

Nos. 14-3528, 14-3729

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

CATERPILLAR INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

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

Intervening Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

The jurisdictional statement of Caterpillar Inc. (“the Company”) is not complete and correct. This case is before the Court on the petition of the Company to review, and the application of the National Labor Relations Board (“the Board”) to enforce, a final Board Order issued against the Company on October 30, 2014, and reported at 361 NLRB No. 27. (SA001–09.)¹ The Board found that the Company unlawfully prohibited a health and safety specialist of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (“the Union”), from accessing its South Milwaukee, Wisconsin facility to investigate an industrial accident that killed a bargaining-unit member and perform a health and safety inspection.

The Board had jurisdiction over the proceeding under Section 10(a) (29 U.S.C. §§ 151, 160(a)) of the National Labor Relations Act (“the Act”), as amended. The Board’s Order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over the proceeding pursuant to Section 10(e)

¹ “SA” refers to the short appendix filed by the Company containing the Board’s 2013 and 2014 decisions and orders. “A” refers to the appendix filed by the Company. “JSA” refers to the joint supplemental appendix filed by the Board and the Union. “GCX” refers to exhibits introduced at the hearing by the General Counsel and “JX” refers to joint exhibits introduced by the General Counsel and the Company that are not contained in either appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice at issue occurred in Wisconsin. The Company's petition for review, filed on November 17, 2014, and the Board's application for enforcement, filed on December 17, 2014, were timely as the Act imposes no time limit on such filings. The Union intervened on the Board's behalf.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to grant the Union's health and safety specialist access to its facility in order to conduct an investigation and health and safety inspection in the wake of an industrial accident that resulted in the death of a bargaining-unit employee.

2. Whether the Company failed to prove that the Board's Order is moot and therefore failed to demonstrate that the case is nonjusticiable.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by prohibiting a nonemployee union agent from accessing the Company's property in order to conduct a health and safety inspection at the site where an industrial accident claimed the life of a bargaining-

unit employee. (SA003; JSA079–86.) An administrative law judge conducted a hearing on this allegation and the parties filed briefs. On September 5, 2012, the judge issued his decision finding that the Company violated the Act as alleged. (SA004–09.) The Company, the Acting General Counsel, and the Union filed exceptions to the judge’s decision.

On April 23, 2013, a three-member panel of the Board (Chairman Pearce and Members Griffin and Block) issued an order affirming the judge’s findings of fact and rulings, but reversing the judge’s finding that the Company had demonstrated a confidentiality interest that would warrant conditioning access on the negotiation of a confidentiality agreement between the Union and the Company. (SA003.) The Board modified the remedial order to require the Company to provide the Union with access to “reasonable places” within the Company’s facility for a “reasonable period” at a “reasonable time” to investigate an industrial accident and conduct a health and safety investigation. (*Id.*)

On May 2, 2013, the Company petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the 2013 Decision and Order. On May 7, 2013, the Company filed a motion for reconsideration with the Board asking it to overturn the 2013 Decision and Order on the sole ground that the panel of the Board that had issued that decision had two members that were invalidly appointed. The court held the case in abeyance pending the completion

of litigation challenging the recess appointments of Members Block and Griffin. On June 27, 2014, in response to the Supreme Court's decision in *NLRB v. Noel Canning* holding invalid the appointments of Members Block and Griffin, the Board *sua sponte* issued an order setting aside the Board's April 23, 2013 Decision and Order. On August 14, 2014, the D.C. Circuit granted the Board's motion to dismiss that case.

On October 30, 2014, the Board (Members Miscimarra, Johnson, and Schiffer) issued a new Decision and Order. The Board considered the judge's decision and the parties' exceptions to that decision *de novo*. (SA001.) The Board also considered the Board's 2013 Decision and Order. (*Id.*) The Board affirmed the judge's decision and order and incorporated, by reference with some modifications, the Board's 2013 Decision and Order, requiring the Company to grant the Union access to its facility in order to investigate an industrial accident and conduct a health and safety inspection. (SA001 & n.2.) Member Miscimarra dissented in part to the remedy and would have ordered bargaining to protect the Company's confidentiality interest. (SA001-02.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Operations

The Company manufactures large strip-mining equipment at its facility in South Milwaukee, Wisconsin. (SA005; A053, A064, JSA068–69, JSA079–93.)

The Company acquired the facility from its former owner, Bucyrus International, on July 9, 2011, which had operated the facility for over one hundred years.

(SA005; A021, JSA034–35.) The Union and its constituent Local 1343 have represented the production and maintenance employees, including crane operators, at the facility for decades. (SA005; A024–25, JSA094–097.) The Company and the Union were parties to a collective-bargaining agreement, which was effective from December 9, 2008 until April 30, 2013. (SA005; JSA079–93, JSA104.)

The facility has various departments that are involved in fabrication, including a welding area. (SA005; A023, A029, JSA042.) In the welding area, several operations are performed including the rotation of multi-ton crawlers—90,000 pound tracks used to propel strip-mining equipment. (SA005 & n.5; A066, JSA006–07.)

Prior to Company's purchase of the South Milwaukee facility, Bucyrus had an established practice of allowing third parties to tour the facility, including the weld shop. Since the Company's purchase of the facility, it has continued Bucyrus's practice of giving nonemployees access to its facility. (SA001, SA003,

SA006, SA008; JSA027.) Specifically, it has continued to permit access by politicians, high school students, customers, dealers, and civic groups for tours of the facility including the weld shop where the fatal accident occurred. (SA001, SA003, SA006, SA008; JSA022–027, JSA073–76.)

B. A Unit Employee is Crushed and Killed by Equipment at the Company's Facility

On the afternoon of September 8, 2011, crane operator Jeffrey Smith, a bargaining unit member, was killed in the weld shop when a crawler frame unexpectedly pivoted and crushed him. (SA005; A068, A223–43, JSA011–13, JSA015.) The Company promptly reported Smith's death to the Milwaukee Police Department and the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"). Both reported to the scene of the accident. (SA005; A030–34, A072, A130, JSA036.) Throughout the afternoon, Company officials, Local 1343 officials, law enforcement, and OSHA arrived at the scene of the accident and participated in an investigation. (SA005; A031, A072, A130, JSA011, JSA036.) Local 1343 Unit President Kevin Jaskie contacted the Union's Emergency Response Team ("ERT") at its headquarters in Pittsburgh, Pennsylvania promptly after learning of the accident. (SA005; A025, JSA017, JSA045, JSA052, JSA105.) The Union's ERT supports its constituent locals and exists in part to investigate all fatalities and catastrophic injuries when accidents occur at the workplace. (SA005; JSA008, JSA052, JSA105.) Jaskie spoke with

Sharon Thompson, a Health and Safety Specialist on the ERT. (SA005; A025, JSA017, JSA045, JSA052, JSA105.) Thompson informed Jaskie that she would be coming to the Company's facility. (SA005; JSA017, JSA057–58.)

In two subsequent conversations, Jaskie, along with Local 1343 Unit Vice-President Michael Dobrzynski, informed the Company's regional manager Rob Bolhous and supervisor Dan Barich that the Union's ERT would be sending a representative to the facility. (SA005; A131–32, JSA018–20, JSA037–38, JSA068, JSA079–86.) Bolhous pledged the Company's full cooperation with the Union's ERT. (SA005; A131, JSA018, JSA037.)

Throughout the rest of the afternoon, OSHA and law enforcement interviewed employees who were in the weld shop at the time of Smith's death. (SA005; A030–32, A058–59, A070, A146.) Local 1334 officials, including Jaskie, Dobrzynski, and weld shop Chief Steward David Uebele, were permitted to observe OSHA-conducted interviews of employee witnesses as their union representatives. (SA005; A031–033, A059, A065, A070.)

Sometime during the evening on September 8, the Company reenacted the events leading to the accident. It asked Uebele to operate the crane and crawler involved in that accident. (SA005; A071, JSA039.) At the time, Uebele was the only individual present at the facility licensed to operate the crane. (SA005; A071.) Company representatives directed Uebele in his operation of the crane

while the OSHA investigator and local law enforcement observed. (SA005; A072–073, A078–080, A138, JSA070.) The Company did not inform Local 1343 or the Union that it was staging any reenactment of the accident and its officials were therefore absent. (SA005 & n.10; A071–72.) Uebele, an employee, was the highest-ranking Union representative present. (SA005 & n.10; A073.) Company officials videotaped the operation of the crane and crawler and its subsequent placement on the ground. (SA005; A049, A219–20.) The Company’s recording efforts produced three different views of the crane and crawler movements of varying quality without audio or other explanation. (SA006 & n.12; A049, A219–20, GCX 32, JTX 1, 2.)

C. The Company Prohibits the Union’s ERT from Accessing its Facility

The next day, on September 9, Thompson arrived at the Company’s facility accompanied by Jaskie and another Local 1343 officer. (SA005; A039–040, A088.) As Thompson headed towards the weld shop, Bolhous confronted her and told her that she was “not welcome” at the facility. (SA005; A040–41, A137, JSA059–60.) Bolhous did not allow Thompson to explain the purpose of her visit and told her that “unless [she] had permission from Cat[erpillar] legal to be on the premises, [she] was not welcome [at the facility].” (SA005; A137.) Thompson tried to explain the purpose of her visit; however, Bolhous “wasn’t really listening” and continued to deny access to Thompson. (SA005; A137, JSA059–60, JSA072.)

Thompson next spoke to an official in the Company's Human Resources department, but was denied access again. (SA005; A041, A089–91, JSA060.)

Thompson ultimately left the Company's facility having never been granted access. (SA005; A090–91.) On the evening of September 9, the Union contacted one of the Company's attorneys again seeking to secure Thompson's access to the facility. (SA005; A090–91, A162–84.)

On September 16, 2011, the Company responded to the Union's request stating that the Company did "not believe that an on-site visit and joint investigations [were] warranted" because it was already cooperating with OSHA's and law enforcement's investigations. (SA005; A186.) In furtherance of its position, the Company also stated that the collective-bargaining agreement did not provide for such investigations and, in any event, an investigation would not be productive because normal operations had resumed so the accident scene had changed. (*Id.*) On September 26, the Union again requested that Thompson be permitted access to the facility, explaining that her purpose was "to understand what went wrong and to . . . prevent[] any similar accident in the future." (SA005–06; A190–91.) On October 10, the Company denied access to the ERT again, but offered to provide the three videos produced during the reenactment on September 8 "subject to the negotiation of a confidentiality agreement." (SA006; A192–95.)

On October 17, the Union again requested access to the Company's facility for the ERT and stated that the September 8 video recordings "w[ere] not adequate and d[id] not obviate the need for an onsite investigation." (SA006; A196-99.) On November 15, the Company responded and asserted that it considered "its manufacturing and operational process to be proprietary and confidential business information." (SA006; A200.) On November 22, 2011, the Union indicated that it would be willing to enter into a confidentiality agreement in order to receive copies of the September 8, 2011 video recordings, but that would "not take the place of an onsite investigation." (SA006; A204-05.) Over the next two months, the Union and the Company went on to negotiate a confidentiality agreement that resulted in the production of the September 8, 2011 video recordings. (SA006; A206-12; A256-71.)

D. The Union's January 19, 2012 Information Request and Continued Need to Secure Access for the ERT

On January 19, 2012, the Union requested information from the Company pertaining to Smith's death including local law enforcement's investigatory file, photographs and video taken during the post-accident investigation, and copies of the newly adopted crawler-turning procedures for the weld shop, as well as copies of the procedures in effect at the time of the accident. (SA006; A216.) On February 14, the Company provided the Union copies of the September 8 video recordings and the requested investigation file compiled by local law enforcement.

(SA001, SA003, n.1, SA006; A219–44.) However, the Company would not provide the Union with the requested photographs or the crawler turning protocols until the Union had confirmed that it was willing to treat these items as confidential. (SA006; A219–20.) The Company produced these additional items after the Union entered into another confidentiality agreement. (SA006; A245–52, A272–88.)

E. OSHA Fines the Company for the Accident Resulting in Smith’s Death

On March 8, 2012, OSHA cited and fined the Company for contributing to Smith’s death. Specifically, the Company failed 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.” (SA006; JSA111.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On October 30, 2014, the Board (Members Miscimarra (dissenting in part to the remedy), Johnson, and Schiffer) found, in agreement with the administrative law judge, that the Company failed to establish that its property interest in its South Milwaukee facility overcomes employees’ right to responsible representation in light of the serious health and safety considerations after a fatal industrial accident. It therefore found the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by prohibiting a nonemployee union representative

from accessing the facility to conduct a health and safety inspection at the site of a unit employee's death. (SA001, SA003, SA007–08.) The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company, upon the Union's request, to "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." (SA002.) The Order also requires the Company to physically and electronically post a remedial notice at its facility where it unlawfully refused access to the ERT.

SUMMARY OF ARGUMENT

A bargaining-unit employee was crushed and killed by equipment in a workplace accident. The Union sought access for its health and safety specialist to investigate and inspect. The Company steadfastly refused, claiming that its property interest trumps the employees' need to have the Union's specialist visit to ensure their safety and that the Union could make do with photographs, video, and various reports. On these facts, substantial evidence supports the Board's finding that the Company's denial of access violated Section 8(a)(5) and (1) of the Act.

Substantial evidence supports the conclusion that the Company's property rights must yield to its employees' right for responsible representation. Precedent and the evidence establish that the information the Union sought via access to the facility was relevant and necessary to represent the employees. The Board found that the Company did not satisfy its burden to demonstrate that its property rights should predominate over its employees' representational rights nor that the employees' Union could effectively represent employees by some alternative means. In this regard, the Company presents a panoply of meritless arguments to frustrate its employees' statutory rights. In aid of its quest, the Company misconstrues Board and court precedent in order to continue the course of conduct it began four years ago.

The Company's attempt to engineer a constitutional defect in this Court's jurisdiction is equally meritless. The Company's claim that this dispute is constitutionally moot is based on a forcedly narrow reading of the Board's Order. The case is not moot as the Board requires enforcement of its Order that mandates not just access for the Union to investigate the 2011 accident, but a health and safety inspection to ensure that the Company's crawler assembly production areas are free of hazards today. The Company's claim that the case is nonjusticiable because the same wrong is unlikely to recur is equally specious. The employees cannot rest their safety on the Company's confidence that another accident will never occur. Thus, enforcement of the Board's Order is still relevant today. The Company's claim that the passage of time has mooted the remedy cannot succeed; its years of unlawfully preventing the Union's access should not be rewarded

STANDARD OF REVIEW

In reviewing the Board's decisions, the Court gives substantial deference to the Board's findings of fact and its interpretation of the Act. The Board's factual determinations must be upheld if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1024 (7th Cir. 2005). "Substantial evidence in this context means such relevant evidence that a reasonable mind might accept as adequate to support the

conclusions of the Board. The presence of contradicting evidence is not of consequence as long as substantial evidence supports the Board's decision." *L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 980 (7th Cir. 2002); accord *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005). In sum, the Court will not "interfere with the Board's choice between two permissible views of the evidence, even though [it] may have decided the matter differently had the case been before [it] *de novo*." *L.S.F. Transp.*, 282 F.3d at 980; see generally *Universal Camera*, 340 U.S. at 477, 488. Moreover, the Board "has the primary responsibility for developing and applying national labor policy," and its rules are accorded "considerable deference." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (citations omitted). Accordingly, the courts defer to the Board's interpretation of the Act if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496–97 (1979); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398–99 (1996); *L.S.F. Transp., Inc.*, 282 F.3d at 980.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY DENYING THE UNION’S REQUEST TO ACCESS ITS FACILITY IN ORDER TO INVESTIGATE A WORKPLACE ACCIDENT AND CONDUCT A HEALTH AND SAFETY INSPECTION

A. Applicable Principles: Requesting Information Through Access to the Employer’s Property

An employer has an obligation under Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5) and (1)) to furnish its employees’ bargaining representative with requested information that is relevant and necessary to the representative’s effective performance of its collective-bargaining responsibilities. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus.*, 385 U.S. 432, 435–37 (1967); accord *General Elec. Co. v. NLRB*, 916 F.2d 1163, 1167–68 (7th Cir. 1990). An employer’s duty to provide needed information to the union is “rooted in recognition that union access to such information can often prevent conflicts which hamper collective bargaining.” *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129 (4th Cir. 1979).

A union’s request for information concerning matters of health and safety conditions is generally treated as presumptively relevant, even in circumstances where the union seeks access to the employer’s property to obtain such information. *NLRB v. Am. Nat. Can Co.*, 924 F.2d 518, 524 (4th Cir. 1991)

(information related to health and safety conditions is presumptively relevant because it encompasses mandatory subjects of bargaining); *NLRB v. Holyoke Water Power Co.*, 778 F.2d 49, 51 (1st Cir. 1985) (union’s request for access for industrial hygienist to gather noise data implicated information that “clearly was relevant to the union’s statutory duty to bargain about conditions of employment”).

In *Holyoke Water Power*, the Board modified its approach to information request cases where a union is requesting access to an employer’s facility to obtain the requested information itself. 273 NLRB 1369, 1370 (1985), *enforced*, 778 F.2d 49, 53 (1st Cir. 1985). Under prior case law, the Board had merely applied the general standard for information request cases to situations where a union was seeking such access to an employer’s property. *See, e.g., Winona Indus.*, 257 NLRB 695, 697 (1981).² In *Holyoke Water Power*, the Board supplemented its analysis in these hybrid information-request/access cases to include a balancing of “an employer’s right to control its property” with “employees’ right to proper representation.” 273 NLRB at 1370. Significantly, the Board did not jettison the doctrinal niche—requests for information under Section 8(a)(5)—that such denial

² The Union argues (Intervening Resp’t Br. 33–35) that the Court should enforce the Board’s Order under *Winona Indus.*, 257 NLRB 695 (1981). The Court should reject that position because the Board did not rely on *Winona Industries* or its rationale in resolving the instant case and it is well-established that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

of access violations are founded upon. Thus, in *Holyoke Water Power* itself, the Board—before determining that the employer’s property rights must yield to the union’s hygienist conducting a noise-level study—first determined that the “health and safety data [wa]s relevant to the Union’s representation obligation.” *Id.*

Where, as here, a union’s information request requires that it be allowed access to an employer’s property, the employer’s property rights potentially represent a countervailing interest that could predominate the union’s need for access. Accordingly, in such cases, the Board balances the employer’s property rights and the employees’ statutory rights in an effort to accommodate each with as little destruction of one as is consistent with the maintenance of the other. *See Am. Nat. Can Co.*, 924 F.2d at 524–25; *Holyoke Water Power Co.*, 273 NLRB at 1370; *see also NLRB v. National Broadcasting Co.*, 798 F.2d 75, 77 (2d Cir. 1986); *NLRB v. Villa Avilla*, 673 F.2d 281, 283 (9th Cir. 1982); *General Elec. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969). The point at which the balance between employees’ statutory rights and an employer’s property rights will be struck in a particular case depends on the nature and strength of the respective statutory rights and property rights asserted in any given context, and rests within the sound discretion of the Board. *Am. Nat. Can Co.*, 924 F.2d at 524–25.

As the Board explained in *Holyoke Water Power Co.*, 273 NLRB at 1370, where access is sought to obtain information, the employees’ interest in

responsible representation by their union must be weighed against the employer's interest in controlling its property and ensuring efficient operations. The Board emphasized that "the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision." *Id.* In striking that balance, "where it is found that a union can effectively represent employees through some alternative 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." *Id.* On the other hand, "[w]here . . . responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end." *Id.* The Board noted, however, that the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations." *Id.*

B. The Board's Finding that the Company Unlawfully Refused Access to the Union to Investigate and Perform a Health and Safety Investigation Following a Fatal Accident is Supported by Substantial Evidence

Applying the foregoing principles, the Board found (SA001, SA003, SA008) that the employees' right to be responsibly represented by the Union in the context of the significant health and safety issues implicated by the industrial fatality of a unit employee outweighed the Company's property rights. The Company does not

dispute that the Union has a significant interest in protecting the Company's unit employees from all manner of health and safety concerns, but instead, argues that the Board did not appropriately apply the analysis articulated in *Holyoke Water Power* and its progeny. (Br. 29–31.) Specifically, The Company disputes the Board's finding that the Company failed to meet its burden of establishing a predominant, exclusionary property interest that outweighs the employees' rights to access for the Union to represent them. (Br. 25–31.) It also contests the Board's finding that the Company did not meet its evidentiary burden to prove that there were other reasonable means by which the Union could fulfill its statutory duty to provide effective representation short of access to the Company's facility. (Br. 32–43.) As shown below, the Board's findings are supported by the evidence and its proper application of *Holyoke Water Power*, and its Order should therefore be enforced.

- 1. The Board properly applied *Holyoke Water Power* to find that the Union sought information relevant and necessary to its representational interest via access to the Company's facility**

As described in the prior section, under *Holyoke Water Power*, the information sought must first be deemed relevant to the union's representational functions before access to the employer's property is considered. The Board reasonably concluded that “[h]ealth and safety matters regarding the unit employees’ workplaces are of vital interest . . . and are generally relevant and

necessary for the union to carry out its bargaining obligations.” (SA007 (quoting *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).) Consistent with precedent favoring access rights to address employee safety, the Board here found that “the Union critically needed to enter the facility, in order to directly observe the manufacturing area, where a fatality occurred.” (SA008.) Further, it is undisputed that the Company, law enforcement, and OSHA never determined a cause of the accident. Accordingly, allowing the Union to investigate and potentially identify a cause would allow it to discuss with the Company ways to enhance the workplace. (SA008.) Moreover, Thompson credibly and persuasively explained that the materials the Union received from the Company were deficient so on-site access remained necessary. (SA008; A094–95.) Accordingly, the Board applied precedent emphasizing the importance of safety concerns and explained the need for access under the circumstances presented here.

The Company wisely does not directly challenge the vital importance to the Union—and the employees it represents—of preventing unit employees’ exposure to industrial accidents. Instead, the Company objects to labeling such concerns as being relevant to the Union’s representational duties, essentially asserting that the Board wrongly analyzed this case using principles applicable to information-request cases not access cases. (Br. 29–30.) Its claim (Br. 30)—that the Board committed “legal error” in explaining the relevance of the information the Union

sought via access—ignores the doctrinal foundation and development of hybrid information-access cases, described above (pp. 16–19). Indeed, as the Board stated, under *Holyoke Water Power*, “it is the General Counsel’s burden to establish the relevance of the information sought by the union.” *Nestle Purina Petcare Co.*, 347 NLRB 891, 891 (2006). Similarly, the Sixth Circuit has previously found that a determination of relevance is prerequisite to the Board’s balancing of interests under *Holyoke Water Power*. See *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 197–98 (6th Cir. 1985) (observing that a union’s request for access to an employer’s mine after a fatal accident concerned information that was “clearly relevant and necessary to [the union’s] duties as bargaining representative”). Thus, before the Board could balance the Company’s concerns regarding the ERT’s access to the weld shop with the Union’s duty to responsibly represent the Company’s employees, the Board, under *Holyoke Water Power*, first had to determine that such information was relevant and necessary to the Union’s duties as bargaining representative.

In contrast to the Board’s reasoned precedent and explanation of the representational interest here, the Company equates that interest to investigating a “leaky faucet” while ostensibly conceding the tragedy of the accident the Union sought to investigate and ensured never happened again. (Br. 31.) Plainly, the employees here have an interest in having their Union visit their worksite to protect

against further hazards that involve far more danger than a leaky faucet. It is wrong to suggest that the context of the Union's request for access is irrelevant.

2. The Company failed to prove that its property interest outweighed its employees' representational interest, including that alternate means existed to allow the Union to effectively represent employees

a. The Board properly found the employees' representational interest outweighed the Company's property interest

Pursuant to the interest-balancing scheme established in *Holyoke Water Power*, 273 NLRB at 1370, the Company has the "burden to establish that its property interest outweighs the Union's need for access." *Northwoods Rehabilitation*, 344 NLRB 1040, 1045 (2005). The Company was therefore required to demonstrate that the Union could satisfy its duties by alternate means short of accessing its facility and therefore that its property interest predominates. *Nestle Purina Petcare*, 347 NLRB at 891. The Board relied on four factors to find that the Company did not meet its burden: (1) the Company's property interest was lessened by its history of allowing nonemployee visitors to access the facility on tours, which included the area of the 2011 fatal accident; (2) the Company failed to prove that its then-asserted confidentiality interest outweighed the representational

interest;³ (3) Thompson credibly testified that her visit would not interfere with production; and (4) the Company failed to show that alternate means would have permitted the Union to effectively represent the employees on this important safety issue. (SA001 n.2, SA008.)

First, it is undisputed that the Company allowed third parties—including students, politicians, and customers—to tour its facility, including the weld shop where Smith died and to which the Union sought access. In *Hercules, Inc.*, the Board noted, in applying *Holyoke Water Power*, that the employer invited nonemployees to visit its facility and property rights are protected less stringently “when there is a lesser expectation of preserving the property right, or when the statutory right pursued is substantial or would involve only a minimal intrusion on their property right.” 281 NLRB 961, 970–71 (1986), *enforced*, 833 F.2d 426 (2d Cir. 1987). In applying this standard, the Board found that the Company—which has continued its predecessor’s practice of permitting third parties access to its

³ In its opening brief, the Company has not asserted confidentiality concerns as a basis to deny access to the Union. Likewise, it has not asserted as error the Board’s rejection of its confidentiality claims and the modification of the remedy to simply grant reasonable access rather than require bargaining over confidentiality. Arguments not raised in the opening brief are waived and may not be raised in a reply brief. *SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 989 (7th Cir. 2004); *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 370 (7th Cir. 2001).

facility—failed to demonstrate a confidentiality interest worthy of excluding the Union’s ERT from its facility.⁴ (SA001 n.2, SA003 & n.4.)

The Company claims the Board considered its property rights only to the extent that those rights were diminished and erred by considering its admitted practice of permitting third parties to tour its facility, including the weld shop. (Br. 30–31.) (JSA22–27, JSA073–76.) As shown, the Board reasonably concluded, applying longstanding precedent, that the Company’s practice in permitting such third-party access diminished its interest in excluding the Union’s ERT. The Company has presented no evidence or authority demonstrating that the Board erred in making this finding. Indeed, in considering the Company’s then-asserted claims about proprietary information, it would have been remiss of the Board not to consider the countervailing evidence of the wider access the Company granted to parties with no representational interest.

Next, the Board found that Thompson credibly testified that, if permitted access, “her investigation would not have affected workplace operations.” (SA007.) Thompson testified that the Company could “even blindfold [her] and take [her] to the site” because she was “not interested in anything else.” (JSA060.) Moreover, the Board’s Order limits Union access to reasonable periods, times, and

⁴ The Board’s discussion of facility tours was partly in the context of responding to the Company’s assertion of confidentiality interests, an argument it does not make in its opening brief (see above, p. 24 n.2). (SA001 n.2, SA003.)

places. Thus, the Board did accommodate the Company's property interest as *Holyoke Water Power* requires. The Company never rebutted that testimony and has not challenged the Board's credibility determinations.

b. The Company failed to prove alternate means would suffice for the representational interest

The Board reasonably concluded that the Company did not meet its burden of demonstrating that the Union could have effectively represented employees absent accessing the areas of the Company's facility involved in crawler-assembly turning. (SA003.) Specifically, the Board explained that the materials the Company provided to the Union were "a poor substitute for the information that might have been obtained during an onsite survey." (SA008 n.17.) For example, the Board explained that the DVD offers only a two-dimensional view that was "limited to the angles, distance and duration that the nonexpert filmmaker considered relevant" and was therefore not equivalent to a three-dimensional inspection. (*Id.*) Thompson credibly testified that the DVD reenactments⁵ were deficient because they did not provide the "whole picture," did not adequately depict the mats used in turning a crawler assembly, and did not adequately show how the chains or mats used in the crawler turning maneuver reacted when under load. (SA008; A093-95.)

⁵ As the administrative law judge observed, Joint Exhibits 1 and 2 are not viewable in either a standard DVD player or in traditional video-viewing applications such as Windows Media Player or Quick Time Player. (SA006 n.12.)

Before the Court, the Company continues to argue that alternative means did exist for the Union in the form of access by Local 1343 representatives and bargaining unit employees (Br. 33–34), DVD reenactments prepared by the Company (Br. 34), and reports concerning the fatality compiled by local law enforcement—who had access—and another Union official—who lacked access. (Br. 35–36). It also contends that the Union improperly failed to consider alternatives to on-site access. (Br. 34–35.) However, the Company fails to demonstrate that any of these “alternatives”—either individually or cumulatively—could fulfill the Union’s statutory duty to effectively represent the employees.

As an initial matter, the Company errs in claiming that the Union bore the burden of showing that no alternate means were adequate to represent the employees. (Br. 29, 32.) The opposite assignment of burdens is well established. After *Holyoke Water Power*, “the Board clarified that, although it is the General Counsel’s burden to establish the relevance of the information sought by the union, it is the employer’s burden to show that there are alternate means other than access that would satisfy the union’s need.” *Nestle Purina Petcare Co.*, 347 NLRB at 891 (collecting cases). The Company has failed to meet that burden with any of the inadequate substitutes for access upon which it relies.

First, the Company’s contentions that it did provide sufficient access to the Union by using representatives of Local 1343 (who are all employees at the

Company's facility) and other bargaining-unit employees during the Company's reenactments and drawing on their experience in drafting new crawler turning protocols are meritless. Under the Company's faulty premise, it believes that it can determine which Union agents—and in what capacity—can represent the employees. It is uncontested that the Local 1343 officials do not have any expertise or training in the investigation or reconstruction of industrial accidents or fatalities. (A057, A069, A073 JSA014.) It is an even greater stretch to suggest (Br. 33) that the presence of unit employees—the individuals the Union seeks to protect—are a plausible substitute for the trained ERT. The Company's contentions are also belied by the fact that Local 1343 President Jaskie requested assistance from the Union's ERT as soon as he heard about Smith's death. (JSA017, JSA057–58.) Furthermore, although unit employees⁶ aided the Company in performing the reenactments and developing new procedures, it is uncontested that no Union officials—from Local 1343 or otherwise—were involved in this process. (A023, A047, A075, A143–44, A153–59, A272, A289–95, JSA033, JSA077.)

An employer is not entitled to deem which union officials may represent the employees' interests and which ones cannot. *See Hercules, Inc.*, 281 NLRB at 961, 968, 970 (employer unlawful refused access to union's designated industrial

⁶ As noted above, p. 9, Uebele was asked to operate the crane in his capacity as an employee, not as shop steward for Local 1343.

hygienist; rejecting argument that employee observation sufficed), *enforced* 833 F.2d 426 (2d Cir. 1987); *cf. Caribe Staple Co.*, 313 NLRB 877, 889–90 (1994) (employer unlawfully conditioned bargaining on limiting the size and particular members of the union committee; absent bad faith, employers must bargain with union’s designated representatives). The Company does not provide this Court with any basis for the notion that including unit employees in its reenactments and discussions sufficiently satisfies its statutory duty to provide information via access to the Union.

The Company further argues that the DVD reenactments obviated the Union’s need for access. (Br. 34.) However, as explained above, the Board found that Thompson credibly testified that the materials the Company did provide “were deficient, and an onsite survey remained necessary.” (SA008.) Rather than presenting any rebuttal testimony to demonstrate how the materials provided to the Union obviated an on-site investigation and despite not challenging the Board’s credibility determinations, the Company mocks Thompson for her “Zen-like” need to visit the site.⁷ (Br. 42.) Regardless of how it was articulated, Thompson’s point—that the alternate materials could not replace an in-person visit to properly ensure employee safety—is logical and consistent with what the Board has stated.

⁷ The administrative law judge specifically noted the Company’s failure to present *any* testimony to rebut Thompson’s testimony concerning the deficiency of the materials the Union was provided. (SA007 n.13.)

“There 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.*, 318 NLRB 977, 978 (1995) (quoted at SA007).

The Company also contends that the reports prepared by OSHA; local police; and Jim Novak, another Union official, warrant denying the Union’s ERT access to the facility. (A333.) Initially, the Company has offered no evidence that rebuts Thompson’s testimony that the police report was deficient for the Union’s purpose because one could not get “the whole picture” from the report alone without the context of actually seeing the facility and the equipment involved in person. (A094–95.) Instead, the Company states that the Union’s ERT did not attempt to interview witnesses. (Br. 40–41 & n.6.) However, as the Company observes, the Union—through Novak—*did* interview witnesses to the accident and produced a report. (A298–338.) The Company ignores the fact that Novak conducted his interviews and prepared his report *under Thompson’s direction*. (A333.) The Company offers no evidence to counter Thompson’s testimony that access to the facility was still required because Novak’s report provided “no definitive answers” and that, in her expert opinion, an on-site investigation was still required. (JSA061–62.)

The Company's next claim—that the Union failed to consider the other alternatives available to it—is irrelevant and meritless. Initially, as explained above (p. 28), it is neither the Union's nor the General Counsel's burden to demonstrate that the alternatives available to the Union would allow effective representation of unit employees. Instead, the Company must demonstrate that its DVD reenactments, photographs, the OSHA and law enforcement reports on the accident, Novak's report, and the litany of other information the Company *thought* the Union *should* have sought (Br. 41) would have enabled the Union to “effectively represent employees . . . other than by entering on [its] premises.” *Holyoke Water Power*, 273 NLRB at 1370. As Thompson credibly testified, access would have permitted her to understand the “complete picture” and better understand the interaction of the chains and mats used in the crawler-rotation procedure. (A093–94.) In other words, the materials that the Company has been willing to provide are woefully short on context, which can only be achieved by in-person viewing of the crawler-turning procedure. Indeed, both OSHA and local law enforcement were permitted access to the Company's facility to conduct their investigations. The Company's speculation (Br. 34–35, 41) as to materials that the Union *should have* asked for, but did not, is irrelevant. The Company points to no authority, applying *Holyoke Water Power* or even arising under the Act generally, that would excuse the Company's denial of access of its employees' collective-

bargaining representative on the basis of action the Union *should have* taken or requiring the Union to take whatever information the Company believed sufficiently satisfied the Union's representational duties and only that. Instead, it is the Company's burden to demonstrate that alternative means would satisfy its employees' right to effective representation. *Holyoke Water Power*, 273 NLRB at 1370.

Rather than meeting that burden, the Company attempts to analogize its willingness to accommodate the Union in its investigation—short of providing access to its facility—with an employer's duty to engage employees in seeking an accommodation under the Americans with Disabilities Act. (Br. 43–44.) This analogy is at best strained and logically runs counter to the Company's burden under *Holyoke Water Power* to demonstrate that the Union's need for information could be accomplished through means short of accessing its facility. Had the Company satisfied its burden, at that point it would have been incumbent on the Union to request the needed information in some other format, short of access.

c. The Company's reliance on *Lechmere* is misplaced

Before the Court, the Company argues the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992), regarding employers' property rights to exclude non-employee union organizers, controls the Union's request for access in the instant case. (Br. 25–26.) By painting in broad strokes, the Company

attempts to place access to its facility by its employees' collective-bargaining representative to perform a safety investigation in the wake of a fatal industrial accident on the same footing as access to employer property by nonemployee union agents seeking to organize employees. (Br. 26.)

However, this ignores the plain language of *Lechmere*—which applies to access by nonemployees engaged in “trespassory organizational activity.” 502 U.S. at 535. The Board and the courts recognize that, generally, there is a distinction between a union seeking entry to property to carry out its statutory representational duties under the Act and a union seeking entry to property to organize employees. *See, e.g., Wolgast Corp. v. NLRB*, 349 F.3d 250, 255–56 (6th Cir. 2003) (stating that *Lechmere* is not a “trump card” that authorizes exclusion of every nonemployee union representative from third-party property, regardless of the purpose or relationship with employees at the jobsite). More specifically, the Board, in applying *Holyoke Water Power*, recognizes the distinction at play when an incumbent collective-bargaining representative seeks access to an employer’s property in exercising its statutory duties, compared with union organizers. *See Washington Beef, Inc.*, 328 NLRB 612, 618–19 & n.8 (1999) (under *Holyoke Water Power*, an incumbent union is entitled to access because it implicates representational, rather than organizing rights).

A practical difference between cases involving organizational and representational access is upon whom the burden falls to demonstrate the availability of alternative means. By invoking *Lechmere*, the Company erroneously attempts to alter the burdens (Br. 27, 32) assigned under *Holyoke Water Power*. Under *Lechmere*, the burden to demonstrate the unavailability of alternate means of communicating with employees rests on the union and the General Counsel to demonstrate the need for access. 502 U.S. at 539–40. With a *Holyoke Water Power* analysis, the burden is on the employer to demonstrate that alternate means of representation are available to demonstrate that access is not needed. *Nestle Purina Petcare*, 347 NLRB at 891. Subsequent to the Supreme Court’s decision in *Lechmere*, the Board has continued to apply a balancing approach where both the General Counsel *and* the employer carry an evidentiary burden in determining whether the employer’s property rights must yield to its employees’ right to responsible representation. *Id.* (citing *New Surfside Nursing Home*, 322 NLRB 532, 535 (1996)).

The Company’s theory that *Lechmere*’s principles can extend to this case finds no support in its cited cases. (Br. 26–27.) Most do not involve representational access: *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (access to employer’s bulletin board sought during organizational campaign); *Leslie Homes Inc.*, 316 NLRB 123, 127–29 (1995) (access to

employer's property sought for area standards handbilling aimed at the general public where union did not represent *any* of those employees.), *affirmed*, 68 F.3d 71 (3d Cir. 1995); *Galleria Joint Venture*, 317 NLRB 1147, 1147–48 (1995) (under *Lechmere*, third-party mall owner could exclude picketers engaged in an unfair-labor-practice strike against a tenant). Its only cited case involving representational access is *Success Village Apartments*, 347 NLRB 1065, 1077 (2006), where the union sought to meet with employees at work prior to a grievance meeting. No exceptions were taken to the administrative law judge's dismissal of that allegation, cited by the Company. *Id.* at 1065 n.2. "It is well settled that the Board's adoption of a portion of a judge's decision to which no exceptions are filed is not precedent for any other case." *Local Union 370, United Bhd. of Carpenters & Joiners of Am.*, 332 NLRB 174, 175 n.2 (2000).

Accordingly, the Company has presented no compelling basis for the Court to modify the Board's established analysis under *Holyoke Water Power* by supplanting it with *Lechmere*.

II. THE COMPANY HAS FAILED TO DEMONSTRATE THAT THE BOARD'S ORDER IS MOOT; THIS CASE PRESENTS A JUSTICIABLE CASE AND CONTROVERSY

The Company asserts that this Court lacks Article III jurisdiction because the underlying unfair-labor-practice case and the Board's ordered relief are moot. (Br. 21–22.) As with all other aspects of this case, the Company has not met its burden to establish that its unlawful conduct should not be remedied. In claiming mootness, the Company ignores the fact that the Board's Order does not merely order access to investigate the industrial accident that killed Smith, but also orders the Company to cease and desist from related conduct, post a notice acknowledging its unlawful conduct, and permit access to the Union to conduct a health and safety inspection to ensure that the crawler-turning operations are safe from similar hazards today. The Board requires enforcement of each aspect of its Order. This case presents a live case and controversy for this Court to adjudicate. Specifically, the Company's claim that the case is nonjusticiable fails because the case is not moot and it offers only speculation that the injury will not likely recur as it has never assured either the Board or the Union that it will permit the Union's designated health and safety officials access to its facility in the (hopefully unlikely) event of a future accident. Instead of claiming that it has altered its views on access, the Company boldly submits to the Court that no accidents will ever occur to necessitate further union access for investigation. Those unfounded

arguments offer no compelling basis to find that the case is moot and nonjusticiable.

A. The Company Has Not Met its Heavy Burden of Proving Mootness

The Company claims this dispute is moot because the accident site has not existed in the same condition for almost four years, the procedure used to rotate its multi-ton crawler assemblies has changed, and no accidents have occurred in the last four years.⁸ “[T]he mootness inquiry turns on ‘whether the *relief sought* would, if granted, make a difference to the legal interests of the parties.’” *Killian v. Concert Health Plan*, 742 F.3d 651, 661 (7th Cir. 2013) (citation omitted) (emphasis in original). “[T]he burden of demonstrating mootness is a heavy one’ [. . .] borne by the party seeking to have the case declared moot.” *Id.* at 660 (citation omitted). Enforcement of the Board’s Order here will make a difference to the employees, whose interest remains in having their union access the facility to investigate an industrial accident and inspect their worksite to protect their health and safety from similar hazards to life and limb.

The Company plainly misrepresents the Board’s order in claiming mootness. Contrary to the Company’s view (Br. 20–21), the Board’s Order is not limited to granting the Union access to investigate Smith’s death. Rather

⁸ Because the Company never argued to the Board that the remedy or case was moot, that legal theory is not addressed in the Board’s decisions.

than ordering access “to investigate the 2011 accident” (Br. 21), the Board ordered access to investigate “an industrial accident” (SA004)—thus, it is not limited to an investigation of Smith’s death.⁹ Similarly, the “health and safety inspection” is not tethered to Smith’s death. Additionally, the Board’s Order continues to be relevant for the simple reason that the Union has never had an opportunity to investigate the crawler-turning operations to determine whether the danger has reasonably passed. Indeed, the Order specified that the Union can investigate “all of the processes used to turn crawler assemblies.” (SA002.)

In asserting mootness, the Company also attempts to diminish (Br. 22) its continuing obligation under the Board’s cease-and-desist order. Such orders operate “prospectively to prohibit future unfair labor practices.” *Power Inc. v. NLRB*, 40 F.3d 409, 421 (D.C. Cir. 1994). A cease-and-desist order may “restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the [employer’s] conduct in the past.” *NLRB v. Express*

⁹ The Company fares no better in contending that, because the accident scene was quickly cleaned, granting the Union access to investigate would be akin to “attempting to determine the cause of a 2011 car accident by visiting the intersection where the accident occurred in 2015.” (Br. 24). The Company’s claim that the Union “cannot possibly determine what caused the accident” is pure speculation on what the ERT could determine in its investigation. For example, as noted above (pp. 27–28, 30), a site visit could lend important context, such as a better appreciation of size and scale, to the photographs, video, and documents provided.

Publ'g Co., 312 U.S. 426, 435 (1941). An employer has a “continuing obligation” to comply with a Board order, and a party’s voluntary compliance does not preclude the Board from petitioning a court for enforcement. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 560, 563 (1950). The order here explicitly requires the Company to cease and desist from the specific violations found, and from “[i]n any like or related manner” coercing employees in the exercise of their statutory rights. (SA002.)

Furthermore, the Company utterly ignores its obligation to post the Board’s remedial notice at its facility. (SA002.) As the Supreme Court has observed, the Board’s notice posting remedy informing employees of their rights under the Act is a “significant sanction.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002). Accordingly—like the affirmative order granting access—the plain language of the cease-and-desist order and the Board’s requirement that the Company post the Board’s notice are not limited to prohibiting merely the identical misconduct that occurred here.

In any case, the Company’s cramped view of the Board’s Order requiring access as involving only the 2011 accident flies in the face of settled case law. If Board orders were interpreted to enjoin only the precise wrong that gave rise to it, then a violator could avoid contempt by engaging in new misconduct “that was not specifically enjoined by the order; under such a scheme, “a whole series

of wrongs is perpetrated and a decree of enforcement goes for naught.”

McComb v. Jacksonville Paper Co., 336 U.S. 187, 192–93 (1949); *cf. NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. at 563 (“[T]he employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court.”). Thus, while the Company may have put Smith’s death behind it, the employees still have a present and future need for access by the Union to protect them. As discussed below (pp. 44–46), the employees cannot rest on the Company’s sanguine claims that an accident will never occur again.

In this regard, enforcement of the Board’s Order would not be a “vain and useless act” (Br. 25) as the Company is still in business of manufacturing strip-mining equipment—including multi-ton crawlers similar to the one that crushed Smith in 2011—and the Union is the employees’ collective-bargaining representative. The Company’s cited authority (Br. 25) is not analogous because it involved a closed facility and defunct unit. *NLRB v. Globe Sec. Services, Inc.*, 548 F.2d 1115, 1116–17 (7th Cir. 1977) (finding case moot where Board sought enforcement of a bargaining order against an employer that had ceased all operations and had no plans of resuming operations).

The Company suggests that the Board’s affirmative order is unprecedented because it is “not aware of a single appellate decision affirming enforcement of a Board order commanding future inspections of specific accident scenes, much less by a specific class of Union official.” (Br. 21.) The Company overlooks at least two cases with similar orders enforced by courts. *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199 (6th Cir. 1986), *enforcing* 276 NLRB 1367, 1371 (1985); *Hercules, Inc. v. NLRB*, 833 F.2d 426, 430 (2d Cir. 1987), *enforcing* 281 NLRB 961, 961 (1986). Like here, those cases involve an employer’s denial of access to a union’s designated expert surrounding the investigation of industrial accidents that had already occurred—and presumably had been cleaned up.¹⁰ A comparison of the affirmative orders in each case illustrates their similarity:

¹⁰ In *ASARCO*, 805 F.2d at 194, 195–96, and *Hercules*, 805 F.2d at 194, 195–96, the courts’ ultimate enforcement of the Board’s access orders occurred, respectively, over two years and two-and-a-half years after the initial industrial accidents.

<i>Caterpillar</i>	<i>ASARCO</i>	<i>Hercules</i>
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	Upon request, grant access, by an industrial hygienist designated by the Union , to the Young mine and the Field accident site for a reasonable period and at a reasonable time sufficient to permit the hygienist to fully investigate the accident site and its approaches	Upon Local 271's request, grant access to its Parlin, New Jersey facility for reasonable periods and at reasonable times sufficient to allow Local 271's representatives to fully investigate industrial accidents, to conduct health and safety inspections, and to conduct tests for determining the presence of toxic or hazardous fumes

Court enforcement is needed because, if an employer continues to defy a Board order, it is "subject to contempt proceedings and penalties." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 n.13 (1984). "This threat of contempt sanctions . . . provides a significant deterrent against future violations of the Act." *Id.* As the Company continues to oppose any access for the ERT, enforcement of the Board's order is necessary to allow the health and safety inspection and prevent the Company from engaging in similar unlawful conduct in the future.

B. Enforcement of the Board's Order Presents a Justiciable Controversy; the Company Has Not Proven Its Premise that the Same Wrong Is Not Reasonably Expected To Occur

The Company has couched its mootness claim as depriving the Court of jurisdiction over a justiciable dispute under Article III of the U.S. Constitution. Specifically, the Company argues that the accident site has been cleaned, normal operations have resumed, and the specific procedures used to turn the crawler assemblies in 2011 are no longer used to turn crawler assemblies today. (Br. 23–25.) Based on this and its view that no more accidents will occur, the Company claims that the same wrong cannot reasonably be expected. The Company, however, has failed to meet its heavy burden of demonstrating that the case is nonjusticiable.

The Court has explained that “[u]nder Article III, the federal courts ‘may only adjudicate actual, ongoing controversies’” and “[w]hen a case becomes moot, this constitutional requirement is lacking.” *Killian v. Concert Health Plan*, 742 F.3d 651, 660 (7th Cir. 2013) (citations omitted). However, a claim of mootness will be defeated “even though the factual controversy is over, [if] the case involves an order ‘capable of repetition, yet evading reviewing.’” *United States v. Peters*, 754 F.2d 753, 757–58 (7th Cir. 1985) (exclusion of media from voir dire of prospective jurors was long over but case remained justiciable because orders were capable of repetition) (citations omitted). Even a dispute that is arguably moot is

justiciable if there exists “a reasonable expectation that the same complaining party would be subjected to the same action again” and the duration of the underlying dispute was “too short to be fully litigated prior to its cessation or expiration, and there was.” *Id.* (internal citations and quotation marks omitted). The premise of the Company’s justiciability argument—that the harm will not recur—is unfounded or speculative at best. However, in order to succeed, the Company carries a “heavy burden” to demonstrate that “subsequent events ma[ke] it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (internal quotation marks and citations omitted) (alteration in original). Here, the same wrong—the Company’s denial of access to the Union’s ERT after an accident—can reasonably be expected to recur. The Company has never claimed it would grant access to the ERT if another accident occurred. The distinction it draws to its cited case (Br. 22) involving an employer who reinstated a discriminatee and discharged him again is inapposite. *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 892 (7th Cir. 1990). While it claims that it would never repeat its conduct (Br. 22), it has offered no reason to think otherwise. The Company will rebuff the ERT if another accident occurs, absent enforcement of the instant Order.

Instead of demonstrating that it has changed its view of access, the Company suggests (Br. 21, 22) that there is no likelihood that an accident will occur again, in a misguided attempt to meet its burden.¹¹ Four years of accident-free work is no guarantee that an accident is impossible in the future. Indeed, the Company can with no more certainty assure this Court that all danger has passed than it would have been able to assure Smith before the accident on September 8, 2011, that he was working in a danger-free environment.

Thus, the Company's claim that the likelihood of another accident occurring at its facility is "a matter of pure speculation" (Br. 21) is itself brash speculation. The employees cannot pin their safety on the Company's bravado. Moreover, if another accident never occurs again (as the Company predicts), the Company would thus not be harmed by the prospective import of the Board's order because the Union would have no need for access to investigate a future accident.

In all respects, the case before the Court presents a "real, earnest and vital" case and controversy under Article III. *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). The Board has a "personal stake" (Br. 19) in the outcome of the case. It is undisputed that the Act expressly authorizes the

¹¹ The Company wrongly put the burden on the Union to show that another accident will occur (Br. 22) rather than accepting its burden of proving mootness and nonjusticiability by showing that an accident will not occur.

Board “to petition” the appropriate federal circuit court “for the enforcement” of its unfair-labor-practice orders under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Company’s citation (Br. 20) to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), is unavailing as its required elements—an injury in fact caused by the conduct complained of and redressible by a favorable decision—are easily met in this case. The injury to be redressed by the Court was caused by the Company’s refusal to comply with the Board’s Order requiring access for investigation of an industrial accident and for a health and safety inspection. Because Board orders are not self-enforcing, the Board must secure enforcement from the Court to prompt compliance by the Company. *P*I*E Nationwide, Inc.*, 894 F.2d at 890 (Board orders are not “self-executing”). As explained above, the employees have a real and present need for the Union to access the facility.

Furthermore, it is unclear how, under the Company’s view, *any* case involving a union’s request for access to conduct an accident investigation would ever be justiciable by an Article III court. It is impossible that the Board would ever be able to fully litigate a case before an employer would clean-up the accident and resume normal operations. The duration of the underlying event was too short to allow conclusion of the litigation; the case therefore remains justiciable. *Peters*, 754 F.2d at 757–58.

The Company's attempts to analogize the Union's role to that of the union in *Milwaukee Police Association v. Board of Fire & Police Commissioners*, 708 F.3d 921 (7th Cir. 2013) (Br. 21–22) is based on several errors in logic. In *Milwaukee Police Association*, a panel of this Court dismissed as moot a suit brought by a union and one of its members after the member settled her claim and the union had “not pled any injury to itself.” 708 F.3d at 927. The fact that the union there did not have standing to continue its claim without the aggrieved plaintiff is an entirely different situation. Here, the Board clearly has standing to seek enforcement of its order. Moreover, although the Union is concerned with determining the ultimate cause of Smith's death, its ultimate goal is to obtain information that is relevant and necessary to its role as the employees' statutory bargaining representative. As noted above (pp. 20–22), the Union's representational concern here is that the Company's employees work in a facility free of hazards. Thus, the Company's claim that this is now “an abstract dispute about the law” (Br. 22 (quotation marks omitted)) is false. It is undisputed that the Company has not permitted the Union to conduct an investigation and safety inspection to ensure to its—*not* the Company's—satisfaction that no other employee will suffer the same fate as Smith.

Enforcement of the instant order will ensure that the employees' bargaining representative will be able to fulfill its statutory duty of representation now and in the event of another accident. In sum, the Company can hardly avoid the consequences of its unlawful activities by relying on its stonewalling of the Union and then pointing to the passage of time as a basis to claim mootness and deny relief.

CONCLUSION

The Board reasonably concluded that the Company unlawfully refused to permit the Union access to its facility to investigate the horrific death of a unit employee and perform a safety inspection. As the Company has failed to demonstrate that the Union could effectively represent employees by means other than access, its denial of access violated Section 8(a)(5) and (1). Accordingly, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's petition for review.

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June 2015

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

CATERPILLAR INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 14-3528
)	14-3729
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	30-CA-064314
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC)	
)	
Intervening Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,061 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben

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Dated at Washington, DC
this 15th day of June, 2015

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ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO-CLC)	
)	
Intervening Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2015, I electronically filed the foregoing
JOINT SUPPLEMENTAL APPENDIX OF RESPONDENT/CROSS-
PETITIONER AND INTERVENING RESPONDENT with the Clerk of the Court
of the United States Court of Appeals for the Seventh Circuit by using the
appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and
that service will be accomplished by the appellate CM/ECF system.

s/ Linda Dreeben _____
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Dated at Washington, DC
this 15th day of June, 2015

STATUTORY ADDENDUM

RELEVANT STATUTORY PROVISIONS

Section 7 of the Act, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title [Section 8(a)(3) of the Act];

Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5):

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [Section 7 of the Act].

* * *

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title [Section 9(a) of the Act].

Section 10(a) of the Act, 29 U.S.C. § 160(a):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title [Section 8 of the Act]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial

statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Section 10(e) of the Act, 29 U.S.C. § 160(e):

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove

provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 10(f) of the Act, 29 U.S.C. § 160(e):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [Section 10(e) of the Act], and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.