

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

Submitted by:

Rachel A. Centinario
Counsel for Acting General Counsel
National Labor Relations Board
Region 30
310 West Wisconsin Avenue, Suite 700W
Milwaukee, WI 53203

Pursuant to Section 102.46(h) of the National Labor Relations Board's ("Board") Rules and Regulations, Rachel A. Centinario, Counsel for the Acting General Counsel ("Acting General Counsel"), submits this Reply Brief in Support of Acting General Counsel's Exceptions to the Administrative Law Judge's ("ALJ") Decision and Order.

I. INTRODUCTION¹

Caterpillar Inc. ("Respondent") both misses and misconstrues Counsel for the Acting General Counsel's exceptions to the ALJ's Decision and Order. The ALJ correctly found that Respondent violated Section 8(a)(1) and (5) of the Act in refusing to grant access 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") after a fatality in Respondent's facility. The ALJ also properly applied *Holyoke*'s balancing test to the present case, correctly finding that there was no alternate substitute for access to the facility in order to conduct an investigation of the fatal accident, and that Respondent's insistent refusal to grant access to the Union is unlawful.

Where the ALJ erred was in fashioning remedial relief. Instead of requiring that Respondent grant access for reasonable periods and at reasonable times sufficient for the Union to conduct an investigation that would permit responsible representation of its members, which would be consistent with access case remedies, the ALJ ordered that the parties first bargain over

¹ General Counsel Exhibits will be referred to as (G.C. 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 the Acting General Counsel's exceptions will be referred to as (GC Excpt. __), and citations to the Acting General Counsel's brief in support of its exceptions will be referred to as (GC Br. Excpt. __). Citations to Caterpillar Inc.'s ("Respondent") answering brief to the Acting General Counsel's exceptions will be referred to as (R. Ans. Br. __). Citations to the Acting General Counsel's answering brief to Respondent's exceptions will be referred to as (GC Ans. Br. Excpt. __.)

confidentiality concerns. After improperly finding that Respondent had a “significant” confidentiality interest in granting the Union access to its facility, the ALJ relied upon an inapposite information request case in creating the remedy. Even if the Board were to apply such a standard to the instant case, it is clear that Respondent did not have a “legitimate and substantial” confidentiality concern.

II. ANALYSIS

Although the ALJ properly applied *Holyoke’s* balancing test, the Acting General Counsel excepts to the ALJ’s Decision and Order on the basis that he incorrectly fashioned an information request remedy. *See Holyoke Water Power Co.*, 273 NLRB 1369 (1985). Respondent mischaracterizes the Acting General Counsel’s exceptions by stating that it “agrees that the ALJ committed reversible error by failing to apply” *Holyoke’s* balancing test. (R. Ans. Br. 1.) The Acting General Counsel does *not* agree that the ALJ failed to apply *Holyoke’s* balancing test; rather, the Acting General Counsel excepts only on the basis that the ALJ fashioned a remedy that does not comport with the prevailing case law regarding refusal to grant access cases. (*See, e.g.*, GC Br. Excpt. at 1; GC Ans. Br. Excpt. at 14-15 (“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. . . However, the ALJ properly applied the relevant balancing test set forth in *Holyoke . . .*” (internal citations omitted).) Contrary to Respondent’s assertion that there were alternate means other than on-site access available to the Union (R. Ans. Br. at 5), the ALJ properly dismissed that argument and found that the Union’s safety expert credibly testified that

no alternate means existed. (*See discussion in GC Ans. Br. Excpt. at 1-2, 18-25; ALJD 6:27-40, n.16; 8:24-34.*)

The Acting General Counsel excepts only on the basis that the ALJ improperly ordered the parties to bargain over confidentiality concerns. Respondent significantly misquotes the Acting General Counsel's argument stating that none of the Board access case decisions set forth a remedy other than granting access (*see R. Ans. Br. at 3*), and then cites to *Circuit-Wise*, an access case ordering the employer to meet with the union to decide on reasonable times and places for access, in an effort to somehow undermine the Acting General Counsel's argument. (*R. Ans. Br. 3 (citing Circuit-Wise, Inc., 306 NLRB 766 (1992).*)

The Acting General Counsel was clear in asserting that the remedy should require access be granted only for reasonable periods and at reasonable times, consistent with the remedies in *Holyoke* and its progeny. (*See, e.g., GC Br. Excpt. at 5 and cases cited therein.*) The Acting General Counsel asserts this traditional language is used to ensure neither party acts excessively. However, the crux of the Acting General Counsel's exceptions, which Respondent almost entirely fails to address, is that the ALJ erred in ordering that the parties bargain over a confidentiality agreement. Unlike information request cases, no Board access case has required the parties to first meet and bargain over a *confidentiality* agreement before granting access, and it is likewise inappropriate here, given Respondent's proclivity towards permitting access to third parties. (*See, e.g., GC Br. Excpt. at 5, 6; ALJD 8:35-37, 8:42-9:2 (footnote omitted).*)

The ALJ erred in applying *Roseburg*, an information request case, to fashion the remedy here. (*ALJD 9:8-11 (citing Roseburg Forest Products Co., 331 NLRB 999 (2000)); see also GC Br. Excpt. at 1-2.*) However, even applying *Roseburg* here, contrary to Respondent's contention, Respondent had no "legitimate and substantial" confidentiality concerns that would warrant such

a bargaining order here. (R. Ans. Br. at 5-6.) First, the ALJ never articulated that Respondent even had a “legitimate and substantial” interest in the confidentiality of its facility in his decision. (GC Br. Excpt. at 6.) Second, Respondent is incorrect in arguing that the Acting General Counsel did not point to any facts undermining the ALJ’s conclusion. (R. Ans. Br. at 6-7.) The Acting General Counsel noted both that the ALJ’s own finding that “[Respondent’s] property interest was lessened to a degree by a *considerable* history of permitting non-employee visitors to access the facility” (ALJD 8:42-9:2, footnote omitted), and Respondent’s acknowledgment of allowing other groups into the same area without concern for disruption or confidentiality contradicted a finding that Respondent had some sort of confidentiality concern in denying on-site access to the Union here. (*See* GC Br. Excpt. at 6; *see also* GC Ans. Br. at 6, n.2.)

Finally, the Acting General Counsel’s proposed Order and Notice to Employees conforms to the remedial relief afforded under *Holyoke* and its progeny, and the Board should adopt it in place of the ALJ’s erred Order and Notice. (*See* GC Br. Excpt. at Attachment A.) Contrary to Respondent’s argument, the Acting General Counsel’s proposed Order and Notice is not “patently overbroad.” (R. Ans. Br. at 4.) Consistent with the remedies in *Holyoke* and its progeny, the Order and Notice should reflect that access be granted to an unidentified Union “health and safety specialist,” as limiting access to only Sharon Thompson would require the parties to re-litigate the entire case should for some reason Ms. Thompson become unavailable to conduct the investigation in the months and possibly years this case will take to litigate. (*See, e.g., Holyoke*, 273 NLRB at 1370-1372 (requiring access to “an industrial hygienist designated by the Union” and not naming a specific individual); *ASARCO, Inc., Tennessee Mines Div.*, 276 NLRB 1367, 1371, *enf’d in relevant part* 805 F.2d 194 (6th Cir. 1986) (same); *Hercules Inc.*,

281 NLRB 961, 961 (1986) (requiring access for the “union’s representative” generally); *C.C.E. Inc.*, 318 NLRB 977, 981 (same); *Nestle Purina Petcare Co.*, 347 NLRB 891, 895 (2006) (ordering access for “an expert designated by the Union”); *Circuit-Wise*, 306 NLRB at 770 (ordering access for union’s “designated health and safety expert”).)

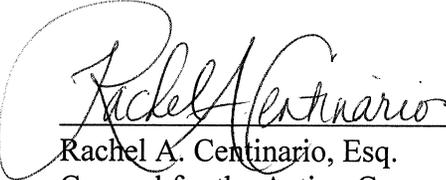
Additionally, the Board should adopt the language that Respondent grant access for the Union to conduct health and safety inspections and to investigate industrial accidents. This language is not overbroad. Here, Respondent broadly denied access to the Union in the most exigent circumstances – a fatality at the facility – and has unreasonably litigated this case. This case involves health and safety issues, as the ALJ properly noted that Respondent was fined \$7,000 by OSHA for failing to “furnish employment and a place of employment which were free from recognized hazards that were . . . likely to cause death or serious physical harm to employees from crashing hazards.” (ALJD 6:18-21 (internal citations omitted).) As all parties must acknowledge, this case unfortunately centers around a tragic, fatal industrial accident that occurred at Respondent’s facility. (*See, e.g.*, ALJD 3:3-4.) As the proposed language is neither overbroad nor irrelevant here, the Acting General Counsel respectfully requests that the Board adopt her proposed Order and Notice to Employees in lieu of the ALJ’s incorrect remedial relief.

III. CONCLUSION

For the reasons set forth above, Respondent’s conduct violates Section 8(a)(1) and (5) of the Act. The ALJ properly applied *Holyoke*’s balancing test to this case but erred in fashioning an information request remedy to this case. Respondent unlawfully denied access to the Union’s safety expert after a fatality occurred at Respondent’s facility, and any property interest was outweighed by the Union’s need for access to investigate the industrial accident so it could responsibly represent its members. No alternate means existed that could substitute for the

Union's need to access Respondent's facility, and the ALJ's recommended Order and Notice to Employees does not adequately remedy Respondent's blatant violation of the Act. Instead of bargaining over confidentiality concerns, and given Respondent's unwarranted insistence on denying the Union access in the most exigent circumstances, the Board should adopt the Acting General Counsel's Proposed Order and Notice and require that Respondent grant access to the Union's health and safety specialist for reasonable periods and at reasonable times sufficient for the Union to conduct health and safety inspections and to investigate industrial accidents.

Respectfully submitted this 14th day of November, 2012.

A handwritten signature in cursive script, reading "Rachel A. Centinario". The signature is written in black ink and is positioned above a horizontal line.

Rachel A. Centinario, Esq.
Counsel for the Acting General Counsel
National Labor Relations Board
Region 30
310 West Wisconsin Avenue, Suite 700W
Milwaukee, Wisconsin 53203-2211

Caterpillar Inc.
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Copies of Counsel for Acting General Counsel's Reply Brief in Support of Acting General Counsel's Exceptions to the Administrative Law Judge's Decision and Order have been sent November 14, 2012 by the following methods, to the following parties of record:

E-FILED

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Sent via REGULAR AND ELECTRONIC MAIL

Mr. Derek G. Barella, Esq.
Mr. Joseph J. Torres, Esq.
Ms. Elizabeth J. Kappakas, Esq.
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601-1723
dbarella@winston.com
jtorres@winston.com
ekappakas@winston.com

Phone: (312) 558-7334
Fax: (312) 558-5700

Sent via REGULAR AND ELECTRONIC MAIL

Ms. Marianne Goldstein Robbins, Esq.
Previant, Goldberg, Uelmen, Gratz,
Miller & Bruggeman, S.C.
1555 North RiverCenter Drive, Suite 202
Milwaukee, WI 53212-3958
mgr@previant.com

Phone: (414) 271-4500
Fax: (414) 271-6308

Sent via REGULAR MAIL

Mr. Daniel Kovalik

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,

Allied Industrial and Service Workers International Union, AFL-CIO/CLC

5 Parkway Center, Room 807

Pittsburgh, PA 15220-3608

Sent via REGULAR MAIL

Mr. Chuck Murray, HR Director

Caterpillar Inc.

1100 Milwaukee Avenue

South Milwaukee, WI 53172-2013