ also found that Caterpillar “regularly allowed third parties to tour the facility” *Id.* at 6.

Contrary to the Union’s argument, the ALJ expressly found that one of the reasons for the Company’s denial of the Union’s requested access was “in order to maintain the confidentiality of its manufacturing procedures.” ALJD at p. 7, lines 13-14. To that end, Caterpillar offered undisputed testimony from its Labor Relations Manager and Regional Manager that third parties are *not* generally permitted onto the property, that the Company utilizes specialized welding and production techniques that it considers and treats as proprietary, and that the Company’s chief competitor in the strip mining market, Joy Global Surface Mining, has operations just across town from Caterpillar’s South Milwaukee facility and its production employees also are represented by the USW. *Id.* at p. 7, lines 14-20.

Moreover, the Union’s hyperbole that Caterpillar and its predecessor Bucyrus gave “ready access” for tours by student groups, customers, “and others” is a red herring. USW Ex. Br. at 6. As explained in Caterpillar’s exceptions brief, there is no claim in this case that the Company discriminated against the Union by allowing some types of third-party access while denying similar access by Union agents. Further, Caterpillar disputes 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.

In fact, the record demonstrates that since Caterpillar acquired the facility from Bucyrus on July 9, 2011, Tr. 32, 109-10, those instances in which access has been allowed to third-parties have been extremely limited—not “ready,” as the USW asserts—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).

Caterpillar additionally noted in its exceptions that the ALJ erred by presuming an entitlement to access that gave no weight to the Company’s significant property rights, as recognized by Supreme Court precedent. Caterpillar Ex. Br. at 26-28, 36, 38; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527. 535 (1992). Thus, whatever interests are to be balanced, none of the Union’s arguments provides any basis for dispensing with the *Holyoke* requirement to bargain over the scope of reasonable access, assuming a violation actually occurred.

In a related vein, the Union argues the ALJ erred by relying on an information request case to guide his fashioning of a remedial order. USW Ex. Br. at 8-9 (citing, *Roseburg Forest Prods. Co.*, 331 NLRB 999, 1003 (2000)). According to the Union, *Roseburg* is inapposite because “the ALJ had already determined the balance . . . tips in favor of Union access.” USW

Ex. Br. at 9. But, as discussed above, *Holyoke* still requires the parties to reach agreement on the scope of “reasonable” access.

To be sure, the ALJ’s reliance on an information request case like *Roseburg* arguably supports Caterpillar’s view that the ALJ erred by treating this dispute like an information request case. *See* Caterpillar Ex. Br. at 25-28. But, it does not, once again, support the Union’s argument that no bargaining over “reasonable” access must occur.

For these reasons, the Union’s exceptions concerning the ALJ’s proposed order should be denied.

II. THE UNION’S EXCEPTIONS CONCERNING THE ALJ’S IDENTIFICATION OF THE VARIOUS DVD RECORDINGS THAT CATERPILLAR PROVIDED TO THE UNION ARE IMMATERIAL

In its exceptions 1, 2, and 4, the USW argues that the ALJ erred in referring to GC Exhibit 32 as the DVD recording of the post-accident reenactment as the recording that Caterpillar produced to the Union prior to the hearing. The Union clarifies in its exceptions that pursuant to the parties’ stipulation, the DVD recordings marked and offered as Joint Exhibits 1 and 2 were those that the Company had produced prior to the hearing; the third recording, marked as GC Exhibit 32, was also provided to the Union, but not until the hearing.

This is much ado about nothing, as the record is undisputed that 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. And, whether or not the ALJ admitted the specific DVDs into evidence, there is no dispute that Caterpillar produced recordings of the accident reenactment to the Union. 4/17/12 Joint Stip.; GC Exs. 14, 24, 32.

III. THE UNION'S ARGUMENT TO OVERTURN THREE DECADES OF BOARD JURISPRUDENCE IN ACCESS CASES SHOULD BE REJECTED

The USW also takes exception to the ALJ's purported application³ of the *Holyoke* balancing test to this case. In an argument that gives new meaning to the term "hypocrisy," the USW, having criticized the ALJ in the same brief for applying an information request standard in fashioning his remedial order, now criticizes the ALJ for *not* applying information request cases in deciding liability (and notwithstanding that the ALJ found in the Union's favor on liability). USW Ex. Br. at 12-17.

Internal inconsistencies aside, the USW's argument is not well-founded. The Union advocates a return in access cases to the legal standard described in *Winona Indus., Inc.*, 257 NLRB 695 (1981). But, *Holyoke* is not some recent pronouncement to be lightly set aside in favor of a competing approach. The Board has followed the *Holyoke* standard in access cases for almost thirty years. And, for good reason.

Under the *Winona* test, the sole inquiry on the issue of access was whether the union made a request relevant to its representative duty, with no consideration of the employer's property rights. 257 NLRB at 697-98. However, as the Board recognized in *Holyoke*, this standard, while suitable for judging information request disputes, is *not* appropriate in access cases for the very reason that requests for access are fundamentally different from other information requests. Requests for access necessarily involve a potential encroachment on

³ As explained in Caterpillar's exceptions brief, the Company maintains that while the ALJ claimed to be applying the *Holyoke* balancing test, in fact, he did not. Caterpillar Ex. Br. at 25-28.

competing rights—namely, the employer’s inherent property rights—that have long been accorded protection under federal labor law. *Holyoke*, 273 NLRB at 1370.

Thus, it has been well-established since at least 1956 that an employer has a right to exclude non-employee union agents from its property. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Yet, the USW now criticizes the Board in *Holyoke* for relying on *Babcock & Wilcox*, a case the Union contends is “wholly inapposite” to access cases. USW Ex. Br. at 14. *But, Babcock & Wilcox was an access case.* And, the Union’s argument that *Babcock & Wilcox* should be distinguished on the grounds that it involved access issues in an organizing context, as opposed to a situation where the union already represented employees at the site, is a canard.

Contrary to the Union’s premise, “the statutory rights involved in an organizing drive as in *Babcock*” are *not* distinguishable, or derived from different parts of the Act, as are “the rights and obligations of an exclusive bargaining representative.” USW Ex. Br. at 14. The statutory rights at issue are the same, and they derive from *Section 7* (not Section 8). In both cases—organizing drives and requests by a statutory bargaining representative for on-site access—the “rights” at issue are those of “[e]mployees . . . to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. And, when those rights—*i.e.*, those of employees to be represented by an agent of their choosing—are in conflict with an employer’s property rights, whether in the initial organizing context or a circumstance where a bargaining agent requests access to the employer’s site, the competing interests must be balanced in the same fashion.

Indeed, it is significant that since *Holyoke* was decided, the Board and the Courts have continued to uphold employers’ rights to exclude non-employee union agents from their facilities in a variety of contexts. *See, e.g., Success Village Apartments, Inc.*, 347 NLRB 1065, 1077

(2006) (noting that *Lechmere* extended *Babcock* such that “the employer’s property right must yield only where there are extraordinary barriers to communication with the employees” and dismissing the complaint’s allegation of violation of Section 8(a)(1) where it found that the union failed to show that it was unable to meet with employees outside of the employer’s property to prepare for a grievance session); *Leslie Homes Inc.*, 316 NLRB 123, 130-31 (1995) (dismissing complaint and upholding employer’s property rights when it ordered union representatives to leave private property by calling police where union failed to carry its burden to show that there was an absence of reasonable means to communicate its messages); *Galleria Joint Venture*, 317 NLRB 1147, 1149-50, 1148 (1995) (applying *Lechmere* to conclude that shopping center owner did not violate Section 8(a)(1) by prohibiting handbilling in front of a retail store within an enclosed shopping mall; shopping center owner had right to exclude from its private property nonemployee union representatives where, as there, “the heavy burden to demonstrate the absence of feasible alternatives to trespass has not been satisfied”). *See also Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16, 16 (1991) (finding that failure of two nonemployee union organizers to vacate the premises at the employer’s request, when they had no demonstrated legal right to be there, constituted objectionable conduct by the union warranting setting aside the election on the grounds that it suggested to employees that employer was powerless to defend its property rights).

Moreover, in 1992, the Supreme Court left little room for disagreement concerning the importance of an employer’s rights to control its property. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court instructed that unless a union can show no reasonable alternative means of reaching employees other than through on-site access—for example, because the employees are sequestered in logging camps—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*). *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)).

Thus, the USW’s campaign for a return to the *Winona* standard that the Board rejected almost thirty years ago is inconsistent with *Holyoke*’s admonition that a request for access is not tantamount for a request for information. 273 NLRB at 1370. It also flies in the face of long-standing precedent, including *Babcock & Wilcox*, *Lechmere*, and their progeny, recognizing an employer’s inherent property rights. The only case law the Union offers for a return to the *Winona* standard provides no meaningful support. In *NLRB v. Holyoke Water Power Co.*, 778 F.2d 49 (1st Cir. 1985), the First Circuit, in enforcing the Board’s decision to overrule *Winona*, questioned the application of the *Holyoke* balancing test but ultimately concluded that it made no difference to the outcome of the case. *NLRB v. Holyoke*, 778 F.2d at 53. While the First Circuit did suggest that *Babcock & Wilcox* and its progeny did not “obviously govern” in an access dispute, the court seemed to reduce *Babcock* to a case involving an employer’s obligation to “refrain from interfering with protected employee activities,” *id.* at 52, without recognizing any of the additional points outlined above regarding third-party access and the origin of the

underlying Section 7 rights of employees. As further amplified by *Lechmere, Holyoke* is the proper balancing test to be used, given the competing interests at issue. *See* discussion *supra*.

Similarly, in *C.C.E. Inc.*, 318 NLRB 977 (1995), Member Browning's concurrence simply suggests that a certified union should somehow stand in better stead than a union seeking to organize employees. *Id.* at 978. But, numerous Board decisions since *Holyoke* and post-*Lechmere* have found to the contrary. *See* discussion *supra*. Member Browning's abstract preferences provide no meaningful response to this line of Board and Supreme Court precedent holding otherwise.

The Union's exceptions requesting that the Board overrule *Holyoke* should, therefore, be denied.

Dated: October 31, 2012

Respectfully submitted,

CATERPILLAR INC.

By: /s/ Joseph J. Torres
One of Its Attorneys

Joseph J. Torres
Derek G. Barella
Elizabeth J. Kappakas
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5700
jtorres@winston.com
dbarella@winston.com
ekappakas@winston.com

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 Exceptions Filed by the Charging Party USW to be served upon:

VIA ELECTRONIC AND REGULAR MAIL:

Rachel A. Centinario
Counsel for the General Counsel
National Labor Relations Board
Region 30
310 West Wisconsin Avenue
Suite 700W
Milwaukee, WI 53203-2211
Rachel.Centinario@nlrb.gov

Marianne Goldstein Robbins
Previant, Goldberg, Uelmen, Gratz, Miller
& Brueggeman, S.C.
1555 North, RiverCenter Drive
Suite 202
Milwaukee, WI 53212
mgr@previant.com

Daniel Kovalik, Senior AGC
United Steel, Paper, and Forestry, Rubber, Mfg., Energy, Allied Industrial
and Service Workers International Union
Five Gateway Center, Room 807
Pittsburgh, PA 15222
dkovalik@usw.org

E-FILED:

Lester A. Heltzer
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20005-3419

via electronic mail where indicated and by regular U.S. Mail this 31st day of October 2012.

/s/ Elizabeth J. Kappakas