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March 1, 2011

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

Re: Comau, Inc.
Cases 7-CA-52614 and 7-CA-52939
Comau Employees Association (CEA)
Case 7-CB-16912

Dear Sir:

Attached is an electronic copy of the Counsel for the Acting General Counsel's Answering Brief to Respondents' Exceptions to the Decision of the Administrative Law Judge 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 Pring Karpinen
Counsel for the General Counsel

Attachments: Counsel for the Acting General Counsel's Answering Brief to Respondents' Exceptions to the Decision of the Administrative Law Judge and Certificate of Service

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

COMAU, INC.

Respondent Employer

and

Cases 7-CA-52614 and 7-CA-52939

**AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with
CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA
Charging Party**

and

**COMAU EMPLOYEES ASSOCIATION (CEA)
Party in Interest**

**COMAU EMPLOYEES ASSOCIATION (CEA)
Respondent Union**

and

Case 7-CB-16912

**AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with
CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA
Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENTS' EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Counsel for the Acting General Counsel, Sarah Pring Karpinen and Darlene Haas Awada, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submit this Answering Brief to the Exceptions to the Administrative Law Judge's Decision (hereafter ALJD) filed by Respondents Comau and Comau Employee Association (CEA).¹

I. INTRODUCTION

Respondent Comau filed forty three exceptions to the Administrative Law Judge's Decision in the instant matter. Respondent CEA filed seven. Respondents argue that Administrative Law Judge Carter (hereafter the ALJ) erred in finding a causal connection between Respondent Comau's unilateral implementation of healthcare on March 1, 2009 and the employee disaffection petition submitted by Respondent CEA to Respondent Comau on December 22, 2009. They further argue that the ALJ erred in finding that employees were coerced into signing dues authorization forms, and assert that the remedy recommended by the ALJ is inappropriate.²

¹ The following abbreviations are used in this brief:

ALJD: Administrative Law Judge Decision

GC, Resp. Comau or Resp. CEA Ex or Exhs: General Counsel or Respondent Exhibit(s)

Tr.: Transcript

² Respondents assert that the ALJ erred by not ruling that Harry Yale, Nelson Burbo and James Reno were not agents of Respondent Comau with regard to their actions in circulating the December disaffection petition. That issue will not be addressed in this brief, but will be addressed in separately filed cross-exceptions.

II. ARGUMENT³

A. **The ALJ's finding that the December 2009 disaffection petition was tainted by Comau's unlawful implementation of a new health care plan in March 2009 is supported by the record**

In a previous case, *Comau, Inc.*, the Board found that Comau violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new health insurance plan on March 1, 2009 in the absence of an agreement or a bona fide impasse. *Comau, Inc.*, 356 NLRB No. 21 (November 5, 2010). The unlawfully implemented plan had a significant impact on employees. Under the new terms imposed by Comau, employees were required to pay premiums for the first time. The premiums cost employees from \$57.28 to \$453.05 per month, depending on the benefit plan the employee selected. Employees also were to pay between \$321 and \$507 per month to obtain coverage for children between 19 and 25 years of age. The new plan also reduced health care coverage for employees. (Jt. Ex. 2; ALJD at 6)

Under Board law, it is well settled that if an employer has "committed as yet unremedied unfair labor practices that could have reasonably tended to contribute to employee disaffection from the union," it may not rely on employee expressions of disaffection, such as a petition, as a basis for withdrawal of recogni-

³ This discussion relies upon the facts set forth in the ALJD.

tion. *Ryan Iron Works*, 257 F.3d 1, 11 (1st Cir. 2001); *Highland Yarn Mills, Inc.*, 313 NLRB 193, 212 (1993); *Chicago Magnesium Castings Co.*, 256 NLRB 668, 674 (1981). An Employer's doubt as to the union's continuing majority status can arise only in a context free of the coercive effect of unfair labor practices. *Columbia Portland Cement*, 303 NLRB 880, 882 (1991), aff'd 979 F.2d 460 (6th Cir. 1992); *Miller Waste Mills, Inc.*, 334 NLRB 466, 468 (2001).

Respondents Comau and CEA each claim that the record evidence does not support the ALJ's finding that the December 2009 disaffection petition was tainted by Comau's actions in unilaterally imposing health care premiums on employees.⁴ To the contrary, there is ample evidence on the record that Comau's actions in imposing significant and detrimental changes to employees' health care coverage were of such a nature as to cause employee disaffection with the ASW. The changes undercut the ASW's status as the collective bargaining representative, and had an adverse effect on employee morale.

⁴ Respondent Comau attached the Opinion and Order issued on February 10, 2011 in *Glasser v. Comau, Inc. and Comau Employees Association* denying temporary injunctive relief under Section 10(j) in this matter to its brief, and makes a number of references to the decision in its argument. The role of the District Court in this matter was not to make findings of fact, but rather to determine whether injunctive relief was appropriate. The ALJ, as the trier of fact, presided over the hearing and made legal and factual findings with regard to whether unfair labor practices occurred.

1. Comau's unilateral implementation of its health care plan had a reasonable tendency to cause employee disaffection with the ASW

An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber II*), *enfd.* in relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997); ALJD at 18. The Board has held that unilateral changes to wages and benefits, such as the changes implemented by Comau in this case, are of "such a character as to either affect the Union's status, cause employee disaffection or improperly affect the bargaining relationship itself." *Guerdon Industries, Inc.*, 218 NLRB 658, 661 (1975).

The unilateral implementation of changes to employee healthcare coverage is a serious unfair labor practice, "not simply [a] benign technical change[]," but "precisely the type of change[] that would tend to undermine the Union's perceived authority as the bargaining representative of the employees and to interfere with the employees' free choice." *Priority One Services, Inc.*, 331 NLRB 1527, 1527 (2000). Because the changes imposed by Respondent Comau in this case had a significant impact on all unit employees, the Employer's unlawful conduct was of a type to invite employee unrest and disaffection from a union. Compare

e.g., *Lexus of Concord, Inc.*, 343 NLRB 851 (2004) (single employee transfer did not have detrimental or long lasting effect on employees); *Champion Home Builders Co.*, 350 NLRB 788 (2007) (nature of the violations did not support a finding of taint because employer's confiscation of union materials from an employee workstation and a supervisor's threat to an employee were isolated events involving one employee each).

As the ALJ notes, the unilateral changes imposed by Comau in this case are even more significant than those in *Priority One Services*, 331 NLRB 1527 (2000), where the Board found that unilateral increases to employee health insurance premiums undercut the union in the eyes of employees. The changes imposed by Comau here had more of a detrimental impact on employees, “because instead of a percentage increase to premiums that employees were already paying (as in *Priority One*), Comau unilaterally changed employee health insurance premiums from zero...to hundreds of dollars per month in some cases.” ALJD at 20. Moreover, the new plan also reduced health care coverage for employees.

2. The April decertification petition was tainted by Comau's unilateral changes

Respondents claim that the ALJ improperly reversed cause and effect in determining the impact that the unilateral change in health insurance had upon employees. Both argue that, because some employees signed the April decertification petition prior to the date Comau committed its unfair labor practice, its unlawful actions could not have motivated employees to sign the decertification petition. This argument is not supported by the evidence on the record.

All of the employees who signed the decertification petition did so within several days of the March 1, 2009 unilateral implementation of Comau's health care plan. 34 employees signed it after March 1, meaning that the number of signatures on the petition prior to Comau's unfair labor practice did not represent a majority of employees until after its March 1 unfair labor practice. Respondents' argument--that no money was subtracted from employee checks until March 6, so the March 1 unfair labor practice could not possibly have caused them to sign the petition--defies logic. As the ALJ noted in his decision, the Board ruled in *Comau, Inc.* that the unfair labor practice occurred on March 1, not March 6. Further, the March 1 effective date was well publicized by Comau prior to such, and a reasonable employee would have been aware that the change would take effect on that date. ALJD at 21, fn. 39.

The record demonstrates that the unilateral changes in health coverage had a significant impact on employees, and they were well aware of the changes both before and after they actually occurred. In January and February 2009, Comau held meetings with employees to discuss how the changes would affect them. (Tr. 937) In early 2009, members of the ASW executive committee met, prompted by the committee's understanding that employees were upset about the imposed contract and the way things were going with the announced changes to the medical plan. (Tr. 394) Dave Baloga testified that the committee saw "what was coming with the insurance, and that was probably the final straw." (Tr. 394) He downloaded a decertification petition from the internet, and the committee began circulating it within the plant. Employees signed the petition between February 19 and March 10, 2009. (R. CEA Ex. 3)

In November 2009, an unfair labor practice hearing was held in Case 7-CA-52106 to determine whether Comau had unlawfully implemented its health care plan. In conjunction with that hearing, a *St. Gobain*⁵ hearing was conducted to determine if there was a causal link between the alleged unfair labor practice case and the decertification petition. Employee testimony at the *St. Gobain* hearing

⁵ *St. Gobain Abrasives, Inc.*, 343 NLRB 542 (2004).

demonstrated that employees were well aware of the proposed changes to their health care plan when they signed the decertification petition.

Felix Nash testified that he signed the petition because he had heard that health care premiums were going to increase. (R. Comau Ex. 13, p. 548) Thomas Kalenick testified that he signed the petition because he did not want health care premiums to be taken out of his check. (R. Comau Ex. 13, p. 554) Joseph Yoerg testified that he signed the petition because he wanted to push the ASW to work harder at the bargaining table to prevent Comau from imposing its health care plan. (R. Comau Ex. 13, p. 563) Randall Nance testified that he signed the petition because it was his belief that employees would never be asked to pay health care premiums because of concessions they had given in previous contracts. He also testified that his insurance costs increased from \$0 to \$680 per month after March 1, 2009. (R. Comau Ex. 13, p. 568) William Filbey testified that he signed the petition because he was not happy about the way the health care plan was imposed on employees. (R. Comau Ex. 13, p. 576) Lacey Mathis testified that he signed the petition “pretty much out of frustration. So much was going on. It's like after we got the letter about the insurance changes...the next month or so everything was in effect, and I wasn't happy about it.” (R. Comau Ex. 13, p. 586)

Daniel Molloy, the Charging Party's vice president at the time the decertification petition circulated, testified that health care was a prime concern for employees, and that his understanding of employee sentiment was that "if we got to start paying health insurance dues...[and] you guys don't take care of this... we're going to take action. We're going to rebel." (Tr. 817) He further testified that "once the [health care premium] money started to come out of employees' checks, they wanted to fry us [the ASW officers].... -because we were promised all along that we would -- that they would work to keep us from having to pay anything." (Tr. 833)

There is ample evidence, as noted above, that the changes to employee health coverage were on the minds of employees at the time they signed the decertification petition. Respondent Comau discounts this testimony because the employees were testifying about a mindset that was formed prior to the actual commission of the unfair labor practice on March 1. (Respondent Comau's Brief at 7) What this argument ignores is the fact that the ALJ was tasked not with determining whether the April 2009 decertification petition was tainted by Comau's unfair labor practices, but with whether the December 2009 disaffection petition was. The fact that employees were upset about the proposed changes to their health insurance prior to March 1 clearly supports ALJ Carter's finding that the unilateral implementation of those changes had a tendency to (and actually did) cause the

employee disaffection with the ASW that manifested itself in the December 2009 petition.

3. The unilateral implementation of Comau's healthcare plan outweighed other sources of employee disaffection

Respondents argue that disaffection with the ASW was caused by factors other than the unlawful changes made to employee health coverage. The ALJ's finding that any alternative sources of discontent were "tolerated to some degree with the hope that, in the end, the merger would be beneficial" and that it was the unilateral implementation of Comau's health insurance plan that "had a reasonable tendency to (and did, in fact) cause employee disaffection with the ASW/MRCC" is amply supported by the record. (ALJD at 20, fn. 37)

For example, the record evidence shows that members raised the issue of the illegally implemented healthcare plan at membership meetings. (Tr. 108) In addition to bringing the topic up at union meetings, over 40 employees personally raised the issue with Charging Party president Darrell Robertson. (Tr. 110) According to Charging Party recording secretary David Baloga, after Comau announced its intent to implement the healthcare plan, employees were "bombarding [him] daily" with their dissatisfaction about the imposed contract and the plan to implement the healthcare. (Tr. 394)

The CEA called several witnesses at the hearing to testify regarding their subjective reasons for signing the decertification and/or disaffection petitions. Cecil Brewington testified that he was upset with the ASW because of an asserted incident where he says he received inadequate welding training; however, the incident he testified about occurred in the spring or summer of 2008 and involved only one other member. (Tr. 1197, 1198) Several employees testified that they felt the ASW's dues were too high; however, the dues had not changed since 2007, when the membership voted to affiliate with the Michigan Regional Council of Carpenters. Further, former ASW vice-president Dan Malloy testified that employees were okay with the dues being charged by the MRCC as long as they were getting their Blue Cross paid by the company. (Tr. 772)

A few witnesses mentioned the transfer of funds from the ASW treasury to the MRCC as a source of their discontent with the ASW. Again, because the transfer occurred at the time of the ASW's merger with the MRCC in 2007, and members were informed about it at that time, (R. CEA Ex. 2, p. 4) it is unlikely that this issue would have continued to fester long enough to cause employees to attempt to oust the ASW over two years later.

The CEA attempts to link some of the employee dissatisfaction with the ASW to the disaffection petition by proffering the testimony of Willie Rushing.

Rushing testified that the disaffection petition was prompted by an “uproar” over dues deductions when employee bonus checks were distributed. The record evidence did not support his claim. Dave Baloga gave unrebutted testimony that holiday bonus checks were distributed on December 18, 2009. (Tr. 1217-1218, GC Ex. 55) The majority of the signatures on the petition were dated December 15, 2009. (R. CEA Ex. 5) In addition, dues had been taken out of employee bonus checks in 2007 and 2008, without causing employees to sign petitions to remove themselves from the ASW. (GC Ex. 55)

In contrast with the training and dues issues, the health care issue arose concurrently with the circulation and filing of the decertification petition, and affected all the members of the bargaining unit. Employees were aware of the Respondent Comau’s intent to begin charging them premiums for healthcare as of December 22, 2008, when its last best offer was imposed. Meetings were held in January and February to discuss the changes and how individual employees would be affected. (Tr. 937) Willie Rushing testified that he spoke to employees while circulating the decertification petition, and what he “heard more than anything else...is why the hell am I paying for all these union dues and I wound up with the same contract as Novi as and Novi does [sic] even pay union dues? What’s the point of the ASW?” (Tr., p. 953)

The majority of employees at Comau's Novi plant are not represented by the ASW, but are covered by a contract with an employee association. According to the testimony of CEA president Harry Yale, those employees accepted the same insurance plan that was imposed upon the ASW-represented employees, but received hourly rate raises over the life of their contract to compensate for the increase in premium costs. Yale testified that "our guys wanted the same thing." (Tr. 1052) Employee Andrew Katsiyiannis testified that one of the "main things when we first got into this union [the MRCC] was they were going to save money on our health insurance, and that cost savings with the company was going to be – the company would save money, plus we'd get a raise out of the deal." (Tr. 1151)

As the ALJ noted, employee discontent regarding the health insurance was kept alive by a variety of factors, including ongoing, significant deductions from employee paychecks to pay the premiums imposed by Comau, and the *St. Gobain* hearing in November 2009, "in which several employees testified (and were reminded of the fact) that the new health insurance (and its costs) was among their concerns when they signed the decertification petition." ALJD at 19, fn. 36. This hearing occurred less than a month before the disaffection petition was circulated. The temporal proximity between the *St. Gobain* hearing and the circulation of the disaffection bolsters the ALJ's finding that employee disaffection caused by Comau's unfair labor practices was reinvigorated by the hearing.

4. The ALJ applied the correct standard in finding that the disaffection petition was tainted by Co-mau's unilateral changes to health insurance

The CEA proffers a rather puzzling argument that the ALJ applied the wrong standard in this case because he wrote in his decision that the issue in the case is whether there is a causal relationship between the March 1, 2009 unfair labor practice and the disaffection petition. (CEA's Brief, p. 27) The CEA claims that this formulation works where only "one potential cause" of disaffection has been alleged, and could lead to a result where any one cause, no matter how trivial, could be found to form the basis for employee disaffection.

The CEA's selective reading and misinterpretation of the ALJD wildly misses the mark. To suggest that the ALJ blithely determined that, because the unfair labor practice was but one cause of the disaffection, it was the only cause. To the contrary, the ALJ examined the facts presented at the hearing in detail, recognized that employees had other reasons to be dissatisfied with the ASW, and found, notwithstanding the other causes, that the unlawful implementation of the health care plan tainted the disaffection petition. In reaching this conclusion, he correctly applied the factors outlined by the Board in *Master Slack*⁶ in determining that the timing of the unfair labor practice, its significant impact upon every member of the bargaining unit, its tendency to undermine the ASW in its role as

⁶ *Master Slack Corp.*, 271 NLRB 78 (1984).

the collective bargaining representative of the employees, and the adverse impact the change had on employee morale, all demonstrated that Respondent Comau's unfair labor practice tainted the December 2009 disaffection petition.

5. The ALJ did not err in refusing to allow the CEA to call additional witnesses to testify

Respondent CEA argues that the ALJ erred in refusing to allow it to call 90 witnesses that it claims were prepared to testify that they signed the petition for reasons other than Comau's unilateral changes to their health care coverage. The ALJ's decision in this regard is supported by well-established case law. Direct evidence that an employer's unfair labor practice caused disaffection is not required, because "the actual effect of coercive conduct is irrelevant." *Columbia Portland Cement*, supra; *NLRB v. Kaiser Agricultural Chemicals, Division of Kaiser Aluminum & Chemical Corp.*, 473 F.2d 374, 383 (5th Cir. 1973) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969)). It is sufficient to demonstrate that the unfair labor practices would reasonably tend to cause employee disaffection. *Columbia Portland Cement*, supra; *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 279 (5th Cir. 1997).

The relevant inquiry is whether the **objective** evidence of the commission of unfair labor practices has the tendency to undermine the union, **not** employees' subjective state of mind. *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007);

AT Systems West, Inc., 341 NLRB 57, 60 (2004). The CEA was given ample opportunity to present witnesses with regard to the issue of causation. As the ALJ noted, “various witnesses have testified about a variety of issues...[s]ome of them would cite issues one and four as their reasons, others would cite numbers three and five. But the circumstances have been put into the record.” (Tr. 1206-1207) Those circumstances were considered by the ALJ, and any additional testimony in that regard would have been cumulative.

B. Respondents coercively solicited dues authorization forms from employees

Respondents argue that the ALJ erred in finding that they threatened employees with loss of employment for failing to sign dues authorization forms for the CEA. The ALJ’s finding in this regard is supported by both the evidence and the law. Employees have a Section 7 right to refuse to sign dues check-off authorization forms. *Communications Workers Local 1101*, 281 NLRB 413, 417 (1986); *Metal Workers’ Alliance*, 172 NLRB 815, 817 (1968). It is unlawful for an employer to lead employees to believe that it is compulsory for them to elect the automatic deduction of dues from their checks. *Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997).

Respondent CEA’s only argument in support of its contention that the actions of its agent, Fred Lutz, were not coercive, is its claim that Lutz did not

threaten employee Jeffrey T. Brown. As the ALJ noted, Lutz escorted Brown to the office of human resources director Fred Begle, a place Brown had never been before, and Begle questioned him about why he did not want to sign the authorization form. The ALJ was correct in finding that the circumstances surrounding this interaction were inherently coercive. See, e.g., *Rossmore House*, 269 NLRB 1176 (1984) (questioning by a high level official about union activities without legitimate purpose and without assurances that no reprisals will be taken inherently coercive).

Respondent Comau claims that Mr. Begle's intent was to avoid the difficult situation of having employees fall behind in their dues. Assuming, arguendo, that this was his intent, it does not change the fact that his conduct was inherently coercive. Comau further claims that the ALJ erred in not finding that unfair labor practice it may have committed with regard to the dues authorization forms was later "cured" when it informed employees that they were not required to pay dues via payroll deduction. In order for an employer to avoid liability for an unfair labor practice through repudiation of its actions, that repudiation must be unambiguous, specific in nature to the coercive conduct, and it must be free from other proscribed illegal conduct. In addition, there must be adequate publication of the repudiation, and employees must be assured that it will not interfere with their Section 7 rights in the future. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978).

If Comau's June 6 notice to employees was an attempt to repudiate its unlawful actions, the attempt failed under the standards set forth in *Passavant*. First, most employees signed their dues authorization forms between February and May 2010. (Resp. Comau Ex. 6) Comau did not post its letter until June. Second, Comau did not offer evidence showing that the letter was circulated in a manner guaranteed to reach employees who may have been threatened with discipline for not signing a dues authorization forms. Finally, the letter contains no assurances to employees that their Section 7 rights will be respected in the future.

In addition, the CEA's circulation of its notice that employees who did not want to pay their dues via payroll deduction must pay in person via certified check imposed another unlawful restriction on employees' rights to pay dues in whatever manner they chose.

C. The remedy recommended by the ALJ is appropriate

Respondent Comau argues that the ALJ's recommended remedy is inappropriate. In support of its argument, it cites *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir 2000). Comau claims that the D.C. Circuit refused in that case to enforce the Board's order to re-establish the union. In fact, the Court *remanded* the case to the Board to justify its ordering of an affirmative bargaining order. *Id.* at 739. There was no finding that the Board's order was not

appropriate or justified, only that the Board did not include in its decision an analysis balancing (1) the employees' Section 7 rights; (2) whether other purposes of the Act overrode the rights of employees to choose their bargaining representative; and (3) whether alternative remedies would be adequate to remedy the violations of the Act.

On remand, the Board reaffirmed its original finding that a bargaining order was warranted. *In re Vincent Industrial Plastics, Inc.*, 336 NLRB 697 (2001). The Board noted that employee disaffection from the union was caused by the Employer's unfair labor practices, including unilateral changes, and that an "affirmative bargaining order, and the temporary decertification bar that it would provide, would restore to the Union and the majority who selected the Union a benefit that the Respondent's violations deprived them of, namely a period of repose during which the bargaining relationship will have a genuine opportunity to bear fruit." *Id.* at 698.

The Board further held that a cease-and-desist order would be an inadequate remedy, because it "would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement." The Board further noted that such a result "would be particularly unfair in circumstances such as those here, where many of the

Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employees' disaffection from the Union arising during that period or immediately thereafter.” The Board held that those factors outweighed any temporary impact on the rights of employees who opposed the incumbent union for reasons that did not result from the employer’s unfair labor practices. *Id.*

An affirmative bargaining order is a standard Board remedy for an employer’s unlawful withdrawal of recognition. “This remedy is warranted, even if the union has lost its majority support after the unfair labor practice and even though the order will operate to preclude, for a reasonable period, an election to test majority status. In such cases, the Board's paramount concerns are to restore to the union the bargaining opportunity which it should have had in the absence of unlawful conduct and to prevent the possibility that the wrongdoing employer would ultimately escape its bargaining obligation as the result of the predictably adverse effects of its unlawful conduct on employee support for the union.”

Williams Enterprises, Inc., 312 NLRB 937, 940 (1993).

The Supreme Court has held that a bargaining order “does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bar-

gaining relationship without regard to new situations that may develop.... But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). Once a reasonable period has passed, the Court noted, the Board may, “in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.” *Id.* at 706.

As the Board noted in *Lee Lumber*, 322 NLRB 175 (1996), “the presumption that an unlawful refusal to recognize and bargain taints any evidence of subsequently arising employee dissatisfaction with the union promotes stability in collective-bargaining relationships without unduly impairing employees' free choice. In fact, it promotes free choice by giving effect to the uncoerced choice of the majority of employees who selected the union as their bargaining representative before the employer unlawfully refused to recognize and bargain with the union.” *Id.* at 179.

Respondent CEA cites *Timmins v. Narricot Industries*, 567 F. Supp. 2d 835 (E.D. Va. 2008) in support of its argument that the remedy recommended by the ALJ is inappropriate. It is unclear why the CEA believes this case is applicable. *Timmins* was a district court decision denying a petition for temporary in-

junctive relief under Section 10(j) of the Act, not denying enforcement of a Board Order. In fact, the decision was subsequently vacated by the Fourth Circuit following the issuance of a Board Order in the case. *Timmins v. Narricot Industries*, 360 Fed. Appx. 419 (2010). The Board found in *Narricot* that the employer relied upon a petition tainted by its own unfair labor practices in withdrawing recognition from the union. An affirmative bargaining order was issued in the case. *Narricot Industries*, 353 NLRB 775 (2009). The Board's decision was appealed to the Fourth Circuit, which enforced the bargaining order. *Narricot Industries v. NLRB*, 587 F.3d 654 (2009).⁷

Finally, Respondents suggest in their briefs that a return to the status quo ante is impossible, because the ASW ended its affiliation with the Michigan Regional Council of Carpenters and became an affiliate of the Carpenters Industrial Council (CIC). In *The Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008), the Board held that when there is a merger or affiliation, an employer's obligation to recognize and bargain with an incumbent union continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative. The burden is on the party seeking to avoid the bargaining obligation. *Kravis*, 351 NLRB at 147 n. 30. Here, there is no evidence that the move to the CIC resulted

⁷ The Fourth Circuit's decision in *Narricot* was later abrogated by the Supreme Court's decision in *New Process Steel, L.P. v. N.L.R.B.*, 130 S.Ct. 2635 (2010) because the Board's decision in *Narricot* was rendered by a two-member Board.

in a lack of substantial continuity altering the ASW's identity. Rather, as ALJ Carter found, both entities, the ASW and the MRCC, are within the United Brotherhood of Carpenters and Joiners of America. (ALJD p. 28, n.46)

III. CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondents' Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy, except as provided in Counsel for the Acting General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision.

Dated at Detroit, Michigan this 1st day of March, 2011.

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