

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 30**

**CATERPILLAR INC.**

**and**

**Case 30-CA-064314**

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

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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Submitted by:

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Rachel A. Centinario, Counsel for the Acting General Counsel, respectfully submits this Brief in Support of Acting General Counsel's Exceptions to the Administrative Law Judge's Decision and Order ("Brief in Support").

## I. INTRODUCTION<sup>1</sup>

On September 5, 2012, Administrative Law Judge Robert R. Ringler ("ALJ") issued his Decision and Order in the above case, correctly finding that Respondent committed unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act ("Act") when it denied the request of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Worker's International Union, AFL-CIO/CLC ("Union") for access to Respondent's facility in order to conduct a health and safety inspection after a fatality occurred at the facility.

However, the ALJ erred in concluding that Respondent violated the Act by not granting access to the Union's health and safety specialist to conduct a health and safety inspection "*without first bargaining in good faith with the Union concerning appropriate confidentiality safeguards associated with such access.*" (ALJD 9:35-36, emphasis added.) As a remedy, the ALJ then stated Respondent "must grant the Union access to its facility, subject to certain limitations. . ." and that Respondent "must bargain in good faith with the Union over its legitimate confidentiality concerns and reduce the resulting agreement to writing." (ALJD at 10:1-3.) Such a remedy does not comport with the prevailing case law regarding refusal to grant access cases; likewise, the ALJ's reliance on *Roseburg Forest Products Co.*, 331 NLRB 999

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<sup>1</sup> General Counsel's Exhibits will be referred to as (G.C. Exh. \_\_), and Transcript citations will be referred to by page number and line number as (Tr. \_\_:\_\_), unless the Transcript cite covers multiple pages. The ALJ's decision will be referred to as (ALJD \_\_:\_\_). Respondent's Post-Hearing Brief will be referred to as (Resp. Post-Hearing Br. \_\_:\_\_).

(2000) is misplaced, as *Roseburg* is an information request case, and the Board has held in *Holyoke* and its progeny that access cases are *not* akin to information request cases and thus warrant a balancing test as opposed to a “broad relevancy” standard. *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), *enf’d* 778 F.2d 49 (1st Cir. 1985). In fashioning such a remedy, the ALJ also erred in finding that Respondent had a significant confidentiality interest in protecting its manufacturing procedures, as the evidence does not support such a conclusion.

Counsel for the Acting General Counsel respectfully requests that the Board modify the ALJ’s decision to reflect that Respondent did not have a significant confidentiality interest in protecting its manufacturing procedures. Counsel for the Acting General Counsel further respectfully requests that the Board modify the ALJ’s Order and Notice to Employees to reflect an order directing that, on request by the Union, Respondent grant access to the Union’s health and safety specialist for a reasonable time period sufficient to permit the Union to conduct health and safety inspections, including of industrial accidents, as stated in the proposed Order and Notice to Employees attached to this Brief in Support as Attachment A.

## II. ANALYSIS

The Complaint issued by Region 30 alleged not that Respondent failed to bargain over confidentiality safeguards associated with information requests but rather that Respondent failed to provide on-site access to the Union’s health and safety specialist after a fatality at the plant. (G.C. Exhibit 1(c).) Although the ALJ correctly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by denying on-site access to the Union in order to conduct a health and safety inspection after a fatality occurred at the facility, the ALJ erred in fashioning a remedy pursuant to *Roseburg*. 331 NLRB 999 (2000).

In *Roseburg*, the Board found the employer violated the Act by refusing to provide to the union information relevant to a grievance alleging the employer violated contractual seniority provisions. *Id.* There, the employer admittedly violated the parties' collective-bargaining agreement when it placed a less senior employee in a highly-sought-after bargaining unit position despite more senior employees bidding for the position. The employer argued it had to give the less senior employee the position pursuant to creating a reasonable accommodation for him pursuant to his doctor's excuse and the Americans with Disabilities Act ("ADA"). The union then requested information concerning the individual's physical condition and disability in order to determine whether the employer's accommodation was necessary. The employer refused to provide the information pursuant to the ADA's confidentiality requirements pertaining to medical information.

There, the Board applied the Supreme Court's decision in *Detroit Edison* for the proposition that, although relevant, the employer had a "legitimate and substantial" interest in maintaining the confidentiality of the information. 331 NLRB at 1001 (*quoting Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979)). The Board found the employer violated Section 8(a)(1) and (5) by failing to provide the information or attempt to accommodate the concern for confidentiality and the union's need for the information. *Id.* at 1002 (*citing GTE Southwest Inc.*, 329 NLRB 563 (1999)). The Board then analyzed the EEOC's guidance and opinion regarding what the requirements of the ADA are and the facts of the case there and fashioned a remedy giving the parties the opportunity to first bargain in good faith over appropriate safeguards. *Id.* at 1003 (*citing GTE Southwest*, 329 NLRB 563).

*Roseburg* is inapposite to the instant case, as it deals with an information request violation, *not* a refusal to grant access case. Although the ALJ ultimately applied *Holyoke's*

balancing test for access cases, he failed to recognize that the Board expressly rejected the notion that access cases are akin to information request cases. 273 NLRB 1369, 1370. Indeed, the Board held:

Thus, we disagree with the judge's analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors. Rather, each of the two conflicting rights must be accommodated. . . . *Id.*

Because the ALJ here applied *Holyoke's* balancing test and found the Union's right to access the facility outweighed Respondent's property interests, it is puzzling why the ALJ fashioned a remedy from an information request case. (ALJD 8:4-33.) First, Respondent never contended in its post-hearing brief that it refused access to the Union due to confidentiality concerns. Indeed, Respondent articulated a blanket refusal to grant access based solely on its "legitimate interest in and right to control its property." (Resp. Post-Hearing Br. at 29.) Second, the Board in *Hercules, Inc.* adopted the ALJ's decision in which he enumerated factors to consider in granting access, none of which expressly relate to confidentiality concerns. 281 NLRB 961, 970 (1986), *enf'd* 833 F.2d 426 (2d Cir. 1987).

One notable factor enumerated in *Hercules* that is especially relevant here is "the extent to which nonemployees are permitted to enter on private property," especially in light of Respondent's reliance in refusing access to the Union solely on its "property interest." *Id.* at 970. Here, Respondent admits, and the ALJ correctly found, Respondent regularly allows nonemployees access to the same location to which Respondent refused the Union's health and safety expert access – the location where the fatality occurred. (*See* ALJD 6:9-14 (recounting

Respondent testimony affirming visitors regularly view the location where the fatality occurred).)

Most importantly, none of the Board access case decisions set forth a remedy other than requiring the employer to grant access to the union. Not one decision orders that the parties first bargain over a confidentiality agreement. Instead, the decisions consistently require only that the employer grant access to the union's health and safety specialist for reasonable periods and at reasonable times sufficient to allow the union representatives to fully investigate industrial accidents and to conduct health and safety inspections. (*See, i.e., Holyoke*, 273 NLRB at 1370-1371 (modifying judge's order to "provide that the access be for a reasonable period sufficient to allow the union hygienist to fully observe and survey noise level hazards"); *Hercules*, 281 NLRB at 961 (maintaining *Holyoke's* "accommodation policy . . . [that access] be limited to reasonable periods and at reasonable times, consistent with the times least likely to disrupt [the employer's] operations, to allow the [u]nion's representative to fully investigate industrial accidents, to conduct health and safety inspections. . ."); *ASARCO, Inc., Tennessee Mines Div.*, 276 NLRB 1367, 1371, *enf'd in relevant part* 805 F.2d 194 (6th Cir. 1986) (Board adopting judge's order requiring employer grant access to union's hygienist "for a reasonable period and at a reasonable time sufficient to permit the hygienist to fully investigate the accident site and its approaches"); *Nestle Purina Petcare Co.*, 347 NLRB 891, 894 (2006) (maintaining *Holyoke's* "accommodation policy . . . [that] the [u]nion's access shall be limited to reasonable periods and at reasonable times 'consistent with the times least likely to disrupt [the employer's] operations'"); *C.C.E., Inc.*, 318 NLRB 977 (1995) (Board upholding judge's order requiring the employer grant access to the union "for reasonable periods and at reasonable working or production times" to allow union representatives to adequately investigate working conditions).)

Even if this Board were to apply the standard articulated in *Roseburg*, the ALJ did not articulate whether Respondent had a “legitimate and substantial” interest in maintaining confidentiality of its manufacturing processes. 331 NLRB 999, 1001. Moreover, the ALJ erred in considering that Respondent “held a significant competing interest in protecting against the potential dissemination of its confidential manufacturing procedures as well as an interest in preventing visitors from interfering with its operations.”<sup>2</sup> (ALJD 8:35-37.) The ALJ’s finding is undermined by his statement later in the same paragraph that “[Respondent’s] property interest was lessened to a degree by a *considerable* history of permitting non-employee visitors to access the facility (e.g., politicians, civic groups, high school students and customers). . .” (ALJD 8:42-9:2, footnote omitted) (emphasis added). Because Respondent did not demonstrate, and the ALJ did not find, any “legitimate and substantial” confidentiality interest, the Board should modify the ALJ’s holding to reflect that Respondent did not have a significant confidentiality interest in protecting its manufacturing procedures.

### III. CONCLUSION

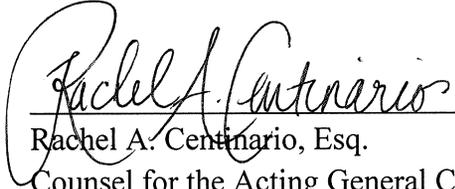
Counsel for the Acting General Counsel respectfully requests that the Board modify the ALJ’s holding to reflect that Respondent did not have a significant confidentiality interest in protecting its manufacturing procedures. Counsel for the Acting General Counsel further

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<sup>2</sup> Counsel for the Acting General Counsel does not except to the ALJ’s dicta that Respondent had an interest in preventing visitors from interfering with its operations. It is common sense that any employer would have an interest in preventing visitors from interfering with its operations. However, to the extent the ALJ relies on such a finding in determining Respondent had some “significant” confidentiality interest, Counsel for the Acting General Counsel does except. First, the Union’s request for access is limited both temporally – a reasonable period of time – and geographically – only in the location where the fatality occurred. Second, to the extent Respondent argues that on-site access would disrupt production, Respondent conducted its own investigations during working time on the plant floor using its own employees. (Tr. 163-164.) Respondent further acknowledged that it allows other groups into the same area without concern for disruption. (Tr. 74-79, 334.) A finding that Respondent has some “significant” confidentiality interest because of visitors interfering with operations is untenable.

respectfully requests that the Board modify the language in the ALJ's Order and Appendix Notice to Employees to the requested language attached to this Brief in Support as Attachment A.

Respectfully submitted this 17<sup>th</sup> day of October, 2012.

  
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## PROPOSED ORDER AND NOTICE TO EMPLOYEES

### ORDER

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

1. Cease and desist from

a. Failing and refusing to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (Union) as the exclusive collective bargaining representative of employees in the unit described below by denying its request that its health and safety specialist access the facility, in order to conduct a health and safety inspection and fully investigate industrial accidents:

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

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

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

a. Upon request, grant access to the Union's health and safety specialist designated by the Union to Respondent's facility for reasonable periods and at reasonable times sufficient to permit the Union's health and safety specialist to conduct health and safety inspections and to fully investigate industrial accidents.

b. Within 14 days after service by the Region, physically post at its Milwaukee, Wisconsin facility, and electronically send and post via email, intranet, internet, or other electronic means to its unit employees who were employed at its Milwaukee, Wisconsin

facility at any time since September 9, 2011, copies of the attached Notice marked "Appendix."<sup>1</sup> Copies of the Notice, on forms provided by the Regional Director of Region 30, after being signed by Respondent's authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or close the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by it at the facility at any time since September 9, 2011.

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

## APPENDIX

### NOTICE TO EMPLOYEES Posted by Order of the National Labor Relations Board An Agency of the United States Government

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

**WE WILL NOT** fail or refuse to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (the Union) as the exclusive collective-bargaining representative of employees in the bargaining unit described below by refusing to grant the Union's designated health and safety specialist access to our facility in order to conduct health and safety inspections and to fully investigate industrial accidents:

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<sup>1</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

**WE WILL**, upon request, grant access to the Union's designated health and safety specialist to our facility for reasonable periods and at reasonable times sufficient to permit the Union to conduct health and safety inspections and to investigate industrial accidents.

**CATERPILLAR INC.**  
**(Employer)**

**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
**(Representative)** **(Title)**

Caterpillar Inc.  
Case 30-CA-064314

Copies of Counsel for Acting General Counsel's Exceptions to the Administrative Law Judge's Decision and Order and Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order have been sent October 17, 2012 by the following methods, to the following parties of record:

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