

Nos. 15-1433 & 15-1611

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In the  
**United States Court of Appeals**  
**For the Sixth Circuit**

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CATERPILLAR LOGISTICS, INC.,  
*Petitioner/Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent/Cross-Petitioner,*

and

INTERNATIONAL UNION,  
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA (UAW),  
*Intervening Respondent.*

**On Petition for Review from the National Labor Relations Board**  
**Case Nos. 09-CA-110687, 09-CA-114560, 09-RC-111362 & 09-CA-120356**

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**BRIEF OF INTERVENING RESPONDENT**  
**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND**  
**AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)**

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

CATERPILLAR LOGISTICS, INC.,

Petitioner/Cross-Respondent,

Case Nos. 15-1433  
15-1611

v.

NATIONAL LABOR RELATIONS BOARD ET AL.,

Respondent/Cross-Petitioner.

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Intervening Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO.

If YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Not Applicable.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO.

If YES, list the identity of such corporation and the nature of the financial interest.

Not Applicable.

/s/ Kristin Seifert Watson  
Kristin Seifert Watson, Esq. (0078032)

November 20, 2015  
(Date)

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT .....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES .....iv

STATEMENT REGARDING ORAL ARGUMENT ..... viii

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... 1

II. STATEMENT OF THE CASE ..... 1

III. STATEMENT OF THE FACTS ..... 3

    A. Interrogation and Surveillance ..... 4

    B. Improper Promise and Grant of Employee Benefits..... 6

        1. The \$400 Safety Bonus ..... 7

        2. The Smoking Shelters ..... 11

IV. SUMMARY OF THE ARGUMENT ..... 13

V. ARGUMENT ..... 16

    A. Standard of Review ..... 16

    B. First Issue: Substantial Evidence Supports the Board’s Determination that Caterpillar Committed Unfair Labor Practices and Objectionable Conduct through the Improper Promise and Grant of Employee Benefits..... 18

        1. Substantial evidence supports the Board’s holding that the announcement and granting of the safety bonus were unfair labor practices and objectionable conduct ..... 20

a.	<u>Substantial evidence establishes that the safety bonus was not an established benefit</u> .....	23
b.	<u>Substantial evidence shows that Caterpillar manipulated the announcement and granting of the safety bonus to interfere with the election</u> .....	31
c.	<u>Substantial evidence shows that the safety bonus affected the election</u> .....	33
2.	Substantial evidence supports the Board’s holding that the promise of smoking shelters constituted an unfair labor practice.....	34
C.	<u>Second Issue: The Board’s holding that unlawful interrogation took place is supported by substantial evidence</u> .....	42
1.	The Board properly held that Sponsler was unlawfully interrogated .....	43
2.	The Board properly held that Applin was unlawfully interrogated .....	47
3.	The Board properly held the interrogations, as well as Caterpillar’s other misconduct, constituted a basis for setting aside the election .....	52
D.	<u>Third Issue: The Board’s holding that Caterpillar created an unlawful impression of surveillance is supported by substantial evidence</u> .....	57
VI.	CONCLUSION.....	60
	CERTIFICATE OF COMPLIANCE.....	62
	CERTIFICATE OF SERVICE .....	63

**TABLE OF AUTHORITIES**

<b><u>Cases:</u></b>	<b><u>Page(s)</u></b>
<i>Abramson, LLC</i> , 345 NLRB 171 (2005).....	50
<i>Accubuilt, Inc.</i> , 340 NLRB 1337 (2003).....	56
<i>Aladdin Gaming LLC</i> , 345 NLRB 585 (2005) .....	44
<i>Am. Sunroof Corp.</i> , 248 NLRB 748 (1980).....	21, 31
<i>Bay-Wood Indus. Inc. v. NLRB</i> , 666 F.2d 1011 (6th Cir. 1981).....	23
<i>Beverly Enterprises, Inc. v. NLRB</i> , 139 F.3d 135 (2d Cir. 1998).....	27
<i>Blue Flash Express</i> , 109 NLRB 591 (1954).....	45
<i>Bon Appetit Mgmt. Co.</i> , 334 NLRB 1042 (2001).....	52
<i>Cambridge Tool &amp; Mfg. Co.</i> , 316 NLRB 716 (1995) .....	52
<i>Cedars-Sinai Med. Ctr.</i> , 342 NLRB 596 (2004) .....	56
<i>Centralia Fireside Health, Inc.</i> , 233 NLRB 139 (1977) .....	19
<i>Champion Enterprises, Inc.</i> , 350 NLRB 788 (2007).....	26
<i>Clark Equipment Co.</i> , 278 NLRB 498 (1986).....	59
<i>Crown Bolt, Inc.</i> , 343 NLRB 776 (2004) .....	56
<i>Dal-Tex Optical, Inc.</i> , 137 NLRB 1782 (1962).....	53
<i>Detroit Medical Center</i> , 331 NLRB 878 (2000).....	52
<i>Emery Worldwide</i> , 309 NLRB 185 (1992) .....	28
<i>Flexsteel Indus.</i> , 311 NLRB 257 (1993).....	57

*Frontier Tele. of Rochester, Inc.*, 344 NLRB 1270 (2005) .....57

*Hayes-Albion Corp., Tiffin Div.*, 237 NLRB 20 (1978) .....19, 20

*Heartshare Human Srvcs. of NY*, 339 NLRB 842 (2003) .....57

*Huntsville Manufacturing Co.*, 211 NLRB 54 (1974).....54

*In re Safeway, Inc.*, 338 NLRB 525 (2002) .....55

*Jurys Boston Hotel*, 356 NLRB No. 114, (March 28, 2011).....56

*Kingsboro Medical Group*, 270 NLRB 962 (1984).....27

*Kingspan Insulated Panels, Inc.*, 359 NLRB No. 19 (November 8, 2012).....35

*Lake Mary Health Care Assocs., LLC v. NLRB*, 211 Fed. App’x 878 (11th Cir. 2006) .....36

*Lampi, LLC*, 322 NLRB 502 (1996).....19

*Material Handling Equipment Div. of FMC Corp.*, 217 NLRB 12 (1975).....20

*Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944) .....18

*Meijer, Inc. v. NLRB*, 130 F.3d 1209 (6th Cir. 2007) .....17

*Metro One Loss Prevention*, 2010 NLRB LEXIS 445, 190 LRRM 1226, (2010) .....28

*Miss. Extended Care Ctr.*, 202 NLRB 1065 (1973) .....48, 49

*Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003) .....16, 17

*Network Ambulance*, 329 NLRB 1 (1999).....35

*Niblock Excavating, Inc.*, 337 NLRB 53 (2001).....19

*North Hills Office Srvcs., Inc.*, 346 NLRB 1099 (2006) .....58

*NLRB v. Crown Can Co.*, 138 F.2d 263 (8th Cir. 1943) .....18

*NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).....19

*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) .....30

*NLRB v. Howell Automatic Mach. Co.*, 454 F.2d 1077 (6th Cir. 1972).....23

*NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531 (6th Cir. 2000) .....16

*NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102 (6th Cir. 1987).....47

*NLRB v. Sherwood Trucking Co.*, 775 F.2d 744 (6th Cir. 1985) .....23

*NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000) .....17, 52

*NLRB v. West Coast Casket Co.*, 205 F.2d 902 (9th Cir. 1953).....49

*Painting Co. v. NLRB*, 298 F.3d 492 (6th Cir. 2002) .....17

*Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985).....30

*Real Foods Co.*, 350 NLRB 309 (2007) .....27

*Rossmore House Hotel*, 269 NLRB 1176 (1984) .....45, 46

*Sanitation Salvage Corp.*, 359 NLRB No. 130,  
196 LRRM 1124 (June 5, 2013).....55

*SKD Jonesville Division, LP*, 340 NLRB 101 (2003) .....59

*South Shore Hosp.*, 229 NLRB 363 (1977) .....59

*Stabilus, Inc.*, 355 NLRB 836 (2010) .....59

*Stanadyne Auto Corp.*, 345 NLRB 85 (2005).....28

*Struksnes Constr. Co.*, 165 NLRB 1062 (1967) .....49

*Sun Mart Foods*, 341 NLRB 161 (2004) .....36

<i>Super Thrift Mkts.</i> , 233 NLRB 409 (1977).....	53, 54
<i>Teledyne Dental Products Corp.</i> , 210 NLRB 435 (1974) .....	41
<i>Toma Metals, Inc.</i> , 342 NLRB 787 (2004).....	50
<i>Tony Scott Trucking, Inc. v. NLRB</i> , 821 F.2d 312 (6th Cir. 1987).....	37
<i>Torbitt &amp; Castleman, Inc. v. NLRB</i> , 123 F.3d 899 (1997) .....	29
<i>Van Dorn Plastic Machinery Co. v. NLRB</i> , 736 F.2d 343 (6th Cir. 1984).....	17
<i>Waste Mgmt. of Palm Beach</i> , 329 NLRB 198 (1999) .....	19, 21
<i>Weather Shield of Connecticut</i> , 300 NLRB 93 (1990).....	27
<i>Werthan Packaging, Inc.</i> , 345 NLRB 343 (2005).....	55
<i>Western Cartridge Co. v. NLRB</i> , 134 F.2d 240 (7th Cir. 1943).....	19
<i>Wex-Tex of Headland, Inc.</i> , 236 NLRB 1001 (1978).....	30
<i>Vanguard Fire &amp; Supply Co. v. NLRB</i> , 468 F.3d 952 (6th Cir. 2006).....	17
<b><u>Statutes</u></b>	
29 U.S.C. § 151 <i>et seq.</i> .....	1

**STATEMENT REGARDING ORAL ARGUMENT**

These cases involve various allegations from several unfair labor practice charges and objections to a union representation election. The Intervening Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (“Union”) asserts that argument in this matter could enable the parties to further present the complex factual and legal issues to this Court and permit the Court to present its questions.

**I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether Caterpillar Logistics, Inc. (“Caterpillar”) unlawfully promised and granted employee benefits in order to interfere with the Union representation election warranting the setting aside of the election.

2. Whether Caterpillar unlawfully interrogated employees regarding their Union support warranting the setting aside of the election.

3. Whether Caterpillar unlawfully created an impression of surveillance of employees’ Union organizing activities warranting the setting aside of the election.

**II. STATEMENT OF THE CASE**

This case involves a Complaint issued against Caterpillar for unfair labor practices and a Report on Objections, based in part upon unfair labor practice charges and election objections filed by the Union. Appendix (hereinafter “A-\_\_”) 645-50, A-639-44. The Complaint alleged that Caterpillar violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the “Act”), during the critical period before a Union representation election when, through the actions of certain management employees, it unlawfully created an impression of surveillance, interrogated employees regarding their Union sympathies, solicited employee complaints and grievances, and promised employees increased benefits and improved conditions of employment if employees refrained from Union

organizing activity. The Regional Director, in his Report on Objections, found that the Union's objections, which alleged the same conduct as its unfair labor practice charges, raised substantial and material issues affecting the results of the election. A-639-44.

After a hearing held in Dayton, Ohio, on May 14-16, 2014, Administrative Law Judge Arthur J. Amchan ("ALJ") issued his Decision on August 4, 2014. The ALJ determined that Caterpillar violated Section 8(a)(1) of the Act and engaged in objectionable conduct by announcing and granting a safety bonus, promising to erect shelters in the smokers' break areas, and interrogating employees during the critical period before the Union representation election. The ALJ further determined that the objectionable conduct necessitated the setting aside of the results of the September 27, 2013, Union representation election and the conduct of a second election. A-012. The ALJ also determined that Caterpillar violated the Act by terminating employee Michael Craft, the issue in a separately filed charge. The ALJ did not find that Caterpillar engaged in objectionable conduct or violations of Section 8(a)(1) by creating an impression of surveillance or soliciting employee complaints and grievances. A-010.

The parties filed exceptions to the ALJ's Decision, which were considered by the Board. In its decision issued March 30, 2015, the Board affirmed the ALJ's Decision with respect to the safety bonus, smoking shelters, employee

interrogation, and discharge of Michael Craft. A-001. The Board did not adopt the ALJ's conclusion that the interrogations did not constitute a reason to set aside the election. A-001, n. 5. The Board reversed the ALJ's Decision with respect to surveillance, holding that Caterpillar violated the Act and engaged in objectionable conduct by creating an impression that employees' Union activity was under surveillance. A-001. Caterpillar timely filed a Petition for Review, designated as Case No. 15-1433. The Union filed a Motion to Intervene, which was granted on May 1, 2015. The Board filed a Cross-Application for Enforcement on May 28, 2015, designated as Case No. 15-1611. Briefing in the two cases has been consolidated.

### **III. STATEMENT OF THE FACTS**

Caterpillar's Clayton, Ohio, facility is a logistics center employing approximately 500 employees. A-300, A-556-60. Union organizing activity among the Clayton hourly employees began in 2012. A-193-94. On August 16, 2013, the Union filed a petition seeking an election to represent the warehouse hourly employees at the Clayton facility. A-326, A-634. The Union representation election was held on September 27, 2013. A-330. 435 employees were eligible to vote, and 417 employees voted. A-555. 188 employees cast ballots in favor of representation by the Union, and 229 employees cast ballots against representation.

*Id.*

**A. Interrogation and Surveillance.**

A large pro-Union meeting was held off-site in late August 2013. A-048. This was the first pro-Union meeting to which all employees eligible to vote in the Union representation election were invited. *Id.* No members of management were invited or attended the meeting. A-048-49.

On the first workday following that meeting, employee John Sponsler, while working alone, was approached by Nick Ewry, his immediate supervisor or “coach.” A-049-50. Ewry asked Sponsler what his feelings were about the Union. A-050. Sponsler responded that he was in favor of the Union, but he was fearful that if the Union lost the election, he would face retaliation from Caterpillar. *Id.* Ewry responded that Sponsler did not need to worry, because there would be no retaliation, and that Caterpillar’s upper management already knew everybody who was involved in the Union organizing campaign. *Id.*

Prior to the conversation with Ewry, Sponsler had not expressed support for the Union organizing campaign in front of management and had not worn any Union insignia, paraphernalia or t-shirts.<sup>1</sup> A-051-52.

At the direction of Caterpillar, Ewry reported his opinions about employees’ level of support for the Union. A-384. He had frequent one-on-one meetings with Ron Hassinger, Caterpillar’s labor relations representative. A-380, A-384. He

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<sup>1</sup> Prior to the Union organizing campaign, Sponsler once expressed his general support for unions to his former supervisor Tom McNulty. A-056.

reported his opinions to Hassinger every one to two weeks. A-385. Ewry informed Hassinger both of his rating of employees' level of Union support on a scale from one to five and of behaviors he observed. *Id.*

Sponsler told at least five other employees eligible to vote in the Union representation election about his conversation with Ewry. A-052-054. At least one of those employees told three additional employees eligible to vote in the Union representation election about the conversation between Sponsler and Ewry. A-212.

After the petition was filed, and increasing in frequency to weekly as the election neared, Caterpillar held mandatory, all-associate, anti-Union meetings at which Caterpillar provided employees eligible to vote in the Union representation election information about Caterpillar's position regarding the Union organizing campaign. A-043-44, A-126. Caterpillar has a stated position against "third party" representation of its employees. A-336, A-568. Employees were subject to discipline for failure to attend the meetings. A-499-500. The anti-Union meetings were different than Caterpillar's regular all-employee meetings held on a quarterly or monthly basis at which various topics were discussed, including Caterpillar's gain sharing program and safety. A-044-45, A-307.

Following one of Caterpillar's weekly anti-Union meetings held at the Clayton facility in late August 2013, employee Marquis Applin was approached by Coach Cory Butcher, his supervisor. A-125-26. The two were alone when Butcher

approached Applin. A-127. Butcher stood very close to Applin—shoulder to shoulder—in a manner atypical for their interactions. A-131-32. Butcher asked Applin what he thought about the anti-Union meeting. A-127-28. Prior to this conversation, Applin had not worn any Union insignia. A-131. Applin was shocked by the questioning from Butcher. A-128. Butcher admitted to questioning Applin about his feelings about the anti-Union meeting. A-394-95, A-403-04. Like Ewry, Butcher was required to rate his opinions regarding employees' support for the Union and report the rating and behaviors he observed to Hassinger. A-400-02.

Applin told at least two fellow employees eligible to vote in the Union representation election about being questioned by Butcher, and asked them whether such questioning was appropriate. A-088, A-109-10, A-133, A-137. Those two employees each told at least one other employee about the conversation. A-088, A-094-95, A-108.

**B. Improper Promise and Grant of Employee Benefits.**

As mentioned above, Caterpillar holds quarterly or monthly regular all-employee meetings. A-122, A-307. Because of the size of the workforce, Caterpillar held eight or nine meetings throughout the workday in order to cover all of the employees. A-458. During the critical period, the meetings were led by facility General Manager Brian Purcell. A-458-59. Purcell came to the Clayton facility from Caterpillar's Denver facility in mid-July 2013. A-455. Purcell was

aware of the ongoing Union organizing activity at the Clayton facility prior to transferring to the facility. A-499.

At the last set of all-employee meetings prior to the Union representation election, Caterpillar announced two new benefits to the employees—a \$400 safety bonus and smoking shelters. A-079, A-081. The meetings were held on or about September 18, 2013, within ten days before the September 27, 2013, Union representation election. A-046, A-148, A-201.

### **1. The \$400 Safety Bonus**

Employees at the Clayton facility participate in a gain sharing program. A-180. Under the program, the employees are eligible to receive quarterly payments adjusted on the basis of numerous metrics, including hours worked and customer satisfaction. A-045. The amounts employees receive on a quarterly basis vary, but may be around \$400. A-180.

At the series of eight or nine mandatory all-employee meetings held on or about September 18, 2013, Purcell announced to the gathered employees that they would receive a one-time safety bonus of \$400. A-046. Purcell stated that the bonus would be paid to employees in December 2013. *Id.* Two employees testified that Safety Manager Kevin Rivera made the announcement at the version of the meeting they attended. A-124, A-149. Employee Tandy Combs served on

Caterpillar's Safety Committee during 2013. A-144. The safety bonus was never discussed at the Safety Committee meetings. A-150.

The employees received the bonus in late November or December 2013. A-047, A-146. \$400 represented approximately 75% to 100% of one week's pay for the employees eligible to vote in the Union representation election. A-075, A-142, A-175. This was the first and only safety bonus the employees received. A-123, A-145-46. The employees had no recollection of ever hearing about the "safety bonus" before September 18, 2013. (e.g., A-156, A-183, A-186, A-231). The safety bonus constituted a significant amount of money for them and was important to them. A-191, A-236-37.

Value Stream Manager Pahlas testified that Caterpillar changed strategies with regard to the safety component of the gain sharing program in 2013. A-312. In 2012, safety was one of the metrics for the quarterly gain sharing program. The employees were eligible for a maximum of \$100 per quarter for safety. *Id.* Unsafe behaviors like reportable incidents at the facility caused deductions from the safety payment for all employees each quarter. *Id.* According to Pahlas, for 2013, safety was removed as a gain sharing component and instead would be a "one-time only payment if and only if" the facility was to submit a project for a company-wide Chairman's Award. A-303. The gain sharing payments for 2013 continued as they had in 2012, "aside from safety," which had been removed. A-304. According to

Pahlas, the changes were made to the program in November 2012. A-305. If the facility submitted a project for a Chairman's Award, the "safety bonus" would be triggered automatically. A-332. If the facility did not submit a project, the employees would not receive the \$400. A-333. There were no benchmarks required before a facility could submit a project. A-366.<sup>2</sup> Effectively, *any* of Caterpillar's facilities could submit *any* five-page document to be considered for the Award. *Id.* For 2014, employees did not receive any money for a safety component of the gain sharing program. A-338.

Pahlas claimed that the employees were informed about the possibility of the safety bonus at the set of all-employee meetings held in March 2013. A-307. Pahlas testified that then-plant manager Jeff Slocum read the PowerPoint slides prepared for the meeting verbatim, as was his style for presentations. A-309, A-509-28. Pahlas later claimed that the employees were informed that they would receive the safety bonus payoff, if eligible, "in the October timeframe," but page 7 of the presentation indicates that the evaluation period would continue until year end, and page 8 states that the payout date would be TBD. A-311, A-515-516. None of the General Counsel's witnesses recalled a reference to a potential safety bonus at the March 2013 all-employee meetings, or at any other time prior to the

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<sup>2</sup> Although the March 2013 PowerPoint presentation discussed herein referenced internal criteria for a submission, the ALJ correctly observed that Caterpillar did not present evidence indicating that those criteria were ever fulfilled. A-008, n.10, A-515.

September 2013 all-employee meetings held within ten days before the Union representation election. A-067, A-156, A-183, A-232-33.

According to Rivera, the evaluation period selected by the facility for submission for the Chairman's Award was January through September 2013. A-368. Rivera claimed that the submission was due at the end of September. A-360. Despite the evaluation period running through September 2013, Rivera claimed that it was decided in July 2013 that the facility would make a submission. A-353. He also claimed that the employees were notified that the decision had been made at the July 2013 all-employee meetings. *Id.* However, when asked what he informed the employees, he responded:

I asked if they remembered the safety component of the gain sharing program and how it was contingent on us submitting a project for the Health and Safety Award. And I covered the two projects that I **thought** we would be submitting, or we **thought** we would be submitting for that award.

A-355. (emphasis added). The slide in the PowerPoint presentation Rivera referenced from the July 2013 all-employee meetings stated "Chairmen's [sic] Award Project Update—Two project ideas—Clayton Safety Culture Improvement—IPC Light Pack Table Ergonomic." A-535. No bargaining unit employees, including Caterpillar's witnesses, testified that they recalled a discussion of the safety bonus at the July 2013 all-employee meetings. A-160-61, A-186, A-435-36.

After the July 2013 all-employee meetings, Rivera collected additional data and prepared the submission. A-355. He did not include the second possible project mentioned in the July 2013 PowerPoint presentation, because it was not going to be complete by the submission deadline. A-369-70. The Award application was submitted on September 13, 2013, even though the deadline and the end of the evaluation period were allegedly not until September 30, 2013. A-363-64, A-368. The submission itself indicates a number of incidents through September 2013, although it was submitted in the first half of the month. A-370. Caterpillar did not wait for any feedback from the submission recipient before announcing the “safety bonus” to employees on or about September 18, 2013. A-335.

## **2. The Smoking Shelters**

At the time of the Union organizing campaign in 2013, employees were permitted to smoke on the property, but only in uncovered designated areas marked “off-campus.” A-082-83, A-202. Employee Kevin Harvey testified that no member of management ever discussed any safety concerns regarding the location of the designated smoking areas. A-208. Employees did, however, consistently complain to management about the lack of seating and cover from the elements, and requested seating and cover. A-083, A-206-07, A-224-25. These complaints and

requests were made verbally and in the form of Continuous Improvement (“CI”) cards submitted to management. *Id.*

At the end of each of the September 2013 all-employee meetings held within ten days before the Union representation election, Purcell asked the smokers in the audience to remain after the meeting. A-086. This was the same series of meetings in which Purcell and/or Rivera announced the \$400 safety bonus. A-205. At the time of the September 2013 meetings, Caterpillar had commenced construction on an outside break area for non-smokers. A-199-200.

Fifteen to eighteen employees eligible to vote in the Union representation election remained to hear Purcell during the first of the eight or nine meetings. A-461. Purcell announced to the gathered employees that Caterpillar was going to build shelters under which they could stand or sit and smoke while on break. A-463. Purcell told the gathered employees that Caterpillar had heard their complaints and was trying to show compassion so that the smokers did not have to stand in the rain. A-098-99. Purcell did not provide a timeline for the construction of the smoking shelters. A-206.

Purcell admitted that he repeated the news about the construction of smoking shelters to the employees who stayed after each of the next seven or eight versions of the meeting. A-464. Approximately fifteen unit employees stayed after the meeting employee Larry Stamm attended to hear Purcell’s announcement for

employees who smoked. A-086. Approximately ten unit employees stayed after the meeting Denise Michele Scales-Smith attended to hear Purcell's announcement. A-225. Approximately eighteen to twenty-two unit employees stayed after the meeting Harvey attended to hear Purcell's announcement. A-206.

Construction of the smoking shelters was completed in March 2014. A-205. The smoking shelters are constructed of steel and have benches and lighting. A-097. Caterpillar made the request for additional capital for the shelters through an undated "return on investment" document. A-472. The construction of the shelters was estimated to cost \$105,407. A-630. Caterpillar received an estimate for the erection of the smoking shelters dated October 15, 2013, more than two weeks following the Union representation election. A-503. Purcell testified that Caterpillar's Denver facility did not have smoking shelters because he "would not get funding for a capital project that said 'smoke shelter' on it." A-501.

#### **IV. SUMMARY OF THE ARGUMENT**

The Board's Decision that Caterpillar engaged in unfair labor practices and objectionable conduct by promising and granting employees benefits, interrogating employees, and creating the impression of surveillance during the critical period before a Union representation election is supported by substantial evidence. The Board's Decision that Caterpillar's unfair labor practices during the critical period necessitated the setting aside of the September 27, 2013, Union representation

election was not an abuse of discretion. Therefore, this Court should grant the Board's Cross-Application for Enforcement and deny Caterpillar's Petition for Review.

Caterpillar's grant and announcement of a \$400 safety bonus within ten days before the Union representation election was unlawful because it was designed to impinge upon the employees' freedom of choice in the election and reasonably had that effect. The safety bonus was not an established benefit prior to the Union organizing campaign. Even if Caterpillar's witnesses were believed, at most, the safety bonus was contemplated and full of contingencies prior to that date. Substantial evidence demonstrates that Caterpillar manipulated the timing of the grant and announcement in order to interfere with employee choice in the Union representation election. Caterpillar failed to set forth a legitimate business explanation for the timing of the grant and announcement.

Similarly, substantial evidence supports the Board's holding that Caterpillar's promise of smoking shelters constituted an unfair labor practice and objectionable conduct. This promise occurred at the same set of meetings within ten days before the Union representation election as the safety bonus announcement. Caterpillar made the promise because smokers had previously complained about a lack of seating and shelter, and it sought to demonstrate to the employees that their demands would be made through direct dealing and that the

Union would be of no use to them. Caterpillar did not promise the smoking shelters because of safety. Any safety issues in the smoking areas could have been rectified without building shelters. Like the safety bonus, the promise of the smoking shelters was designed and timed for the purpose of influencing the choice of the employees in the upcoming Union representation election, and was reasonably calculated to have that effect.

The Board's holding that two instances of unlawful interrogation took place is also supported by substantial evidence. During the critical period, two employees were interrogated regarding their Union sympathies by their immediate supervisors. Both conversations took place when the employees were working alone and at a time when the employees had not openly expressed support for the Union. The relevant factors demonstrate that the interrogations were unlawful, and the Board's determination is supported by substantial evidence.

The Board, rejecting a finding otherwise by the ALJ, properly determined that the aforementioned interrogations, as well as Caterpillar's other misconduct, warranted setting aside the Union representation election. Contrary to Caterpillar's assertion, there is evidence in the record of dissemination of the interrogations. The Board properly applied its precedent and did not abuse its discretion in finding that the interrogations and other unfair labor practices interfered with the exercise of a free and untrammelled choice in the Union representation election.

Finally, the Board's holding that Caterpillar created an unlawful impression of surveillance is supported by substantial evidence. In this instance, the Board overruled a contrary finding by the ALJ. The Board properly found that the supervisor's statement in question would reasonably lead the employee to believe that the employees' Union activities had been placed under surveillance.

The Board followed its precedent and properly applied all relevant legal analyses to conclude that Caterpillar committed numerous unfair labor practices and objectionable conduct which necessitated the setting aside of the September 27, 2013, Union representation election and the conduct of a new election. This Court should enforce the Board's decision.

## **V. ARGUMENT**

### **A. Standard of Review.**

The Board's factual determinations and application of law to the facts may not be disturbed on appeal when they are supported by substantial evidence. *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844 (6th Cir. 2003) (citing *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” even if there is also substantial evidence for an inconsistent conclusion.” *Id.* (quoting *Main St.*, 218 F.3d at 537). Thus, even if the court would decide an appeal differently under *de novo* review, the substantial

evidence standard requires the court to ““defer to the Board’s reasonable inferences and credibility determinations.”” *Mt. Clemens*, 328 F.3d at 844 (quoting *Painting Co. v. NLRB*, 298 F.3d 492, 499 (6th Cir. 2002)).

The Board’s interpretation of the Act is also entitled to deference; as long as it is ““reasonably defensible,”” it may not be disturbed on appeal. *Mt. Clemens*, 328 F.3d at 844 (quoting *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1212 (6th Cir. 2007)); *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006). It is only when the Board decides other questions of law that a *de novo* standard applies. *Mt. Clemens*, 328 F.3d at 844 (citing *Meijer*, 130 F.3d at 1212). The Board’s decision to set aside a representation election is reviewed under the more deferential abuse of discretion standard. *NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945, 951-52 (6th Cir. 2000).<sup>3</sup>

Here, the Board’s factual determinations and application of law to the facts are supported by substantial evidence and are reasonably defensible, and its decision to set aside the election was not an abuse of discretion. The Board made, and adopted from the ALJ, reasonable inferences and credibility determinations which may not be disturbed by this Court. There is substantial evidence supporting

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<sup>3</sup> Caterpillar repeatedly cites *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 347 (6th Cir. 1984) (overruled in part on other grounds), apparently to assert that the Board abused its discretion by failing to adhere to its precedent. As will be discussed below, the Board correctly applied the relevant precedent, and its legal determinations are reasonably defensible and did not constitute an abuse of discretion.

the Board's holding that Caterpillar improperly promised and granted employee benefits, impermissibly interrogated employees, and unlawfully created an impression of surveillance, which necessitated the setting aside of the representation election. The Board made no legal conclusions subject to a *de novo* standard of review. This Court should deny Caterpillar's Petition for Review and grant the Board's Cross-Application for Enforcement.

**B. First Issue: Substantial Evidence Supports the Board's Determination that Caterpillar Committed Unfair Labor Practices and Objectionable Conduct through the Improper Promise and Grant of Employee Benefits.**

Caterpillar's granting and announcement of a \$400 safety bonus and the announcement of the construction of three smoking shelters at a series of all-employee meetings held on or about September 18, 2013, within ten days prior to the Union representation election of September 27, 2013, were unlawful, because they were designed to impinge upon the employees' freedom of choice for or against Union representation and reasonably had that effect.

An employer's promise or grant of benefits can constitute an unfair labor practice. "The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944). "Interference is no less interference because it is accomplished through allurements rather than coercion." *NLRB v. Crown Can Co.*, 138 F.2d 263, 267

(8th Cir. 1943) (quoting *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943)). “[T]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

“In determining whether a grant of benefits is unlawful, ‘the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits.’” *Niblock Excavating, Inc.*, 337 NLRB 53, 53 (2001) (citing *Lampi, LLC*, 322 NLRB 502 (1996)). “[T]he question to be answered is whether the granting or timing of the announcement of the benefits was calculated to interfere with the right of the employees to organize.” *Hayes-Albion Corp., Tiffin Div.*, 237 NLRB 20, 24 (1978) (citing *Centralia Fireside Health, Inc.*, 233 NLRB 139 (1977)); see also *Waste Mgmt. of Palm Beach*, 329 NLRB 198, 198 (1995) (“an employer cannot time the announcement of increased benefits to employees in order to dissuade their union support”). “Whether the employer’s actions...constitute objectionable conduct requires a determination that the increases and announcements were timed for the purpose of influencing the

choice of the employees in the forthcoming election and were of a type reasonably calculated to have that effect.” *Hayes-Albion Corp.*, 237 NLRB at 24 (citing *Material Handling Equipment Div. of FMC Corp.*, 217 NLRB 12 (1975)).

Substantial evidence establishes that Caterpillar could not overcome the inference of coercion with regard to the safety bonus or smoking shelters, because the grant and announcement of the benefits were designed to impinge upon the employees’ freedom of choice for or against Union representation and reasonably had that effect. Whether the Union was specifically mentioned during the announcement of the benefits is irrelevant. This Court should deny Caterpillar’s Petition for Review and grant the Board’s Cross-Application for Enforcement.

**1. Substantial evidence supports the Board’s holding that the announcement and granting of the safety bonus were unfair labor practices and objectionable conduct.**

Substantial evidence demonstrates that the granting and announcement of the safety bonus were timed for the purpose of influencing the choice of the employees in the Union representation election and were actions of a type reasonably calculated to have that effect. Caterpillar failed to provide an explanation for the timing or announcement of the benefit within ten days before the Union representation election, and cannot rebut the inference of coercion. The Board’s conclusion that Caterpillar violated Section 8(a)(1) of the Act by announcing and granting the safety bonus during the critical period, and all related

findings, are supported by the substantial evidence in the record and controlling law.

Benefits granted prior to a Union representation election can be permissible if the company can demonstrate that the benefits were already part of an established company policy and the employer did not deviate from that policy upon the advent of the Union. *Waste Mgmt. of Palm Beach*, 329 NLRB 198 (1999). Deviation of planned employee benefits in response to a union organizing campaign constitutes an unfair labor practice. *See Am. Sunroof Corp*, 248 NLRB 748, 748 (1980). Even if the safety bonus was a planned benefit, Caterpillar deviated from the plan to manipulate the granting and announcement to occur within the critical period.

The Board affirmed the ALJ's rulings, findings, and conclusions with respect to the announcement and granting of the safety bonus. A-001. The ALJ noted the following:

[i]t is uncontroverted that at an all-employee meeting on or about September 18, 2013, little more than a week before the representation election, Plant Manager Brian Purcell and Safety Manager Kevin Rivera announced to employees that they would be receiving a one-time "safety bonus" of \$400, to be paid in December. What is primarily at issue is whether this was news to Respondent's employees **and** whether there was any reason for the timing of the announcement other than the pending election.

A-006. In analyzing the evidence and testimony, the ALJ found that the safety bonus was a "material change" in the way employees were compensated for good

safety practices, and that the bonus could have influenced the outcome of the election because it made a “significant impression” on unit employees. A-006. The ALJ noted that none of the twelve unit employee witnesses recalled a presentation in March 2013 in which there was any mention of the safety bonus, and several recalled that the first time they heard about the bonus was in the September 2013 meeting. A-007. The ALJ went on to find that “[e]ven if [he] credited the testimony of Respondent’s witnesses, [he] would find that employees were not told that a decision had been made to submit for the safety award, nor when a decision would be made, nor when the safety bonus would be paid, until September 18, 2013.” *Id.* The Board made the same finding—even if Caterpillar’s witnesses were fully credited, the statements about the safety bonus at the March and July 2013 meetings were “full of contingences. As such, those statements did not amount to an announcement that employees *would* receive a bonus.” A-001. It was not until during the critical period that the employees were told they would receive the bonus; thus, it was unlawful. *Id.*

Caterpillar asserts that there is undisputed evidence proving that employees knew \$400 had been set aside for each employee, that the employees would receive \$400 each if the facility submitted for the Award, and that the facility was

submitting for the Award, all prior to the Union representation petition.<sup>4</sup> (Caterpillar's Brief, p. 24). That assertion is simply false. The testimony of Pahlas and Rivera is disputed, contrary to Caterpillar's insistence otherwise. Thus, the law relied upon by Caterpillar addressing truly uncontroverted evidence is irrelevant. *NLRB v. Sherwood Trucking Co.*, 775 F.2d 744 (6th Cir. 1985); *Bay-Wood Indus. Inc. v. NLRB*, 666 F.2d 1011 (6th Cir. 1981); *NLRB v. Howell Automatic Mach. Co.*, 454 F.2d 1077 (6th Cir. 1972). Moreover, even if their testimony was credited, it did not establish the items Caterpillar claims.

Substantial evidence supports the Board's determination that the safety bonus was, at best, a benefit that was contemplated or contingent, but not established, prior to its announcement. Additionally, Caterpillar cannot rebut the inference of coercion with a legitimate business justification as to the timing of the announcement and grant of the benefit.

- a. Substantial evidence establishes that the safety bonus was not an established benefit.

None of the General Counsel's witnesses had any recollection of announcements regarding the safety bonus in March or July 2013. (e.g., A-067, A-156, A-160, A-163, A-183, A-186, A-232-33). The safety bonus constituted a

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<sup>4</sup> While Caterpillar focuses on the filing of the Union representation petition, the ALJ correctly noted that Caterpillar was already aware of the Union organizing campaign in November 2012 when it allegedly first conceived the safety bonus concept. A-009, n. 13; A-379-80.

significant amount of money for them and was important to them. A-191, A-236-37. Even Caterpillar's own unit witnesses did not recall a discussion of the safety bonus at the July 2013 all-employee meetings. A-160-61, A-186, A-435-36. It is reasonable to infer, as the Board did, that if the safety bonus had been announced as a certain payment of \$400 prior to September 18, 2013, the employees would have remembered it.

The presenter at the March 2013 meetings, then-plant manager Slocum, did not testify at the hearing. Pahlas specifically testified that he was familiar with Slocum's presentation style, which was to "read slides word for word." A-309. The PowerPoint presentation for the March 2013 all-employee meetings contained no information about when the submission would occur or when the bonus would be paid. A-509-28. Page 7 of the presentation indicated that the evaluation period would continue until year end, and page 8 indicated that the payout date would be TBD. A-515-16. Pahlas' statement that Slocum informed the employees that they could expect the payout in the October timeframe contradicts his own testimony and was appropriately rejected by the ALJ upon consideration of the entire record, including Pahlas' demeanor.

Slocum's PowerPoint presentation at the March 2013 all-employee meetings set forth six stated criteria for the submission, including "[d]ocumented reduction in high risk and zero tolerance behaviors [and] [d]ocumented improvements in

“near misses” at the facility.” A-515. The ALJ made a reasonable and permissible inference, which was adopted by the Board, that “if lost-time injuries had occurred between the July all-employee meeting and September 13, or if the contingencies set forth in slide 7 of the March 2013 PowerPoint had not been satisfied, the submission for the Award may not have occurred.” A-007-08. The criteria for submitting for the Award show that the safety bonus was contingent upon a number of factors, and was not an established benefit.

The substantial evidence concerning the July 2013 meeting also establishes that Caterpillar did not inform employees they would be receiving the safety bonus. When asked what he informed the employees at the July 2013 all-employee meetings when he presented the PowerPoint slide entitled “Safety Update,” Rivera responded:

I asked if they remembered the safety component of the gain sharing program and how it was contingent on us submitting a project for the Health and Safety Award. And I covered the two projects that I **thought** we would be submitting, or we **thought** we would be submitting for that award.

A-355, A-529-43 (emphasis added).<sup>5</sup> The relevant slide stated “Chairmen’s [sic] Award Project Update—Two project ideas—Clayton Safety Culture Improvement—IPC Light Pack Table Ergonomic.” A-535. Rivera did not begin

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<sup>5</sup> The ALJ properly rejected Pahlas’ testimony that the employees were informed at the July 2013 all-employee meetings that the facility was going to submit for the award, because his testimony was not supported by Rivera’s description of what he actually informed the employees at the meetings.

preparing the submission until after the July 2013 all-employee meetings. A-356. Neither Rivera's testimony about what he told the employees nor the written materials contain any indication that the employees were informed at the July 2013 all-employee meetings that the decision to submit for the Award had been made at that time. Rivera testified that he told employees he **thought** they would be submitting, not that they were submitting, a key distinction that Caterpillar attempts to obscure.<sup>6</sup>

Caterpillar's assertion that the Board parsed Rivera's statement in contradiction to its precedent set forth in *Champion Enterprises, Inc.*, 350 NLRB 788 (2007), is without merit. There, the Board determined that a management employee's problematic statements should be considered within the context of his entire speech to employees. Here, the Board weighed the evidence presented regarding when the safety bonus was announced, a function within its authority that is entitled to deference from this Court. The Board properly rejected Rivera's self-serving conclusions in favor of his actual statements to the employees.

If the employees had already been advised that Caterpillar had decided to submit for the Award and that the safety bonus would be paid, there would have been no purpose for the announcement at the September 2013 meetings held within

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<sup>6</sup> Caterpillar falsely claims in its brief that Rivera stated at A-355-56 that he informed the employees at the July 2013 all-employee meeting that the facility *would be* submitting for the Chairman's Award. (Caterpillar's Brief, p. 26). A review of those pages demonstrates that Caterpillar's claim is untrue.

ten days before the Union representation election. If the facts had occurred as Caterpillar argues, the employees would have already known all of the relevant information and no announcement would have been necessary.

The safety bonus was not an established or existing benefit; therefore, the cases cited by Caterpillar are inapplicable. *Weather Shield of Connecticut*, 300 NLRB 93, 96-97 (1990) (announcement of pension plan was lawful because it was an existing benefit unrelated to organizing activity); *Real Foods Co.*, 350 NLRB 309, 310-11 (2007) (no violation when award program was established by corporate parent prior to the employer's notice of union organizing activity, only two employees received the benefit, and employees at other facilities received the same benefit); *Beverly Enterprises, Inc. v. NLRB*, 139 F.3d 135, 141 (2d Cir. 1998) (no violation because "all the benefits at issue were benefits available to the employees well before any union activity").

The Board followed its precedent because, as a benefit subject to so many contingencies, the safety bonus was not an established benefit. Caterpillar cites *Kingsboro Medical Group*, 270 NLRB 962 (1984), for its claim that it, like the employer in that case, was merely following up on a pre-existing benefit plan with the grant and announcement of the \$400 safety bonus. This claim is without merit. *Kingsboro* involved no unlawful grant of benefits; the question was solely with regard to the announcement. In *Kingsboro*, the Board found that the employer

merely notified employees of additional aspects of its plan to equalize benefits that had already commenced. Further, the timing of the announcement was legitimate, because the first paid holiday was less than one month away. *Id.* at 963. Finally, unlike Caterpillar, the employer in *Kingsboro* expressed no Union animus, voluntarily offered to recognize the Union, readily entered into a consent election agreement and engaged in no campaigning in opposition to the Union.

Similarly, this case is distinguishable from *Emery Worldwide*, 309 NLRB 185 (1992), wherein the employer announced a bonus the day before the election. *Emery*, like *Kingsboro*, only involved the announcement of the otherwise legitimate benefit, unlike here. In *Emery*, unlike in this case, there was no dispute that employees were aware of the corporate competition that could lead to a bonus. *Id.* at 185. Further, in *Emery*, the opportunity for the bonus hinged on satisfactorily completing the companywide competition, as determined at the corporate level. The management had just discovered that the bonus would be available the night before the announcement, and no amount for the bonus was announced at the meeting. *Id.*

In *Stanadyne Auto. Corp.*, 345 NLRB 85, 91 (2005), affirmed in relevant part, 520 F.3d 192, 197 (2d Cir. 2008), the Board determined that the employer did not violate the Act by announcing a \$2 pension increase. There, the pension increase was the result of an annual process under which the employer sometimes

granted pension increases, and sometimes did not. *Id.* The Board determined that the employer rebutted the inference of coercion because the increase was part of an established annual process and was conducted in accordance with that process. *Id.* Here, there was no established process that resulted in the \$400 safety bonus. Rather, the substantial evidence shows there was a possible safety bonus, planned after management was aware of Union organizing activity, which was not definitely established or announced until within ten days of the Union representation election. Unlike in *Stanadyne*, Caterpillar has not rebutted the inference of coercion with credible evidence.

This Court's precedent, as set forth in *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899 (1997), supports the Board's Decision. There, this Court held that solicitation of employee grievances did not violate the Act because the employer provided substantial evidence that some form of solicitation had been decided upon as part of a gainsharing program before it became aware of union organizing activity. *Id.* at 907-08. The employer did violate the Act by implementing an employee benefit by changing its parking lot policy. *Id.* at 908. The gainsharing program was not a justification to rebut the inference of coercion because the decision to alter the parking lot policy was made after the organizing effort began. *Id.* Here, the safety bonus was not an established benefit prior to its announcement

on September 18, 2013. The safety bonus is like the parking lot policy, not the employee suggestion boxes in *Torbitt*.

The cases cited by Caterpillar addressing management's predictions on what would happen if the employees unionize have no relevancy to this matter. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985); *Wex-Tex of Headland, Inc.*, 236 NLRB 1001 (1978). Predictions based on objective fact, which are not within the employer's control, may be protected by the First Amendment. *Gissel*, 395 U.S. at 618. As the United States Supreme Court has established, however, an employer's promise of benefits is not included in this protection. *Id.* Here, Caterpillar made a promise of a benefit solely within its control. All Caterpillar had to do was submit any document, that did not have to meet any criteria, in order to establish the safety bonus.

The substantial evidence supports the conclusion that the decision to submit for the Award had not been made by the July 2013 all-employee meetings. Instead, Caterpillar "thought" it would submit. Thus, Caterpillar did not communicate to employees prior to September 18, 2013, that the safety bonus was an established benefit and the inference of coercion remains unrebutted.

- b. Substantial evidence shows that Caterpillar manipulated the announcement and granting of the safety bonus to interfere with the election.

The substantial evidence demonstrates that Caterpillar manipulated the submission for the Award in order to grant and announce the safety bonus within ten days before the Union representation election.

The period of examination during which the facility's safety record would be evaluated for the award submission necessary to trigger the safety bonus allegedly ran through September 2013. A-368. According to Rivera, the deadline for the submission was September 30, 2013—after the Union representation election. A-363. Instead of submitting the project on September 30, 2013, which would have provided Caterpillar an opportunity to present a complete project for the alleged evaluation period, Caterpillar submitted the project over two weeks early, on September 13, 2013. A-363-64. The submission itself indicates that it contains a record of incidents “through September 2013.” A-370. However, September 13, 2013, the date of the submission, was not “through September 2013.”

The safety bonus was not paid until late November or December 2013. A-047, A-146. In *Am. Sunroof Corp.*, 248 NLRB 748, where the Board found no violation, the Board stated that the employees “would have received notice of the new [benefit] when they did even if there had been no union activity.” *Id.* at 748. That is not the case here. There was no practice of Caterpillar to announce

payments over two months in advance—gain sharing payments were paid during the month after the close of the quarter. A-100, A-538. There was an October 2013 set of all-employee meetings available to Caterpillar to make the announcement, which would have been after the Union representation election, after the alleged deadline for submission, after the close of the evaluation period and closer to the payout. A-338. Caterpillar had no legitimate business purpose for announcing the safety bonus at the September all-employee meetings within ten days of the Union representation election.

Additionally, as the ALJ found significant, and as adopted by the Board, the employees received nothing for safety at all for the gain sharing program for 2014, which highlights the Union organizing campaign and election as the improper motive for the granting and announcement of the safety bonus. A-009, n. 13, A-338. If Caterpillar's business practice regarding the safety bonus was legitimate and as successful in 2013 as Caterpillar claims, it is totally illogical that it would have been abandoned for 2014.

As also noted by the ALJ, there is no evidence in the record that the criteria in Slocum's March 2013 PowerPoint presentation were ever mentioned again, even in the submission for the Award. A-008, n. 10, A-556-560. Rivera testified that there were no requirements for the submission. Any facility could submit any five

page document to be considered for the Award. A-366.<sup>7</sup> The submission made by Rivera was not simply a continuation of an already-established process for a safety bonus; it was a sham process designed to allow Caterpillar to announce a \$400 payment to the employees within ten days prior to the Union representation election.

The foregoing substantial evidence establishes that Caterpillar manipulated the date of submission in order to have an opportunity to report the safety bonus prior to the Union representation election. It did so for the calculated purpose of influencing the choice of the employees in the forthcoming election, and its actions were of a type reasonably calculated to have that effect.

- c. Substantial evidence shows that the safety bonus affected the election.

The announcement of the safety bonus had a significant impact on the bargaining unit employees and influenced the outcome of the election, as the ALJ properly determined and as adopted by the Board. A-001, A-006. The effect on the employees of the manipulated grant and announcement is demonstrated by the email Butcher authored to Human Resources Manager Jason Murphy on September 25, 2013, just two days before the Union representation election. A-631. Butcher reported to Murphy that employees expressed to him concern that the

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<sup>7</sup> Caterpillar repeatedly references the fact that it received a “Gold” award in its Brief. That fact is completely irrelevant, as the bonus was contingent on the submission, not the receipt of an award. A-332 .

safety bonus would be taken away after the Union representation election and that they wanted the promise in writing. *Id.*<sup>8</sup> The email demonstrates that Caterpillar's unlawful calculation worked, and that the manipulated grant and announcement of the safety bonus had the effect of interfering with the employees' free choice in the Union representation election.

The \$400 safety bonus was approximately 75%-100% of one week's pay for the employees eligible to vote in the Union representation election. A-075, A-142, A-175. The safety bonus announced at the September 2013 all-employee meetings was the first and only time employees received a safety bonus from Caterpillar. A-123, A-145-46. As the employee witnesses testified, the safety bonus constituted a significant amount of money for them and was important to them. A-191, A-236-37.

**2. Substantial evidence supports the Board's holding that the promise of smoking shelters constituted an unfair labor practice.**

Like with the safety bonus, Caterpillar's announcement at the same eight or nine all-employee meetings on or about September 18, 2013, that it was going to erect three smoking shelters was timed for the purpose of influencing the choice of the employees in the forthcoming election and was of a type reasonably calculated

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<sup>8</sup> Unit employee Rob Reheman testified that, after the meeting at which the safety bonus was announced, he had conversations with his fellow employees about how the safety bonus was nothing more than a bribe to get people to vote no in the upcoming Union representation election. A-106-07.

to have that effect. As the ALJ found, and the Board adopted, Caterpillar “deliberately embarked upon a course of action designed to convince the employees that their demands would be met through direct dealing with [Caterpillar] and that union representation could in no way be advantageous to them.” A-010. The ALJ’s determinations, adopted by the Board, that the smoking shelters were an employee benefit and that Caterpillar failed to rebut the inference of coercion are supported by substantial evidence.

After several years of no cover from the elements or seating, Purcell announced at each of the previously discussed all-employee meetings held within ten days before the election that he had heard the employees’ complaints and was going to show compassion by building smoking shelters so that the employees did not have to stand in the rain. A-098-99.

Caterpillar argues that there is insufficient evidence that the construction of three smoking shelters was considered a benefit by the employees. This argument is baseless for numerous reasons, and should be rejected. First, in its brief, Caterpillar cites *Network Ambulance*, 329 NLRB 1 (1999), and *Kingspan Insulated Panels, Inc.*, 359 NLRB No. 19 (November 8, 2012), for its assertion that proof was required that the shelters were in fact a “benefit.” (Caterpillar’s Brief, p. 36). No support for that assertion whatsoever is contained in those two cases.

Additionally, the substantial evidence supports the ALJ's finding, as adopted by the Board, that the construction of the smoking shelters was a benefit.

Counsel for the General Counsel asked the first witness at the hearing who smokes, Stamm, if he viewed the erection of the smoking shelters as a benefit. A-082. Caterpillar's counsel promptly objected that Stamm's opinion and subjective perception were not appropriate for the hearing. *Id. Sun Mart Foods*, 341 NLRB 161, 163 (2004); *Lake Mary Health Care Assocs., LLC v. NLRB*, 211 Fed. App'x 878, 880-1 (11th Cir. 2006). Instead, the Board upheld the ALJ's reasonable determination, based on all of the evidence of the record, that employees would reasonably have viewed the building of the smoking shelters with cover from the rain, lighting and seats as a benefit. The ALJ also correctly noted that employees would reasonably view as beneficial not having to walk down the steep slope to the IPC (Inbound Processing Center—one of Caterpillar's work areas) smoking area in the elements. A-010. It is clearly a reasonable inference that employees who smoked would consider shelter from the Ohio weather and a place to sit a benefit.

The conclusion that it would be considered a benefit is also supported by the undisputed testimony regarding the consistent complaints the employees who smoked lodged about having no shelter from the rain or a place to sit A-083, A-206-07, A-224-25. Stamm characterized the erected shelters as "very nice." A-085.

The shelters are three sided structures built of steel beams with benches and two lights. A-097.

Caterpillar cites *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 316 (6th Cir. 1987), in support of its argument that the Union did not meet its burden to overturn the representation election because there is insufficient evidence that employees knew or cared about the construction of the smoking shelters. Caterpillar's reliance on *Tony Scott* is misplaced. In that case, the employer alleged the union interfered with the representation election. *Id.* at 313. There was no promise of a benefit by the employer, and no inference of coercion. In this case, the substantial evidence demonstrates that employees knew and cared about the construction of the smoking shelters.

Fifteen to eighteen employees eligible to vote in the Union representation election stayed after the first of the eight or nine meetings held that day to hear Purcell's announcement. A-461. Purcell admitted that he repeated the news about the construction of the smoking shelters to the employees who stayed after each of the subsequent meetings. A-464. Caterpillar's claim that there is no evidence regarding how many employees attended other meetings is simply false. Three different witnesses provided testimony regarding the number of unit employees who stayed after three separate all-employee meetings to hear the smoking shelter announcement. Approximately fifteen unit employees stayed after the meeting

Stamm attended to hear Purcell's announcement for employees who smoked. A-086. Approximately ten unit employees stayed after the meeting Scales-Smith attended to hear Purcell's announcement. A-225. Approximately eighteen to twenty-two unit employees stayed after the meeting Harvey attended to hear Purcell's announcement. A-206.

Caterpillar's nonsensical milkshake comparison and conjecture about whether smokers would prefer to simply not smoke at work, sit in their cars, or have the company spend its money on other projects rather than take breaks in a covered, lit outdoor shelter do not outweigh the substantial evidence that establishes that the smoking shelters were considered a benefit and that the promise of the benefit was communicated to a significant number of employees.

Based on the evidence in its entirety, the ALJ made a reasonable inference that "as many as 100 to 150 unit employees [possibly over a quarter of the unit] who smoked were told for the first time on September 18, that Caterpillar was erecting shelters for them." A-008. That inference is wholly supported by Purcell's testimony alone, and is further bolstered by the testimony of the other witnesses who indicated how many employees who smoked attended the specific meeting they attended.

Even if Purcell's testimony is true that he was asked a question about improvements for smokers at the first meeting of the day, he nonetheless chose to

repeat the announcement about the smoking shelters at each subsequent meeting. Further, if an employee asked the question, it demonstrates that improvements for employees who smoked were viewed as a benefit. A-460. According to Purcell's testimony, "I had the information and I was willing to share it." A-505. Purcell was willing to share the information to fulfill Caterpillar's unlawful purpose of affecting the outcome of the Union representation election. As the ALJ properly found and the Board upheld, "there was no reason to make such an announcement at these subsequent sessions other than to sway employees prior to the election." A-010.

Caterpillar argues that it had a legitimate business purpose for announcing the construction of smoking shelters with lights and benches within ten days before the Union representation election—safety. (Caterpillar's Brief, p. 38-39). Contrary to Caterpillar's argument, however, two witnesses testified that Purcell stated that the shelter was being provided so that the employees could get out of the rain while they smoked. A-098, A-205. Purcell acknowledged that he said as much. A-463.

Purcell testified that he observed that the IPC smoking area was unsafe due to potential truck traffic and the steep slope of the ground the employees had to navigate, which could be slick in inclement weather. A-462. Purcell asserted that the timing worked out well; because there was already an approved project to build outside break areas, he was able to add additional capital to the project for smoking

shelters. A-463. Purcell's testimony in this regard rings hollow, and most certainly does not support Caterpillar's assertion that Purcell's safety concerns were the motivation for the decision. The additional capital required for the smoking shelters was \$105,407. A-630. That is not a *de minimis* amount of money. The construction of the outside break areas was already ongoing by September 18, 2013. A-200. The addition of smoking shelters was a totally new concept. The only estimate that Caterpillar obtained for the smoking shelters was dated October 15, 2013, after the representation election. A-503-04. No timeline was provided for the construction at the September 2013 meetings. A-206.

Moreover, Purcell testified that, despite safety issues with the smoking areas in Denver, there were no smoking shelters there, because he "could not get funding for a capital project that said smoke shelter on it." A-465, A-501. Purcell indicated that he was able to obtain funding in this instance because of timing, because it was an addition to the outside break areas project. A-463. Purcell's response does not indicate justification for why Caterpillar would permit funding for smoking shelters in Clayton when it would not in Denver. The real explanation *was* one of timing—the timing of the Union representation election. Employees had consistently complained about the lack of cover from the elements and seating in the smoking areas. A-083, A-206-07, A-224-25. The promise of smoking shelters was the fist inside the velvet glove designed to coerce the employees and interfere

with their free choice. As the ALJ correctly determined and the Board adopted, Caterpillar, like the employer in *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974), “indicated its willingness to comply with employees’ demands and give them a reason to believe that it was equally anxious to satisfy their other demands.” A-010.

Purcell admitted that the alleged safety issue with the IPC smoking area could have been remedied simply by moving that area. A-501. That is what happened in Denver. A-465. Further, the employees were permitted to smoke in the allegedly unsafe area for the six months between the September 18, 2013, meetings and the opening of the smoking shelters in March 2014. A-496-97. If the safety concern was legitimate, Caterpillar would have at least relocated the IPC smoking area during the fall and winter months while construction was completed and the inclement weather could have caused the “steep” land to become slick. The ALJ’s finding that “[t]he safety concerns cited by Purcell were concerns that could have been addressed by Respondent long before September 18, 2013 and were not addressed for several months after the election” is supported by the record and established precedent. A-010. The safety concerns were not legitimate; the promise of the smoking shelters was designed and timed for the purpose of influencing the choice of the employees in the upcoming Union representation election, and was reasonably calculated to have that effect.

Caterpillar cannot articulate a legitimate business justification for the timing of the grant or announcement of the \$400 safety bonus and the smoking shelters within ten days prior to the Union representation election. Caterpillar certainly cannot rebut the inference that the promise of those benefits was coercive and was reasonably calculated to have the effect of influencing employee choice in the Union representation election. The Board's findings and conclusions regarding the improper grant and promise of benefits are fully supported by substantial evidence and law; therefore, the Court should deny Caterpillar's Petition for Review and grant the Board's Cross-Application for Enforcement.

**C. Second Issue: The Board's holding that unlawful interrogation took place is supported by substantial evidence.**

The Board adopted the ALJ's finding that, on two separate occasions, members of management, Ewry and Butcher, interrogated employees, Sponsler and Applin, about their union sentiments. A-001. The Board did not adopt the ALJ's finding that the interrogations, standing alone, would be insufficient to warrant a second election, thereby holding that the interrogations were sufficient to require a second election. A-001, n.5. The Board's determination that Ewry and Butcher impermissibly interrogated Sponsler and Applin is supported by the substantial evidence and the Board's precedent. The Board's holding that the interrogations warranted setting aside the election was not an abuse of discretion.

**1. The Board properly held that Sponsler was unlawfully interrogated.**

The substantial evidence and the ALJ's reasonable inferences and credibility determinations, as adopted by the Board and which are entitled to deference upon review, support the Board's determination that Ewry unlawfully interrogated Sponsler.

In late August 2013, Ewry approached Sponsler while he was working alone. A-049-050. Ewry was Sponsler's coach, or immediate supervisor. A-040. Ewry asked Sponsler what his feelings were about the Union. A-050. Sponsler responded that he was in favor of the Union, but he was fearful that if the Union lost the election, he would face retaliation from Caterpillar; "I was extremely nervous about anyone knowing about my involvement." A-050-051. Ewry responded to Sponsler that he did not need to worry, because there would be no retaliation, and that Caterpillar's upper management already knew everybody who was involved in the Union organizing campaign. A-050.

Sponsler had, on one occasion **prior to** the Union organizing campaign, expressed support for unions generally to his former supervisor, Tom McNulty. A-056. However, at the time of the conversation with Ewry, Sponsler had not expressed support for the Union organizing campaign in front of management and had not worn any Union insignia, paraphernalia or t-shirts. A-052. Sponsler was later an open and active union supporter, but not at the time of the interrogation.

There is no evidence in the record contradicting Sponsler's testimony that he had not openly supported the Union organizing campaign in front of management or worn pro-Union paraphernalia as of the date of the interrogation. At that point in time, Sponsler was not an open Union supporter, and the Board's findings and inferences are supported by substantial evidence.

Ewry admitted that the first knowledge that he possessed that Sponsler was a Union supporter was during the conversation in question. A-385. If Sponsler had been an open and active Union supporter at that time, his immediate supervisor would not have learned about it during that conversation. He would have already known. Caterpillar's reliance on *Aladdin Gaming LLC*, 345 NLRB 585 (2005), and all arguments that Sponsler was an open Union supporter at the time of the interrogation are not supported by the record and should be rejected.

Sponsler testified that, while he attempted to obtain authorization cards outside of work time and talked on occasion with his coworkers about the Union organizing campaign, it was commonly expected that his coworkers would not discuss those issues with management, because it was an intimidating atmosphere. A-056-57, A-059. Further, Sponsler did not wear any pro-Union paraphernalia at the facility until three weeks prior to the vote, which would have been in September. A-058. Because Sponsler had undertaken such efforts to conceal his Union support from management to that point in time, the ALJ's inference that it is

“extremely unlikely” that Sponsler would have volunteered the information gratuitously is wholly supported by the record. A-006.

At Caterpillar’s direction, Ewry reported his opinions about employees’ level of support for the Union to senior management. A-384. He had frequent one-on-one meetings with Hassinger, Caterpillar’s labor relations representative, to report his opinions. A-380, A-384-85. Ewry informed Hassinger both of his numerical rating of employees’ level of Union support on a scale from one to five and of behaviors he observed. *Id.*

The fact that Sponsler did not feel at that moment like Ewry was interrogating him renders the interrogation no less unlawful. A-065. In order for an employer’s interrogation to be unlawful, “either the words themselves or the context in which they are used must suggest an element of coercion or interference.” *Rossmore House Hotel*, 269 NLRB 1176, 1177 (1984). Ewry’s interrogation of Sponsler meets the test for unlawful interrogation the Board established in *Blue Flash Express*, 109 NLRB 591 (1954). According to the *Blue Flash Express* Board, “[t]he time, the place, the personnel involved, the information sought and the employer’s conceded preference must be considered....” *Id.* at 594. In later years, the Board developed several factors for analyzing whether employer questioning constitutes unlawful interrogation: “(1) the background; (2) the nature of the information sought; (3) the identity of the

questioner; and (4) the place and method of interrogation.” *Rossmore House Hotel*, 269 NLRB at 1178 n.20.

In regard to the first *Rossmore House* factor, the background, the interrogation occurred during the critical period at a time when Sponsler had not expressed support for the Union organizing campaign in front of management employees or worn Union paraphernalia.

Addressing the second *Rossmore House* factor, the nature of the information sought, Ewry sought information regarding how Sponsler felt about the Union. Ewry’s question was designed to induce Sponsler to reveal his level of support for the Union so that Ewry could report the information to Hassinger.

The third *Rossmore House* factor is the identity of the questioner. Ewry is Sponsler’s immediate supervisor, or coach. Ewry was under a duty from Caterpillar to report his opinions about employees’ level of support for the Union to senior management, which the ALJ properly determined motivated his actions in interrogating Sponsler. A-010, A-384-85.

With respect to the fourth *Rossmore House* factor, the place and method of interrogation, the interrogation took place in a one-on-one situation where maximum pressure could be exerted. Sponsler was approached by Ewry in an area where no one else was present. A-050. The record establishes that the unlawful

questioning fulfilled the unlawful objective of creating fear. Sponsler immediately stated to Ewry that he was fearful of retaliation by Caterpillar. *Id.*

Caterpillar's reliance on *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 108 (6th Cir. 1987), is misplaced. There, the Court determined that one management employee's casual questions about how many people had signed up for the union were innocuous and did not constitute interference because the questioner was merely "curious," and was contemplating signing up for the union himself. *Id.* Here, as found by the ALJ and adopted by the Board, Ewry's questioning was motivated by his need to inform upper management of employees' organizing activities. A-010. Such questioning is not innocuous.

The substantial evidence supports the Board's holding that Ewry unlawfully interrogated Sponsler. This Court should deny Caterpillar's Petition for Review and grant the Board's Cross-Application to Enforce on this issue.

**2. The Board properly held that Applin was unlawfully interrogated.**

The Board's holding that Butcher unlawfully interrogated Applin about his Union sympathies during the critical period is also supported by substantial evidence. Caterpillar's arguments are unavailing, and this Court should deny its Petition for Review and grant the Board's Cross-Application for Enforcement.

Based on the testimony of Butcher and Applin, the ALJ concluded that Applin asked Butcher how he felt about one of the mandatory anti-Union meetings

during the critical period, and that the question was the “functional equivalent” of interrogating Applin about his union sympathies because “[a]ny answer by Applin would tend to indicate where he stood.” A-006. Support for the ALJ’s determination, which was upheld by the Board, is found in *Miss. Extended Care Ctr.*, 202 NLRB 1065 (1973). In *Miss. Extended Care Ctr.*, a company vice president asked individual employees “how they felt about the subjects that he had discussed in an antiunion speech to a group of employees.” *Id.* at 1065. The Board stated that the questions, in the circumstances in which they were asked, “amounted to interrogations of employees as to how they felt about the Union, in violation of Section 8(a)(1) of the Act, and interfered with their free choice in the election.” *Id.* Further, the Board stated that the questioning was “calculated to elicit a response concerning the employee’s feelings toward the Union, even though the word ‘union’ was not used in the question.” *Id.* at 1066.

Caterpillar attempts to deflect blame from Butcher by focusing on the answers Applin *could possibly have given* in response to Butcher’s questioning. (Caterpillar’s Brief, p. 44). But this argument ignores the fact that it is the questioning—and not the potentially benign nature of the employee’s hypothetical answers—that deserves scrutiny and violates the Act, because of the questioning’s “natural tendency to instill in the minds of employees fear of discrimination on the

basis of the information the employer has obtained.” *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953).

The employer, “in questioning his employees as to their union sympathies, is not expressing views, argument or opinion [protected by] Section 8(c) of the Act, as the purpose of the inquiry is not to express views, but to ascertain those of the person questioned.” *Struksnes Constr. Co.*, 165 NLRB 1062, 1062 n.8 (1967). There is no question that Caterpillar’s position against unionization was known to Applin at the time of the interrogation by Butcher. Butcher was not expressing views, argument or opinion protected by the Act. Caterpillar has a stated position against “third party” representation, and the interrogation occurred immediately after a weekly captive audience meeting in which Caterpillar informed its employees regarding its anti-Union position.<sup>9</sup> A-336, A-125-26, A-568. Caterpillar’s focus on what Applin could have said in response is further undercut by the *Miss. Extended Care Ctr.* decision, which held that “it is simply not the law that an interrogation is harmless because the employee answers that she has nothing to say.” 202 NLRB at 1066.

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<sup>9</sup>The fact that Caterpillar held weekly captive audience anti-Union meetings during the critical period, which were not held to be unlawful, demonstrates that the Board’s holding in this case would not prohibit all employer-directed conversations that touch on unionization, as Caterpillar alleges in its brief. (Caterpillar’s Brief, p. 20).

The precedent cited by Caterpillar is distinguishable. In *Abramson, LLC*, 345 NLRB 171, 172-73 (2005), the Board held that under the “totality of circumstances,” management did not unlawfully interrogate the employee when the employee initiated the conversation with the manager about another subject, and the manager asked the “spontaneous off-the-cuff” question of ““what about this union”” with no indication or reasonable interpretation that he was requesting the employee’s personal opinion. Similarly, in *Toma Metals, Inc.*, 342 NLRB 787, 789-90 (2004), the supervisor asked the employee, who was also his wife’s first cousin, the general question of ““what’s up with the rumor of the union I’m hearing,”” which was prompted by questions the supervisor had received from other employees. Here, unlike in *Abramson* and *Toma*, Butcher specifically asked Applin what he thought. Butcher was not asking a spontaneous question driven by curiosity, but was motivated by his directive to report employee Union sympathies to upper management. A-010.

The Board’s adoption of the ALJ’s determination that Butcher interrogated Applin is correct, because not only was the questioning from Butcher designed to ascertain Applin’s views on his degree of Union support, but it also instilled fear in Applin’s mind based upon his supervisor’s decision to question him. Applin stated that he was “shocked” in response to Butcher’s questioning, and as a result,

reached out to at least two fellow employees to inquire whether such questioning from a supervisor was appropriate. A-088, A-109-10, A-128, A-133-37.

Finally, the *Rossmore House* factors establish that Butcher engaged in unlawful interrogation when he questioned Applin's Union sentiments. With regard to the first factor, the background, the encounter between Butcher and Applin took place during the critical period, following a mandatory all-employee anti-Union meeting. A-125-26. Butcher, like Ewry, was under an obligation to report to senior management the Union sentiments of employees under his command, and Applin had not yet worn any pro-Union apparel. A-131, A-400.

Addressing the second *Rossmore House* factor, the nature of the information sought, Butcher sought information about how Applin felt about the Union, albeit thinly disguised as a question about the anti-Union meeting. A-127-28. Butcher's question was designed to induce Applin to reveal his level of support for the Union so that he could report the information to Hassinger.

As to the third *Rossmore House* factor, the identity of the questioner, Applin was interrogated by his immediate supervisor, or coach. A-125. Butcher, in turn, was under an obligation to report the information up the chain of command. A-400. With respect to the fourth *Rossmore House* factor, the place and method of interrogation, the interrogation by Butcher took place in a one-on-one situation in

which maximum pressure could be exerted. A-127. Butcher also stood unusually close to Applin. A-131-32.

The Board's adoption of the ALJ's findings and conclusions about which Caterpillar complains is supported by the substantial evidence and applicable law.

**3. The Board properly held the interrogations, as well as Caterpillar's other misconduct, constituted a basis for setting aside the election.**

The Board's standard applicable to determining whether to set aside an election, which is entitled to abuse of discretion review, is whether the misconduct taken as a whole warrants a new election because it has "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *St. Francis Healthcare Centre*, 212 F.3d at 951-52; *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). The Board has described the factors used in making this determination as follows:

In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination, and the size of the unit. Other factors the Board considers include the 'closeness of the election, proximity of the conduct to the election date, [and the] number of unit employees affected.'

*Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001) (quoting *Detroit Medical Center*, 331 NLRB 878, 880 (2000)). "[The Board's] normal policy is to direct a new election whenever an unfair labor practice occurs during the critical period since '[conduct] violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes

with the exercise of a free and untrammelled choice in an election.” *Super Thrift Mkts.*, 233 NLRB 409 (1977) (quoting *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1786-87 (1962)). Only when Section 8(a)(1) “violations are such that it is virtually impossible to conclude that they could have affected the results of the election,” does an election need not be set aside. *Super Thrift*, 233 NLRB at 409. The Board’s test is, as it should be, not difficult to meet.

Here, the Board did not abuse its discretion by determining that the unlawful interrogations of Sponsler and Applin provided cause to set aside the election. All of Caterpillar’s violations of the Act, and their severity, are relevant to this inquiry, not just the interrogations. Further, the interrogations of Applin and Sponsler were disseminated to additional employees eligible to vote in the Union representation election, and, even standing alone, were not *de minimis* and could have affected the outcome of the vote.

Contrary to Caterpillar’s claim, the substantial evidence shows the interrogations of Sponsler and Applin were significantly disseminated among fellow employees eligible to vote in the Union representation election. The encounter between Sponsler and Ewry was disseminated to at least eight other employees eligible to vote in the Union representation election. A-053-54, A-076, A-212. The unlawful interrogation of Applin by Butcher was disseminated to at

least four other employees eligible to vote in the Union representation election. A-088, A-095, A-108-09, A-133.

The present case features even more wide ranging dissemination than that which occurred in *Super Thrift Mkts*, which involved twenty-four employees, only two of whom were subjected to statements that the Board found violated Section 8(a)(1). 233 NLRB 409, 409. On balance, the Board concluded that the election should be set aside, in part because “[w]e have long held that statements made during election campaigns can reasonably be expected to have been disseminated and discussed among the employees.” *Id.*

In *Huntsville Manufacturing Co.*, 211 NLRB 54 (1974), the Board found that up to ten incidents of individual interrogation took place. *Id.* at 60. The employer argued against setting aside the election, pointing to the fact that the factory employed 1,000 employees, the employees interrogated constituted 1% of all eligible voters, and the union lost the election by a 280 vote margin. *Id.* The Board was not persuaded by the employer’s argument and ordered a new election. *Id.*

Here, there were 435 employees eligible to vote in the Union representation election. A-555. 417 employees voted. *Id.* 188 employees cast ballots in favor of Union representation, and 229 employees cast ballots against Union representation. *Id.* Twenty-one votes would have changed the result of the election. Two

employees directly suffered unlawful interrogation and the impression of surveillance. However, those individuals, as can be expected, told others about Caterpillar's unlawful conduct. The dissemination of Caterpillar's unlawful conduct could have influenced countless employees eligible to vote in the Union representation election. *Super Thrift Mkts* and *Huntsville Manufacturing* both support the Board's position that the interrogations warrant setting aside the election.

The cases relied upon by Caterpillar are unpersuasive. In *In re Safeway, Inc.*, 338 NLRB 525 (2002), the alleged objectionable conduct was the employer's maintenance of a confidentiality work rule during a decertification election. In determining that the facts did not show that "maintenance of the confidentiality rule could reasonably have affected the election results," the key fact cited by the Board was that the employees were represented by the union during the period in question. *Id.* at 526. The Board applied the standard argued above in *In re Safeway*, and the facts distinguish that case from the case at bar.

Caterpillar cites cases involving no dissemination of the unlawful conduct among the other employees, which is not the case in this matter. *Sanitation Salvage Corp.*, 359 NLRB No. 130, 196 LRRM 1124 (June 5, 2013) (two employees were threatened but there was no evidence of any dissemination); *Werthan Packaging, Inc.*, 345 NLRB 343, 345 (2005) (employer's objectionable conduct affected a

total of five employees, and there was no evidence of dissemination); *Accubuilt, Inc.*, 340 NLRB 1337, 1337 (2003) (threats known to no more than three employees in a unit of over 150, which were not disseminated, did not create an atmosphere of fear and reprisal); *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004) (overruling precedent that did not require a showing of dissemination of a plant-closure threat).

Caterpillar also relies on cases that do not support its position based on the facts and dispositions of the cases. *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597-98 (2004) (setting aside election based on anonymous telephone threats made to one anti-union employee); *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 11 (March 28, 2011) (setting aside decertification election based on work rules with no evidence the work rules affected employee conduct or were enforced during the critical period).

Based on the Board's normal policy of directing a new election whenever a violation occurs that could have possibly affected the election results, the Board correctly determined that the unlawful interrogations constitute a separate basis for setting aside the election. The Board did not abuse its discretion in so holding; therefore, this Court should grant the Board's Cross-Application for Enforcement and deny Caterpillar's Petition for Review.

**D. Third Issue: The Board's holding that Caterpillar created an unlawful impression of surveillance is supported by substantial evidence.**

Substantial evidence supports the Board's holding that Caterpillar committed an unfair labor practice and engaged in objectionable conduct when, in late August 2013, Ewry told Sponsler during their aforementioned one-on-one conversation that Caterpillar's upper management already knew everybody who was involved in the Union organizing campaign. A-050.

As the Board determined, Ewry's statement meets the requirement that "the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance." *Heartshare Human Svcs. of NY*, 339 NLRB 842, 844 (2003); *Frontier Tele. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005) (citing *Flexsteel Indus.*, 311 NLRB 257 (1993)). As the Board explained in *Frontier Telephone*, "[t]he essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities." *Id.* This assumption is made all the more reasonable when, like with Ewry's conversation with Sponsler, the employer fails to tell the employee the source of the information.

When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.

*Metro One Loss Prevention*, 2010 NLRB LEXIS 445, \*73, 190 LRRM 1226, (2010). The failure to identify the source of the information is the “gravamen” of the violation. *North Hills Office Svcs., Inc.*, 346 NLRB 1099, 1103 (2006).

Ewry’s statement to Sponsler meets the burden. Sponsler reasonably believed that his Union activities had been placed under surveillance, and he told other employees eligible to vote in the Union representation election about that reasonable belief. A-053-054, A-076.

The impression of surveillance created by Ewry is particularly threatening because the conversation occurred on the first workday immediately following the first pro-Union meeting open to all employees eligible to vote in the Union representation election. Management was not invited to the meeting, and no members of Caterpillar’s management attended. A-048-49. Sponsler attended the meeting and participated by taking notes on an easel at the front of the room. A-049. At the time of the conversation with Ewry, Sponsler had not openly supported the Union organizing campaign in front of management and had not yet worn any Union insignia or clothing to work. A-051-52.

Ewry’s statement to Sponsler, because of its direct factual nature and the fact that Sponsler had not yet openly supported the Union organizing campaign, is distinguishable from the line of cases Caterpillar cites that deal with rumor or the open nature of an employee’s union support. For example, in *SKD Jonesville*

*Division, LP*, 340 NLRB 101, 102 (2003), the Board determined it was not reasonable for the employee to assume that her activities had been placed under surveillance because the management employee said he had “heard” about her union activities. There was no reason to assume management obtained the information through surveillance rather than the grapevine. *Id.*; *South Shore Hosp.*, 229 NLRB 363, 364 (1977) (noting that a rumor is, by definition, talk or opinion widely disseminated with no discernible source, so employees could not reasonably assume from Respondent’s knowledge of a rumor that their union activities had been placed under surveillance); *Clark Equipment Co.*, 278 NLRB 498, 503 (1986) (overruled in part on other grounds) (holding supervisor’s comments related to what he “heard” and others observed through open union activity were not unlawful); *Stabilus, Inc.*, 355 NLRB 836, 848 (2010) (holding statement in question indicated only that the employer was aware of the existence of union organizing activity and was not unlawful).

Unlike the foregoing cases, Ewry’s statement to Sponsler was not that upper management had “heard” that certain employees were supporting the Union, but rather that upper management “knew everybody” who was involved in the Union organizing efforts. Ewry presented the statement as specific fact, not rumor. This distinction brings Ewry’s statement to Sponsler out of the realm of permissible rumor mongering and squarely into the realm of unlawfully creating the impression

of surveillance. Additionally, Sponsler had not openly supported the Union at the time this conversation took place, a key fact that Caterpillar ignores and further distinguishes this case from those cited by Caterpillar.

Sponsler's belief that the employees' Union organizing efforts were under surveillance was reasonable; therefore, Ewry's statement was an unfair labor practice and objectionable conduct. The Board's holding is support by substantial evidence and should be enforced.

## **VI. CONCLUSION**

The Board properly held that Caterpillar unlawfully made promises and grants of employee benefits, interrogated employees, and created an impression of surveillance, which all warranted setting aside the results of the September 27, 2013, Union representation election and the conduct of a new election. For this and all of the foregoing reasons, the Union respectfully requests that this Court deny Caterpillar's Petition for Review and grant the Board's Cross-Application for Enforcement.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief complies with the type volume limitation of Fed. R. App. P. 32(a)(6) and Fed. R. App. P. 32(a)(7)(B) as it was prepared using Microsoft Office Word 2007, Times New Roman, 14 pt. Font, and contains **13,733** words.

/s/ Kristin Seifert Watson  
Kristin Seifert Watson (0078032)

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was filed electronically on November 20, 2015. Notice of this filing will be sent to all interested parties by operation of the Court's electronic filing system. This document may be accessed through the Court's electronic filing system.

/s/ Kristin Seifert Watson  
Kristin Seifert Watson (0078032)

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