

**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’S CONSOLIDATED REPLY IN SUPPORT OF ITS EXCEPTIONS 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 submits the following consolidated reply brief, which addresses the answering briefs filed by the Counsel for the Acting General Counsel (“CAGC”) and the Union.

ARGUMENT

I. *HOLYOKE’S* BALANCING TEST GOVERNS THIS DISPUTE, AND THE ALJ’S DECISION MAKES CLEAR HE FAILED TO PROPERLY BALANCE THE PARTIES’ COMPETING INTERESTS

As explained in Caterpillar’s opening submission, the ALJ erred by failing to apply *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), instead treating this matter as if it were an information request dispute. Caterpillar Ex. Br. at 25-28. The CAGC agrees *Holyoke* controls and acknowledges that “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 Ex. Br. at 2 (emphasis in original); CAGC Ans. Br. at 12-13.¹ The CAGC and the Union also agree that the ALJ improperly utilized an information request standard in his evaluation of this access dispute, *but* they maintain the ALJ’s error was confined to his proposed remedy. CAGC Ex. Br. 2-4; USW Ex. Br. at 8-9. That is, they suggest the ALJ properly applied *Holyoke* in balancing the parties’ competing interests regarding the Union’s request for access, only to then abandon that authority when it came time to fashion a remedy.

Such cynical cherry-picking highlights the obvious flaws in the ALJ’s decision. The ALJ’s purported balance of the parties’ competing interests 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. Thus, while the ALJ’s decision speaks of weighing the parties’ competing interests, as *Holyoke* requires, it begins the balancing from a predisposition that no

¹ The Union similarly acknowledges *Holyoke* is the governing legal standard, but urges the Board to overturn *Holyoke* and return to the standard articulated in *Winona Indus., Inc.*, 257 NLRB 695 (1981). USW Ex. Br. at 12-15. *But see* Caterpillar Ans. Br. to USW Ex. at 7-11.

alternative other than access could suffice. *Id.* In this respect, the ALJ's analysis tracks the Board's information request jurisprudence, an approach that *Holyoke* specifically rejects. *Holyoke*, 273 NLRB at 1370.

In their answering briefs to Caterpillar's exceptions, the CAGC and the Union offer nothing to support the ALJ's faulty approach other than to repeat the conclusory, but unsupported, assertion that the ALJ "properly applied the relevant balancing test set forth in *Holyoke*" CAGC Ans. Br. at 15. *See also* USW Ans. Br. at 9. But, simply saying that the ALJ balanced the parties' interests (over and over) does not make it so. The ALJ's decision reveals that he simply presumed access was required and accepted the Union's claim that no adequate substitute to access existed.

The ALJ also failed to consider the multitude of alternatives that were provided and made available to the Union, and the Union's candid admission that it did nothing at the time in question to engage Caterpillar in any discussion concerning those alternatives. Neither of these points from Caterpillar's opening brief are meaningfully addressed by the CAGC or the Union in their answering briefs. Nor do they attempt to defend the ALJ's erroneous acceptance of the Union's *post hoc* explanation for why Caterpillar's proffered information was supposedly inadequate.

II. CATERPILLAR'S PROPERTY INTERESTS ARE RECOGNIZED AT LAW TO BE SIGNIFICANT AND WORTHY OF PROTECTION

As explained in Caterpillar's exceptions brief, an employer possesses a well-established interest in and right to control its property. *See* Caterpillar Ex. Br. at 26-28, 38. Moreover, an employer's rights in this regard are not confined to cases where non-employee union organizers seek access to an employer's property for the purpose of gathering interest among non-represented workers. To the contrary, while *Lechmere v. NLRB*, 502 U.S. 527 (1992) and *NLRB*

v. Babcock & Wilcox Co., 351 U.S. 105 (1956), provide perhaps the most definitive validation of an employer's property rights under federal labor law, the Board has recognized the legitimacy of an employer's property interests in a variety of contexts. See, e.g., *Success Village Apartments, Inc.*, 347 NLRB 1065, 1077 (2006) (dismissing Section 8(a)(1) complaint where 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 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, 1148, 1149-50 (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).

Thus, the suggestion by the CAGC and the Union that *Lechmere* and *Babcock* are "inapposite" to the instant case, CAGC Ans. Br. at 13; USW Ans. Br. at 10-11, is manifestly wrong. As much as the CAGC and the Union might want to avoid the Supreme Court's jurisprudence, *Holyoke* expressly recognizes its applicability to the very fact setting at issue here. Citing *Babcock*,² the Board in *Holyoke* instructed that when a union seeks access to an

² Contrary to the Union's reliance on *dicta* from the First Circuit's decision enforcing *Holyoke*, "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 Ans. Br. at 11. Rather, the statutory rights at issue are the same Section 7 rights in both scenarios. And, more fundamentally, since *Holyoke* was decided, the Board and the Courts have upheld employers' rights to exclude non-employee union agents from their facilities in a variety of contexts. See *supra* p. 3. Given this abundance of precedent, the CAGC's citation to one pre-*Holyoke* decision from 1964 provides no meaningful response. See CAGC's Ans. Br. At 25-26 (citation omitted).

employer's property for purposes of investigating safety concerns, "an employer's right to control its property...must be weighed" *Holyoke*, 273 NLRB at 1370.³

Under these authorities, the CAGC's and Union's accusation that Caterpillar "fail[ed] to articulate what its property interest is," *see, e.g.*, CAGC Ans. Br. at 3, 25, Union Ans. Br. At 14, is spurious. The law recognizes that Caterpillar has a legitimate right to control its property, just as the law recognizes that Caterpillar's employees have legitimate Section 7 rights to representation. It is no more incumbent on the employer to "articulate" its right under the law than it is for employees to do so. That is the whole point of *Holyoke*'s test—employers and employees are recognized as having interests at law that may be in conflict where a union seeks access to the employer's property. Therefore, those competing interests must be balanced, and as *Holyoke* makes clear, "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." *Holyoke*, 273 NLRB at 1370.⁴

Further, while the CAGC and the Union continue to argue that the ALJ properly discounted Caterpillar's property interests because of prior instances in which other third-party

³ It follows that the CAGC is similarly incorrect in suggesting that Caterpillar is seeking an "extension" of *Lechmere* and *Babcock*, CAGC Ans. Br. at 13. The reality is just the opposite. The CAGC is seeking to restrict *Lechmere* and *Babcock* in a manner that conflicts with governing precedent.

⁴ The CAGC's utter failure to understand or accept this basic premise—that employers have rights at law just as employees do—is seen in the callous assertion that Caterpillar is "ambivalent" to the fact that a workplace death occurred. CAGC Ans. Br. at 16. This accusation is offensive and unbecoming of the agency. The accident in this case was a tragedy, and the record shows Caterpillar properly responded to it as such. However, the tragic results of the accident does not mean, as the CAGC suggests, that the Company must renounce its legal rights, particularly where, as here, there was no legitimate representational need or purpose to be served by the Union's requested access.

access was allowed, CAGC Ans. Br. at 26-28; USW Ans. Br. at 2-4, the record does not support their position.⁵ As explained in Caterpillar's exceptions brief, the alleged "other third-party access" that the ALJ erroneously considered was of a fundamentally different type and character than that sought by the International USW here. Caterpillar Ex. Br. at 38-46. But, contrary to the ALJ's decision, governing law establishes that an employer can recognize categories of exceptions to access policies that are distinct in character from requested access by non-employee union agents. Thus, even if Caterpillar (or its predecessor) allowed politicians, student groups, or customers to have limited and controlled access to its facility in the past, such access does not result in an abdication of the Company's property rights as against access by others. *See, e.g., Register-Guard*, 351 NLRB 1110, 1117-18 (2007). There is no evidence, and the CAGC concedes there is no claim, CAGC Ans. Br. at 3, that Caterpillar has drawn lines for access along Section 7 grounds. *Register-Guard*, 351 NLRB at 1118. The ALJ erred, therefore, in relying on these unrelated, distinguishable incidents in diminishing Caterpillar's property interests here.

III. THE MULTITUDE OF ALTERNATIVES AVAILABLE TO THE UNION, CONSIDERED CUMULATIVELY, NOT IN ISOLATION, DEMONSTRATE THAT THE CAGC FAILED TO ESTABLISH A LEGITIMATE UNION REPRESENTATIONAL INTEREST FOR ACCESS

As explained in Caterpillar's exceptions brief and above, the ALJ erred by failing to consider the wealth of information the Company provided and offered to the Union, which provided sufficient alternate means other than access by which the Union could effectively

⁵ Contrary to the Union's argument, 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, 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. *See, e.g., Register-Guard*, 351 NLRB 1110, 1117-18 (2007).

represent employees. *See* Caterpillar Ex. Br. at 23-37 and *supra* at 1-3. In a futile attempt to rehabilitate this flaw in the ALJ's decision, the CAGC and the Union both assert that Caterpillar's exceptions improperly seek to put the burden on the Union to show that no reasonable alternatives to access would suffice, when in fact, Board precedent holds it is the employer's burden to establish existence of reasonable alternatives to access. CAGC Ans. Br. at 2, 14 (citing *Nestle Purina Pet Care*, 347 NLRB 891, 891 (2006)); USW Ans. Br. at 13 (same). This is a red herring.

Caterpillar's exceptions brief details the overwhelming record evidence of information that the Company provided and offered to the Union. Specifically, 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 procedures⁶;
- 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.

⁶ The Union seeks to discount the value of the protocols based on Committeeman Uebele's testimony suggesting that the protocols are not followed in all instances. USW Ans. Br. at 8. Uebele's testimony on this point is incorrect, but it is also beside the point. It is undisputed that the new protocols were adopted and maintained at the appropriate work stations in order to provide detailed guidance to employees as to the proper procedures to be followed. Tr. 341-44. Caterpillar's agreement to share copies of the detailed standard work protocols with the Union was, therefore, a meaningful piece of the overall production of information.

Thus, the Company more than satisfied its preliminary burden, under *Nestle Purina*, of establishing adequate alternatives to access that would have allowed the Union to represent its members with respect to the September 8, 2011 accident at the South Milwaukee facility. It was therefore incumbent upon the Union to show that those alternatives were somehow deficient. And, as the Union's chief witness conceded at trial, the Union never did so. Other than repeating their demand for on-the-ground access, the USW and its International representative Sharon 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 you to see things that she thinks are important to understanding how the process works. (Tr. 226).

Further, 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, even without Thompson being permitted on the property. Tr. 235-37, 240, 242; R. Ex. 1.

In short, 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 on those subjects—the CAGC and the Union cannot be said to have met their burden of showing that the Company’s proffered alternatives to access were deficient. *Holyoke*, 273 NLRB at 1370. Nor can it be reasonably argued that the ALJ properly discounted this evidence by purportedly crediting Thompson’s *post hoc* explanations for why this information was allegedly deficient.

Beyond their misplaced argument concerning which party bore the burden of proof and in what order, the CAGC and the Union also attempt to distinguish the alternatives to access that Caterpillar established by evaluating each one in isolation, with citations to cases where similar alternatives were deemed insufficient. For instance, the CAGC and the Union cite *Hercules, Inc.*, 281 NLRB 961 (1986) and *Exxon Chemical*, 307 NLRB 1254 (1992), for the proposition that an OSHA-conducted investigation, employer reports, and police reports, are not satisfactory alternatives to access. CAGC Ans. Br. at 18-19. They cite *Hercules* and *ASARCO, Inc., Tennessee Mines Div.*, 276 NLRB 1367 (1985), for the proposition that access by local union officials is not a satisfactory alternative to access by an alleged international “expert” who is

“experienced” in investigations. CAGC Ans. Br. at 23-24; USW Ans. Br. at 10. And, they cite Sharon Thompson’s hearing testimony for the proposition that two-dimensional images like photographs and video recordings are inadequate alternatives to an individual’s actual three-dimensional presence at the site. CAGC Ans. Br. at 23-24; USW Ans. Br. at 12.

The problem with the CAGC’s and the USW’s argument—other than the fact that the Union and Thompson never raised these supposed insufficiencies prior to trial—is that Caterpillar did not simply provide an OSHA report, *or* a police report, *or* access by local representatives, *or* photographs, *or* video recordings, and so on. It provided *all of these things*. The alternatives that were available to the Union must be considered in the aggregate, and viewing the information cumulatively shows how the instant case is distinguishable from cases like *Nestle Purina*, where the Board found the employer failed to show it actually possessed any of the alternative data that is theorized could have been provided to the union as a substitute for access. 347 NLRB at 893. Here, in contrast, Caterpillar had a wealth of alternative information concerning the accident and the part turning operation that was being performed when the accident occurred, provided all of it to the Union, and repeatedly offered to discuss the matter further.⁷

So, when the CAGC and Union deride Caterpillar for relying on the Eighth Circuit’s so-called “aberrant” decision in *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), CAGC Ans. Br. at 29, and the CAGC boldly asserts, “there exists *no Board decision* where the union, as

⁷ Indeed, as previously explained in the Company’s exceptions brief, the wealth of information that Caterpillar provided to the Union was the *only* available information that showed work location and the part turning operation as it existed at the time the accident occurred. After the OSHA inspector completed his immediate investigation on September 8 and released the facility to return to work, the accident site was cleaned, the equipment removed, and the part turning process was reevaluated (including with Union participation) and changed. Thus, there was nothing further to be gained by on-site access. Tr. 315-16, 345.

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 Reply Brief in Support of Respondent's Exceptions to be served upon:

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, Wisconsin 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, Pennsylvania 15222
dkovalik@usw.org

via electronic mail and regular U.S. Mail this 14th day of November 2012.

_____/s/ Elizabeth J. Kappakas_____