

**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**

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

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TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	iii
I. INTRODUCTION.....	1
II. FACTUAL ANALYSIS	4
A. Background.....	4
B. September 8, 2011.....	6
C. Denial of Access to International Union’s Expert	8
D. Relative Experience of International Union’s Expert and of Local Union Officials.....	9
E. Facility Access by Nonemployees	11
III. STANDARD OF REVIEW.....	11
IV. ARGUMENT.....	12
A. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) and (5) of the Act by Refusing to Grant On-site Access to the Union’s Health and Safety Expert After a Fatal Accident at Respondent’s Facility	12
1. The ALJ correctly applied <i>Holyoke’s</i> balancing test and applied the correct burden-shifting analysis.....	12
2. The ALJ correctly found that on-site access was necessary and relevant to the Union’s role as the employees’ exclusive collective-bargaining representative.	14
3. The ALJ correctly concluded that alternate means would not have satisfied the Union’s need for on-site access.....	18
i. An OSHA-conducted investigation, employer reports, and police reports are not a satisfactory alternative to on-site access.	18

ii.	The ALJ correctly found that, unlike the Union’s safety expert, Local Union officials were not qualified to investigate health and safety concerns/fatal accidents.....	23
4.	Respondent has failed to articulate any legitimate property interest that would outweigh the Union’s right to access the facility.	25
i.	The ALJ properly found that Respondent has consistently permitted access to third parties, which is relevant as it undermines Respondent’s purported property interest.	26
ii.	The sole decision relied upon by Respondent, <i>Brown Shoe</i>, is both factually distinguishable and aberrant.....	29
V.	CONCLUSION.....	31

TABLE OF AUTHORITIES

Pages

<i>American National Can Co.</i> , 293 NLRB 901, 905 (1989), <i>enf'd</i> F.2d 518 (4th Cir. 1991)	14, 15
<i>ASARCO, Inc., Tennessee Mines Div.</i> , 276 NLRB 1367 (1985), <i>enf'd in relevant part</i> 805 F.2d 194 (6th Cir. 1986).....	<i>passim</i>
<i>Brown Shoe Co. v. NLRB</i> , 33 F.3d 1019 (8th Cir. 1994), <i>reversing</i> 312 NLRB 285 (1993)	3, 29, 30, 31
<i>C.C.E., Inc.</i> , 318 NLRB 977 (1995)	15
<i>Exxon Chemical Co.</i> , 307 NLRB 1254 (1992).....	14, 15, 18
<i>Fafnir Bearing Co.</i> , 146 NLRB 1582 (1964), <i>enf'd</i> 362 F.2d 716 (2d Cir. 1966)	25
<i>Hercules Inc.</i> , 281 NLRB 961 (1986) <i>enf'd</i> 833 F.2d 426 (2d Cir. 1987).....	<i>passim</i>
<i>Holyoke Water Power Co.</i> , 273 NLRB 1369 (1985), <i>enf'd</i> 778 F.2d 49 (1st Cir. 1985)	<i>passim</i>
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992)	2, 12, 13
<i>Minnesota Mining & Mfg. Co.</i> , 261 NLRB 27 (1982), <i>enf'd sub nom. Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB</i> , 711 F.2d 348 (D.C. Cir. 1983)	16, 17, 18
<i>Nestle Purina Petcare Co.</i> , 347 NLRB 891 (2006)	<i>passim</i>
<i>New Surfside Nursing Home</i> , 322 NLRB 531, 535 (1996)	13
<i>NLRB v. Babcock & Wilcox Co.</i> , 351 U.S. 105, 112 (1956)	2, 12
<i>Standard Dry Wall Products, Inc.</i> , 91 NLRB 544 (1950), <i>enf'd</i> 188 F.2d 362 (3d Cir. 1951)	11, 25, 30
Wisconsin Statutes Section 19.35(1) (2011-2012).....	27
Wisconsin Statutes Section 19.36(5) (2011-2012).....	27
29 CFR § 1903.9 (2011).....	27

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

I. INTRODUCTION¹

On September 5, 2012, the Honorable Administrative Law Judge Robert R. Ringler ("ALJ") issued his Decision correctly finding that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act ("Act") by denying on-site access to its South Milwaukee, Wisconsin facility to the safety expert of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") following a fatal accident at the facility. On October 17, 2012, Respondent filed Exceptions and a Brief in Support. For the reasons stated below, the Board should affirm the ALJ's Decision.

In finding Respondent violated the Act by refusing to grant access to the Union's safety expert, the ALJ correctly applied the Board's decision in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), *enfd* 778 F.2d 49 (1st Cir. 1985), to the instant case. The ALJ properly found that the Union's access request, in light of the fatality of one of its bargaining unit members, was necessary and relevant to the Union's function as the employees' collective-bargaining representative. The ALJ also correctly concluded that Respondent could not establish any

¹ General Counsel Exhibits will be referred to as (G.C. Exh. __). Respondent's Exhibits will be referred to as (R. Exh. __). United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") Exhibits will be referred to as (U. Exh. __). Joint Exhibits will be referred to as (Jt. Exh. __). Transcript citations will be referred to by page number as (Tr: __), or by page number and line number where appropriate as (Tr: __:__). The ALJ's decision will be referred to by page number and line number as (ALJD __:__). Citations to Respondent's Exceptions will be referred to as (R. Excpt. __), and citations to Respondent's Brief in Support of its Exceptions will be referred to as (R. Br. Excpt. __.)

alternate means that would satisfy the Union's need for on-site access. Thus, by continually denying access to the Union's safety expert despite repeated requests by the Union, the ALJ properly found that Respondent committed unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

Respondent excepts on the basis that the ALJ failed to find that alternate means would have satisfied the Union's need for access. Respondent, relying on the United States Supreme Court's inapposite decisions in *Lechmere* and *Babcock & Wilcox*, inappropriately claims that the Union has the burden of proving there were no alternate means available to it. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). *Lechmere* and *Babcock & Wilcox* apply to organizing drives by labor organizations that have not yet been chosen as the employees' representative, *not* to situations in which a union is the exclusive collective-bargaining representative of the employees. Moreover, *Holyoke* and its progeny already considered *Lechmere* and *Babcock & Wilcox* and make clear that it is Respondent's burden to prove alternate means were available that would obviate the Union's need for access. *Nestle Purina Pet Care*, 347 NLRB 891, 891 (2006) (internal citations omitted).

Respondent also incorrectly claims the ALJ applied an information request standard, instead of *Holyoke*, here. Admittedly, both the Acting General Counsel and the Union excepted to the ALJ's order in which he misapplies an information request remedy, rather than an access case remedy. To that end, the Acting General Counsel agrees with Respondent's exceptions that the ALJ ordered an improper remedy. (R. Excpt. 75, 76, 78, 81 (limited), 82 (limited).) However, the ALJ properly applied the relevant balancing test set forth in *Holyoke* when he weighed the Union's need for access against the Employer's property interest. The ALJ also accurately noted

that the Board has “frequently found a union’s right to access for health and safety reasons outweighs the employer’s property interest.” (ALJD 8:14-15.)

Respondent, in direct contrast to long-standing Board precedent, incorrectly asserts that OSHA reports, employer-promulgated reports, and police reports were a satisfactory alternate means to on-site access available to the Union. Likewise, Respondent ignores Board precedent in claiming that the little involvement in the post-accident investigation by Local Union officials and bargaining unit members, who were otherwise completely untrained in industrial accidents, somehow would supplant the International Union’s need to have its trained safety expert engage in post-accident investigation. Finally, Respondent, contending the ALJ failed to fully consider the alternate means available to the Union other than on-site access, relies exclusively on an Eighth Circuit decision, *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), which is not only distinguishable from the instant case but also an aberrant decision.

In addition to arguing the Union had alternate means to investigate the fatal accident and thus on-site access was not necessary, Respondent excepts on the basis that the ALJ failed to appreciate Respondent’s purported property interest, yet Respondent fails to articulate what its property interest is. Respondent excepts to the relevance of the ALJ’s correct finding that Respondent has consistently permitted access to third parties, contending that such information is only relevant if the Acting General Counsel were alleging discriminatory motive under Section 8(a)(3) of the Act. The Acting General Counsel concedes it is not alleging any violation of Section 8(a)(3), but that Respondent permits third-party visitors “frequently” is clearly relevant as it *significantly* undermines Respondent’s purported property interest. Moreover, the extent to which third parties are permitted on an employer’s job site is one of the factors considered in an analogous case, *Hercules Inc.*, 281 NLRB 961, 961 (1986), *enf’d* 833 F.2d 426 (2d Cir. 1987).

Because Respondent's exceptions have no basis in fact or law, the Board should uphold the ALJ's decision finding that Respondent violated Section 8(a)(1) and (5) of the Act by denying on-site access to the Union's safety expert following a fatal accident at the facility, but amend the ALJ's remedy to reflect the appropriate remedial relief – that the Union be granted access to the facility for reasonable periods and at reasonable times sufficient to fully investigate health and safety concerns, including industrial accidents.

II. FACTUAL ANALYSIS

A. Background

Respondent operates a facility in South Milwaukee, Wisconsin ("Respondent's facility" or "the facility"), where it is engaged in the manufacturing of mining equipment. (G.C. Exhs. 1(c), 1(e); Tr. 307-308.) Respondent acquired the facility from its former owner, Bucyrus, in about July 2011.² (Tr. 32, 308.) Rod Bolhous, Dan Barich, and John Hubert have been supervisors and/or agents of Respondent within the meaning of Section 2(11) and/or 2(13) of the Act. (G.C. Exhs. 1(c), 1(e); Tr. 59, 337.) Mark McVay has also been an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 371:12-13.)

Since about 1936, the Union has represented the production and maintenance employees at Respondent's facility. (Tr. 36-37.) The Union, not Local 1343, is the Section 9(a) representative of bargaining unit employees. (G.C. Exh. 26.) Local 1343 Unit President is Kevin Jaskie. (Tr. 37.) Local 1343 Unit Vice-President is Michael Dobrzynski. (Tr. 114-115.) Local 1343 Chief Steward/Zoneman in the Weld Shop is David Uebele. (Tr. 143.)

Respondent and the Union are parties to a collective-bargaining agreement, dated December 9, 2008 to April 30, 2013. (G.C. Exhs. 1(c), 1(e), 26.) Article X of the parties'

² All dates herein are 2011 unless otherwise noted.

collective-bargaining agreement relates to health and safety. (G.C. Exh. 26.) Article X, Section 1001, Letter A, states the following: “The Company and the Union will cooperate in the objective of eliminating accidents, health hazards and protecting the Plant environment.” (G.C. Exh. 26.)

Respondent’s facility is four to five blocks long and roughly two to three blocks wide. (Tr. 33.) The facility has a variety of different departments, one of which is the weld shop. (Tr. 34, 45, 142.) The weld shop is about two blocks long and is divided into bays. (Tr. 45.) One routine procedure performed by crane operators in the weld shop is the rotation of crawler frames. (Tr. 145.) A crawler is the track device that propels a machine, such as a tank or a bulldozer, in any given direction. (Tr. 35-36.) The typical crawler frame weighs roughly 72,000 pounds. (Tr. 36.)

Depending on personal preference, crane operators utilize one of about six different procedures for the actual rotation process itself. (Tr. 156.) One rotation procedure involves using one of three sets of clam-shaped rotisserie devices, although only two such sets existed at the time of the accident. (Tr. 145-147.) Another such procedure is using the crane to manually rotate the crawler frame by placing the frame on wooden cribbing. (Tr. 147-148.) One may also use the crane to manually rotate the crawler frame by placing the frame on a pile of rubber mats. (Tr. 148-149.) The rubber mats were initially used in the assembly department for a different purpose entirely. (Tr. 149.) Crane operators only first began using the rubber mats three to four years ago, and, prior to September 8, there was no standard work protocol regarding using the rubber mats for the crawler frame rotation. (Tr. 150.) All cranes are operated by a crane operator on the floor using a radio-control box. (Tr. 146.) To rotate the crawler frame, a crane operator may use one crane with either a single trolley or dual trolleys or two cranes with single hooks. (Tr. 151, 168.)

Despite the fact that new standard work protocols have issued since the accident, all of these crawler rotation procedures are still being used today, based on the crane operator's personal preference. (G.C. Exh. 25; Tr. 167-168.)

B. September 8, 2011

In the early afternoon on September 8, Jeffrey Smith, a bargaining unit member, was working in the north bay of the weld shop when he was fatally crushed beneath a crawler frame. (Tr. 44-46, 157.) Mr. Smith and his crane operator partner were rotating the crawler frame for welding, when the crawler somehow fell on Mr. Smith, killing him. (Tr. 48, 157.) He and his crane operator partner had apparently been using the rotation procedure involving a single trolley and rubber mats. (Tr. 168, 173.)

Throughout the afternoon, Local Union officials, including Mr. Jaskie, Mr. Dobrzynski, and Mr. Uebele, as well as Respondent's representatives, local law enforcement, and an OSHA representative arrived at the scene of the accident. (Tr. 44, 55, 119, 161, 310.) Shortly after being informed of the accident, Mr. Jaskie contacted the Union's Emergency Response Team ("ERT") at the Union's headquarters in Pittsburgh, Pennsylvania and was directed to Sharon Thompson. (G.C. Exh. 27; Tr. 50.) The ERT is a service provided by the Union to its locals that exists in part to investigate all fatalities and catastrophic injuries when accidents occur at the workplace. (G.C. Exh. 27; Tr. 41, 194.) Ms. Thompson is employed as the Union's Resource Technician, Health and Safety Specialist and is on the ERT. (Tr. 186; 194.) As part of her duties with the ERT, Ms. Thompson makes site visits to employers' facilities when accidents have occurred to determine the root cause of the accident, with the goal of preventing recurrences in the future. (Tr. 194; 221.) The ALJ correctly found, and Respondent has not challenged, that Ms. Thompson is the Union's safety expert. (ALJD 3:10-13; 6:32, n.14.)

When they spoke on September 8, Ms. Thompson informed Mr. Jaskie that she would be coming to the facility, and Mr. Jaskie indicated that he would contact Respondent to inform it that Ms. Thompson would be coming. (Tr. 50, 208-209.) In separate subsequent conversations on September 8, Mr. Jaskie, along with Mr. Dobrzynski, informed Respondent, through Mr. Bolhous and separately through Mr. Barich, that the ERT would be sending someone to Respondent's facility. (Tr. 58-60, 123-124, 307, 311-312.) Mr. Bolhous did not object but instead responded that he would work together with the Union to get through this. (Tr. 58, 123, 311.) In the conversation with Mr. Barich, Mr. Dobrzynski informed Mr. Barich that Mr. Dobrzynski could not wait until the International Union representative got there because Mr. Dobrzynski did not know what he was doing. (Tr. 124.) Although Mr. Bolhous testified that he had a second conversation with Mr. Jaskie and Mr. Dobrzynski in which he claims he recounted, stating "that was a conversation that needed to take between the national office and Caterpillar's legal department to gain access to the property" (Tr. 312:13-15), both Mr. Jaskie and Mr. Dobrzynski deny that any second conversation with Mr. Bolhous occurred. (Tr. 59, 123, 397-398.) Mr. Barich did not testify.

During the afternoon of September 8, Local Union officials were permitted to sit in on the OSHA investigator's witness interviews. (Tr. 55-56, 121, 159.) The Local Union officials that sat in on OSHA-conducted interviews did not ask questions of the witnesses but rather were there to serve as representatives for their members. (Tr. 55-56, 121, 159.)

Sometime in the evening on September 8, Adam Schrank, Weld Shop Superintendent, asked Mr. Uebele to operate the crane and crawler involved in the accident. (Tr. 125, 160.) Mr. Uebele was the only individual present at the facility at that time that had a level 3 operator's

license. (Tr. 160.) Mr. Schrank did not request that Mr. Uebele operate the crane in his capacity as a Local Union officer. (Tr. 160:13-18.)

Present when Mr. Uebele operated the crane that evening were the OSHA representative, Respondents' representatives and safety staff, such as Mark McVay, the medical examiner, and police and fire personnel. (Tr. 161, 320, 330.) No other Union officer and no eye-witness to the accident were present. (Tr. 162.) Mr. Uebele was informed by Respondent's representatives as to how to operate the crane that evening. (Tr. 162.) Mr. Uebele was never told how to position the crawler with respect to the mats, and he was never informed where to stand while he operated the crane. (Tr. 165-166.) When he finished operating the crane, Mr. Uebele was told he was not needed, so he left the facility. (Tr. 163.)

C. Denial of Access to International Union's Expert

On September 9, Ms. Thompson, along with Local Union officials, arrived at Respondent's facility. (Tr. 68-69, 210.) As Ms. Thompson was heading toward the location of the accident, Mr. Bolhous testified that he informed her that she was "not welcome here" and would have to leave the premises. (Tr. 69-70, 211-212, 317:9-23.) Despite Ms. Thompson's attempts to explain why she was present, Mr. Bolhous testified that he "cut her off and said, 'I understand,' you know, 'what you're saying, but unless you have permission from Cat legal to be on the premises, you are not welcome here.'" (Tr. 317:12-15.) Ms. Thompson explained to Mr. Bolhous that her role was different than that of OSHA or the police, and stated, "'I'm here to help the Union and to find the root cause...You can even blindfold me and take me to the site...because I'm not interested in anything else you've got going on here.'" (Tr. 211:25-212:3.) Despite Ms. Thompson's attempts to explain the relevance and necessity of the on-site visit, Mr.

Bolhous stated that he “wasn’t really listening,” “cut her off,” and denied her access. (Tr: 317:9-23, 322:10-18.)

Ms. Thompson requested that she speak with someone who could grant her access. (Tr. 70, 212.) She was directed to Brian Stone in Human Resources. (Tr. 70, 212.) Ms. Thompson and other Local Union officials waited in a conference room until Mr. Stone arrived. (Tr. 212.) When Ms. Thompson asked Mr. Stone with whom she could speak to get access, Mr. Stone replied, “‘Well it’s Friday afternoon.’ He said, ‘I’m not going to bother him on a Friday afternoon.’” (Tr. 213:19-20.) Mr. Stone did not testify at trial. Bradley Butler, the individual to whom Mr. Stone was referring, eventually spoke with Ms. Thompson’s boss that day, but Ms. Thompson was still denied access and was forced to leave the facility without having conducted her investigation. (Tr. 214-215.)

Beginning on September 9 and continuing to date, the Union has continued to communicate to Respondent the relevance and necessity of the Union’s request for on-site access. (*See, e.g.*, G.C. Exhs. 2, 4, 6, 8, 10, 13.) Nevertheless, to date, Respondent has continued to deny the Union’s safety expert access to the facility.

D. Relative Experience of International Union’s Expert and of Local Union Officials

Ms. Thompson, as the Union’s Resource Technician, Health and Safety Specialist, has advanced training and experience. (G.C. Exh. 29; Tr. 186.) In order to be qualified for her position, Ms. Thompson obtained a health and safety technician certificate, which required two years of study. (Tr. 188-190.) Since commencing her current position, Ms. Thompson has obtained an industrial hygiene technician certificate, which also required two years of study. (Tr. 190-191.) She has an extensive background in both nursing and management-side OSHA risk assessment. (Tr. 193-194.) Her additional qualifications include the following: OSHA 10; OSHA

30; HAZWOP training; radiation training; MSHA training; train-the-trainer training; participation in and facilitation of various conferences and workshops; and participation in OSHA health and safety committees or organizations. (Tr. 188-192.)

Though denied on-site access by Respondent in the instant case, Ms. Thompson has conducted other similar on-site accident investigations in the past at other employers' facilities. (Tr. 204-206.) Specific to fatal accidents, Ms. Thompson has conducted eight to ten investigations. (Tr. 204.) In one such example that occurred prior to September 8, Ms. Thompson investigated the root cause of an accident at a different facility where an employee had been fatally crushed. (Tr. 205-206.) Her investigation in that matter was swift and successful, and her suggestions were taken and the correction was made. (Tr. 206.)

Unlike Ms. Thompson, Local Union officials have no such similar qualifications or experience. Mr. Jaskie, Mr. Dobrzynski, and Mr. Uebele have never experienced a fatal accident while employed at Respondent's facility. (Tr. 47, 120, 157.) None of them have received any kind of specialized training in accidents whether as Local Union officials or as Respondents' employees. (Tr. 47, 116, 144, 158.) They have not received training as to how to react in situations of life-threatening or fatal accidents. (Tr. 47, 116, 158.) Despite the fact that Mr. Uebele operated the crane on the night of September 8, he has never had any training in accident reenactment or reconstruction. (Tr. 162.)

Neither Mr. Jaskie, Mr. Dobrzynski, nor Mr. Uebele is qualified to handle the Union's investigation of the fatal accident. (Tr. 89, 136, 219.) In addition to not having received any accident investigation training, Mr. Jaskie explained that he has immediate emotional attachment to the issue which would influence his investigation. (Tr. 89.) Mr. Dobrzynski explained that he "[w]ouldn't know what to do. Wouldn't know where to start. I have never done anything like

that.” (Tr. 137.) The ALJ properly found, and Respondent has not challenged, that Local Union officials were unqualified to independently investigate the fatality. (ALJD 3:10-13, n.8.)

None of the Local Union officials have been involved in any follow-up investigation regarding the fatal accident. Despite the fact that Respondent performed follow-up investigations at the accident site on working time while work was in progress, it failed to involve Local Union officials. (Tr. 163-164.) Although new standard work protocols have been issued since the fatal accident and were received by the Union on March 20, 2012, no Local Union official was involved in creating such protocols. (G.C. Exhs. 25, 34; Tr. 92, 164, 342-343, 386-392.) While bargaining unit members William Frahman and Dave Klein were involved in creating the protocols, neither is a Local Union official. (G.C. Exh. 34; Tr. 90, 164, 388, 396.) Thus, the Union has been excluded from any post-accident investigations or new standard work protocol creation.

E. Facility Access by Nonemployees

As recently as early- to mid-March 2012, nonemployees have accessed Respondent’s facility. (Tr. 79.) International representatives, local and national politicians, high school students, and customers, dealers, and civic groups have regularly accessed the facility. (Tr. 74-79, 331-334.) Such groups commonly tour the same area where the accident occurred. (Tr. 74-79, 334.) Although some of these groups accessed the facility prior to July, there are not greater risks, such as revelation of confidential information or liability due to injury, to the entity as a result of Respondent’s acquisition of the former Bucyrus facility. (Tr. 333.) To be sure, they are the same sort of risks. (Tr. 333.) The manner in which the products are made has not changed. (Tr. 332.)

III. STANDARD OF REVIEW

The Board applies a *de novo* standard of review for an ALJ's legal determinations. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951). Because the ALJ has the "advantage of observing the witnesses while they testified," the Board gives great weight to the ALJ's credibility determinations and will not overrule credibility determinations except "where the clear preponderance of *all* the relevant evidence" convinces the Board that the ALJ's determinations were incorrect. *Id.* (emphasis in original).

IV. ARGUMENT

A. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) and (5) of the Act by Refusing to Grant On-site Access to the Union's Health and Safety Expert After a Fatal Accident at Respondent's Facility

1. The ALJ correctly applied *Holyoke's* balancing test and applied the correct burden-shifting analysis.

The seminal case regarding a union's right to access an employer's property where the union is the exclusive collective-bargaining representative of the employees is *Holyoke Water Power Co.*, 273 NLRB 1369, which the ALJ properly applied here. In *Holyoke*, the Board enunciated a balancing test in which the employer's property rights must be weighed against the employees' right to responsible representation. *Id.* at 1370. As the Board further explained:

...Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

Id.

Respondent is simply wrong in contending the burden of proof in access cases falls on the Union. (R. Br. Excpt. 27.) Citing the Supreme Court’s decision in *Lechmere*, an organizing case, Respondent argues that “nonemployee union organizers” must only have access to employees outside of the employer’s property and, unless the union can demonstrate that access is infeasible, “the requisite accommodation has taken place.” (R. Br. Excpt. 27, quoting *Lechmere*, 502 U.S. 527 (citing *Babcock & Wilcox Co.*, 351 U.S. 105).) *Lechmere* and *Babcock & Wilcox* are inapposite to the instant circumstances, as they deal with employer property rights in an *organizing* drive, where a union has not yet been elected the exclusive collective-bargaining representative of the employees. Indeed, Respondent quotes *Lechmere* in arguing, “. . . That the burden imposed on the union [to show it has no alternate means in accessing employees other than on-site access] is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principal has rarely been in favor of *trespassory organizational activity*.” (R. Br. Excpt. 27, quoting *Lechmere*, 502 U.S. at 535 (internal citations omitted) (emphasis added).) In essence, Respondent would have the Board extend *Lechmere*’s burden to apply to all situations in which a union has already been chosen as the exclusive collective-bargaining representative of the employees, despite the fact that the union is no longer engaged in “trespassory organizational activity” but rather collective-bargaining representation. The Board should reject such an extension of *Lechmere* and *Babcock*, as it would significantly undermine the ability of the Union, as the exclusive collective-bargaining representative, to responsibly represent its unit members.

Instead, the Board should uphold the ALJ’s decision, as he applied the correct burden-shifting analysis. *Holyoke*’s progeny establishes that, in access cases where the union is already the exclusive collective-bargaining representative of the unit members, the General Counsel has

the initial burden of establishing the relevance of the information sought by the union's representative for access. *Nestle Purina Petcare Co.*, 347 NLRB 891, 891 (2006). If the General Counsel satisfies that burden, the *employer* bears the burden of demonstrating that there are alternative means, other than access, that would satisfy the union's need. *Id.* at 891 (*citing New Surfside Nursing Home*, 322 NLRB 531, 535 (1996) (employer's burden to establish those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access); *Exxon Chemical Co.*, 307 NLRB 1254, 1255 (1992); *American National Can Co.*, 293 NLRB 901, 905 (1989), *enf'd* F.2d 518 (4th Cir. 1991) (emphasis added)).

Although the Union's access request, in light of the safety concerns after the fatality at Respondent's facility, is both relevant and necessary to its duty as the employees' collective-bargaining representative, Respondent cannot meet its burden under *Holyoke* and its progeny of establishing there were alternate means available to the Union that would have satisfied the Union's need for on-site access to investigate the fatal accident. As such, the ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to grant on-site access to the Union's safety expert. Accordingly, Respondent is legally obligated to grant access to Union representatives for reasonable periods and at reasonable times sufficient to allow the Union's representatives to fully investigate industrial accidents and to conduct health and safety inspections. *See Hercules Inc.*, 281 NLRB 961, 961.

2. The ALJ correctly found that on-site access was necessary and relevant to the Union's role as the employees' collective-bargaining representative.

Respondent incorrectly claims the ALJ applied an information request standard, instead of *Holyoke*, here. (R. Br. Excpt. 25-26.) Admittedly, both the Acting General Counsel and the Union have filed exceptions to the ALJ's order and remedy, in which he misapplies an information request remedy, rather than an access case remedy. To that end, the Acting General

Counsel agrees with Respondent's exceptions that the ALJ ordered an improper remedy. (R. Excpt. 75, 76, 78, 81 (limited), 82 (limited).) However, the ALJ properly applied the relevant balancing test set forth in *Holyoke* when he weighed the Union's need for access against the Employer's property interest. Contrary to Respondent's contention, the ALJ also accurately noted that the Board has "frequently found a union's right to access for health and safety reasons outweighs the employer's property interest." (ALJD 8:14-15.) (See, e.g., *Holyoke*, 273 NLRB 1369; *Hercules*, 281 NLRB 961; *ASARCO, Inc., Tennessee Mines Div.*, 276 NLRB 1367 (1985), *enf'd in relevant part* 805 F.2d 194 (6th Cir. 1986); *C.C.E., Inc.*, 318 NLRB 977 (1995); *Exxon Chemical*, 307 NLRB 1254; *American National Can Co.*, 293 NLRB 901.)

Respondent fails to understand the connection between access cases and information request cases, as Respondent incorrectly asserts that the standard for information request cases is whether the information is "relevant" and in access cases is whether access is "relevant *and necessary* to the union's representational duties." (R. Br. Excpt. 2 (emphasis in original).) The standard for both information request and access cases is whether the requested information is "relevant and necessary" to the union's representational duties. Instead of Respondent's misconstruction, *Holyoke* instructs that where, in information requests, the union would be usually entitled to information if it demonstrates that information is necessary and relevant, in access cases, the union is not automatically entitled to access if it demonstrates the information it would glean from access would be necessary and relevant; rather, the union's right to access must be balanced against the employer's legitimate property interest. 273 NLRB at 1370 (internal citations omitted).

Here, the ALJ correctly found that, in requesting access to Respondent's facility to investigate the root cause of a fatal accident, the Union sought plainly relevant and necessary

information. On September 9, the Union's safety expert sought access to Respondent's South Milwaukee facility to investigate the root cause of a fatal accident that had occurred at the facility the previous day. The Union has been the exclusive collective-bargaining representative of the production and maintenance employees at Respondent's South Milwaukee, Wisconsin facility since about 1936. (G.C. Exhs. 1(c), 1(e), 26; Tr. 36-37.) As such, the Union is concerned with safety and health of its bargaining unit members. Safety and health are conditions of employment and thus mandatory subjects of bargaining. *See Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), *enf'd sub nom. Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). Absent on-site access to investigate the root cause of the accident with the goal of preventing recurrences in the future, the Union could not fulfill its obligation to responsibly represent Respondent's workforce as the exclusive collective-bargaining representative.

Respondent's ambivalence towards the nature of this case and its obstructionist approach is troubling. Respondent cavalierly describes the triggering event here as an "unfortunate workplace accident" (R. Br. Excpt. 1); rather, the triggering event requiring Union access to the facility was the work-related death of Mr. Smith, a bargaining unit member, which occurred on Respondent's premises while he was performing the same rotational procedures on large machinery that are used in the facility by other bargaining unit members to this day. (Tr. 166-169.) Respondent ignores applicable law regarding proper union access, argues its property right is paramount, and exaggerates its efforts to "cooperate," despite well-established law deeming union access entirely appropriate in similar circumstances.

It is under this guise that Respondent contends the ALJ failed to determine whether access was "necessary." (R. Br. Excpt. 4.) While the bulk of Respondent's argument actually

goes to whether there were alternate means available to the Union, which is discussed further, *infra*, Respondent raised a few contentions worth dismissing here. First, Respondent asserts that there is no longer a need for on-site access because the equipment has been moved or the accident was a one-time occurrence that “ceased to exist,” impliedly with no on-going risk of recurrence. (R. Br. Excpt. 32, n.11 (distinguishing *ASARCO*, 276 NLRB 1367), 33.) Board law and sound public policy are clear that such arguments are not a defense to denying on-site access after an accident. Indeed, in the very case Respondent cites at footnote 11 of its Brief in Support, in an opinion adopted by the Board, the ALJ in *ASARCO* rejected those same arguments. *ASARCO*, 276 NLRB at 1370 (rejecting the employer’s contention that *Holyoke* is inapplicable because the condition there was an on-going one). As in *ASARCO*, even if the site were already “cleaned up,” Ms. Thompson testified that visual observation of the site would still be useful to see the “actual process” in making recommendations for future accident avoidance. (Tr. 274:19-20.) Furthermore, “[s]afety concerns over conditions which have resulted in an accident are as compelling if not more so than concerns about conditions which present only a potential hazard not yet manifested in an injury.” *ASARCO*, 276 NLRB at 1370.

Absent on-site access to investigate the root cause of the accident with the goal of preventing recurrences in the future, the ALJ properly found that the Union cannot fulfill its obligation to represent Respondent’s workforce as the exclusive collective-bargaining representative. As safety and health information are conditions of employment and thus mandatory subjects of bargaining, *Minnesota Mining*, 261 NLRB 27, the Acting General Counsel has established the relevance of the information sought by the Union. Accordingly, the burden then shifts to Respondent to prove some alternate means would have satisfied the Union’s need. *Nestle Purina*, 347 NLRB at 391.

3. The ALJ correctly concluded that alternate means would not have satisfied the Union's need for on-site access.

The ALJ correctly concluded that alternate means would not have satisfied the Union's need for access, and Respondent cannot meet, and has not met, its burden to establish that there existed satisfactory alternate means. *Nestle Purina*, 347 NLRB at 891. Respondent argues that the Union's need for access was satisfied by the following: the Local Union having participated in the OSHA-conducted investigation; Respondent having offered and provided to the Local Union the police report regarding the fatal accident, a video recording of the crawler-frame rotation procedure from the night of the fatal accident, and new standard work protocols of the revised crawler-frame rotation procedure, which Respondent also erroneously alleges the Local Union partook in creating; Respondent having offered, albeit never provided, to the Local Union the opportunity to somehow direct from off-site another video of the crawler rotation procedure and a copy of Respondent's photographs of the fatal accident; and the fact that the Union had access to interviewing its members off-site and produced a report on those interviews. (R. Br. Excpt. 29-32.) The Union's safety expert testified exhaustively as to the deficiencies of Respondent's purported alternate means, and the ALJ properly credited her testimony (ALJD 6:27-40, n.16; 8:24-34), and each will be discussed in turn.

i. An OSHA-conducted investigation, employer reports, and police reports are not a satisfactory alternative to on-site access.

Respondent's contention that OSHA reports, employer reports, and local law enforcement reports are somehow an adequate alternate means to the Union rather than on-site access is contrary to Board law. In a case strikingly similar to the instant case, *Hercules*, 281 NLRB 961,³ the Board adopted the ALJ's opinion, in which he explained that "[t]he proposition

³ It is particularly noteworthy that Respondent has failed to even attempt to distinguish *Hercules*,

that a union must rely on an employer's good intentions concerning the vital question of the health and safety of represented employees seems patently fallacious.” 281 NLRB at 967 (quoting *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348, 361). The ALJ elaborated further, stating that the union:

“is not obligated to rely solely on reports and information obtained by others. It is entitled to its own independent examination of the facilities and this entitlement is unrelated to the [employer's] contention that its own studies and examinations are performed with such accuracy and expertise that no independent verification is required. Such position amounts to an absolute, closed-door policy and renders irrelevant the balancing test that is required to be done.”

Id. at 970.

In *Exxon Chemical*, the Board found that on-site access must be granted to the union, contrary to suggestions by the employer that the union could obtain information solely from employer-maintained reports. 307 NLRB 1254. The Board held that the employer's records would not provide a sufficient alternate means to the union, and, absent on-site access, the union could not obtain the complex data that an expert could collect when observing employees at work in the plant. *Id.* at 1255.

Similarly here, the purported alternate means Respondent suggests are all inadequate substitutes for on-site access. Respondent has only offered two-dimensional alternatives, such as reports, photographs, or video recordings, and the ALJ properly credited Ms. Thompson's following testimony related to the deficiencies of the information (ALJD 8:29-31, n.18):

- Q: Ms. Thompson, has the Employer provided any information regarding the fatal accident to the Union?
A: Yes, they did.
Q: What has the Employer provided?
A: A DVD.

an almost entirely analogous case involving denial of access in light of a fatality at the employer's plant, given that the Union initially provided the citation to *Hercules* to Respondent as early as September 9. (G.C. Exhs. 2(a), 2(b).)

Q: Have you had a chance to review that DVD?
A: Yes.
Q: Is the DVD sufficient for you to be able to determine the cause of the September 8, 2011 fatal accident?
A: No.
Q: Why not?
A: Again it's only – it's only – it doesn't give me the depth, the angle, the – I can't see – I can't even see the mats in the picture. I have no idea what the mats look like. I can't feel – see the compression, hear the compression. See the chains. I can see the chain, but I can't hear the chains. I can't see what the crane is doing. While this is moving, I can't see what this is doing. I can't see what this is doing while that's – you know what I mean? There is not – I can't see a whole picture at any time. You know, I can't look from over here to over there or from over here to over there. I have – I can't see, hear, feel everything. I can't do anything. I'm looking at something that isn't a complete picture. That's all I see is something goes like this, and that's it. That's all I have as a video that lasts I think it's 45 seconds.
Q: Do you know if anything else has been provided by the Employer to the Union?
A: To me? Oh, to the Union? The police report.
Q: Have you had a chance to review the police report?
A: Yes, I have.
Q: And are the police reports sufficient for you to be able to determine the cause of the September 8, 2011 fatal accident?
A: No.
Q: Why not?
A: Well, again, I can't see what the actual – what they're talking about – you know, to be able to take it and to look again and see that, that what they're talking about – you know, the two chains, the three chains, the two trolleys, the one trolley, the[] put the cribbings here, put the mats here, the extra mats here, you know – and it misses the mat, it's on a wood floor, then it's on the cement, then it's lifted up. Now he's talking about that, you know, there's policy – you know, there's these – there's a lot that you can't get the whole image going when you can't hear it, you can't – there's so much that's happening. You know, if you really would sit and look at a process, there is more than just somebody just going like this and, you know, hooking it, turning it, you know, putting a chain on, somebody going like this with the remote crane, you know, welding it. You know, there's a lot more than that really going on. You know, there's the compression, there's the movement, there's – you know, there's the slight turning, there's the noise, there's the creak. You know, you got – there's a lot of pressure of things going on. And to understand the pressure on the chains and just a lot of things that are going on, you really need to be there to observe.

(Tr. 217:10-219:14.)

Through its communications with the Union, Respondent indicated it would be willing to re-vidiotape the crawler rotation procedure as per the Union's off-site direction. (G.C. Exh. 15; Tr. 339.) Respondent reiterates this point in its brief. (R. Br. Excpt. 33, 35.) Respondent did not explain how that would logistically function. On cross-examination, Respondent implied that, although it refuses to grant on-site access to the Union's safety expert, it would be willing to undertake the expense and time of photographing every single angle of the room in which the accident occurred.⁴ Both of these options are insufficient alternate means. Ms. Thompson clearly articulated why two-dimensional recordings do not substitute for actual observation in that they cannot establish depth, perspective, noise, or pressure – subject matters that are necessary to observe. (*See generally* Tr. 217-219, 230.) No matter that Respondent views Ms. Thompson's expert assessment as "Zen-like" (R. Br. Excpt. 35), the ALJ properly found that Respondent failed to bring forth any expert to refute Ms. Thompson's testimony (ALJD 6:31-32, n.14), as it is Respondent's burden to prove that alternate means other than on-site access were available to the Union. *Nestle Purina*, 347 NLRB 891.

⁴ Q: So if you asked the Company to take a picture of every area of that room from every angle, you could look at them to your heart's content and see every possible angle or scenario, and if you felt you needed additional angles or lightings or perspectives, you could ask them for those as well, correct?

A: But I still can't see the lighting on the – I still can't see how – hear it. I still can't understand the angle. I still can't – there's still things that you can't get the depth. You still can't get that 3D perspective.

Q: In a picture.

A: That is what's missing.

Q: Right. From a picture. Correct?

A: That is what's missing from a picture and a video.

Q: And if you take video of the area –

A: Same thing.

Q: -- from different perspectives, your view is that's still not adequate?

A: Correct.

(Tr. 230:2-23.)

Respondent's contention that either the OSHA-conducted or police-conducted investigation serves as an alternate means also fails. (R. Br. Excpt. 29, 33.) Respondent set forth such an argument to the Union in its post-accident correspondence, which the Union repeatedly rejected. (*See, e.g.*, G.C. Exh. 4 ("The role of the Union is distinct from that of OSHA and local law enforcement. OSHA determines whether or not there have been violations of the Occupational Safety and Health Act and the regulations promulgated there under [sic]. Local law enforcement investigates whether or not a crime has been committed.")) Moreover, Board law is clear that an agency-conducted investigation does not supplant the Union's right to conduct its own investigation relating to unsafe working conditions. *Hercules*, 281 NLRB at 967 (finding "without merit the bare claim that the Union could have had a thorough, complete, meaningful, and proper investigation without an inspection of the accident site by its own investigator and that the reports of investigation made by others provides a satisfactory and adequate alternative"); *ASARCO*, 276 NLRB at 1369 (rejecting the employer's "arguments that such access [by the union's representative] was unnecessary because the hygienist was able to compile a competent report on the accident through other sources including the MSHA report").⁵

Finally, Respondent argues that the investigation conducted by Jim Nowak, a grant trainer with the Union who also conducts ERTs, is an adequate alternate means available to the Union. (*See* R. Br. Excpt. 31-32; R. Exh. 1; Tr. 246.) Such an argument is deficient for the same reasons stated earlier: Mr. Nowak was not granted on-site access, which is necessary for

⁵ Respondent's contention that it somehow aided in having Local Union officials involved in the OSHA investigatory interviews or police-led interviews is inaccurate. (R. Br. Excpt. 29; R. Excpt. 1-3.) No Union representative sat in on any police-led interviews. (Tr. 56:2-6.) Union representation during the OSHA interviews was in part requested by the OSHA investigator and in part by the Local Union. (Tr. 56:15-18.) Furthermore, Local Union officials sat in on the OSHA-conducted investigations on September 8 "to represent the people that were being questioned." (Tr. 56:9-21.) None of the Local Union officials asked questions during the OSHA-led interviews. (Tr. 56, 121, 159.)

appropriate representation of the bargaining unit. Mere discussions with witnesses and hearsay are not adequate to determine the root cause of the accident. Indeed, Ms. Thompson testified to the deficiencies of Mr. Nowak's report, specifically that there were "no definitive answers" or "conclusions" in his report. (Tr. 269:14-16, 278:4-6.) Likewise, Ms. Thompson explained that her own report, which in part incorporates Mr. Nowak's report (Tr. 262-263), is inconsistent with other reports she has written in the past, as there are no conclusions. (Tr. 220.) Finally, Ms. Thompson testified that, irrespective of the accident investigation report, an on-site inspection is still necessary. (Tr. 269.)

ii. The ALJ correctly found that, unlike the Union's safety expert, Local Union officials were not qualified to investigate health and safety concerns/fatal accidents.

Respondent asserts that alternate means, other than on-site access, were available to the Union because Local Union officials were involved (albeit on a limited basis) in the OSHA investigatory process and/or involved somehow in the alleged "re-enactment" and/or creation of new standard work protocols for the crawler rotation procedure. (R. Br. Excpt. 29; R. Excpt. 1-5, 8-13.) This argument fails under *Hercules* for determining who should be permitted access as the Union's representative. 281 NLRB at 968. There, in rejecting the employer's claim that local union officers were satisfactory alternatives to the union's nonemployee representative's requested visits, the ALJ considered that the union's nonemployee representative had advanced training and expertise and had conducted similar tests in other plants, and that the local union representatives had no such qualifications or experience. *Id.*

Similarly, in *ASARCO*, a case with analogous facts, the Board upheld the ALJ's finding that local union officials were not adequate alternatives to on-site access by the union's nonemployee representative. 276 NLRB 1367. There, the union had requested on-site access for

its health and safety expert after a fatal accident had occurred at the employer's facility. *Id.* The ALJ rejected the employer's argument that the local union officials' 20 years of on-the-job experience made them qualified to investigate because they did not have "accident investigation experience." 276 NLRB at 1368, 1370.

Here, the ALJ properly found that Ms. Thompson is the Union's safety expert, and Respondent has not excepted on the basis that she is not, somehow, a safety expert.⁶ (ALJD 3:10-13; 6:31-32, n.14; 8:41-42.) The ALJ also correctly found that, unlike Ms. Thompson, the Local Union officials have no such similar qualifications or experience. (ALJD 3:10-12, n.8.) None of them have experienced a fatality in the facility before. (Tr. 47, 120, 157.) They have never received training as to how to react in such situations, and none of them have specialized training in accidents. (Tr. 47, 116, 144, 158.) All of them testified that they are not qualified to handle the Union's investigation of the fatal accident. (Tr. 89, 136, 219.)⁷ Mr. Uebele, whom Respondent, in particular, argues was an adequate alternative due to his years of working for Respondent and the fact that he operated the crane the night of the accident, has never received any training in accident re-enactment or reconstruction. (Tr. 162; R. Br. Excpt. 31.) That he has years of experience as a crane operator does not make him a competent accident investigator. *See ASARCO*, 276 NLRB at 1368, 1370.

Respondent's argument that there were alternate means available to the Union, other than on-site access, because the Local Union officials were involved in creating new standard work protocols also fails. (R. Br. Excpt. 29; R. Excpt. 9-12.) First, none of the Local Union officials have been involved in any follow-up investigation regarding the fatal accident. Respondent failed to involve Local Union officials in its follow-up investigations at the accident

⁶ See discussion of Ms. Thompson's qualifications, at pages 9-10, *supra*.

⁷ See discussion of Local Union officials' lack of qualifications, at pages 10-11, *supra*.

site. (Tr. 163-164.) Although new standard work protocols have been issued since the fatal accident, no Local Union official was involved in creating such protocols. (G.C. Exhs. 25, 34; Tr. 92, 164, 342-343, 386-392.) Although bargaining unit members William Frahman and Dave Klein were involved in creating the protocols, neither is a Local Union official. (G.C. Exh. 34; Tr. 90, 164, 388, 396.)

Despite the fact that the Union has continually argued to Respondent that the Local Union officials are not competent investigators,⁸ Respondent has obtusely insisted on denying the Union's safety expert access to its facility. "Access to an accident site by an experienced investigator is fundamental to an accurate, authoritative, and comprehensive report on an accident." *ASARCO*, 276 NLRB at 1369. Here, the Union's safety expert, *not* its Local Union officers, is the individual who must be granted on-site access. Accordingly, the Board should uphold the ALJ's decision, and his credibility determinations as to Ms. Thompson's testimony, that no alternate means were available to the Union. *Standard Dry Wall*, 91 NLRB 544, 545.

4. Respondent has failed to articulate any legitimate property interest that would outweigh the Union's right to access the facility.

In addition to arguing on-site access was not "necessary" for the Union to responsibly represent its unit members, Respondent excepts on the basis that the ALJ failed to fully appreciate Respondent's property interest. Respondent's contends that its property interest is so strong that the Union should be prohibited from accessing it even in the most extreme circumstances – a bargaining unit employee being fatally injured on the job. Nevertheless, Respondent has never articulated why access must be denied in this case or why its property interest outweighs the Union's interest in gaining access to the facility. Indeed, "property rights

⁸ See, e.g., G.C. Exh. 4 ("...[T]he Local Union representatives have not had adequate training to be able to identify the root causes of the accident so that the cause or causes can be addressed with the parties.").

alone will not suffice as a reason for denial of rights guaranteed under the Act.” *Fafnir Bearing Co.*, 146 NLRB 1582, 1586 (1964), *enf’d* 362 F.2d 716 (2d Cir. 1966).

- i. **The ALJ properly found that Respondent has consistently permitted access to third parties, which is relevant as it undermines Respondent’s purported property interest.**

Respondent improperly claims as irrelevant and incorrect the ALJ’s finding that Respondent has consistently permitted access to third parties, arguing that such information is only relevant if the Acting General Counsel were alleging discriminatory motive under Section 8(a)(3) of the Act. (R. Br. Excpt. 38-46). The Acting General Counsel concedes it is not alleging any violation of Section 8(a)(3). However, the ALJ’s correct finding that Respondent permits third-party visitors “frequently” is clearly relevant as it *significantly* undermines Respondent’s purported property interest. The extent to which third parties are permitted on an employer’s job site is one of the factors considered in an analogous case, *Hercules Inc.*, 281 NLRB 961.

In *Hercules*, the Board affirmed the ALJ’s decision, which elaborated on *Holyoke*’s balancing test. There, the ALJ enunciated the following factors to be evaluated for their relative weight: (1) the availability of alternative means to the union to obtain information other than through an invasion of the property; (2) the nature of the employer’s operation; (3) the impact of access on production and discipline; (4) the extent to which nonemployees are permitted to enter on private property; (5) the nature of the information sought as a result of the access request; and (6) the location on the property where the exercise of the protected activity will occur. 281 NLRB at 970. These factors all weigh substantially in favor of granting access to the Union. The first factor has been discussed in detail, *supra*. The remaining factors, which relate to confidentiality of the employer’s operations and impact on production, are addressed in detail immediately below.

Respondent has broadly alleged it is concerned with the Union revealing proprietary information to its competitors; however, it has not expressly stated that is the reason for denying the Union access to its facility. To be sure, Respondent stated that the ALJ erred in assuming that Respondent's property interest was related to confidentiality just because Respondent invoked those concerns when discussing the disclosure of documents to the Union. (R. Br. Excpt. 38, *citing* G.C. Exhs. 5, 7(a).) In any event, Respondent's bare assertion that its processes are confidential and proprietary so as to deny the Union access is fallacious. The standard work protocols (G.C. Exh. 25), which Respondent alleged to the Union were confidential (G.C. Exhs. 11, 14(a), 15, 17, 19, 21, 23, 24, 25), were received as evidence in the record without any protective order. Moreover, Respondent did not put any confidentiality restrictions on the two DVDs proposed by all parties as Joint Exhibits 1 and 2 to the ALJ.⁹ Respondent also gave the work protocols to OSHA without any protective order qualifier. (Tr. 222-223.) In addition to the access consistently and "frequently" granted to nonemployees, the OSHA representative witnessed such alleged "proprietary" information during the crane operation on September 8. (Tr. 335.)¹⁰ When Respondent provided the standard work protocols to OSHA, it never claimed

⁹ The Acting General Counsel is not excepting to the fact that the ALJ refused to receive these two exhibits, although the Union and Respondent are so excepting. Here, the Acting General Counsel merely asserts their relevance, in that Respondent's purported confidentiality concerns are significantly undermined by the lack of care it gave in admitting in the record the same documents it made the Union leap through hoops to obtain. (G.C. Exhs. 11, 14(a), 15, 17, 19, 21, 23, 24, 25).

¹⁰ The Acting General Counsel requests that the Board take administrative notice that the police investigatory file, which includes photographs of the accident scene, is readily available under Wisconsin Statutes Section 19.35(1) (2011-2012), and no protective order has been requested of the South Milwaukee Police Department pursuant to Wisconsin Statutes Section 19.36(5). The Acting General Counsel also requests that the Board take administrative notice that, because Respondent did not inform OSHA that its standard work protocols were a trade secret or otherwise confidential (Tr. 222-223), they will not be held as such and are subject to disclosure pursuant to FOIA requests under 29 CFR § 1903.9 (2011).

they were a trade secret or otherwise confidential. (Tr. 222-223.) Moreover, Ms. Thompson had informed Respondent that she was not interested in seeing anything other than the accident site and would even allow Respondent to blindfold her and take her to the site (Tr. 212), and the Union has demonstrated its willingness to ensure information is kept confidential. (*See, e.g.* G.C. Exhs. 8, 10, 14(b), 16, 18, 22, 23.) Ms. Thompson also explained that her reports generated from her investigation are not made public but rather are disseminated only to the involved employer and union. (Tr. 203.)

Further, any impact on Respondent's production by granting on-site access to the Union's safety expert would be *de minimis*. Respondent cannot argue that the Union's limited access would disrupt production any more than Respondent has already done. Respondent performed its own investigations during working time on the floor with employees that were on the clock. (Tr. 163-164.)

Moreover, contrary to Respondent's assertion, that Respondent consistently grants facility access to nonemployees is relevant to undermining both Respondent's purported property interest and any claim that Union access would disrupt production. The ALJ correctly found that nonemployees have frequently accessed the facility (ALJD 6:3-14.), and as recently as early to mid-March 2012. (Tr. 79.) Respondent cites only to Bolhous' testimony in contending that no such access was granted after Caterpillar acquired Bucyrus. (R. Br. Excpt. 40.) To the extent that Respondent contends only Bolhous' testimony should be considered, the ALJ properly credited Jaskie's testimony that nonemployees frequently access the facility and have done so since Caterpillar acquired Bucyrus, and such credibility determinations should be afforded deference. *Standard Dry Wall*, 91 NLRB at 545. Moreover, the record is clear that international representatives, local and national politicians, high school students, and customers, dealers, and

civic groups have regularly accessed the facility and commonly tour the same area where the accident occurred. (Tr. 74-79, 331-334.)¹¹ Although some of these groups only accessed the facility prior to Respondent's acquisition of the former Bucyrus facility, the risks associated with access, such as confidentiality and liability, have not changed. (Tr. 333.) Indeed, the manner in which the products are made has not changed. (Tr. 332.)

As in *ASARCO*, Respondent's denial of access to the Union was broad and not conditioned on production concerns. 276 NLRB at 1370. "When there is a lesser expectation of preserving the property right, or when the statutory right pursued is substantial or would involve only a minimal intrusion on their property right, the need to protect the property right correspondingly is less stringent." *Hercules*, 281 NLRB at 970.

ii. The sole decision relied upon by Respondent, *Brown Shoe*, is both factually distinguishable and aberrant.

In denying the Union access, Respondent, grasping at straws, relies almost exclusively upon *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), reversing 312 NLRB 285 (1993). (R. Br. Excpt. 2, 24.) *Brown Shoe* is both factually distinguishable and an aberrant decision and should not have any sway here. Also, notably, the Eighth Circuit in *Brown Shoe* reversed the Board, which had held that the union there was entitled to access in order to responsibly represent its unit members. There exists *no Board decision* where the union, as the exclusive collective-bargaining representative, was lawfully denied access. Likewise, there exists *no decision, whether Board or Circuit Court*, where the union, as the exclusive collective-bargaining representative, was lawfully denied access after a fatality occurred at the employer's facility.

¹¹ Respondent has made no showing that any of these groups or visitors has been subjected to a confidentiality arrangement.

In *Brown Shoe*, the Eighth Circuit Court of Appeals reversed the Board's decision that the union there be granted on-site access for a time study. 33 F.3d 1019. The Eighth Circuit articulated that the *Holyoke* test was not whether the union had an alternate means of performing a time study or collecting time study data but rather whether the union has alternate means of effectively representing the employees on the particular bargaining issue. 33 F.3d at 1023. Unlike the instant case, the court observed, among other things, that the union had resolved numerous piece-rate grievances without time studies; that time studies may be available from the employer's other facilities; and that the union never requested a joint time study investigation, which it was entitled to do under its collective-bargaining agreement. *Id.* at 1023-1024. The court was also concerned with the union's refusal to offer assurances to the employer that the presence of its representative would not be disruptive. *Id.* at 1024.

Contrastingly here, the issue in *Brown Shoe* did not involve an accident, let alone a fatality. Moreover, there is no evidence that the Union has ever investigated a fatal accident without an on-site investigation. There is no evidence that this exact accident has occurred at another facility of Respondent, so there is no alternative information to be gleaned in that respect. Additionally, although the parties' contract states that Respondent and the Union "will cooperate in the objective of eliminating accidents, health hazards and protecting the Plant environment," this does not necessarily entitle the Union to request a "joint investigation" as in *Brown Shoe*. (See G.C. Exh. 26, Article X, Section 1001.) In any event, since September 9, Respondent has rebuffed the Union's request to undertake a joint investigation with Respondent. (See G.C. Exh. 3 at 1 ("I write in further response to the Union's request to access the Bucyrus facility in Milwaukee in order to conduct what you described as a 'joint investigation' of the workplace accident that occurred at the facility on September 8, 2011.")) Finally, any concern

by Respondent regarding the disruptiveness of Ms. Thompson's presence is unfounded, as Respondent conducted its own investigations of the accident on working time while work was in progress. (Tr. 163-164.) Respondent allows other groups into the same area without concern for disruptiveness. (Tr. 74-79, 334.) Moreover, to the extent Respondent is concerned about the proprietary nature of the subject matter under investigation, the Union has already demonstrated its willingness to enter into confidentiality agreements with Respondent. (*See, e.g.*, G.C. Exhs. 8, 10, 14(b), 16, 18, 22, 23.)

Any suggestion by Respondent that the Union failed to request alternate information and thus should not be granted on-site access is factually incorrect and not the correct standard. Although in *Brown Shoe*, the court considered that the employer had provided certain information to the union and the union could have sought information elsewhere, those factors alone are not dispositive. 33 F.3d at 1023-1024. Even if relevant, it is Respondent's burden, which it has failed to meet, to demonstrate that those alternative sources of information were sufficient alternates to on-site access. *See, e.g., Nestle Purina*, 347 NLRB at 891, 893 (internal citations omitted). The deficiencies – such as lack of dimension, perspective, depth, or other sensory indicia – of the information Respondent contends the Union should have requested are detailed *infra*. Further, the moment the Union became aware such information existed, it submitted a request for that information. (*See* G.C. Exhs. 5, 6, 11, 12.)

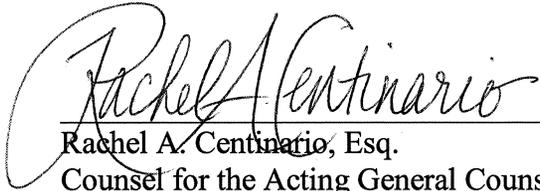
V. CONCLUSION

The Acting General Counsel respectfully requests that the Board reject Respondent's exceptions except for those related to the remedy and adopt the ALJ's decision that Respondent violated Section 8(a)(1) and (5) of the Act when it denied access to its South Milwaukee facility to the Union's safety expert to investigate the root cause of a fatal accident involving one of its

members. Since September 9, Respondent has continued to date to deny such access to the Union, despite the Union's repeated thoughtful explanations concerning the relevance and necessity of on-site access.

The Acting General Counsel also respectfully requests that the Board find that, in accordance with Respondent's exceptions 75, 76, and 78, and to a limited degree 81 and 82, the ALJ's remedy is incorrect, as it provides only that the parties bargain over a confidentiality agreement, which is an information request remedy, *not* an access case remedy. Instead, and consistent with *Holyoke* and its progeny, the Acting General Counsel seeks an appropriate notice to employees and an order requiring that Respondent cease and desist from engaging in the above unlawful conduct, as well as an affirmative order that Respondent grant access for reasonable periods and at reasonable times sufficient to allow the Union's representatives to fully investigate industrial accidents and to conduct health and safety inspections.

Respectfully submitted this 31st day of October, 2012.



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Caterpillar Inc.
Case 30-CA-064314

Copies of Counsel for Acting General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support of its Exceptions to the Administrative Law Judge's Recommended Decision and Order have been sent October 31, 2012 by the following methods, to the following parties of record:

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