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July 29, 2010

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St., NW
Washington, DC 20005-3419

Re: Comau, Inc.
Case 7-CA-52106

Dear Sir:

Attached is an electronic copy of Counsel for the General Counsel's Brief in Support of Cross-Exception to the Administrative Law Judge's Decision in the above case. As indicated on the last page of the document, copies have been electronically served on all parties of record.

Very truly yours,

Sarah Karpinen

Sarah Pring Karpinen
Counsel for the General Counsel

Attachments: Brief in Support of Cross Exception and Certificate of Service

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

COMAU, INC.,

Respondent

and **CASE 7-CA-52106**

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

Charging Party/ Incumbent Union

and **CASE 7-RD-3644**

WILLIE RUSHING, An Individual

Petitioner

BRIEF IN SUPPORT OF CROSS-EXCEPTION OF COUNSEL FOR THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Brief in Support of Cross-Exception to the Decision of the Administrative Law Judge.[1]

I. Respondent demanded that the ASW pay its trailing costs to create an impediment to reaching agreement in violation of Section 8(a)(5) of the Act (Exception 1) [2]

The ALJ in this matter erred in finding that Respondent's eleventh hour demand that the Union take over its responsibility to pay trailing costs did not create an impediment to bargaining in violation of Section 8(a)(5) of the Act. ALJD, p. 17. The ALJ acknowledged that Respondent's demand was regressive, but found that it was not unlawful because it was not made for the purpose of frustrating the possibility of agreement. The General Counsel respectfully disagrees with the ALJ's characterization of Respondent's motives in introducing the demand, and asks that the Board find that Respondent made the demand in order to prevent reaching an agreement with the Union.

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[1] The following abbreviations are used in this brief:
ALJD: Administrative Law Judge Decision
GC/R Ex or Exhs: General Counsel/ Respondent Exhibit(s)
Tr.: Transcript

[2] This discussion relies upon the facts as set forth in the ALJD.

As the ALJ noted, the record, and particularly the documentary evidence, makes it clear that in January and February both parties were bargaining "with the understanding that, if the MRCC plan was implemented for unit employees, the Respondent would pay its own trailing costs from the prior healthcare insurance." ALJD, p. 17. The main focus of the negotiations between the parties was the contribution amount that Respondent would pay to the MRCC plan for employees' healthcare coverage. ALJD, p. 7. On February 5, Respondent proposed making contributions in the amount of $835 per covered employee. On February 20, the Union agreed to that figure. ***Id.*** Respondent informed the Union that it would review the Union's proposal. The parties did not meet again until March 20, when Respondent suddenly demanded that the Union shoulder the responsibility for paying the leftover healthcare bills from its old plan as a precondition to switching to the MRCC plan. ALJD, p. 18.

Respondent offered no explanation for why it chose to introduce the new demand when it did. It asserts that it had consistently demanded that the Union pay its costs, an assertion the ALJ determined was "simply not credible given the record evidence." ***Id.*** The ALJ's finding in this regard is, indeed, supported by the record. Fred Begle testified that the subject of trailing costs would come up at "every" bargaining meeting that the Respondent had with the Union. (Tr. 327) However, he did not say that Respondent made it clear to the Union at these

sessions that Respondent expected it to pay these costs. Instead, he testified that it was his "assumption" that the ASW would pay them. (Tr. 421) Even in its Brief in Support of Exceptions, Respondent asserts only that "Comau **believed** it had made clear that it could not assume this....expense..." (emphasis added)

There is nothing in any of Respondent's written proposals about the trailing costs, or who would be responsible for them. Respondent did create a document during negotiations in which it added the trailing costs to its own costs, however. In the cost sheet Begle sent to the Union on December 19, he included columns for the run-out cost (trailing cost) from the Comau plan, as well as Respondent's proposed payments to the MRCC plan at a weighted average cost of $820. He then added the two figures together to determine the potential savings Respondent would enjoy with the MRCC plan over the cost of the health care plan in the expired collective bargaining agreement. (GC Ex. 17) The fact that these numbers were added together by Begle supports the ALJ's finding that Respondent did not view the trailing costs as the Union's cost.

When a "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." ***Mid-Continent Concrete***, 336 NLRB 258, 260 (2001). The ALJ, citing this case, acknowledged that Respondent did not offer an explanation for introducing its regressive demand

so late in negotiations. Nevertheless, the ALJ found that because the parties had not reached agreement on all outstanding issues, coupled with a lack of evidence that Respondent sought to avoid reaching an agreement, he was precluded from finding that Respondent introduced the trailing costs demand in order to avoid reaching agreement. ALJD, p. 18.

A. The other outstanding issues were not bona fide points of contention

The parties had not reached agreement on a few minor issues concerning the contract at the time Respondent made its demand that the Union pay trailing costs. ALJD, p. 18. While the parties had not reached agreement as to every issue, there is no evidence that the issues remaining on the table would have prevented the parties from reaching an agreement. However, the parties were not able to discuss those issues because of Respondent's sudden demand on this major issue at the March 20 meeting. As the ALJ noted, even Begle testified that the proposal "was a shock to the Union." ALJD, p. 11. The meeting ended shortly after the proposal was made, and despite requests by the Union, the parties did not meet again to bargain.

The record does not support a finding that the additional outstanding issues would have prevented the parties from reaching agreement had the regressive proposal not been introduced on March 20. First, Respondent claimed that

differences between the ASW's February 20 offer and the LBO with regard to the "hold harmless" language in the health care agreement was a barrier to it reaching an agreement with the ASW (Tr. 347). The ALJ correctly found that there was no genuine disagreement between the parties as to this issue. ALJD, p. 8. Respondent questioned the hold harmless language used by the Union in its February 20 proposal, but there is no evidence that the ASW indicated it would not agree to the language used by Respondent in its final proposal.

Second, the question of whether Respondent's contribution amounts would be broken down according to family size, remained open. ALJD, p. 8. There is no evidence that disagreements regarding this issue would have prevented the parties from reaching agreement. Third, the parties had not agreed upon contract duration as of March 20, but there was no evidence that they would not have been able to do so. Finally, Respondent raised the issue of a training fund that the ASW added to its February 20 proposal. The proposal differed from Respondent's LBO in that it contained a clause taking money from members' checks for the training fund; however, the ASW did not propose that Respondent contribute to the training fund. (Tr. 267) In fact, Respondent never raised the training fund with the ASW as a barrier to reaching agreement. ALJD, p. 8, fn. 15.

B. Respondent had a motive to avoid reaching agreement

In holding that Respondent did not make its regressive proposal with regard to trailing costs to avoid reaching agreement, the ALJ stated that there was no "direct evidence" that Respondent's strategy was to avoid reaching agreement. ALJD, p. 18. While it is true that there is no evidence of statements made by Respondent's negotiators indicating a strategy to avoid agreement, the General Counsel did introduce evidence that Respondent knew by at least March 16, and possibly before that date, that rumors of a decertification petition were circulating around the plant. That knowledge, coupled with Respondent's failure to explain why it suddenly introduced a regressive demand on March 20, supports an inference that Respondent had an unlawful motive in introducing the demand.

The ALJ determined that evidence that Respondent was pressuring the Union to reach agreement to nullify the petition weighs against accepting the contention that the trailing costs demand was introduced as an impediment to signing a contract. ALJD, p. 18. There is no evidence that Respondent indicated a willingness to back away from its trailing cost demand during negotiations. The fact that Respondent may have been urging the Union to sign a contract that erased all the progress the parties made in negotiations regarding switching to the MRCC

plan does not change the fact that Respondent introduced its trailing costs demand as a way of avoiding reaching agreement on the MRCC plan.

Not only did the evidence establish that Respondent knew of the decertification petition when it introduced its regressive demand, Reuter testified that Respondent's CEO, Luca Savi, told him that he wanted one of Respondent's buildings to be non-union because he could get better employees without the Union. (Tr. 84) This testimony was not only unrebutted by Respondent, but Begle bolstered it by admitting that Savi said that he preferred to select employees without regard to seniority. (Tr. 499). The ASW subpoenaed Savi, and Respondent flatly refused to produce him, despite his availability. An adverse inference should be drawn from a party's failure to comply with a subpoena when directed to do so. ***Autoworkers v. NLRB***, 459 F.2d 1329 (D.C. Cir. 1972).

Given Savi's statement to Reuter, Respondent's keen awareness of the possibility of ridding itself of the ASW cannot be discounted as a factor in its change in behavior toward the Union between February and March. Respondent met regularly with the ASW in December, January and February, making significant strides toward reaching an agreement. Then, when the ASW had agreed to all but match Respondent's last best offer and Respondent's health care proposals, Respondent introduced its trailing costs demand, and brought negotiations to a screeching halt. The only logical explanation for Respondent's

sudden shift in behavior was that it had seized upon its chance to operate without the constraints of a union, and took it.

CONCLUSION

WHEREFORE, Counsel for the General Counsel respectfully requests that the Board grant the above Cross-Exception and modify the Administrative Law Judge's Decision accordingly.

Dated at Detroit, Michigan this 29th day of July, 2010

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CERTIFICATE OF SERVICE

I certify that on the 29th day of July, 2010, I electronically served copies of the Counsel for the General Counsel's Brief in Support of Cross Exception to the Administrative Law Judge's Decision in Comau, Inc., Case 7-CA-52106, on the following parties of record:

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