UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COMAU, INC.

and — Case 7-CA-52106

AUTOMATED SYSTEMS WORKERS LOCAL 1123, A DIVISION OF MICHIGAN REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

and — Case 7-RD-3644

WILLIE RUSHING, An Individual

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for the General Counsel.
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for the Charging Party.
Willie Rushing, *Pro Se,*
for the Petitioner.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on November 17, 18, and 19, 2009. The Automated Systems Workers Local 1123, A Division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union) filed the original charge in case 7CA–52106 on May 19, 2009, and the amended charge on July 28, 2009. The Regional Director of Region 7 of the National Labor Relations Board (the Board) issued the Complaint on August 28, 2009. The Complaint alleges that Comau, Inc. (the Respondent or the Company), has failed to bargain in good faith in violation of section 8(a)(5) and (1) of the Act by: making unilateral changes to the healthcare benefits provided to bargaining unit employees without the Union's consent and without bargaining to a good-faith impasse; failing to cloak its representatives with the authority to make proposals or enter into binding agreements; submitting written proposals to the Union without attempting to gain authority to do so; and introducing a new demand that the Union absorb the Respondent's liability for previously accrued health insurance "trailing costs."

On April 14, 2009, Willie Rushing, an individual, filed the petition in case 7–RD–3644 seeking an election to determine whether the Union should be decertified as the exclusive collective-bargaining representative of unit employees. The Regional Director has determined that substantial and material issues of fact exist as to whether the unfair labor practices alleged in case 7–CA–52106 bear a causal relationship to the employee disaffection reflected in the filing of the decertification petition. The Regional Director ordered that the hearings on cases 7–CA–52106 and 7–RD–3644 be held at the same time and place and requested that, in addition to serving as the administrative law judge in case 7–CA–52106, I perform the functions of hearing officer in case 7–RD–3644. As requested by the Regional Director, I conducted the consolidated hearing and, as further requested by the Regional Director, I directed that, upon the closing of the record, case 7–RD–3644 be severed from case 7–CA–52106, and a true and complete copy of the transcript and exhibits be forwarded to the Regional Director. My decision does not include a determination regarding case 7–RD–3644.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with an office in Southfield, Michigan, and various plants in the metropolitan Detroit area, has been engaged in the design, sale, and installation of automated industrial systems. In conducting those business operations the Respondent annually derives gross revenues in excess of $1,000,000 and sells goods and provides services valued in the aggregate in excess of $50,000 from its metropolitan Detroit plants and offices directly to customers. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background Facts

The Respondent, a division of the Fiat automotive company, builds assembly lines and specialty tools for the automobile industry. Since at least 2001, the Automated Systems Workers (ASW) has represented a bargaining unit[1] of the Respondent's production employees, maintenance employees, field service employees, inspectors, and machinists.[2] There were over 200 employees in the unit as of early 2009. In about March 2007, the ASW affiliated with the Michigan Regional Counsel of Carpenters (MRCC), United Brotherhood of Carpenters and

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[1] The record indicates that the bargaining unit was established at the Company by 1961, Transcript at pages (Tr.) 382-383, but does not show whether the ASW was the bargaining representative prior to 1981.

[2] The bargaining unit consists of:

> All full-time and regular part-time production and maintenance employees, inspectors, and field service employees, employed by Respondent at and out of its facilities located at 20950, 21000, and 21175 Telegraph Road, Southfield, Michigan; and 42850 West Ten Mile Road, Novi, Michigan; and machinists currently working at its 44000 Grand River, Novi, Michigan, facility who formerly worked at its facility located at 21175 Telegraph Road, Southfield, Michigan; but excluding all office clerical employees, and guards and supervisors as defined in the Act.

Joiners of America. The most recent collective-bargaining agreement between the Union and the Respondent was effective by its terms from March 7, 2005, until March 2, 2008. Prior to the expiration date, the parties entered into an agreement that extended the effective period of the contract indefinitely, but gave either party the right to cancel the extension with 14 days notice.

Officials of the Respondent and the Union began negotiations for a successor contract in January 2008. The Respondent's chief negotiator was Edward Plawecki – vice-president and general counsel of the Company.[3] Fred Begle, the Respondent's director of labor relations was also a primary spokesperson at the negotiating sessions, and led the Respondent's bargaining committee when Plawecki was not present.[4] The other members of the Respondent's bargaining committee were Jim Sheldon (finance department), Tim Withey (manufacturing department) and Brad Pelachyk (purchasing department). Ozell Freeman and Bill Poland attended some of the early negotiating sessions, but both left the Respondent in early 2008, and neither attended any sessions after April 2008. Lisa Minjares (human resources) attended meetings of a subcommittee on healthcare, and on February 20, 2008, attended what may have been a meeting of the full committee. The Union's chief negotiator was Peter Reuter, an employee of the Union. Other members of the Union negotiating committee were Darrell Robertson (president of the Union local), Daniel Malloy (vice president of Union local), David Baloga (recording secretary of the Union local), Harry Yale (treasurer of the Union local), Jeff Brown (trustee of Union local), and Lonnie McCorvey.[5] The meetings continued in 2008 and 2009, although the parties suspended negotiations for much of the summer of 2008 while the Respondent attempted to reach a contract with a union that represented another group of employees.

Early in the 2008–2009 negotiations with the Union, Plawecki stated that the new contract would have to be "concessionary" and that the Respondent would not provide the employees with anything that increased the Company's costs unless the employees provided the Company with savings in return. According to Plawecki, this meant that any new agreement would have to be "cost-neutral" or create savings as compared to the expired collective-bargaining agreement. Tr. 358-359. Among the major concessions sought by the Respondent were reductions in the employees' company-provided benefits for hospitalization, medical treatment, dental care, and vision care (referred to collectively in this decision as "healthcare" benefits). Under the previous collective-bargaining agreement, incumbent unit employees were not required to pay any premiums for their company-provided

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[3] In July 2009, Plawecki ended his employment with the Respondent. Nevertheless, at the time of his testimony in November 2009, Plawecki was still being paid by the Respondent.

[4] I reject Plawecki's testimony that the Respondent's bargaining committee did not meet when he was absent. Tr. 374. Begle, another witness for the Respondent, testified that he was, in fact, present when the full committee met without Plawecki. Tr. 405. Begle stated that he was in charge of running the meeting for the Respondent and receiving the Union's proposals when Plawecki was not present. Tr. 491-492. Begle's account is lent support by the Respondent's minutes of bargaining sessions, which list Begle, but not Plawecki, among the attendees at number of meetings of the full committee. Respondent's Exhibit (R Exh.) 16. Based on the evidence, I credit Begle's testimony that the Respondent's full negotiating committee met during the 2008 to 2009 time period even when Plawecki was not present, and that Begle led the Respondent's negotiating team on those occasions.

[5] At the start of the negotiations in 2008, the Union was bargaining as part of a two-union coalition. Officials from the other union – referred to in the record as "the Wisne Employees Association" – attended some of the early negotiating sessions, but in about August 2008 the two unions disbanded the coalition and began separate negotiations with the Respondent.

healthcare coverage. Although the Respondent used a "self-insured" health plan, the coverage was provided through Blue Cross/Blue Shield (Blue Cross). Under the Respondent's proposed contract, the Respondent would still be self-insured and coverage would still be provided through Blue Cross, but the unit employees would be required to pay health insurance premiums for coverage. The amounts of the employee premiums were significant. The Respondent's last best offer[6] provided that each employee's premium payment would be between $57.28 and $453.05, per month depending on the level of benefits chosen, the type of coverage (individual, two-person, or family), and the extent of cost increases during the term of the contract. Respondent Exhibit 3 at Page 20.[7] The employees could also pay an additional $321.04 to $507.26 per month to obtain coverage for a child between 19 and 25 years of age. The Respondent's new plan also reduced the employees' coverage in some respects.

The healthcare issue became a sticking point between the parties. The unit employees were opposed to paying health insurance premiums unless they received increased compensation in return.[8] The Respondent declined to increase the unit employees' compensation. In an effort to resolve the healthcare issue, the Union, on August 22, 2008, suggested an alternative approach under which the Respondent would cease providing the Company's own healthcare insurance to unit employees, and the Union would offer health insurance to the unit employees through an MRCC plan. The hope was that, because the MRCC had a large number of members, using the MRCC plan would allow the Respondent to realize adequate savings without requiring the employees to pay premiums. Under this proposal the Respondent, instead of paying to finance its own self-insured health insurance plan for unit employees, would make contributions to the MRCC healthcare plan on a per-employee basis to help cover the cost of insuring those employees under the MRCC plan. In order to reach agreement on such an arrangement, the parties would have to agree on, inter alia, the amount the Respondent would contribute to the MRCC plan. From the point of view of unit employees, the most notable advantage of the MRCC health insurance plan was that little or no insurance premiums would be required for participating. Like the Respondent's health insurance plans, the MRCC insurance was provided through Blue Cross.

In August 2008, the Respondent's negotiators indicated that the Company was interested in the Union's idea of switching the unit employees to the MRCC health insurance plan. The Respondent's primary condition was that the switch had to adequately reduce the Company's health insurance costs as compared to its health costs under the prior contract. One factor the parties took into account when calculating the amount the Respondent would save by switching was that, even after the unit employees were moved to the MRCC plan, the

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[6] For convenience, I refer to this proposal as the "last best offer" because that is the title the Respondent placed on the written proposal. By referring to it in that matter, I do find, or imply a finding, that the Respondent had reached the end of its rope in negotiations.

[7] Initially, the premiums the Respondent was seeking from employees had been higher, but the amounts were reduced during negotiations in 2008.

[8] During negotiations in 2005 for the prior contract, the Union had chosen to forgo pay increases and bonuses in exchange for retaining the no-premium healthcare benefit. At about the same time, a bargaining unit of the Respondent's employees who were represented by a different union – the Novi Industries Employees' Association (NIEA) –- accepted the premium-required healthcare benefit and received pay increases and bonuses in exchange. During negotiations in 2008-2009, the Union's position was that it would not agree to the diminished healthcare benefit that the NIEA-represented employees were receiving, unless the Respondent provided the Union's members with the same raises and bonuses that the NIEA-represented employees had received for agreeing to the reduction in healthcare benefits.

Respondent would have to finish paying off remaining costs for the coverage that it had previously provided under the Company's plan. More specifically, if the Respondent discontinued the self-insured plan, it would, for a period of approximately 3 to 6 months, continue receiving bills for healthcare services that unit employees had used during the period when they were covered by the Respondent's plan.[9]

In 2008, the Respondent did not attempt to obtain an estimate from Blue Cross of the amount of the "trailing costs." During negotiations with the Union in 2008, the Respondent guessed, Tr. 491, that such costs would total $1 million or more, often using a figure of $1,172,280. The Union discussed the Respondent's trailing costs liability with Blue Cross, and, based on those discussions, contended that trailing costs would be substantially less—about $500,000. Plawecki told the Union that it was very feasible that the parties could reach agreement on moving to the MRCC plan if the trailing costs were, in fact, less than $500,000. In February 2009, the Respondent for the first time asked its own Blue Cross contact to estimate the trailing costs the Company would be responsible for if it terminated the self-insured plan. The figures that Blue Cross provided to the Respondent were far lower than what the Respondent had, during negotiations, been contending the switch would cost the Company. The Respondent's Blue Cross contact first estimated the total amount of the trailing costs at $183,000, and later adjusted its estimate upward to $240,000 and then to $440,000.

B. Declaration of Impasse and Implementation

The parties met more than 20 times in 2008 to negotiate for a new contract. A federal mediator participated in the negotiating sessions on December 2 and 3, 2008. At the December 3 bargaining session, the Respondent declared that the parties were at impasse, gave 14 days notice that it was canceling the contract extension, and stated that it would impose its last best offer on December 22 when the prior contract ceased to apply. The Respondent informed the Union that, despite these actions, management was "prepared to continue negotiations in order to agree upon and reach a successor Labor Agreement to replace the Labor Agreement . . . which was extended through December 21, 2008."

In a letter to unit employees, the Respondent set forth what it called the "key changes" that it intended to impose on December 22. R Exh. 6. Those changes included new rules regarding: seniority; tardiness; possession of various prohibited items; employee use of a co-worker's "scan card"; the notice required from night shift employees in advance of absences; the mileage reimbursement rate; and, the standards for obtaining "double time" and "overtime" pay. The Respondent also notified employees that, effective March 1, 2009, it would no longer offer the existing health insurance plans, but would instead offer healthcare coverage through other, premium-required, medical plans. The imposed last best offer contains a notation that the new medical plans would be "Effective March 1, 2009."

Between the Respondent's announcement of the new insurance in December 2008, and the effective date of that insurance on March 1, 2009, the Respondent took a number of steps to

[9] Witnesses for the Respondent testified that, if the Company proceeded with its proposal to switch employees to another self-insured plan, the Company would not, at that time, be billed for trailing costs. They indicated that the Respondent would, however, still incur the trailing costs at such time as the Company terminated the self-insurance arrangement for any reason, including because it had discontinued, or moved, the operation. This testimony was uncontradicted.

make it possible to switch the unit employees from one plan to the other.[10] From January 23 to 31, 2009, the Respondent held meetings to provide employees with information about the healthcare benefits described in the Respondent's last best offer. By January 31, 2009, the Respondent obtained completed enrollment forms for the new Company plan from every unit employee. The Respondent reviewed the enrollment forms submitted by employees to ensure that they were properly completed. Then, the Respondent entered the information regarding the new healthcare insurance into the Company's payroll system so that, if the new insurance became effective, the proper deductions could be made from employees' paychecks. In addition, Blue Cross prepared new health insurance cards for the employees.

None of the actions taken by the Respondent prior to March 1 constituted a "point of no return" for switching employees to the Respondent's new healthcare plan. Begle, the Respondent's labor relations director, testified that at any point prior to March 1, the Respondent could have chosen to continue providing the unit employees' old healthcare insurance, and cancel the plan to switch those employees to the Company's premium-required insurance. Tr. 504-505. Indeed, Union officials continued to hope that an agreement would be reached to provide insurance through the MRCC plan, without the employees ever being switched over to the Company's premium-required healthcare plan. Union officials helped the Respondent to sign up employees for the Company's new plan, but only because of concerns that there could otherwise be a gap during which employees would be left without any healthcare insurance.

As of March 1, 2009, the parties had not reached an agreement on using the MRCC plan. On that date, the Respondent discontinued the Company's existing healthcare plan, and switched unit employees to the Company's new, premium-required, healthcare plan.

C. Healthcare Insurance Subcommittee Meetings

On December 3, when the Respondent declared impasse and notified the Union that it would impose its last best offer, the Respondent stated that it was prepared to continue negotiations. Beginning on December 8 and continuing through March 20, 2009, the parties met on approximately 10 occasions for negotiations regarding healthcare insurance. In nearly all instances, the parties did not meet with their full bargaining committees to do this, but rather with subcommittees comprised of the persons who were knowledgeable about insurance. The Respondent's subcommittee was led by Begle. Sheldon and Minjares were also members. The Union's healthcare insurance subcommittee was composed of Reuter, Robertson, Baloga and Molloy. Each party's subcommittee had the authority to enter into tentative agreements regarding healthcare, but not into binding agreements. The Union's subcommittee would have to take any tentative agreement to the membership for final approval. The Respondent's subcommittee would have to obtain approval for tentative agreements from the Respondent's full negotiating committee and/or the Respondent's upper management. During the subcommittee meetings, Begle stated that he could not make a decision at a meeting, but rather would have to discuss the matter with the large bargaining group. Each written proposal from the Respondent's subcommittee included the statement that all prior proposals were "null and void." Although the Respondent now claims that it never considered the subcommittee meetings to be negotiations, Begle, the head of its subcommittee, repeatedly identified the subcommittee meetings as "negotiations" and "healthcare negotiating session[s]" in his

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[10] I refer to the Respondent's premium-required healthcare plan as "new" because it was new to the unit employees. That plan was not new to the Respondent, which was already providing it to some employees.

contemporaneous communications with the Union. See, e.g., General Counsel's Exhibit (GC Exh. 9), GC Exh. 19, and GC Exh. 22.

The subcommittee discussions focused largely, although not exclusively, on the amount that the Respondent would pay to the MRCC plan for the employees' healthcare. The record shows that both parties presented multiple written proposals that moved them progressively closer to agreement on a figure for what the Respondent would pay to the MRCC plan. The Union's first subcommittee proposal, made on December 8, provided for the Respondent to pay $1000 per month to the MRCC for each unit employee enrolled in the MRCC plan.[11] This was approximately $214 less than the Respondent's monthly, per employee, cost for the more generous healthcare benefit it was providing under the most recent collective-bargaining agreement. On December 8, the Respondent proposed to make contributions to the MRCC plan that had a "weighted average" of $766 per employee/per month. The Respondent's proposal actually set forth three different per-employee contribution levels depending on the type of coverage the employee chose (individual, 2-person, or family). However, in order to make discussions easier, the Respondent reduced those figures to the single "weighted average" figure of $766. Begle told the Union's subcommittee that the $766 figure was "negotiable."

At a meeting of the healthcare insurance subcommittee on December 15, the Respondent made a new proposal in which it increased the weighted average amount it was offering to pay the MRCC plan to $800 per employee/per month. On December 18, the Respondent increased its weighted average figure again, now to $820 per employee/per month.[12] The parties met next on January 7, 2009, after taking time off during the year-end holiday season. On January 7, the Respondent significantly increased the amount that it was proposing to pay to the MRCC plan.[13] The Union reacted by moving towards the Respondent's proposal on January 15—reducing the amount it was seeking from the Respondent to $880 monthly for each employee. In its February 5 offer the Respondent made a proposal with a weighted average of $835 per month for each covered employee. On February 20, the Union presented a healthcare proposal that met the Respondent's $835 contribution figure. Over the course of the contract, switching to the MRCC plan at that contribution level would result in significant savings for the Respondent as compared to its costs under the old healthcare plan, even when one considered the Respondent's obligation to pay the trailing costs from the old

[11] The Respondent submitted its bargaining notes, including those for the healthcare subcommittee. R Exh. 16. As was subsequently revealed under cross examination, Begle had altered those notes many months after the meetings. Tr. 476-477; see also GC Exh. 38 (attachment is earlier version of some of the bargaining notes). Only a few of the alterations made by Begle were identified at trial, but those alterations tended to favor the Respondent's litigation positions. Begle did not explain why he changed the notes, but it appears likely that the changes were made in order to provide documentation more favorable to the Respondent. For these reasons I do not credit the Respondent's notes of the meetings regarding any disputed matter.

[12] This weighted average was apparently based on the Respondent paying $392 for each of the employees who had individual coverage, $881 for each of the employees who had two-person coverage, and $1060 for each of the employees who had family coverage. GC Exhs. 16 and 17.

[13] On January 7, the Respondent was offering to pay $398 per month for each employee with individual coverage, $900 per month for each employee with 2-person coverage, and $1078 per month for each employee with family coverage. It is not clear that the Respondent calculated a weighted average for its January 7 proposal.

insurance. At the end of the February 20 meeting, the Respondent's negotiators said that they would review the Union's proposal and "get back to" the Union.[14] It was not until March 20, that the Respondent told the Union whether or not the proposal was acceptable to management.

The Union's agreement to the $835 figure did not resolve all the issues that divided the parties regarding healthcare insurance. To begin with, although the Respondent's "weighted average" figure was $835 for purposes of the negotiations, the Company still wanted the figure broken down into different contribution rates depending on whether the enrolled employee had individual, two-person, or family coverage. That apparently meant that if the distribution of employees enrolled in the various types of coverage changed, the Respondent's average per-employee payments to the MRCC plan would change as well. Under the Union's single-figure proposal, changes in that distribution would not affect the amount of the Respondent's per-employee payments to the MRCC plan. Second, the parties had not reached agreement on a system for adjusting the Respondent's payments to the MRCC plan in response to increases in the cost of healthcare insurance. Third, the parties had not reached agreement on the duration of the contract. The Respondent proposed that the new contract remain in effect for 3 years beginning on the date when it was signed, whereas the Union proposed that the new contract run for 3 years from the expiration date of the prior contract.[15]

The Respondent contends that a difference also remained regarding some of the language used in a "hold harmless" provision that the Company had proposed to relieve itself of liability for unit employees' healthcare coverage or healthcare costs if the employees were switched to the MRCC healthcare plan. The record shows that there was no genuine disagreement regarding this provision. The Union agreed to the language that the Respondent had proposed through most of the negotiations. Late in the negotiations, the Respondent deleted some wording from its version of the provision, but the Union neglected to include that change in its proposal of February 20. Begle, in a February 23 email communication to Reuter and Robertson, asked whether the Unions' failure to use the Respondent's most recent wording was "by design or simply an omission." Later that day, Robertson responded with an email communication stating that the version of the provision the Union had used was the last

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[14] The Respondent contends that the Union's offer had an expiration date. I find that contention is not supported by the record. At trial, the Respondent presented a copy of the Union's February 20, 2009, proposal on the cover of which was printed "expires Tuesday, February 23, at noon." R Exh. 12. Later the Respondent conceded that the Respondent itself had added those words to the Union's proposal, and that the words did not appear on the proposal when it was presented by the Union. Tr. 263-264. I credit the testimony of union witnesses who stated that, on February 20, Reuter opined that it was important for the parties to reach an agreement soon, but that the Union negotiators did not state that the February 20 proposal had an expiration date. The Respondent's claim that its negotiators believed the Union's February 20 proposal expired at noon on February 23 is inconsistent with some of the Respondent's actions. For example, subsequent to the supposed expiration of the Union's proposal, the Respondent made email inquiries to the Union regarding the February 20 proposal, GC Exh. 30, R Exh. 10 at 10-52, and discussed it with the Union at a meeting on March 20.

[15] The record also shows that the parties had not come to agreement on a minor issue that was unrelated to healthcare insurance. The Union proposed to deduct ten cents per hour from employees' pay and use that money for a training fund. The Respondent had not agreed to that provision. Since the training fund contribution was to be paid by the unit employees, it does not appear that the Union's proposal imposed any costs on the Respondent. During negotiations, the Respondent never raised the training funds deduction as an impediment to agreement.

electronic version it possessed, and that the Union would consider any alternative wording that the Respondent provided. Robertson spoke to Begle by phone later that day, and stated that the Union did not have a problem with the Respondent's modified hold harmless language.

The Respondent also contends that the parties had a disagreement about which party would pay the Respondent's leftover bills—its "trailing costs"—for the healthcare insurance that the Company had been required to provide under the last collective bargaining agreement. As discussed above, the Respondent would continue to receive such bills for 3 to 6 months after switching to the MRCC plan. The Respondent asserts that it was always management's position that the Union would have to take responsibility for paying those leftover bills. The Union's officials, on the other hand, testified that those costs were treated as the Respondent's responsibility until March 20 when Plawecki unexpectedly added a demand that the Union pay the leftover bills. Plawecki was not a member of the Respondent's healthcare subcommittee, and had not participated in the subcommittee discussions.

The record shows that the healthcare subcommittees of both parties negotiated with the understanding that the Respondent would be responsible for its own leftover bills from the prior insurance. For the reasons discussed below, I find that it was not until March 20 that the Respondent introduced a demand that the Union pay the Respondent's trailing costs. Reuter, Baloga, and Robertson, were very clear and certain when testifying that, prior to Plawecki's March 20 announcement, the Respondent had never suggested that the Union take over responsibility for paying the Respondent's trailing costs. Tr. 79, 223, 241-242. The union witnesses stated that these leftover bills were discussed, but only as a cost to the Respondent that would have to be out-weighed by the savings the Respondent would realize by switching from the old employer-provided plan to the MRCC plan. Tr. 195-196 (Reuter), 241-242, 249-250 (Robertson). On the other hand, Begle, the only subcommittee member who the Respondent called to testify, was vague and somewhat evasive when asked whether, prior to March 20, the Respondent had ever stated that the Union would have to pay those costs. See, e.g., Tr. 420 ("Q. Did you mention to the Union that you expected the Union to pay for these [trailing costs] during these meetings? A. What we said was we cannot agree to anything unless we have a savings to the company . . . ."); Tr. 421 (Begle is asked whether, prior to March 20, the Respondent had mentioned that it expected the Union to pay the trailing costs, and answers "Again we told them we can't have anything that's going to result in something that doesn't give the savings over the implemented offer."). Indeed, Begle conceded that on March 20, when Plawecki demanded that the Union pay the Respondent's trailing costs, "it was a shock to the Union." Tr. 452. Based on the demeanor and testimony of the witnesses, and the record as a whole, I credit the testimony of Reuter, Baloga, and Robertson that prior to March 20 the Respondent had not indicated that it expected the Union to pay the Company's trailing costs, or that such a concession by the Respondent was a condition of reaching agreement. Rather the trailing costs were treated by both parties as an expense to the Respondent that would have to be outweighed by the savings from switching from the old healthcare plan to the MRCC plan.

The documentary evidence supports the testimony of union negotiators that, before March 20, the Respondent had never demanded that the Union agree to pay the Company's leftover bills from the old healthcare plan. The record contains multiple written contract proposals made by the Respondent on the subject of switching employees to the MRCC plan, but the Respondent never included language requiring the Union to take over responsibility for paying the Respondent's trailing costs. Even Plawecki testified that if the Union took on such a responsibility, he would expect that the responsibility would be set forth in the contract. In addition, on the spread sheets that the Respondent and the Union used prior to March 20 to calculate how much the Respondent would save by switching to the MRCC plan, both parties added the Respondent's trailing costs from the prior insurance (referred to on those forms as the "run-out cost") to the Respondent's monthly MRCC payments in order to arrive at the total monthly cost to the Respondent. It is implausible that the parties would have presented the figures this way if, as the Respondent now claims, it was the Company's position before March 20 that the Union would have to pay those leftover bills. Indeed, the mere inclusion of the "run-out" costs on the spread sheets suggests that those were costs to be paid by the Respondent, since the spreadsheets do not list costs to be paid by the Union or its members—such as Union contributions to the MRCC plan, and employee co-payments and deductibles. One of the spreadsheets includes a notation that the Respondent's total monthly savings from switching from the employer's old insurance to the MRCC insurance would outweigh its "run out" costs as of the end of April 2010[16]—after which time the Respondent would begin to realize net savings of $73,652 per month. The underlying assumption of this notation is that the Respondent would be paying those run out costs. Finally, Begle, in a list that he provided to the Union regarding the logistical and other issues relating to a switch to the MRCC plan, made no mention of any payments from the Union to cover the Respondent's trailing costs. GC Exh. 8.

Based on my consideration of the record, I also reject the Respondent's claim that its position throughout negotiations was that switching to the MRCC healthcare plan would have to provide the Company with savings as compared to the new employer plan set forth in the Respondent's last best offer. Rather, the evidence shows that the Respondent's position was that switching to the MRCC plan would have to provide the Company with adequate savings as compared to the more expensive plan required by the last contract, but not as compared to the far-less-generous plan that the Respondent proposed in its last best contract offer. The Respondent's claim to the contrary is rebutted by the fact that the Respondent's own proposals called for Employer contributions to the MRCC plan that were greater than the Employer's cost for the plan in the Company's last best offer. Specifically, although the Respondent calculated its monthly cost for the new company plan at somewhere between $766 and $790 per employee, it made successive proposals for contributing $800, $820, and $835 per employee to the MRCC plan. These were the Respondent's own proposals, and its willingness to make such proposals is incompatible with the subsequent assertion that its position was that switching to the MRCC plan had to create a savings over the Company's proposal for a plan that would cost the Company $766 to $790 per employee. When asked about this, Begle testified that the employer must have increased its proposed MRCC contribution figures above $790 per employee upon discovering that the cost of the Company's new plan was higher than initially thought. However, Begle did not claim to be certain regarding this, and could not say what the higher cost estimate was for the new company plan. The Respondent did not present a single document to substantiate the notion that it had revised its estimate of the per-employee cost of the new employer-provided plan to a figure in excess of the $800, $820, or $835, even after I queried whether such documentation existed. Indeed, the spreadsheet that the Respondent provided to the Union on December 16, 2008, reports that the Respondent was offering to contribute $800 per employee/per month to the MRCC even though the same spreadsheet reports that the cost for the new company plan was only $767 per employee/per month. GC Exh. 17 (attachment to 12/19/08 email); R Exh. 4, at p. 4-000013 (attachment to 12/16/08 email).

Moreover, the Union's officials credibly testified that the Respondent's position during

[16] See GC Exh. 21 (Cost Run Out Breaks Even End of April 2010). This was based on the estimate that the total trailing costs would be $1,172,280. Obviously the net savings would begin much earlier than April 2010 given that the trailing costs were subsequently found to be well under half that amount.

the subcommittee discussions was that switching to the MRCC plan did not have to create savings over the new employer plan, but rather over the old employer plan required by the expired collective-bargaining agreement, see, e.g., Tr. 194, 243, and even some statements by company officials undercut the Respondent's claim to the contrary. For example, Plawecki testified that the Respondent's position was that any new agreement would have to be "cost neutral" or create savings *as compared to the expired collective bargaining agreement*. Tr. 358-359. Based on all the record evidence on the subject, I conclude that both parties understood that they were negotiating for an MRCC plan that would be a compromise between the cost of the Respondent's old health plan and the cost of the much-less-generous plan that the Respondent had proposed, not for an MRCC plan that would exceed even the Respondent's proposal in terms of the employee concessions it afforded the Company.

D. Meeting on March 20, 2009

Prior to March 20, 2009, the Respondent did not tell the Union whether it would accept the Union's February 20 proposal. By the time the parties met again, on March 20, the March 1 effective date for the employer's new healthcare plan had passed, and the Respondent had switched the unit employees to that plan. The Union asked to meet earlier than March 20, but the Respondent was unavailable. Shortly before the March 20 meeting, Plawecki began to hear rumors that some employees were interested in decertifying the Union. During meetings around this time, the Respondent urged the Union to reach a new collective-bargaining agreement and tried to motivate the Union by stating that a new contract would nullify the decertification effort. Tr. 80, 181 (Reuter). The Respondent told the union committee to take a contract to the membership, even if it was not the Respondent's last best offer, and bring the member-ratified proposal back to the Respondent. Tr. 234 (Baloga).

On March 20, at the Union's request, the parties met with their full bargaining committees. Given that on February 20 the parties had essentially reached agreement regarding the level of the Respondent's contribution to MRCC plan, Robertson hoped that the Union would leave the March 20 meeting with a tentative agreement to present to the membership for a vote. However, shortly after that meeting started, Plawecki announced that the Respondent had a problem with the Union's February 20 proposal. Plawecki stated that the Respondent wanted to know how the Union was going to go about paying the Respondent's trailing costs from the old healthcare plan. There would be no agreement, Plawecki stated, unless those costs were paid by the Union. The Union negotiators were surprised by this new demand, and even Begle testified that it "was a shock to the Union." Reuter responded to Plawecki, "[W]ait, why would the Union have to pay this because the trailing costs was [the Respondent's] old bills." The March 20 meeting lasted only about 10 minutes, and essentially ended after the exchange between Plawecki and Reuter regarding the trailing costs.

Subsequent to the March 20 meeting, the Union requested that the Respondent meet with it to discuss a contract, see, e.g., GC Exh. 39, but no further meetings have been held.

E. Prior Related Charges

Prior to filing the charge that underlies the complaint in this case, the Union filed other charges (numbers 7–CA–51886 and 7–CA–51906) challenging the Respondent's December 22 unilateral implementation. On May 29, 2009, after an investigation, the Regional Director dismissed those charges. The Union appealed the dismissal to the General Counsel's Office of Appeals, and on August 31, 2009, the General Counsel denied that appeal, stating:

Regarding the Employer's December 22, 2008 implementation of terms and conditions

> of employment for unit employees represented by the Union, the evidence established that the parties were at a lawful impasse when the implementation occurred. Further, the Employer's conduct at, and away from, the bargaining table was not indicative of bad faith or an unlawful intent not to reach agreement.

R Exh. 14 at 14-9.

Before the action by the General Counsel's Office of Appeals, the Union filed the new charge that underlies the complaint in this case, and amended that charge to add an allegation that the Respondent violated the Act by unilaterally implementing a new health insurance plan on March 1, 2009, in the absence of a bona fide impasse.[17] Prior to the trial in this matter, the Respondent made a motion for partial summary judgment on the grounds that the dismissal of the prior charges, and the General Counsel's denial of the appeal of that dismissal, precluded the allegation in the instant proceeding that the Respondent's new healthcare plan was unlawfully implemented. In an Order dated November 16, 2008, the Board denied that motion, stating that the Respondent had "failed to establish that there are no material issues of fact and that it is entitled to judgment as a matter of law." GC Exh. 1(n). In a footnote, the Board stated, "The Respondent may renew all of its arguments at the hearing before the administrative law judge."

F. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) on about March 1, 2009, by changing the hospitalization, medical, dental, and vision care benefits of bargaining unit employees without the Union's consent and without bargaining to a good-faith impasse. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) during negotiations for a successor collective-bargaining agreement by: failing to cloak its representatives with the authority to make proposals or enter into binding agreements; submitting written proposals to the Union without attempting to gain authority to do so; and on about March 20, 2009, by introducing a new demand that the Union pay the Respondent's accrued health insurance trailing costs.

[17] The Union filed the amendment to the charge on the advice of the Board agent investigating the charge. The Board agent's action in providing that advice was consistent with the General Counsel's Casehandling Manual (Unfair Labor Practices), which instructs Board agents, in consultation with their supervisors, to revise allegations to adjust to developments in the case, and provide the charging party with an opportunity to amend the charge in order to pursue additional allegations. Casehandling Manual Sections 10052.6, 10052.7, and 10062.5. I reject the notion, forwarded by the Respondent, that by complying with these requirements of the Casehandling Manual, the Board agent demonstrated that "[s]he obviously had become an advocate for the Charging Party" or had in any way acted inappropriately. See Brief of Respondent at page 21, fn.7.

III. Analysis and Discussion

A. Respondent's Unilateral Implementation of New Healthcare Plan

The Board has held that when "parties are engaged in negotiations for a collective-bargaining agreement," the employer's obligation to refrain from unilateral changes regarding mandatory subjects "'extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole."' *Register-Guard*, 339 NLRB 353, 354 (2003), quoting *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (Table). The employer's obligation to refrain from such changes survives the expiration of the contract, and failure to meet that obligation is a violation of Section 8(a)(5) and (1) of the Act. *Newcor Bay City Division*, 345 NLRB 1229,1237 (2005); *Made 4 Film, Inc.*, 337 NLRB 1152 (2002).

In this case, there is no dispute that the Respondent unilaterally changed the employees' healthcare benefits and that such benefits are a mandatory subject of bargaining.[18] The disagreement centers on the Respondent's contention that the parties were at a bona fide impasse in negotiations when the Company made the unilateral change. An employer generally may implement some or all of the terms and conditions of employment that are reasonably comprehended by the employer's pre-impasse proposals if the parties have reached an overall impasse. *Richmond Electrical Services*, 348 NLRB 1001 1003 (2006); *Lihli Fashions Corp.*, 317 NLRB 163, 165 (1995). The General Counsel argues that the Respondent was not entitled to unilaterally implement the new healthcare plan for two reasons. First, the General Counsel contends that the parties never reached a bona fide impasse in negotiations for a new healthcare plan, even though they had reached impasse regarding other elements of the Respondent's last offer. Second, the General Counsel argues that even if the parties were at impasse regarding healthcare benefits when the Respondent implemented various non-healthcare provisions of its last best offer on December 22, 2008, that impasse had been broken by March 1, 2009, when the Respondent implemented the terms relating to healthcare. As the Board has held, unilateral implementation violates Section 8(a)(5) even when the parties have reached impasse, if at the time of implementation the impasse no longer exists. *Jano Graphics, Inc.*, 339 NLRB 251 (2003); see also *Richmond Electrical*, 348 NLRB at 1003-1004 (if impasse is broken, the parties' duty to bargain is revived). For the reasons discussed below, the second of the General Counsel's arguments is persuasive, and I find the Respondent violated Section 8(a)(5) and (1) when it unilaterally implemented a healthcare proposal.[19]

"As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service v. NLRB*, 454

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[18] In its amended/supplemental answer, the Respondent admitted that the unilaterally implemented hospitalization, medical, dental and vision care benefit is a mandatory subject of bargaining. GC Exh. 1(j).

[19] I need not decide whether the parties were at impasse regarding healthcare on December 22, 2008, when the Respondent implemented much of its last best offer, since even if there had been an impasse at that time, I find, for the reasons discussed below, that there was no legally cognizable impasse on March 1, 2009 – the date when the Respondent unilaterally implemented its healthcare plan. See *Jano Graphics, Inc.*, 339 NLRB at 251.

U.S. 404, 412 (1982); *McClatchy Newspapers*, 321 NLRB 1386, 1389 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). Anything that creates a new possibility of fruitful discussion breaks an impasse, even if it does not create a likelihood of agreement. *Pavilions at Forrestal*, 353 NLRB No. 60, slip op. at 1 (2008); *PRC Recording Co.*, 280 NLRB 615, 640 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); see also *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d 1293 (4th Cir. 1995) (Impasse exists when both parties believe they are at the end of their rope and that further bargaining would be futile). The record in this case reveals that, far from being at impasse, the parties were in the midst of productive discussions regarding a compromise at the time the Respondent unilaterally implemented its healthcare plan on March 1, 2009. In January and February 2009, there were approximately five subcommittee meetings during which the parties presented written proposals that moved them progressively closer to agreement on the subject of healthcare. Any prior impasse regarding healthcare ceased to exist as of January 7, 2009, when the Respondent made a written proposal that significantly increased the per-employee contribution the Company was offering to make to provide coverage under the MRCC healthcare plan.[20] The positions of the parties continued to converge after that, and, on February 20, the Union made a proposal that essentially agreed to the amount the Respondent had offered to contribute towards coverage under the MRCC plan. Although that proposal did not resolve all issues regarding healthcare, it did bring the parties the closest they had yet been to agreement on a compromise. At the end of the February 20 session, the Respondent's negotiators told the union negotiators that they would review the Union's proposal and "get back to" the union negotiators. When the Respondent unilaterally implemented its own healthcare plan on March 1, the Company's negotiators had not yet responded to the Union's proposal, or provided the Union with any indication about whether the Company would accept that proposal. Given the above, it is clear that any impasse that may have existed when the Respondent implemented most of its proposed contract on December 22, 2008, had been broken as of the time the Respondent unilaterally implemented its own healthcare proposal on March 1, 2009. At that point neither party, and certainly not the Union, was shown to be at the end of its rope, and the parties' proposals had left them positioned for further fruitful negotiations.

The Respondent argues that I should not find its unilateral implementation of the

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[20] The Respondent suggests that these sessions were something less than "negotiations." That claim is dubious, given, inter alia, that, during those subcommittee meetings, agents of both sides presented, and discussed, multiple written proposals for provisions of a labor contract. Moreover, as stated above, in contemporaneous communications to the Union, Begle repeatedly referred to the subcommittee meetings as negotiations. The Respondent's own witnesses stated that the subcommittee had authority to enter into "tentative agreements," although such agreements would require further approval before becoming final. Even assuming that Begle did not have actual authority to negotiate on behalf of the Respondent during these sessions, it is clear that he had "apparent authority." Such authority exists when, as here, "'the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have.'" *Cablevision Industries*, 283 NLRB 22, 29 (1987) (quoting *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969)); see also *Contemporary Guidance Services*, 291 NLRB 50, 64 (1988). At any rate, even were I to accept that the subcommittee meetings were something less than negotiations, it would not affect my conclusion since impasse is broken not only by negotiations, but by anything that creates a new possibility of fruitful discussions. *Pavilions at Forrestal*, 353 NLRB No. 60, slip op. at 1; *PRC*, 280 NLRB at 640. Whatever one calls the subcommittee meetings in January and February 2008, it is clear that they created and advanced the possibility of future fruitful discussions.

healthcare plan unlawful for a number of reasons. First, the Respondent contends that while its new healthcare plan was not "effective" until March 1, 2009, the Company had already "implemented" that plan on December 22, 2008, along with the rest of its last best offer. According to the Respondent, since the parties were at impasse on December 22 when the plan was implemented, it does not matter whether the parties were at impasse on March 1 when the plan was made effective. The semantic distinction upon which this argument relies—i.e., between when a unilateral change is implemented and when a unilateral change is effective—fails not only as a matter of semantics, but also under the facts of this case and the applicable law.

To begin with semantics, Webster's Dictionary defines "implement" as "1. To put into effect. . . ." Webster's II, New Riverside University Dictionary (1984). Thus, it would seem fair to say that a change is generally not implemented until it has been put into effect. The Respondent provides no contrary citation indicating that a change can be implemented without being put into effect.

Even assuming that the definition of "implement" is broad enough to encompass a final action that has not yet been given effect, the evidence in this case shows that the Respondent did not take any final action on December 22, 2008, regarding the announced change in healthcare benefits. Begle, the head of the Respondent's healthcare subcommittee, testified that prior to the March 1 effective date of the new healthcare benefits, the Respondent had not taken any steps that would have prevented the Company from abandoning its plan to make the change. In addition, prior to March 1, not a single unit employee was covered by the Respondent's new healthcare plan. Indeed, according to the Respondent's own claims, it did not even mail enrollment forms to unit employees until January 14, 2009—after the Respondent's January 7 proposal bringing the parties closer to a compromise on healthcare insurance. A change in terms of employment cannot reasonably be viewed as "implemented" for unit employees at a time when that change is not being applied to a single one of those employees and the employer has not passed a "point of no return" committing it to make the change at all.[21] To put it succinctly, what the Respondent did in December 2008 regarding healthcare amounted to an announcement of intent to implement the new plan on March 1—not the implementation of such a plan.

The Respondent has not cited any legal authority showing that the rule permitting an employer to unilaterally implement changes at impasse, also permits an employer to proceed with a change that its officials announced at impasse, but had not yet implemented when impasse was broken. What indications I find in the reported decisions suggest that, to the contrary, the employer must refrain from taking further action to implement a change under such circumstances. In *PRC Recording Co.*, supra, the employer claimed that the parties had reached impasse and that management was, therefore, entitled to unilaterally change its job composition system. The Board affirmed the administrative law judge's conclusion that the change was unlawful because, even if impasse existed at the time the employer initiated the change, that impasse was subsequently broken before the change was completed. "[E]ven if the initiation of unilateral action would be protected" by the existence of impasse, the

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[21] This distinguishes the instant circumstance from one in which a new wage plan is put into effect, but some of the raises scheduled under that wage plan will not be triggered until later dates. In that instance, if the employer has implemented the new wage plan it has passed the point of no return and cannot simply choose to ignore its obligation to provide the raises when the triggering dates arrive. See, e.g., *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

administrative law judge explained, that unilateral action "must cease when, as here, the impasse is immediately broken." 280 NLRB at 640.[22] In *Bryant & Stratton Business*, the employer argued that it was entitled to continue with a change to employees' retirement/termination benefits that the employer announced at impasse, even though impasse was broken between the time when the employer began to implement the change and the time when the change actually became effective for employees. The administrative law judge found that the union proposals breaking the impasse were not "too late" to preclude the Respondent from unilaterally implementing the previously announced change in benefits. 327 NLRB 1135, 1149 (1999), enfd. 140 F.3d 169 (2d Cir. 1998). The Board affirmed the judge's conclusion, but did not pass on the reasoning discussed above. Id. at 1135 fn. 2. Similarly, since there was no impasse on March 1, the Respondent was not free to unilaterally implement a change to healthcare benefits on that date, even assuming the parties had been at impasse when the Respondent announced the change and began to prepare for implementation.

Consideration of the reasoning behind the rule that permits an employer to unilaterally implement changes at impasse also weighs against applying that rule to the facts of this case. In its decision in *McClatchy Newspapers, Inc.*, the Board explained that "the impasse doctrine allowing implementation of employer proposals is legitimated only as a method for breaking the impasse." 321 NLRB at 1389–1390. When the Respondent finally implemented the new healthcare plan on March 1, there was no impasse that needed to be broken. Rather negotiations were ongoing and making progress towards a compromise. Under these circumstances, the March 1 implementation cannot be seen as "a method for breaking impasse," and therefore the only basis on which such an implementation could be "legitimated" was lacking. If anything, the Respondent's action had the opposite effect by interrupting progress towards a compromise.

The Respondent argues that the General Counsel's decision affirming the dismissal of prior charges by the Union, precludes a finding in the instant case that the healthcare plan was implemented on March 1, 2009, rather than, as the Respondent asserts, on December 22, 2008. According to the Respondent, I am bound by the General Counsel's decision upholding the charge dismissal, and that decision necessarily encompasses a finding that the Respondent lawfully implemented all elements of its last best offer, including the new healthcare plan, on December 22, 2008.[23] This argument fails on two accounts. First, the General Counsel's authority not to file a complaint on a particular charge "does not bind the ALJ or the NLRB in a separate but related case." *Cox Publishing of Ohio v. NLRB*, 402 F.3d 651, 668 (6th Cir. 2005); *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 185 (2d Cir. 1998); see also *B.A.F., Inc.*, 302 NLRB 188, 193 (1991) (administrative dismissal or refusal to proceed on a charge is not an adjudication on the merits, and does not preclude further litigation of the subject matter of that charge), enfd. 953 F.2d 1384 (6th Cir. 1992); *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988) (same), enfd. 919 F.2d 839 (2d Cir. 1990). Therefore, litigation regarding the subject matter of the earlier charges is not precluded.

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[22] The Board affirmed the administrative law judge's rulings, findings, and conclusions, and adopted the recommended order as modified. Id. at 615; see also Id. at 616 (While dissenting on other issues, Chairman Dotson makes clear that the Board unanimously concluded that the judge was correct in determining that the unilateral implementation was unlawful.).

[23] The Respondent pursued this same line of argument in its pre-trial motion to the Board for partial summary judgment. As discussed above, the Board rejected the argument and denied the motion, but stated that the Respondent could renew all of its arguments before the administrative law judge.

I considered precedent, cited by the Respondent, which provides that an administrative law judge or the Board cannot make a decision that effectively reverses the General Counsel's exercise of prosecutorial discretion not to issue an unfair labor practices complaint. See, e.g., *Service Employees*, 211 NLRB 982, 984 (1974); *Time Square Stores Corp.*, 79 NLRB 361, 365 (1948), *Cox Publishing*, supra. However, that precedent is inapplicable because, the General Counsel's action on other charges notwithstanding, the General Counsel decided based on *this* charge and *this* investigation to authorize an unfair labor practices complaint alleging that the Respondent unlawfully changed employees' healthcare benefits on March 1. Therefore, action by the Board or myself to find such a violation cannot reasonably be seen as an improper usurpation of the General Counsel's prosecutorial discretion.

Second, the General Counsel's decision to affirm the dismissal of prior charges filed by the Union does not encompass a conclusion that the Respondent implemented its healthcare plan along with other portions of its contract offer on December 22, 2008. In the prior case, the General Counsel found that the implementation on December 22 was lawful because the parties were at impasse on that date. However, the General Counsel, did not specify which terms the Respondent implemented on that date, did not state that the Respondent implemented the entire contract proposal, and made no mention of the healthcare plan. Since at impasse an employer is entitled to choose to implement some aspects of its prior proposal, even while it chooses not to implement others, see *Richmond Electrical Services*, supra, *Lihli Fashions,* supra, a conclusion that the implementation on December 22 was lawful (even if correct) does not mean that the healthcare provisions of the Respondent's last best offer were implemented on that date. The evidence shows that, to the contrary, the Respondent did not implement its new healthcare plan until March 1, 2009.

I find that the Respondent violated Section 8(a)(5) and (1) by changing employees' healthcare benefits without the Union's consent and in the absence of a bona fide impasse.

B. Respondent's March 20 Demand that Union Pay Trailing Costs

The General Counsel alleges that the Respondent intentionally created an impediment to agreement when, on March 20, it introduced an onerous demand that the Union take over the Respondent's responsibility to pay the trailing costs for the insurance the Company had been required to provide under the last collective-bargaining agreement. According to the General Counsel, by intentionally creating this new impediment to agreement, the Respondent failed to meet its duty to bargain in good faith with the Union and violated Section 8(a)(5) and (1).

The Board has stated that "Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), citing *McAllister Bros.*, 312 NLRB 1121 (1993); see also *Houston County Electric Cooperative*, 285 NLRB1214, 1214 (1987) (regressive bargaining tactics that are "designed to frustrate bargaining" are "an indicium of bad-faith bargaining").

The Respondent's March 20 demand regarding the trailing costs is fairly characterized as regressive. The record, and in particular the documentary evidence, makes clear that in January and February 2009 the healthcare subcommittees of both parties bargained with the understanding that, if the MRCC healthcare plan was implemented for unit employees, the Respondent would pay its own trailing costs from the prior healthcare insurance. During that period, the parties moved progressively closer to a mutually acceptable compromise on how they would share the costs of switching to the MRCC insurance. Then, on March 20, Plawecki attended the parties' bargaining session and, for the first time, introduced a regressive demand that the Union take over the Company's responsibility for paying leftover healthcare bills.

Although the Respondent bargained regressively, I find that the record does not establish that the Respondent introduced the new demand for the purpose of creating an impediment to agreement. Even before the Respondent introduced the new demand, there were a number of issues about which the parties had been unable to reach agreement. The areas of disagreement included: whether the Respondent's per-employee contribution would be the same regardless of the type of coverage the employee was enrolled for; the method by which the Respondent's payments to the MRCC plan would be adjusted to account for increases in healthcare insurance costs; and the duration of the contract. These are significant differences and while none of them were insurmountable the record does not show that their resolution was imminent when the Respondent made the new demand regarding trailing costs. Thus, the suggestion that the Respondent introduced the trailing costs demand in order to avoid an agreement is not particularly compelling.

Moreover, Reuter and Baloga—members of the Union's bargaining committee—both testified that in March 2009 the Respondent was pressing the Union to reach a contract. Indeed, the Respondent urged the Union to take a contract proposal to the membership and get it ratified, even if it was inconsistent with the Respondent's last best offer. The Respondent argued that it would be in the Union's best interest to reach a new collective-bargaining agreement because doing so would nullify the decertification petition that was circulating among employees. The fact that even the union witnesses called by the General Counsel remembered that the Respondent was pressuring the Union to agree to a contract in March weighs heavily against accepting the General Counsel's contention that the Respondent was attempting to avoid an agreement at that time. Moreover, the General Counsel produced no direct evidence, such as statements by the Respondent's negotiators, showing that the Respondent's strategy was to avoid an agreement, and certainly none showing that the Company inserted the trailing costs issue on March 20 to further such a strategy.

In reaching my determination, I considered that the Respondent has not provided an explanation for the introduction of the new demand. Instead, the Respondent asserts that it had always maintained that the Union would have to pay the trailing costs—an assertion that, for the reasons discussed above, is simply not credible given the record evidence. This weighs in favor of finding that the Respondent introduced the new demand in an effort to avoid agreement. See *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) ("Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining."), enfd. 308 F.3d 859 (8th Cir. 2002). However, I conclude that in this case the evidence indicating that the Respondent was attempting to reach an agreement—including union officials' testimony that the Respondent was pressing for a contract, and the state of negotiations generally—outweighs the contrary inference arising from the Respondent's failure to provide a reason for introducing the new demand.

For the reasons discussed above, I find that the General Counsel has failed to show that, on about March 20, 2009, the Respondent violated Section 8(a)(5) and (1) by introducing a new demand that the Union absorb the Respondent's liability to pay accrued health insurance trailing costs. That complaint allegation should be dismissed.

C. Authority of Respondent's Subcommittee

The complaint includes allegations that the Respondent violated Section 8(a)(5) and (1) by "failing to cloak its representatives with the authority to make proposals and enter into binding agreements," and by "submitting written proposals to the Charging Party without attempting to gain authority to do so." In its brief, the General Counsel discusses these matters as facts bearing on the question of impasse, but does not make any argument or cite any authority for finding that the limits on the subcommittee's authority constituted an independent violation of Section 8(a)(5) and (1). The record shows that the Respondent's healthcare subcommittee had authority to enter into tentative agreements, but that, like the union subcommittee, it could not enter into final, binding, agreements. The General Counsel has not shown that this circumstance constituted a violation by the Respondent, or even that it is unusual in negotiations for a labor contract.

The allegations that the Respondent violated Section 8(a)(5) and (1) by "failing to cloak its representatives with the authority to make proposals and enter into binding agreements," and by "submitting written proposals to the Charging Party without attempting to gain authority to do so" should be dismissed.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) on March 1, 2009, by changing employees healthcare benefits without the Union's consent and in the absence of a bona fide impasse.

4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent engaged in an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Upon the Union's request, the Respondent should be required to retroactively rescind the unilateral changes to the healthcare benefits of unit employees and make whole its employees for all monetary losses they have incurred as a result of the unlawful unilateral changes, as set forth in *Ogle Protective Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (1971) and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel requests an order providing the unit employees with "quarterly compound interest" for all monetary losses. It is the Board's current practice to award simple interest rather than compound interest. The Board has recently considered, and rejected, arguments to alter this practice. *Cadence Innovation, LLC*, 353 NLRB No. 77, slip op. at 1 fn.1 (2009); *Rogers Corp.*, 344 NLRB 504 (2005). I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[24]

ORDER

The Respondent, Comau, Inc., Southfield, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally and unlawfully changing the terms and conditions of employment of its employees who are represented by the Automated Systems Workers Local 1123, a division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union).

(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 by the Union, retroactively rescind any and/or all healthcare benefits that the Respondent unilaterally implemented on March 1, 2009, and restore, honor and continue the healthcare benefits that were set forth in the collective-bargaining agreement that went into effect on March 7, 2005. Maintain the restored healthcare benefits until such time as the parties complete a new agreement, good-faith bargaining leads to a bona fide impasse, or the Union agrees to changes.

(b) Make bargaining unit employees whole for any monetary losses they suffered as a result of the unlawful unilateral changes to their healthcare benefits, with interest, in the manner set forth in the remedy section of the decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, inspectors, and field service employees, employed by Respondent at and out of its facilities located at 20950, 21000, and 21175 Telegraph Road, Southfield, Michigan; and 42850 West Ten Mile Road, Novi, Michigan; and machinists currently working at its 44000 Grand River, Novi, Michigan, facility who formerly worked at its facility located at 21175 Telegraph Road, Southfield, Michigan; but excluding all office clerical employees, and guards and supervisors as defined in the Act.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel

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[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of monetary relief due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities located at 20950, 21000, and 21175 Telegraph Road, Southfield, Michigan; 42850 West Ten Mile Road, Novi, Michigan; and 44000 Grand River, Novi, Michigan, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be 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 the 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, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities at any time since March 1, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 20, 2010

PAUL BOGAS
Administrative Law Judge

[25] 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."

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 unilaterally and unlawfully change the terms and conditions of employment of our employees who are represented by the Automated Systems Workers Local 1123, a division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL upon request by the Union, retroactively rescind any and/or all healthcare benefits that we unilaterally implemented on March 1, 2009, and restore, honor and continue the healthcare benefits that were provided under the collective bargaining agreement that went into effect on March 7, 2005. WE WILL maintain the restored healthcare benefits until such time as the parties complete a new agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL make you whole for any monetary losses you suffered as a result of the unlawful unilateral changes to your healthcare benefits, plus interest.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees, inspectors, and field service employees, employed by us at and out of our facilities located at 20950, 21000, and 21175 Telegraph Road, Southfield, Michigan; and 42850 West Ten Mile Road, Novi, Michigan; and machinists currently working at our 44000 Grand River, Novi, Michigan, facility who formerly worked at our facility located at 21175 Telegraph Road, Southfield, Michigan; but excluding all office clerical employees, and guards and supervisors as defined in the Act.

COMAU, INC.

(Employer)

Dated __________________ By ____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300

Detroit, Michigan 48226-2569

Hours: 8:15 a.m. to 4:45 p.m.

313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.