

Caterpillar Inc. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC. Case 30-CA-064314

April 23, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 5, 2012, Administrative Law Judge Robert A. Ringler issued the attached decision. The Acting General Counsel, the Union, and the Respondent each filed exceptions with a supporting brief; the Acting General Counsel and the Union each filed an answering brief opposing the Respondent's exceptions; the Respondent filed answering briefs to the Acting General Counsel's exceptions and to the Union's exceptions, and the Acting General Counsel and the Respondent each filed a reply brief in support of their respective exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,¹ findings,² and conclusions except as modified below, and to amend the remedy and to modify the judge's recommended Order consistent with our conclusions here.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to grant a nonemployee union representative access to its facility to conduct a health and safety inspection after a fatal accident. The judge properly applied the balancing test articulated in *Holyoke Water Power Co.*³ to conclude that, under the circumstances presented here, implicating significant health and safety matters, the Respondent's property rights must yield to the employees' right to responsible representation.

However, in agreement with the Acting General Counsel's and the Union's exceptions, we conclude that the judge's finding that the Respondent had a "significant

competing interest" in protecting its confidential manufacturing processes is at odds with his further finding that the Respondent had a "considerable history" of allowing visitors to access the plant. The Board has long considered access granted to third parties a relevant factor under *Holyoke*, as allowing others to enter the property weakens the relative strength of the employer's interest in denying the union access to its property.⁴ In considering this factor, the judge credited Local 1343 President Kevin Jaskie's testimony that nonemployees have accessed the facilities even after the Respondent's acquisition of the plant from predecessor Bucyrus International Inc.; the judge further considered Regional Manager Rod Bolhous' concession that the risks of disclosing confidential information by allowing access have not changed since Caterpillar's acquisition. In light of this testimony, the Respondent's lax approach to the admission of documents at the hearing,⁵ and the Respondent's failure to raise confidentiality concerns before the judge, we find that the Respondent failed to demonstrate a confidentiality interest that would warrant conditioning access upon execution of a confidentiality agreement. Thus, we find that the judge's remedy should be amended to delete the requirement that the parties bargain over and reduce a confidentiality agreement to writing prior to the Respondent granting access. Accordingly, we amend the judge's Conclusion of Law 4 consistent with our findings here and we conform the remedy to that traditionally given in cases where an employer has not demonstrated a compelling confidentiality interest.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caterpillar Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

⁴ See *Hercules Inc.*, 281 NLRB 961, 970 (1986), enfd. 833 F.2d 426 (2d Cir. 1987), where the Board adopted a judge's decision outlining factors to be considered in striking the balance, including, among others, the extent to which nonemployees are permitted to enter on private property.

⁵ We note that the Respondent required the Union to execute confidentiality agreements before turning over its work protocols; however, the Respondent failed to seek a protective order at the hearing when those protocols were admitted into evidence. Although the Acting General Counsel asks the Board to take administrative notice of the Respondent's similar failure to seek protection during the police and OSHA investigations, we find it unnecessary to rely on those asserted additional failures.

⁶ See *ASARCO, Inc.*, 276 NLRB 1367 (1985), enfd. in relevant part 805 F.2d 194, 198 (6th Cir. 1986); *National Broadcasting Co.*, 276 NLRB 118, 119 (1985), enfd. 798 F.2d 75 (2d Cir. 1986).

¹ In the interest of factual accuracy, we reverse the judge's ruling denying the parties' joint motion to reopen the record to receive their Stipulation of Facts and Jt. Exhs. 1 and 2. The joint stipulation makes clear that Jt. Exhs. 1 and 2 are the DVDs actually produced to the Union, as opposed to GC Exh. 32, admitted at hearing, which the judge improperly identified as the DVD produced to the Union.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ *Holyoke Water Power Co.*, 273 NLRB 1369, enfd. 778 F.2d 49 (1st Cir. 1985).

1. Substitute the following for paragraph 1(a).

“(a) Refusing to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC, by denying the Union’s request for access to its South Milwaukee facility to investigate an industrial accident and to conduct a health and safety inspection.”

2. Substitute the following for paragraph 2(a).

“(a) Upon the Union’s request, grant access, by the Union’s Health and Safety Specialist, to reasonable places within the South Milwaukee, Wisconsin facility, for a reasonable period and at a reasonable time, to investigate an industrial accident and to conduct a health and safety inspection, including investigating all of the processes used to turn crawler assemblies.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC, by denying the Union’s request for access to our South Milwaukee facility to investigate an industrial accident and to conduct a health and safety inspection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, upon the Union’s request, grant access, by the Union’s Health and Safety Specialist, to reasonable places within the South Milwaukee, Wisconsin facility, for a reasonable period and at a reasonable time, to investigate an industrial accident and to conduct a health and

safety inspection, including investigating all of the processes used to turn crawler assemblies.

CATERPILLAR INC.

Benjamin Mandelman and Rachel A. Centinario, Esqs., for the Acting General Counsel.

Joseph J. Torres, Derek G. Barella, and Elizabeth J. Kappakas, Esqs. (Winston & Strawn, LLP), for the Respondent.

Marianne Goldstein Robbins, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on March 21 and 22, 2012. On September 12, 2011,¹ the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC (the Union) filed the underlying charge. The resulting complaint alleged that Caterpillar Inc. (Caterpillar or the Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to grant a nonemployee union representative access to its Milwaukee, Wisconsin manufacturing facility, in order to conduct a health and safety inspection.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties’ briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Caterpillar has manufactured mining equipment at its South Milwaukee, Wisconsin plant (the facility). Annually, in conducting its operations, it sells and ships goods valued in excess of \$50,000 directly from its facility to customers located outside of the State of Wisconsin. Based on the foregoing, it admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Introduction

The core facts involved here are essentially undisputed, Caterpillar manufactures strip mining equipment at its South Milwaukee facility.² The production of such equipment involves large-scale metal cutting, fabrication, machining, welding, painting, and assembly.³ The facility, which is roughly 5 “city blocks” long, has been in business since the early 1900s. Caterpillar very recently purchased the facility from Bucyrus In-

¹ All dates are in 2011, unless otherwise stated.

² It produces large trucks, which carry away rock and soil that is unearthed during strip mining procedures.

³ Products are shipped in subassembled pieces, which are subsequently assembled at the mining site.

ternational Inc. (Bucyrus) on July 9.

B. Union's Representation of the Unit

Since 1986, the Union, and its constituent entity, Local 1343, have served as the exclusive collective-bargaining representative of the following appropriate unit (the unit):

All production and maintenance employees employed . . . at . . . [the] South Milwaukee, Wisconsin facility, including all individuals working as powerhouse employees, lead men, but excluding general administrative, office and confidential employees, garage and laboratory employees, technically trained engineers, draftsmen, and all miscellaneous engineering department employees, clerical employees in stock, stores, and production departments (which departments include shop clerks, expeditors, timekeepers), industrial and standards engineers, registered nurses, and all guards and supervisors as defined by the Act.⁴

(GC Exh. 26.) Caterpillar and Bucyrus, its predecessor, have continuously recognized the Union and Local 1343 as the unit's exclusive collective-bargaining representative. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which extends from December 9, 2008, through April 30, 2013. (Id.)

C. September 8 Fatality

On September 8, in the afternoon, Jeffrey Smith, a unit employee, was crushed to death by a multiton crawler,⁵ while working in the facility's welding area. The fatality was promptly reported to the Milwaukee Police Department (the Police) and the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), who each commenced investigations.

Kevin Jaskie, Local 1343 president and unit employee, testified that he also promptly reported Smith's fatality to the Union's Emergency Response Team (ERT), which is a squad that provides accident investigation services to constituent locals.⁶ (see GC Exh. 27.) He explained that he contacted the ERT because Local 1343's staff was unqualified to independently investigate the fatality.⁷ He stated that, shortly thereafter, ERT member Sharon Thompson committed to traveling to the facility and conducting an investigation.⁸ He added that he subsequently relayed Local 1343's plan to have the ERT conduct an onsite investigation to Regional Manager Rod Bolhous, who pledged Caterpillar's full cooperation.⁹

Later that evening, Caterpillar conducted a reenactment of

⁴ There are approximately 900 employees in the unit.

⁵ The crawler, which weighed 90,000 pounds, is similar to the track propulsion device on bulldozers and tanks.

⁶ In 2011, the ERT investigated 39 fatalities.

⁷ Michael Dobrzynski, Local 1343 vice-president and David Uebele, chief steward corroborated this testimony.

⁸ Thompson, a resource technician health and safety specialist, is assigned to the Union's Pittsburgh, Pennsylvania, headquarters. She has extensive experience in accident investigation and industrial safety. (GC Exh. 29.)

⁹ Dobrzynski corroborated this account.

the fatal accident. Although the reenactment was witnessed by corporate officials, OSHA, the Police, and County Medical Examiner, Local 1343's highest officials were not informed and were, consequently, absent.¹⁰

D. September 9 Events

On September 9, ERT member Thompson arrived at the facility, in order to conduct her onsite investigation into the fatality. She stated that, after describing the purpose of her visit to Caterpillar's representatives, she was denied entry by Bolhous and other officials.¹¹

E. September 16 Letter

On September 16, 2011, Caterpillar sent the following letter to the Union:

[Concerning] . . . the Union's request to access the . . . facility . . . in order to conduct . . . a "joint investigation" of the workplace accident that occurred . . . on September 8 . . . (1) the Company was cooperating . . . with OSHA's and local law enforcement's investigation of the incident . . . ; (2) our current collective bargaining agreement does not provide for an additional joint investigation . . . ; (3) in light of the ongoing investigations by OSHA and law enforcement, the Company [does] . . . not believe an additional joint investigation would be productive, particularly given the facts that the facility is operating again and the equipment at issue has since been moved (i.e., the "scene" of the incident is no longer in the same condition as at the time of the incident).

(GC Exh. 3 emphasis added).

F. Ongoing Correspondence and Confidentiality Agreement Covering DVD Footage

The September 16 letter triggered a series of letters between the parties, which clarified their respective stances on access. On September 26, union counsel explained the ERT's goals. (GC Exh. 4.) ("Union has requested access . . . in order to understand what went wrong and to address through the Health and Safety Committee or the grievance procedure means of preventing any similar accident in the future.") On October 10, Caterpillar's counsel redented access, but, offered to provide DVD footage of the accident reenactment, subject to the negotiation of a confidentiality agreement. (GC Exh. 5.) On October 17, union counsel rerequested access and indicated that, "the . . . 'reenactment' was not adequate and does not obviate the need for an onsite investigation." (GC Exh. 6.) On November 15, Caterpillar's counsel explained:

Caterpillar considers its manufacturing and operational processes to be proprietary and confidential business information.

(GC Exh. 7.) On November 22 union counsel replied:

¹⁰ Chief Steward Uebele was the highest ranking Local 1343 official in attendance.

¹¹ Bolhous stated that he reversed his position on ERT access, after he realized that, although Bucyrus would have left this matter to his discretion, Caterpillar required him to seek corporate approval before granting such access.

[T]he Union is willing to enter into a confidentiality agreement, however, receipt of the video will not take the place of an onsite investigation

(GC Exh. 8.) Between December 8 and late-January 2012, the parties negotiated a confidentiality agreement, which resulted in the production of the DVD. (GC Exhs. 9–10, 21–24.)

G. January 19, 2012 Information Request

On January 19, 2012, Jaskie sent an email to Labor Relations Manager John Hubert, which requested certain additional information concerning the fatality:

- . . . [T]he investigatory file prepared by the local law enforcement
- Photographs taken . . . during the post-accident investigation.
- Video recording of the post-accident reenactment.
- Copies of the old standard work order for the crawler frame turning procedure, and the new procedure developed by the committee.

(GC Exh. 12.)

H. Actions Regarding the Union's January 19, 2012 Information Request

On February 14, 2012, Caterpillar responded:

1. Enclosed are . . . two video recordings . . . of the reenactment of the crawler frame turning operation that took place as part of the post-accident investigation on September 8, 2011. These video recordings are produced subject to the Confidential Information Agreement See (GC Exh. 32).¹²
2. [E]nclosed is . . . the investigation file . . . compiled by the local law enforcement officers This is a complete copy of the file, . . . with the exception of copies of certain Standard-Work protocols . . . which we have removed from the copy that is enclosed with this letter. [W]e are willing to produce these Standard Work protocols . . . subject to the parties' . . . agreement concerning confidentiality.

In addition to the materials produced with this letter, we . . . are prepared to produce . . . a number of additional materials that the Company considers to be confidential. Caterpillar's counsel has proposed . . . that the enclosed Confidential Information Agreement also apply to these additional materials These additional materials that are ready to be produced to you

¹² Following the record's closure, the parties filed a joint motion to reopen the record, in order to receive Jt. Exhs. 1–2 into evidence. The motion is denied. First, unlike GC Exh. 32, which is a readable DVD, Jt. Exhs. 1–2 are neither readable, when played on a standard DVD player, nor readable when played on standard computer applications (e.g., Windows Media Player and Quick Time Player). Second, the parties failed to demonstrate that Jt. Exhs. 1–2 constituted "newly discovered evidence," which would warrant reopening the record. See *Planned Building Services*, 347 NLRB 670, 670 fn. 2 (2006). To the contrary, their joint motion stated that Jt. Exhs. 1–2 are "copies of the recordings that Caterpillar produced to the Union on January 28, 2012 and February 14, 2012," which, thus, was not "newly discovered evidence" that would merit reopening the record.

are.

1. Copies of the Standard Work protocols . . . in effect as of September 8, 2011 (including those that were included in the police investigation file), as well as the Standard Work protocols that have since been revised and reissued.

2. Copies of all photographs taken by the Company during the post-accident investigation on September 8, 2011.

(GC Exh. 14); see also GC Exh. 15. The parties, thereafter, entered into another confidentiality agreement covering the Standard Work protocols and photos, and these materials were, thereafter, produced to the Union. (GC Exhs. 16–19, 25.)

I. Nonemployees Accessing the Facility

Jaskie testified that, before the fatality, Caterpillar and its predecessor, Bucyrus, frequently allowed visitors to enter the facility. He recollected: Union representatives being admitted for labor relations matters; public groups touring the facility; a political dinner connected to a mining bill; Senator John McCain visiting during the 2008 Presidential campaign; Milwaukee Mayor Tom Barrett campaigning there; and periodic high school recruiting tours.

Bolhaus acknowledged that Caterpillar conducts customer, employee and student tours at the facility. He recounted politicians and civic groups periodically visiting. He stated that neither the product line made at the facility, nor the underlying manufacturing procedures, have changed significantly since Caterpillar purchased the facility from Bucyrus, and reported that the risks associated with outsiders entering the facility have not changed a great deal over the years. He noted that the area where the fatality occurred is often viewed during tours.

J. March 8, 2012—OSHA Citation

On March 8, 2012, OSHA issued a citation to Caterpillar for failing to "furnish employment and a place of employment which were free from recognized hazards that were . . . likely to cause death or serious physical harm to employees from crashing hazards." (GC Exh. 28.) The citation required Caterpillar to, inter alia, pay a \$7000 fine. (Id.)

K. Parties' Positions Concerning Access

1. Union's purpose in seeking access

The Union asserted that, absent Caterpillar granting it access to the facility, the ERT was unable to complete an adequate investigation concerning the fatality. 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 added that such information paled in comparison to the data, which she would have derived during an onsite observation.¹³ She noted that the DVD recording was deficient because it: failed to cover several relevant vantage points; did not sufficiently demonstrate depth, distance, sound, material properties and other key characteristics; and omitted a

¹³ Caterpillar failed to produce an expert, or other witness, who refuted her claim that an onsite visit was required.

panoramic view of the relevant welding operations.¹⁴ She indicated that the Police's investigatory report similarly failed to identify the root cause of the fatality, and Local 1343's staff was unqualified to perform an independent accident investigation. She stated that, in spite of Caterpillar's lack of cooperation, she prepared a report, which discussed the accident, but, failed to reach any dispositive conclusions regarding causation.¹⁵ (GC Exh. 30.) She noted that Caterpillar was the first company, which refused to grant her access following a fatality.

Thompson contended that, if she had been granted access, she would have carefully studied the crane operations connected to the fatality. She asserted that her investigation would not have affected workplace operations, and would have only been a couple of hours in length. She related that she would have obtained permission before photographing the worksite, in order to protect Caterpillar's proprietary interests. She noted that ERT investigatory reports are generally not made public, and are solely submitted to the local union and employer. She averred that the ERT has often successfully determined causation.

2. Caterpillar's rationale

Caterpillar offered two reasons for its denial of access. First, it asserted that the Union had previously received extensive materials connected to the fatality, which rendered the access request redundant. (GC Exh. 3.) Second, it contended that it denied access, in order to maintain the confidentiality of its manufacturing procedures. Labor Relations Manager Hubert explained that Caterpillar was concerned that, if the Union received access, it might have shared Caterpillar's manufacturing secrets with Joy Global Surface Mining, which is one of its main competitors in the strip mining market. He added that Joy Global Surface Mining was of particular concern because it is also located in Milwaukee and its employees are represented by the Union. Bolhous added that specialized welding techniques are utilized in the area where the fatality occurred, which, if leaked, would benefit Caterpillar's competition.

III. ANALYSIS

Caterpillar violated Section 8(a)(5), when it failed to grant the Union access to the facility in connection with the September 8 fatality.¹⁶ 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. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). This duty encompasses the obligation to provide relevant bargaining and grievance-processing materi-

¹⁴ She estimated that the DVD recording was approximately a minute in length.

¹⁵ She acknowledged, on cross-examination, that Jim Novak, another union official, prepared a report describing the accident and identifying potential causes. See (R. Exh. 1). She contended, however, that his report's findings were partially unsupported, given that he never performed an onsite inspection. She added that, even after reviewing Novak's report, she still needed to perform an onsite inspection.

¹⁶ These allegations are listed under pars. 7 and 8 of the complaint.

als. See *Postal Service*, 337 NLRB 820, 822 (2002). The standard for relevancy is a "liberal discovery-type standard," and the sought-after evidence should solely have a bearing upon the disputed issue. See *Pfizer, Inc.*, 268 NLRB 916 (1984).

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. *York International Corp.*, 290 NLRB 438 (1988). Concerning health and safety, the Board has held:

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.

Detroit Newspaper Agency, 317 NLRB 1071 (1995); see also *American National Can Co.*, 293 NLRB 901, 904 (1989) (health and safety matters are mandatory subjects of bargaining). When material is presumptively relevant, the burden shifts to the company to establish a lack of relevance. *Newspaper Guild Local 95 (San Diego) v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

In information cases where a union seeks access to an employer's plant, the Board employs a two-part balancing test, which balances the right of employees to be responsibly represented by their union, against the right of the employer to control its property and ensure that its operations are unhindered. *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985). In applying this 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. See, e.g., *C.C.E., Inc.*, 318 NLRB 977 (1995); *Gilberton Coal Co.*, 291 NLRB 344, 347 (1988); *Hercules, Inc.*, 281 NLRB 961, 969 (1986). Regarding the relatively unparalleled value of an onsite health and safety inspection, the Board has held that:

[T]here can be no adequate substitute for the Union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate . . . safety concerns.

C.C.E., Inc., supra, 318 NLRB at 978; see also *ASARCO, Inc.*, 276 NLRB 1367, 1370 (1985).

In applying the *Holyoke* balancing test, I find that the Union's right to access the facility outweighed Caterpillar's property interests. In weighing the Union's interests, I note that the Board heavily favors access rights, where such rights are being exercised by a union in order to promote a unit's legitimate health and safety interests. The Union critically needed to enter the facility, in order to directly observe the manufacturing area, where a fatality occurred. A conclusive finding on causation would have permitted the Union to enter into an intelligent dialogue with Caterpillar regarding ways to enhance workplace safety, and could have ultimately prevented another senseless tragedy. Given that Caterpillar, OSHA and the Police failed to pinpoint an exact cause behind the fatality, the Union main-

tained a heightened interest in the ERT performing a comprehensive onsite inspection. Additionally, Thompson persuasively demonstrated that the accident investigation materials that Caterpillar previously submitted to the Union were deficient, and an onsite survey remained necessary.¹⁷ The Union, as a result, maintained a substantial representational interest in conducting an onsite inspection, and had no alternative methodology to obtain comparable safety-related information regarding the fatality.

In assessing Caterpillar's interests, I am mindful that Caterpillar held a significant competing 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. In finding, that the Union's access rights outweighed these competing interests, I relied upon the following factors: (1) Caterpillar failed to carry its burden of showing that there were alternative means available to the Union, which would have permitted it to effectively represent the unit on this key safety issue; (2) Thompson, an experienced ERT member, credibly testified that she would not have interfered with production during her survey; (3) Caterpillar's property interest was lessened to a degree by a considerable history of permitting nonemployee visitors to access the facility (e.g., politicians, civic groups, high school students, and customers);¹⁸ and (4) Caterpillar's interest in protecting its confidential manufacturing procedures could have been addressed by negotiating a separate confidentiality agreement with the Union concerning the inspection. Moreover, given that the parties successfully negotiated similar agreements regarding the DVD, Workplace protocols, and other documents, there is no reason why an analogous agreement could not have been negotiated regarding access.

The *Holyoke* balancing test, thus, tips in favor of access. Accordingly, the parties shall bargain in good faith concerning appropriate safeguards, which will dually protect Caterpillar's confidentiality concerns, while also facilitating a comprehensive onsite safety survey. See *Roseburg Forest Products Co.*, 331 NLRB 999, 1003 (2000).

CONCLUSIONS OF LAW

1. Caterpillar is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

All production and maintenance employees employed at Cat-

¹⁷ 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. For example, the DVD (i.e., GC Exh. 32) is two dimensional, and limited to the angles, distance and duration that the nonexpert filmmaker considered relevant, and is, thus, a poor substitute for a three dimensional onsite inspection.

¹⁸ Although most of these visitors entered under Bucyrus' regime, Bolhous credibly testified that the proprietary risks and potential interferences associated with such visits have not changed since Caterpillar's takeover.

erpillar's South Milwaukee, Wisconsin facility, including all individuals working as powerhouse employees, lead men, but excluding general administrative, office and confidential employees, garage and laboratory employees, technically trained engineers, draftsmen, and all miscellaneous engineering department employees, clerical employees in stock, stores, and production departments (which departments include shop clerks, expeditors, timekeepers), industrial and standards engineers, registered nurses, and all guards and supervisors as defined by the Act.

4. Caterpillar violated Section 8(a)(1) and (5) of the Act by denying the Union's request to access its facility, in order to conduct a health and safety inspection, which was relevant to the discharge of its representational duties, without first bargaining in good faith with the Union concerning appropriate confidentiality safeguards associated with such access.

5. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Caterpillar committed an unfair labor practice, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As stated, it must grant the Union access to its facility, subject to certain limitations. Specifically, it must bargain in good faith with the Union over its legitimate confidentiality concerns and reduce the resulting agreement to writing, prior to granting such access.¹⁹ It shall also distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, Caterpillar, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the unit described below by denying its request to access the facility, in order to conduct a health and safety inspection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union as the exclusive representative of employees in the fol-

¹⁹ The parties could expeditiously amend their earlier confidentiality agreements to address this issue.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

lowing appropriate unit concerning their request to access the facility to conduct a health and safety inspection, embody any resulting understanding in a signed agreement and, thereafter, comply with the terms of such agreement:

All production and maintenance employees employed at Caterpillar's South Milwaukee, Wisconsin facility, including all individuals working as powerhouse employees, lead men, but excluding general administrative, office and confidential employees, garage and laboratory employees, technically trained engineers, draftsmen, and all miscellaneous engineering department employees, clerical employees in stock, stores, and production departments (which departments include shop clerks, expeditors, timekeepers), industrial and standards engineers, registered nurses, and all guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, physically post at its Milwaukee, Wisconsin facility, and electronically send and post via email, intranet, internet, or other electronic means to its unit employees who were employed at its Milwaukee, WI facility at any time since September 9, 2011, copies of

the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Caterpillar's authorized representative, shall be physically posted by Caterpillar and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Caterpillar to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Caterpillar has gone out of business or closed the facility involved in these proceedings, Caterpillar shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since September 9, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

²¹ If this Order is enforced by a judgment of a United States court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."