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Comau, Inc. *and* Automated Systems Workers Local 1123, affiliated with Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America

Comau Employees Association *and* Automated Systems Workers Local 1123, affiliated with Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America. Cases 7–CA–52614, 7–CA–52939, 7–CB–16912

January 3, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On December 21, 2010, Administrative Law Judge Geoffrey Carter issued the attached decision. Respondent Comau, Inc. (the Respondent or Respondent Comau) filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Acting General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order.[3]

The central unfair labor practice issues before the Board in this case are whether the Respondent violated Section 8(a)(5), (2), (3), and (1) of the Act by withdrawing recognition from Automated Systems Workers Local 1123, affiliated with the Michigan Regional Council of Carpenters (the Union or ASW) and thereafter recognizing the Comau Employees Association (CEA) and entering into a collective-bargaining agreement with the CEA containing a union-security clause. The judge found the violations, rejecting the Respondent's reliance on an employee petition opposing continued representation by the Union and requesting that the Respondent recognize the CEA, because he found that the petition was tainted by the Respondent's unremedied unfair labor practice found in *Comau, Inc.*, 356 NLRB No. 21 (2010) (*Comau I*). We adopt the judge's findings for the reasons set forth in his decision, as further explained and clarified below.

I.

The Respondent builds assembly lines and specialty tools for the automotive industry. For many years, unit employees at the Respondent's Southfield, Michigan facility were represented by an in-house union, originally

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent Comau Employees Association has not filed exceptions to the judge's decision. Some of Respondent Comau's arguments in support of its exceptions would, if successful, require overturning the judge's findings that Respondent CEA violated Sec. 8(b)(1)(A) and (2) of the Act by accepting recognition from and entering into a collective-bargaining agreement with Respondent Comau. However, for the reasons discussed below, we find no merit in those arguments.

[2] We adopt the judge's finding that Respondent Comau violated Sec. 8(a)(1) of the Act by telling employees that they could be disciplined or discharged if they did not sign dues-checkoff authorization forms. However, we find it unnecessary to pass on the judge's further finding that Respondent Comau violated 8(a)(1) by making statements and engaging in other conduct "that had a reasonably tendency to coerce employees" to sign dues-checkoff authorization forms, as such findings would be cumulative and would not materially affect the remedy.

[3] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

On February 10, 2011, after the judge issued his decision in this case, the United States District Court for the Eastern District of Michigan issued a decision denying the Acting General Counsel's request for a preliminary injunction under Sec. 10(j) of the Act. *Glasser v. Comau, Inc.*, No. 2:10-CV-13683, 767 F.Supp.2d 778 (E.D. Mich. Feb. 9, 2011). For the reasons set forth in *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993), the court's findings and conclusions in the 10(j) proceeding are not binding on the Board in this proceeding.

called the PICO Employees Association and later renamed the Automated Systems Workers Union. In 2007, the unit employees voted to affiliate the ASW with the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (MRCC).[4] As a result of the affiliation, the employees' dues increased from $20 a month to $20 a month plus 2 percent of wages.

In January 2008, the Respondent and the Union commenced negotiations for a new collec tive-bargaining agreement to replace the existing agreement that was set to expire on March 2, 2008. Health insurance was a contentious issue throughout the negotiations. Under the expiring agreement, Respondent was self-insured and employees received no-cost health, vision, and dental coverage. Early in the negotiations for a successor agreement, the Respondent proposed replacing the existing plan with the plan that the Respondent provided to its nonunit employees. Under the plan proposed by the Respondent, coverage would be reduced in some respects and unit employees would be required to pay premiums for the first time.

The Union rejected the Respondent's healthcare proposal and proposed that the Respondent participate in a plan underwritten by the MRCC. Like the plan in the expiring agreement, the MRCC plan would be offered at no cost to the employees. The Respondent indicated that it was open to considering the MRCC plan if it would be less expensive for the Respondent than the plan in the expiring agreement.

On December 3, 2008, before the parties had fully explored the cost of switching to the MRCC plan, the Respondent declared impasse and announced that it would implement its final offer, including its healthcare proposal. The Respondent implemented most of the provisions of its final offer on December 22. However, because of the administrative burden associated with changing healthcare plans, the Respondent announced that the new healthcare plan would not be implemented until March 1, 2009.

Notwithstanding the Respondent's declaration of impasse, the parties continued to negotiate over the alternative healthcare plan proposed by the Union. Although the parties made significant progress in the negotiations, the Respondent unilaterally implemented its own healthcare plan on March 1, 2009. As a result, employees were forced to pay premiums for the first time, through payroll deduction. The premiums ranged between $57.28 and $453.05 per month depending on the type of coverage chosen (individual, two-person, family, high or low deductible).[5]

On November 5, 2010, the Board issued its decision and order in *Comau I*, reported at 356 NLRB No. 21, finding that any impasse that existed over healthcare in December 2008, when the Respondent announced that it was implementing its final offer, was broken as a result of the significant progress that the parties made in the negotiations over the alternative healthcare plan proposed by the Union. The Board therefore found that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing the healthcare plan in its final offer in the absence of an agreement or a bona fide impasse.

The Decertification Petition

Shortly after the Respondent announced on December 3, 2008, that it planned to implement its final offer, the Union's executive committee (which was comprised primarily of unit employees) began to discuss decertifying the Union. In late December or early January 2009, committeemen David Baloga and Daniel Malloy prepared a decertification petition. Bologa testified that the primary impetus behind the decertification effort was the Respondent's announcement that it intended to implement the new healthcare plan.

After preparing the decertification petition, the executive committee turned it over to employee William Rushing to circulate. Between February 19 and February 28, 2009, 84 of the approximately 234 bargaining unit employees signed the petition (36%). On March 1, 2009, the Respondent implemented the new healthcare plan. Over the next 9 days, 34 more employees signed the decertification petition (15%). Rushing filed the petition on April 14, 2009.

In a Decision and Order dated December 14, 2010, the Regional Director for Region 7 dismissed the petition because he found that there was a causal relationship between the Respondent's unlawful implementation of the new healthcare plan and the employees' disaffection from the Union. By unpublished Order dated March 11, 2011, the Board denied the Respondent's request for review.[6]

The Disaffection Petition

Meanwhile, in December 2009, while *Comau I* was still pending before the judge, unit employee Harry Yale

[4] The merger was effective on March 31, 2007.

[5] Employees could also pay an additional $321.04 to $507.26 per month to cover a child between 19 and 25 years of age.

[6] The Board did not pass on the Regional Director's finding of a causal nexus between the Respondent's unfair labor practice and the employees' disaffection, and instead found that the affirmative bargaining order in *Comau I* precluded a question concerning representation from being raised.

prepared and began circulating a disaffection petition. The petition stated:

> We, the employees of Comau, Inc., in the bargaining unit of the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) declare by our signatures below that we no longer want to be represented by that Union, and we request that Comau, Inc., immediately stop recognizing that Union as our collective bargaining representative.
>
> We no longer want to be represented by the [ASW] because of the excessive dues that Union charges us each month and because it has not come through on its promises to increase job opportunities for us– and not because Comau, Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan.
>
> We also declare by our signatures below that we want to be represented by the Comau Employees' Association, and we request that Comau, Inc. immediately begin recognizing the Comau Employees' Association as our collective bargaining representative.

103 of the then-178-member bargaining unit signed the petition (58%).[7] On December 22, 2009, Yale delivered the petition to human resources manager Fred Begle, who verified the signatures and determined that it had been signed by a majority of the unit employees. On the same day, the Respondent withdrew recognition from the Union and granted recognition to the CEA. The Respondent and the CEA subsequently negotiated a collective-bargaining agreement, which by its terms is effective from December 22, 2009 to April 13, 2013.

II.

The Board has long held that an employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that have a tendency to cause the loss of union support. *Olson Bodies, Inc.,* 206 NLRB 779, 780 (1973). The Board considers several factors in determining whether such a causal relationship exists: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on the employees' morale, their organizational activities, and membership in the union. *Master Slack Corp.,* 271 NLRB 78, 84 (1984).

The judge found that all four of the above factors support a finding that there is substantial causal connection between the Respondent's unremedied unfair labor practice found in *Comau I* and the Union's subsequent loss of majority support reflected in the disaffection petition. We agree with the judge, for the reasons stated in his decision and for the additional reasons stated below.

As to the first factor, 9 months passed between the Respondent's implementation of the new health care plan and the circulation of the disaffection petition. While this is a relatively long period, contrary to the Respondent and our dissenting colleague, it does not preclude a finding of a causal relationship,[8] especially where, as here, the violation is ongoing, rather than an isolated occurrence. The employees in this case were reminded throughout the 9-month period of the unilateral implementation of the healthcare plan by significant recurring deductions from their paychecks to cover insurance premiums. In these circumstances, the passage of time would not dissipate the coercive effect of the unfair labor practice on the unit employees.

As to the second and third factors, we find that the nature of the violation was such that it was likely to have a detrimental and lasting effect on employees and to cause employee disaffection from the Union. The Respondent's unilateral change in healthcare substantially affected all, or nearly all, unit employees and it directly impacted their compensation. In this regard, the employees went from paying no health insurance premium to hundreds of dollars every month in some cases.[9] It follows that such a change would under-

[7] The parties stipulated that there were 178 employees in the bargaining unit on December 22, 2009. No stipulation was offered concerning the number of employees in the bargaining unit on April 14, 2009, when the decertification petition was filed. However, according to the judge's unexcepted-to factual finding, the bargaining unit was comprised of approximately 234 employees on that date.

[8] *Tenneco Automotive, Inc.,* 357 NLRB No. 84, slip op. at 7 (2011) (causal connection found where unfair labor practices occurred 11 months before withdrawal of recognition); *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1328–1329 (2006) (finding that a 6–8 month period was not too long to preclude finding a causal connection); *AT Systems West*, 341 NLRB 57, 60 (2004) (causal connection found where unfair labor practice occurred 9 months before withdrawal of recognition); *Columbia Portland Cement v. NLRB,* 979 F.2d 460, 465 (6th Cir. 1992) (same, passage of 1 year).

[9] For these reasons, we disagree with our dissenting colleague's view that the implementation of the Respondent's plan could not realistically have had a lasting detrimental effect on the unit employees, and we find *LTD Ceramics, Inc.*, 341 NLRB 86, 88 (2004), cited by him, to be distinguishable. In *LTD Ceramics*, the Board found no causal nexus between the employees' disaffection and the respondent's premature implementation of an improved attendance policy that was sought by the union and had been tentatively approved by the parties in their contract negotiations. Here, in contrast, the Union vigorously opposed the healthcare plan that was implemented by the Respondent, and the

mine the employees' confidence in the Union as their collective-bargaining representative. *Priority One Services*, 331 NLRB 1527, 1527 (2000) (finding that 9.5 % increase in health insurance premiums had a tendency to cause erosion of union support, and thus tainted decertification effort, because the change "substantially affect[s] all unit employees and directly impact[s] employee compensation, one of the fundamental subjects concerning which employers must bargain pursuant to Section 8(d) of the Act."); *Penn Tank Lines*, *Inc.,* 336 NLRB 1066, 1067–1068 (2001) (finding that unilateral reduction in waiting-time and lost-time pay had a tendency to undermine employees' confidence in the union and to cause erosion of union support); *Powell Electrical Mfg. Co.,* 287 NLRB 969, 976 (1987), enfd. as modified 906 F.2d 1007, 1014 (5th Cir. 1990) (unilateral implementation of contract offer without valid impasse contributed to employee disaffection and tainted petition on which withdrawal of recognition was predicated); *Page Litho, Inc.*, 311 NLRB 881 (1993) ("It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees." (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967)). Further, as the Board found in *Penn Tank Lines,* supra, "[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving . . . their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear." Id. at 1067.

As to the final factor, the record shows that the Respondent's unlawful conduct adversely affected employee morale and the Union's organizational activities and membership. Indeed, the implementation of the new insurance plan appears to have directly affected employees' support for the Union. Examination of the decertification petition reveals that between February 19 and February 28, 2009, 84 of the approximately 234 bargaining unit employees signed the decertification petition (36%). Nearly all (78) of the 84 signatures were obtained on a single dayFebruary 19. Between February 19 —and February 28, only 6 new signatures were added. On March 1, a Sunday, the Respondent implemented the new healthcare plan. On Monday, March 2, 13 new signatures were added, 21 more signatures were added between March 3 and 10. The additional 34 signatures obtained after March 1, resulting in a majority, represented about 15 percent of the bargaining unit. This sequence of events supports the inference that the Respondent's implementation of the new healthcare plan was a substantial factor motivating employees to sign the petition after March 1. No other reason has been offered to explain the sudden resurgence of interest in the decertification petition.[10]

In sum, applying all of the *Master Slack* factors to the instant facts, we agree with the judge that a causal relationship has been shown between the Respondent's unlawful unilateral change and the Union's subsequent loss of majority support. Accordingly, the unilateral change tainted the petition.[11]

On exceptions, the Respondent primarily argues that the judge erred in finding that the unfair labor practice caused the employees' disaffection, because the disaffection arose prior to, and independently of, the Respondent's unlawful conduct. In this regard, the Respondent points out that the decertification effort began in December 2008 and was largely completed before the healthcare plan was implemented on March 1, 2009. Accord-

implemented plan was not an improvement over the previous plan, which was offered free of cost to the employees.

[10] The conclusion that the unlawful implementation of the healthcare plan added significantly to the disaffection that began when the Respondent initially announced its intention to implement the plan in December 2008, is confirmed by committeeman Malloy's testimony that, while members of the bargaining unit were upset when the Respondent announced that it was imposing its last best offer, once the insurance premiums began coming out of the employees' checks in March 2009, the employees "wanted to fry us. They wanted to fry the committee, they wanted to fry Pete [Reuter] and Darrell [Robertson]. . . . because we were promised all along that . . . they would work to keep us from having to pay anything." Rushing, who circulated the decertification petition, also testified that beginning in March 2009, somewhere between 20 and 50 employees approached him while he had the decertification petition "in [his] hand" to express their discontent over the unlawfully implemented healthcare plan.

As found by the judge, the employees' discontent was kept alive during the 9 months between the implementation of the new healthcare plan on March 1, 2009, and the circulation of the disaffection petition in December 2009, through the weekly payroll deductions for insurance premiums and through the unfair labor practice hearing in *Comau I,* in November 2009. Darrell Robertson testified in the latter regard:

> Q. BY MS. PRING KARPINEN: Was the membership aware of the unfair labor practice hearing that was held over the healthcare issue in November of 2009?
>
> . . . .
>
> THE WITNESS: After it happened, it was discussed at every meeting.
>
> Q. BY MS. PRING KARPINEN: How many employees would you say brought that matter up to you, the matter of unfair labor practice hearing?
>
> A. I mean, I couldn't count. Many, you know, just to me personally probably over 40.

The hearing, while it may have also promised a remedy, served to remind employees of the Resondent's unilateral change in the health benefits.

[11] Like the judge, we therefore find it unnecessary to pass on the Acting General Counsel's allegation that the disaffection petition was tainted by the involvement of non-supervisory leadmen acting with the apparent authority of the Respondent.

ingly, the Respondent argues that the unlawful implementation of the healthcare plan could not have caused the disaffection.

The Respondent's argument is faulty both legally and factually. The Board has held that it will only examine the factors that were actually relied upon by an employer when determining the adequacy of an employer's defense to a withdrawal of recognition allegation. In *RTP Co.,* 334 NLRB 466, 469 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003), the Board explained:

> In analyzing the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors actually relied on by the employer. Conduct of which the employer may have been aware, but on which the employer did not base its decision to withdraw recognition from the Union, is of no legal significance.
>
> Here, we find, contrary to the Respondent's contention, that the February 25 employee petition was the true cause of the Respondent's decision to withdraw recognition from the Union. . . . .
>
> . . . . The Respondent did not withdraw recognition because of "other factors" of which it was aware. Instead, as the judge stated, "the Respondent did not feel confident withdrawing recognition from the Union until it had confirmation regarding the withdrawal petition."
>
> The Respondent's "other factors" are irrelevant because the Respondent did not rely on them in withdrawing recognition. Inasmuch as the record shows that none of the "other factors" played any part whatsoever in the Respondent's decision, we find that they have no legal significance. Id. (Footnote, citations, and internal quotation marks omitted.)

As in *RTP*, the Respondent here withdrew recognition based on the December 2009 disaffection petition alone, and not based on "other factors" (such as the April decertification petition). In its December 22, 2009, Notice to Employees that it was withdrawing recognition from the Union and extending recognition to the CEA, the Respondent explained that "the Company received today a group of petitions signed by a substantial majority of employees in the ASW unit, which requested that the Company withdraw recognition from the ASW/MRCC Union and instead recognize the [CEA] as their exclusive collective-bargaining representative." The notice went on to state that the Respondent had "checked and verified all of the signatures on the petitions" and "determined that this change in bargaining representative is desired by a clear majority of the employees in the unit." The notice did not refer to or rely on other evidence of disaffection that arose prior to the Respondent's unfair labor practice. Accordingly, the appropriate inquiry in this case is whether there is a causal nexus between the Respondent's unfair labor practice and the December 2009 disaffection petition. Other evidence of disaffection of which the Respondent may have been aware, but on which the Respondent did not base its decision to withdraw recognition from the Union, is of no legal significance under Board law.

Moreover, we would reach the same result in this case even if we were to consider the preexisting evidence of disaffection—i.e., the decertification effort. As discussed above, the evidence establishes that the decertification effort was driven by the Respondent's announcement in December 2008 that it intended to implement the new healthcare plan. Committeeman Baloga, who helped prepared the decertification petition, was asked at the hearing, "[W]hat prompted these discussions about the decertification petition," and he responded, "guys [were] bombarding [the committee] daily with their dissatisfaction of this contract *and the way it's going with the medical*" and "*we seen what was coming with the insurance, and that was probably the final straw*." (Emphasis added.) Baloga testified further:

> Q. You talked about dissatisfaction in early '09 that you heard at executive committee meetings . . . .
>
> A. Yes.
>
> *Q. And you mentioned only the insurance being an issue?*
>
> *A. Correct.*
>
> Q. And that's because the company announced in December [2008] that it was implementing the insurance?
>
> A. Correct. (Emphasis added.)

It is true, as the Respondent points out on exceptions, that the Respondent's announcement (and subsequent conduct aimed at preparing employees for the implementation of the healthcare plan) was not itself unlawful. However, given the close link between the announcement of the new healthcare plan and its subsequent implementation, we think it is reasonable to infer that if the Respondent had bargained in good faith over the alternative healthcare plan proposed by the Union, instead of going forward with the implementation of its own healthcare plan despite the absence of an agreement or a bona fide impasse, much of the discontent that originally provoked the decertification effort would have been defused.

We also find no merit in the Respondent's argument that the judge improperly ignored or minimized the tes-

timony of employees that they rejected the Union for reasons other than the new healthcare plan. The Respondent argues that this testimony precludes any finding of a causal nexus between the Respondent's unlawful conduct and the Union's loss of majority support. The Board has held, however, "that it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard." *Bunting Bearings Corp.,* 349 NLRB 1070, 1072 (2007), quoting *AT Systems West,* 341 NLRB 57, 60 (2004). In other words, the Board's usual approach is to assess the *tendency* of unfair labor practices to cause disaffection, instead of relying on employees' recollection of subjective motives for withdrawing support from the union.[12] Hence, the testimony of employees concerning the relative importance of the Respondent's unfair labor practice in their decision to withdraw support from the Union is irrelevant under extant Board law, as is the language on top of the December 2009 disaffection petition stating that the signatories were not motivated to sign the petition by the unlawful implementation of the new healthcare plan.

Moreover, even if we were to consider the employees' subjective reasons for rejecting the Union, some of the reasons given are entirely consistent with a finding that the disaffection was causally related to the Respondent's unlawful conduct. Several employees testified, for example, that they felt union dues were too high. Others testified that they were disappointed with the Union's failure to deliver on its promise of greater bargaining strength following the Union's affiliation with the MRCC in 2007. The evidence establishes that the employees' resentment over dues and the Union's broken promises were strongly linked to the Respondent's announcement and implementation of the new healthcare plan. As discussed above, when the Union affiliated with the MRCC in March 2007, dues increased from $20 per month to $20 per month plus 2 percent of wages. Yale testified that the employees were willing to the pay the increased dues because, among other things, they believed the Union would have more bargaining strength after the affiliation.

> Q. Was the promise of jobs as you've just described, was that one of the reasons for the acceptance of those very significantly greater dues that the MRCC would be charging?
>
> A. That and the fact that we were going to get all kinds of help in bargaining our contracts and have a little more strength than just being a small affiliate, not an affiliate union.

The employees put up with the higher dues from March 2007 until early 2009. When it began to appear that the affiliated Union would not be able to prevent the implementation of the new healthcare plan, however, the employees felt that they were not getting the increased bargaining strength they were paying for. This is reflected in employee Andy Katsiyiannis' testimony when asked why he signed both the decertification petition and the disaffection petition:

> I felt I wasn't represented by the MRCC, by the ASW. . . . [A]ll they had been doing is taking money. . . . [N]one of the promises that were ever made ever came through. It didn't matter what it was.
>
> I mean, one of the main things when we first got into this union was they were going to save money on our health insurance, and that cost savings with

[12] *Saint Gobain Abrasives*, 342 NLRB 434, 434 fn. 2 (2000) ("The *Master Slack* test is an objective one . . . [t]he relevant inquiry at the hearing does not ask employees why they chose to reject the Union."); *C.F. Martin & Co.*, 252 NLRB 1192, 1192 fn. 2 (1980) (specifically disavowing reliance on employees' "subjective testimony" about the relative importance of unremedied unfair labor practices in their decision to withdraw support from the union). See also *Wire Products Mfg. Corp.,* 326 NLRB 625, 627 fn. 13 (1998), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates*, 210 F.3d 375 (7th Cir. 2000) (noting that the Board applies an objective, not a subjective, test). While the Board did not "disturb" the judge's reliance on petition signers' testimony in *Master Slack*, supra, 271 NLRB at 78, fn.1 and 84–85, it did not do so only in the "context" of violations committed 10 years before the signing of the petition, which had been significantly remedied before the circulation of the petition.

Applying these same principles, we find that the judge did not abuse his discretion by refusing to allow testimony from up to 90 additional employees regarding their reasons for withdrawing support from the Union. As the Board recently explained in *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 4 (2011):

> To the extent that an employer seeks to elicit employee testimony about their reasons for signing documents supporting or rejecting a union, the Board and the courts have long recognized the inherent unreliability of such testimony. As the Supreme Court observed in upholding the Board's rule prohibiting employers from demanding employee testimony explaining why they signed authorization cards, "employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1)." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 608 (1969). Consequently, in logic that applies equally here, the Court explained that questioning employees about the subjective motives for their representation preferences would result in "endless and unreliable inquiry." Id.; see also *Ladies Garment Workers Local 153 v. NLRB*, 443 F.2d 667, 668–669 (D.C. Cir. 1970). For those reasons, as well, we are unwilling to subject petition signers to ex post facto examination about their reasons for supporting decertification.

See also *Hopkins Nursing Care Center*, 309 NLRB 958, 958 fn. 4 (1992) (test for conduct warranting setting aside election results is objective; the Board asks whether the conduct has the tendency to interfere with employees' freedom of choice and the employees' subjective reaction is irrelevant).

> the company was going to be—the company would save money, plus we'd get a raise out of the deal.

In the same vein, employee Richard Mroz testified that he was willing to pay the increased dues because he thought the affiliation would benefit the employees. However, he became disenchanted with the leadership of the Union when it failed to deliver on its promises with respect to, among other things, healthcare:

> A. [P]romises, a lot of things that they said that they were going to do did not . . . happen. I wasn't—I wasn't confident they were doing enough for me as a member.
>
> Q. And what did—like what kinds of things?
>
> . . . .
>
> A. The insurance, it just seemed kind of funny that if we wanted to get or go through the insurance through the MRCC, why would the company stop that? I just couldn't understand it.

Employees were also upset over the prospect of having two large deductions from their paychecks. As employee Timothy Robertson testified, employees were willing to tolerate a payroll deduction for either dues or health insurance premiums, but they were not willing to tolerate both:

> The issue of healthcare started coming up about middle of negotiations, and, you know, with the talk of dues and everything, . . . what I was hearing was that it's either -- . . . . Guys were upset. It was either dues or insurance payments.

Bologa similarly testified:

> Q. Now, it is a fact also that you heard a lot of dissatisfaction about the ASW and its representation of people, did you not?
>
> A. I've heard all kinds of reasons, right.
>
> Q. Including about the dues structure?
>
> A. The dues *along with the insurance* was a big problem. (Emphasis added.)

We acknowledge that a number of employees testified that they were dissatisfied with the Union for reasons wholly unrelated to the new healthcare plan. Several employees testified, for example, that they were upset over the Union's failure to protect unit jobs, to provide jobs for laid-off members, and/or to provide job training. Other testified that they were upset over the transfer of funds from the ASW treasury to the MRCC treasury. However, the Board has never held that in order for a nexus to be established under the *Master Slack* causation test, the employer's unfair labor practices must be the *only* factors causing disaffection. As the Board held in *Hillhaven Rehabilitation Center*, 325 NLRB 202, 205 (1997), "Evidence that [an employee] initiated the petition effort for reasons other than the Respondent's unfair labor practices, or that these reasons may also have influenced other employees who signed the petition does not negate the factors supporting the finding of a causal relationship between the Respondent's unlawful conduct and the employees' expression of disaffection"), vacated in part on other grounds sub nom. *Rehabilitation & Healthcare Center of Cape Coral v. NLRB,* 178 F.3d 1296 (6th Cir. 1999). See also *Tenneco Automotive,* supra, 357 NLRB No. 84, slip op. at 8 (finding causal nexus between disaffection and employer's unfair labor practices, despite evidence that other factors may have contributed to the disaffection.). Here, the record establishes that the Respondent's unfair labor practice was a substantial and aggravating cause of the Union's loss of majority support, even if it was not the *only* cause.

Finally, the Respondent contends that the decision to pursue the disaffection petition in December 2009 was born out of frustration that the Union had "block[ed] the employees' much-desired vote" on whether to decertify the Union, by filing unfair labor practice charges over the implementation of the new healthcare plan. This argument finds support in the testimony of Rushing and Yale that by December 2009, employees were growing angry over the Board's lack of action on the decertification petition, and they chose to pursue the disaffection petition as a means of self-help. In making this argument, however, the Respondent ignores the critical role that its own conduct played in precluding a decertification election.[13] Had the Respondent not unlawfully implemented the new healthcare plan, the Board presumably would have processed the petition and held an election. Examined in this light, the link between the Respondent's unfair labor practice and the disaffection petition is clear.

[13] The Respondent emphasizes that the decertification petition had garnered enough signatures to require an election before the unfair labor practice occurred. This argument misses the point. The Respondent's unlawful implementation of the new healthcare plan in the absence of an agreement or a bona fide impasse undermined the Union in the eyes of the employees and made the Union appear powerless. The unlawful conduct affected all, or nearly all, of the unit employees, and it had a lasting and detrimental impact on their compensation. In these circumstances, we have little difficulty in concluding that a fair election could not have been held while the Respondent's unfair labor practice remained unremedied, even assuming the Board had not dismissed the petition for other reasons. See, e.g., NLRB Casehandling Manual (CHM), Sec. 11730, setting forth the Board's policy of holding in abeyance the processing of any representation petition where an unfair labor practice charge is filed alleging conduct which, if proven, would have a tendency to interfere with the free choice of employees in an election. See also *Big Three Industries,* 201 NLRB 197 (1973); *United States Coal & Coke Co.,* 3 NLRB 398 (1937).

In short, we find that a preponderance of the evidence (both objective and subjective) supports the judge's conclusion that there is a causal connection between the Respondent's unfair labor practice and the Union's subsequently loss of majority support. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(5), (2), (3) ,and (1) of the Act by withdrawing recognition from the Union based on the tainted disaffection petition and thereafter recognizing the CEA and entering into a collective-bargaining agreement with the CEA containing a union security clause.[14]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Employer, Comau, Inc., Southfield, Michigan, and its officers, agents, successors, and assigns, and the Respondent Union, Comau Employees Association, Southfield, Michigan, and its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. January 3, 2012

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[14] We note that the judge analyzed the need for an affirmative bargaining order under the criteria set forth by the U.S. Court of Appeals for the District of Columbia Circuit. We adopt the judge's analysis of this issue, and agree that the requirements of the court for an affirmative bargaining order have been met in this case. We adhere, however, to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996).

We find that the judge properly ordered the Respondent to withhold recognition from the CEA "unless and until that labor organization has been certified by the Board." See *NLRB v. Mine Workers District 50 (Bowman Transportation, Inc.),* 355 U.S. 453 (1958). We further find that the judge properly ordered the Respondent to restore recognition to the ASW, even though the ASW has ended its affiliation with the MRCC and has affiliated with the Carpenters Industrial Council (CIC). See generally *The Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008) (holding that when there is a union 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 Respondent does not contend that the ASW's identity has changed so significantly as a result of its disaffiliation from the MRCC and affiliation with the CIC as to alter its identity.

MEMBER HAYES, dissenting in part.

I dissent from the majority's adoption of the judge's finding that Respondent Comau, Inc. violated Section 8(a)(5), (2), (3), and (1) of the Act when it withdrew recognition from Automated Systems Workers Local 1123 (ASW), and then recognized and entered into a collective-bargaining agreement with the Comau Employees Association (CEA). Contrary to the judge's conclusion, I would find that, under the applicable *Master Slack*[1] analysis, the Respondent's implementation of a new healthcare plan on March 1, 2009 did not taint the unit employees' December 22, 2009 petition supporting the Respondent's actions. I would therefore dismiss all but one complaint allegation relevant to this matter.[2]

I. BACKGROUND OF FACTS

ASW was an unaffiliated union until it merged with the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (MRCC) on March 31, 2007. After the merger, the unit employees' dues deduction increased from $20 a month to $20 a month plus 2 percent of pay.

Contract Negotiations. With the collective-bargaining agreement expiring in March 2008, the Respondent and the Union commenced negotiations for a successor agreement in January 2008. The Respondent's initial proposed healthcare plan required the employees to pay health insurance premiums for the first time, and at significant amounts. On August 22, 2008, the Union proposed that the Respondent contribute instead to the healthcare plan underwritten by the MRCC, and the Respondent was open to this suggestion.

The parties failed to reach agreement, and the Respondent declared impasse on December 3, 2008. The Respondent stated that it would implement most of its last best offer, and subsequently implemented its last best offer on December 22, 2008. However, it announced that the proposed new healthcare plan would not be implemented until March 1, 2009.

[1] *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

[2] The CEA did not file exceptions and the Respondent did not provide supporting argument specific to the judge's finding that the Employer violated Sec. 8(a)(2) and 8(a)(3) and that the CEA violated Sec. 8(b)(1)(A) and 8(b)(2), respectively, by extending and accepting recognition and by entering into a collective-bargaining agreement at a time when the CEA did not represent an uncoerced majority of the unit employees. Nevertheless, all of these unfair labor practices turn on the contested finding that the Respondent unlawfully withdrew recognition from ASW. In light of my dissent, I would reverse the judge's finding as to these issues.

I agree with majority that the Respondent violated Sec. 8(a)(1) by telling employees that they could be disciplined or discharged for not signing dues-checkoff authorization forms, and that it is unnecessary to pass on additional allegations of coercive statements because such findings would be cumulative and would not affect the remedy.

Notwithstanding the impasse, the Respondent and Union continued to negotiate about a healthcare plan until March 20. At the same time, the Respondent continued to discuss the plan with employees and prepare the paperwork. The Union assisted the Respondent in signing up employees for the new plan because it was concerned that there could be a gap in coverage if an agreement was not reached. Ultimately, the Respondent implemented its plan on March 1..

The Board addressed the parties' negotiations in an earlier proceeding and found that the impasse with regard to the healthcare plan was broken in January 2009 when the Respondent increased its proposed contributions to the MRCC plan. Consequently, the Board found that the Respondent unlawfully implemented the new healthcare plan. [3]

The Decertification Petition

After the Respondent announced that it was implementing its last best offer, employees began to voice their discontent with the Union. Employee discontent was not limited to the impending health insurance premiums. Employees expressed discontent with the Union's inability to negotiate a new contract; the higher dues; the Union's failure to provide promised training and job placements; the Union's failure to protect the employees' jobs from other contractors and members of other unions; and the handling of approximately $250,000 in ASW's treasury prior to the merger.

A decertification petition was circulated in February 2009. By February 28, 36 percent of the bargaining unit had signed the petition. After the Union promised to place employees who had been laid off into other jobs, the filing of the petition was delayed. However, when the job placements did not materialize, the petition was filed with the Board on April 14, 2009, with the signatures of 51 percent of the bargaining unit. When the Union met with employee Willie Rushing (who circulated the petition) to discuss the reasons for the decertification petition, Rushing repeated the concerns expressed by the employees (described above). Rushing added that he had concerns about the quality of the MRCC healthcare plan and thought the proposal was made belatedly. On March 11, 2011, almost two years later, the Board denied the Respondent's Request for Review of the Regional Director's December 14, 2010, dismissal of the decertification petition, finding that the affirmative bargaining order in *Comau I* precluded a question concerning representation from being raised.

[3] *Comau, Inc.*, 356 NLRB No. 21, slip op. at 9 (2010) (*Comau I).*

The Disaffection Petition

In December 2009, employees started circulating another petition. This disaffection petition stated that the employees wanted to be represented by the CEA and requested that the Respondent recognize it. The petition included language stating that the signers were not motivated by the implementation of the new health insurance plan.[4] When the petition was delivered to the Respondent on December 22, 2009, 58% of the bargaining unit had signed the petition. The same day, the Respondent withdrew recognition from the Union and recognized the CEA. In April 2010, the Respondent and the CEA negotiated a collective-bargaining agreement, which is effective from December 22, 2009 through April 13, 2013. This new agreement maintained the new healthcare plan implemented by the Respondent on March 1, 2009.[5]

II. ANALYSIS

The Board has long held that an employer may not withdraw recognition from a union based on employee disaffection if there is a causal nexus between the disaffection and unremedied unfair labor practices. *AT Systems West,* Inc., 341 NLRB 57, 59 (2004) (citing *Olson Bodies, Inc.*, 206 NLRB 779, 780 (1973)). Other than in cases involving a general refusal to recognize and bargain, the Board requires "specific proof of causal relationship" between the unfair labor practice and the loss of support. *Lexus of Concord*, 343 NLRB 851, 852 (2004) (quoting *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), enfd. in relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997). To make this determination, the Board considers four factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' moral, organizational activities, and membership in the union. *Master Slack Corp.*, supra, 271 NLRB at 84. Under this test, I find that there is insufficient evidence of a causal nexus between the Respondent's implementation of a new healthcare plan and the employees' disaffection petition.

[4] Of the 20 employee witnesses who were permitted to testify, 3 cited the implementation of the new healthcare plan as the reason for their disaffection. Four other employees cited it as a source of dissatisfaction but not the only source.

[5] On February 10, 2011, the United States District Court for the Eastern District of Michigan denied the Acting General Counsel's request for a 10(j) injunction, finding no evidence that that implementation of the new healthcare plan led to the disaffection petition. I had declined to authorize this 10(j) request.

First, the implementation of the new healthcare plan was remote in time from the disaffection petition, which was circulated and submitted to the Respondent in December 2009, nine months after implementation of the plan.[6] Secondly, particularly in the factual context of this case, the possibility that the Respondent's implementation of a new healthcare plan could have a detrimental or lasting effect on employees is limited. It is the only unfair labor practice at issue here, and in cases involving unilateral changes to benefits, the Board regularly relies on other unfair labor practices to find a causal nexus.[7] This is not a situation where the Respondent engaged in bad-faith bargaining that could undermine the ASW in the eyes of the employees. Quite the opposite, the parties had been negotiating for over a year when the Respondent implemented the new healthcare plan, and they continued to negotiate until about 3 weeks later. It was obvious from these negotiations that there was going to be a change from the existing healthcare plan, either to the Respondent's proposed plan or to the MRCC plan.[8] In fact, the ASW assisted the Respondent with signing up employees for the new healthcare plan because it was concerned that there could be a gap in coverage if the parties did not reach agreement. Further, as stated above, there were some employee misgivings about the MRCC plan. Viewed in this context, the implementation of the Respondent's plan could not realistically have had a lasting effect or more than a modest detrimental effect, if any, on unit employees. See *LTD Ceramics, Inc.*, 341 NLRB 86, 88 (2004) (causal nexus not found where unilateral change was a premature implementation of a tentatively approved and improved policy after over a year of negotiations).

Third, the Respondent's implementation of the new healthcare plan did not have a tendency to cause employee disaffection. To the extent that the judge relied on *Priority One Services*, 331 NLRB 1527 (2000), to essentially find that the single unfair labor practice here had the inherent tendency to cause employee disaffection, that notion was overruled by the Board in *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004).[9] In light of the parties' lengthy negotiations as discussed above, and evidence of preexisting disaffection (discussed below), it is unlikely that the implementation of the new healthcare plan here had the tendency to cause employee disaffection by itself.

Finally, the implementation of the new healthcare plan did not lead to the decline in employee morale and participation in the Union's activities and membership. Evidence that employee disaffection arose prior to, and independently of, the unfair labor practice is relevant to the inquiry of causal nexus, and here, there is substantial and undisputed evidence that employee disaffection with the Union existed prior to the implementation of the new healthcare plan.[10] *Lexus of Concord*, supra, 343 NLRB at 852–853 (no causal nexus found where there was evidence of preexisting disaffection at least two months before the unfair labor practice). In addition to the healthcare premiums, the employees expressed discontent with the Union's effectiveness at bargaining; the high dues; the Union's failure to provide promised training and job placements; the Union's failure to protect members from losing jobs to competing employees; and the handling of the $250,000 in ASW's treasury. In fact, only three of the 20 employee witnesses cited the imple-

[6] While the Board has found causal nexus where at least nine months had passed between the unfair labor practice and the withdrawal of recognition, those cases involved additional and more pervasive unfair labor practices. See e.g., *AT Systems West*, supra (causal nexus found where nine months passed between employer's unlawful solicitations to decertify and direct dealing and withdrawal; only three months had passed between parties' settlement agreement and withdrawal); *Columbia Portland Cement Co.*, 303 NLRB 880 (1991), enfd. 979 F.2d 460, 465 (6th Cir. 1992) (causal nexus found where employer withdrew recognition a year after it was ordered to reinstate unlawfully discharged employees and accept strikers' offers to return to work). Contrary to the majority, I would not render consideration of this factor nugatory in any instance of a unilateral change because of its continuing nature.

[7] See e.g., *Goya Foods*, 347 NLRB 1118 (2006) (causal nexus found where unfair labor practices include unilateral changes in work conditions and discharge of three active union employees and suspension and underemployment of a fourth); *Penn Tank Lines*, 336 NLRB 1066 (2001)(causal nexus found where unfair labor practices include unilateral reduction in employee pay and discharge of active union supporter).

[8] Thus, the effect of the unilateral healthcare plan change was not, as the majority suggests, an increase in payments from zero to hundreds of dollars for unit employees.

[9] The Board stated that "the real test is whether there is a causal nexus between the change and the loss of support for the Union. The use of a conclusionary phase can be no substitute for an evidentiary inquiry into this matter. To the extent that *Priority One Services* is to the contrary, it is overruled." Id., supra at 434, fn. 4.

[10] The majority dismisses the evidence of preexisting disaffection stating that, under *RTP Co.*, 334 NLRB 466, 469 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003), the Board can only examine factors that were actually relied upon in evaluating a defense to a withdrawal of recognition. Since the Respondent withdrew recognition based on the December 2009 disaffection petition, the majority finds that evidence of preexisting disaffection, i.e., the decertification petition, are of no legal significance. The majority's reading of *RTP* is unduly restrictive. Obviously, the disaffection petition did not arise out of a vacuum. The facts show, and the majority even recognizes, that the disaffection petition is inextricably linked to the decertification effort. To the extent that the reasons that drove the decertification effort are evidence of preexisting disaffection, they are relevant to the inquiry of causal nexus. *Lexus of Concord*, supra, 343 NLRB at 852-853.

mentation of the new healthcare plan as the reason for their disaffection.[11]

Furthermore, the judge and the majority ignore the possibility that employee disaffection could have been caused by the ASW's actions as the employees' bargaining representative. With higher dues, employees reasonably had high expectations for the ASW. In addition to the concerns described above, employees questioned the quality of the MRCC healthcare plan, which also was not proposed until eight months into negotiations. Significantly, the ASW was unable to negotiate a successor agreement after a year of negotiations, and the Respondent declared a *lawful* impasse. It is at least as likely that the ASW's poor performance as a bargaining representative caused employee disaffection.

In sum, I would find that under the *Master Slack* test, there is insufficient evidence to establish that a causal nexus exists between the Respondent's implementation of the new healthcare plan and the disaffection petition. Consequently, the Respondent did not improperly rely on the disaffection petition, signed by 58 percent of the employees, to withdraw recognition from the ASW and to recognize the CEA as the employees' majority choice for collective-bargaining representation on December 22, 2009.

Dated, Washington, D.C. January 3, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

Sarah Pring Karpinen and *Darlene Haas Awada, Esqs.,* for the Acting General Counsel.

Thomas G. Kienbaum and *Theodore R. Opperwall, Esqs.,* of Birmingham, Michigan, for the Respondent Employer (Comau).

M. Catherine Farrell and *David J. Franks, Esqs.,* of Bloomfield Hills, Michigan, for the Respondent Union (CEA).

Edward J. Pasternak, Esq., of Southfield, Michigan, for the Charging Party.

[11] The majority finds that the judge did not improperly ignore this testimony because the subjective state of mind of the employees for rejecting the Union is irrelevant. *Saint Gobain*, supra, 342 NLRB at 434 fn. 2. However, the decertification petition and the employees' testimony expressing disaffection with the Union are objective evidence of preexisting employee disaffection. Id. (number of employees who expressed dissatisfaction with union prior to unilateral change in healthcare benefits is an objectively ascertainable factor to be considered in determining causation).

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Detroit, Michigan, from August 31–September 3, 2010, and from September 16–17, 2010. The charge in Case 7–CA–52614 was filed on December 29, 2009, and was amended on January 8, 2010. The charge in Case 7–CA–52939 was filed on May 20, 2010, and was amended on July 8, 2010, and further amended on July 23, 2010. The charge in Case 7–CB–16912 was filed on May 20, 2010, and was amended on June 9, 2010, and further amended on July 8, 2010. The consolidated amended complaint was issued on July 30, 2010, and alleges that Comau, Inc. (Comau or Respondent Employer (RE)) violated Section 8(a)(1), (2), (3), and (5) of the Act by: failing and refusing to bargain collectively and in good faith with the Automated Systems Workers Local 1123 (ASW, ASW/MRCC[1] or Charging Party); dominating and interfering with the administration of, and rendering unlawful assistance to, a labor organization; discriminating against employees and thus encouraging membership in a labor organization; and interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act. The consolidated amended complaint also alleges that the Comau Employees Association (CEA or Respondent Union (RU)) violated Section 8(b)(1)(A) and (b)(2) of the Act by: restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act; and attempting to cause Comau to discriminate against its employees such that Comau would violate Section 8(a)(3) of the Act.

Both Comau and the CEA filed timely answers denying the alleged violations in the consolidated amended complaint.

This case follows on the heels of Case 7–CA–52106, decided by Administrative Law Judge Paul Bogas on May 20, 2010 and adopted by the Board on November 5, 2010. See *Comau, Inc.*, 356 NLRB No. 21 (2010). During trial, I took judicial notice of the legal and factual findings in Judge Bogas' decision, and advised the parties that they could make any relevant arguments about those findings (including the weight that the findings should carry). Those findings became binding authority when the Board affirmed Judge Bogas' rulings, findings and conclusions, and adopted his remedy and recommended order (with minor modifications to each that are not relevant to my analysis).

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs[3] filed

[1] The ASW/MRCC abbreviation is used for all time periods during which the ASW was affiliated with the MRCC.

[2] The trial transcript is generally accurate, but I make the following corrections to clarify the record: (a) at Tr. 203–845, all references to "Harry Hale" should read "Harry Yale"; (b) at Tr. 484, line 23, "away" should be "weight"; (c) at Tr. 601, line 1, "Carey" should be "Harry"; (d) at Tr. 643, line 3, "not" should be "reflect"; (e) at Tr. 797, line 19, "Kim Kayka" should be "Jim Kayko." In addition, at various points in the transcript, the record did not record (or mislabeled) the charging party's attorney's (Ed Pasternak) responses to my inquiries about objections to exhibits. The record should reflect that I admitted the following two exhibits into evidence over the charging party's objection:

by the Acting General Counsel, Respondent Employer and Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer Comau operates plants in the Detroit, Michigan area to design, build, sell, and install automated industrial systems. In 2009, Respondent Employer derived gross revenue in excess of $1 million, and sold goods and provided services valued in excess of $50,000 from its Michigan facilities directly to customers located outside of Michigan. Respondent Employer admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent Union admits, and I find, that at all material times it has been a labor organization within the meaning of Section 2(5) of the Act. I also find that, at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

A. Comau's Organizational Structure

Comau, Inc. designs and builds automated equipment (tooling systems, robotic applications, etc.) for a variety of customers, including Chrysler, General Motors, Ford Motor Company. Comau's headquarters are located in Southfield, Michigan, and additional facilities are located in Novi, Michigan. Tr. 102, 573–576.

At each facility, Comau generally has departments that are led by supervisors. Each department is separated into work centers (or teams), each of which has an assigned "leader" who (among other qualifications) is able to provide team and individual leadership for the other employees in the work center, and is highly skilled and experienced in the work that employees carry out in the work center.[5] Tr. 580, 594–595, 599; GC Exh. at 45–52. There are approximately 30 leaders in the bargaining unit, each of whom receives a slightly higher wage (approximately one additional dollar per hour) for performing the leader position.[6] Tr. 592–593. Several leaders have simultaneously served as union officers. Tr. 123–126, 384–385, 1044–1045.

When projects come to Comau, the design group outlines the project as a whole, and then managers assign the work needed to complete that project to one or more of the work centers. Tr. 590–591. As the project proceeds, leaders receive instructions through an automated computer system, and then communicate

RE Exhs. 12, 15. Finally, I note that while the exhibit files generally are correct, I excluded Acting GC Exhs. 22 and 25–30 from the record (those exhibits were erroneously placed in the admitted exhibits file).

[3] I have also considered the posttrial motions filed by the parties. The Acting General Counsel filed a motion to substitute the table of contents and table of authorities in its post trial brief. Given the fact that the Acting General Counsel only seeks to make clerical corrections to its brief, and given that no other party has opposed the motion, I will grant the Acting General Counsel's request and will include the revised table of contents and table of authorities in the post-trial materials that will be forwarded to the Board if any exceptions are filed.

On October 8, 2010, Comau filed a motion to supplement the record with the transcript and exhibits from an October 5, 2010 deposition of David Baloga in connection with a 10(j) petition that is currently pending in the United States District Court for the Eastern District of Michigan. The proffered records included cover sheets from the ASW/MRCC's meetings in 2008 (showing the number of members who attended each meeting), and Mr. David Baloga's post–trial deposition testimony about those documents. The Acting General Counsel opposed Comau's motion, and I denied Comau's motion to supplement the record in an order dated October 14, 2010.

In its posttrial brief, Comau (in part) asked me to reconsider my ruling on its motion to supplement the record. See RE Br. at 15. The Acting General Counsel, meanwhile, filed a motion to strike section C of Comau's post–trial brief on the theory that Comau argued evidence that is outside of the record. Given these filings, I have reviewed my decision to deny Comau's motion to supplement the record, and I stand by my decision to deny Comau's motion to supplement. Comau made a strategic decision during trial not to introduce the ASW/MRCC 2008 meeting attendance figures into evidence, and it cannot now introduce a new issue at trial that it could have litigated in the original hearing. See RE Br. at 14; *compare Winkle Bus Co.*, 347 NLRB 1203, 1211 fn. 4 (2006) (ALJ permitted the General Counsel to supplement the record with an exhibit that, by prior agreement, the Respondent did not provide until after trial, and that corrected an error in another exhibit already admitted into the record). More important, however, the issue is moot. As noted below, I have determined that although meeting attendance figures may be relevant as a general matter to showing a causal link between an unfair labor practice and a subsequent loss of union support (see *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the limited ASW/MRCC meeting attendance figures that were admitted into evidence in this case are not sufficiently reliable for me to draw any meaningful conclusions about whether the various attendance fluctuations resulted from Comau's unfair labor practice. See infra, fn 15.

Finally, I have decided to grant in part and deny in part the Acting General Counsel's motion to strike section C of Comau's post–trial brief. Baloga's posttrial affidavit has not been admitted into the record, and thus I will strike the portions of Comau's brief that refer to the affidavit's contents. See RE Br. at 15. Similarly, I will strike the portions of Comau's brief that characterize the contents of RE Exh. 11, because the contents of that rejected exhibit were never placed on the record. See RE Br. at 14. The Acting General Counsel's motion to strike is denied as to the remaining portions of Section C of Comau's brief, because the remaining portions of Section C are arguments that Comau made in anticipation of a contrary argument that the Acting General Counsel might make in its own post-trial brief.

[4] Both Comau and the CEA admit that from 2001 to March 2007, the ASW (formerly known as the PICO Employees Association) was a labor organization within the meaning of the Act. Testimony presented at trial demonstrated (without dispute) that the ASW continued its status as a labor organization from March 2007 to the present. (Tr. pp. 103–104, 367) On March 1, 2010, the ASW changed its affiliation from the Michigan Regional Council of Carpenters (MRCC) to the Carpenters Industrial Council (CIC). Notwithstanding this change, the ASW continued its affiliation with the United Brotherhood of Carpenters, and retained its same officers. Tr. 104.

[5] Many of the shop floor employees also have several years of experience, though they have not taken on the role of leader. Tr. 602.

[6] Before March 2001, leaders were identified as supervisors in the collective-bargaining agreement. Tr. 969. That changed in March 2001 (at the Union's request), when the new collective-bargaining agreement was modified to describe leaders as employees who take on the responsibility of individual and team leadership in particular areas. Tr. 969–970; Respondent Union (RU) Exh. 9 at 43–47.

those instructions to the individual workers on their teams. Tr. 600–601.

Leaders perform a variety of functions in connection with their role as the intermediaries between the employees in their work centers and management. When they first receive work assignments and the corresponding blueprints, leaders may request specific employees to be assigned to their teams. Tr. 601, 604, 1005. Leaders also attend a project kickoff meeting with a representative from management and the project manager. Tr. 609, 873, 1005. Once the leader's team is assembled, the leader assigns specific tasks to individual employees. Tr. 266–267, 606, 682, 874, 1140–1141. As the team members carry out their assignments, the leader facilitates the overall project by consulting with the designers as needed, and providing instructions to the team members about new assignments, work revisions and corrections, or about how specific tasks should be performed. Tr. 165, 189, 216–217, 270–272, 340–341, 437–438, 445–446, 606, 1008. Leaders also stay in contact with management by attending weekly leader meetings and periodic manpower meetings, and by providing verbal updates. Tr. 256, 424–425, 440–441, 608, 610–611.[7]

Leaders also serve as the beginning and end points for communication between employees on the shop floor and management. Leaders generally initiate nonconformance reports to advise management (via a computer database) about problems or defects in work product that require additional time or money to repair. Tr. 697–700. When management decides to authorize overtime for a project, leaders may recommend employees to perform the overtime work, and leaders notify the individual employees who have been selected to work the overtime hours. Tr. 167, 275–277, 443, 612–613, 689–690; GC Exh. 5. Similarly, employees wishing to take a day off must first obtain their leader's approval (and signature on an "absentee report" form) before the paperwork is forwarded to the shop foreman (or another supervisor) for final signature and approval. Tr. 272–273, 615, 618–619; Respondent Employer ("RE") Exh. 14. In some instances, employee leave requests have been approved without obtaining the supervisor's signature, leaving the leader as the only individual to sign the request. Tr. 620–621; GC. Exhs. 40 (Grayson); 41 (Sobeck); and 42 (Constantine).[8]

B. Union History at Comau

For a number of years (dating back to at least the 1980s), the PICO Employees Association (PEA) served as the exclusive collective bargaining representative for all full-time and regular part-time production and maintenance employees, inspectors and field service employees (hereafter, the bargaining unit) at Comau (and at Comau's predecessor, Progressive Tool and Industries Co. (PICO)).[9] Tr. 102–103, 236, 861. The PEA was not affiliated with a larger union—instead, it was solely composed of Comau employees. In 2004, the PEA changed its name to the ASW, but otherwise maintained its leadership, bylaws and overall structure. Tr. 140, 757, 862.

In 2007, the ASW began exploring the possibility of affiliating with a larger union. After gauging the interest of various larger unions in such an affiliation, the ASW decided to affiliate with the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the MRCC).[10] Tr. 103; GC Exh. 34. Proponents of the merger hoped that the affiliation with the MRCC would (among other things) enhance the ASW's bargaining strength, and also increase training and job opportunities for members of the bargaining unit. Tr. 762–763, 1012, 1051, 1117; RU Exh. 2; RE Exh. 13 (pp. 590–592). On the other hand, opponents of the merger expressed concerns about the substantial increase in union dues (an increase from $20 per month to the ASW, to $20 per month (to the ASW) plus an additional 2% of all wages (excluding vacation) per month to the MRCC), how the balance in the ASW treasury (approximately $250,000) would be handled, and the wisdom of associating with a union of carpenters given that the ASW bargaining unit was composed of machinists, and given that the MRCC already had several members laid off. Tr. 723–724, 863–867, 974, 1013–1014, 1017–1018, 1111.

The ASW bargaining unit voted to approve the merger with the MRCC, effective March 31, 2007. Tr. 103, 867. In connection with the merger, the ASW underwent the following changes: a) executive board members Pete Reuter and Darrell Robertson terminated their employment with Comau and became full time employees of the MRCC (they also continued to serve on the ASW/MRCC's executive board); and b) the ASW became subject to the MRCC's bylaws. Tr. 142, 764–765, 769–770, 1018–1019.[11]

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[7] To carry out these responsibilities, leaders are provided some equipment that is not generally provided to other employees on the shop floor. Specifically, leaders have desks on the shop floor, telephones, and have computers with password access requirements. Tr. 264, 647–648, 653, 701, 995, 999–1000, 1006, 1008–1010.

[8] Occasionally, Comau has called upon individual leaders to take on specific additional responsibilities. For example, in connection with its hiring decisions, management asked leader James Reno to review applicant résumés and provide his opinion about the applicant's ability to operate the company's boring mills. Tr. 658–659, 669; GC Exhs. 46–48. In another instance, leader Nelson Burbo communicated with an outside vendor to arrange a meeting about options for upgrading the Company's equipment. Tr. 695; GC Exh. 50.

[9] During the relevant time period, the bargaining unit was defined as: "[a]ll full-time and regular part-time production and maintenance employees, inspectors and field service employees, employed by [Comau] 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." *Comau*, 356 NLRB No. 21, slip op. at 2 fn. 2. The current bargaining unit is substantially similar, though the language was modified slightly after Comau recognized the CEA as the unit's collective bargaining representative. GC Exh. 1(bb) at 2.

[10] The MRCC is also referred to as the Millwrights. Tr. 355–356. The terms were used interchangeably during the trial.

[11] The ASW/MRCC still maintained its old bylaws, but to the extent that those conflicted with the bylaws of the MRCC, the MRCC bylaws controlled.

C. Contract Negotiations—2008–2009

In 2008, the ASW and Comau began negotiations for a new collective-bargaining agreement, since the existing agreement (effective from March 7, 2005 to March 2, 2008) was due to expire. Tr. 809–810; GC Exh. 32. The parties extended the collective-bargaining agreement through December 21, 2008, while negotiations proceeded. Jt. Exh. 2. The issue of health insurance coverage became a sticking point between the parties. *Comau*, 356 NLRB No. 21, slip op. at 3. Under the previous collective-bargaining agreement, incumbent unit employees were not required to pay any premiums for the company-provided healthcare coverage. Although Comau used a self-insured health plan, the coverage was provided through Blue Cross/Blue Shield (Blue Cross). Under Comau's proposed contract, Comau 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. Id.

The amounts of the proposed employee premiums were significant. Comau's last best offer 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 the cost increases during the term of the contract. 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. Comau's new plan also reduced the employees' coverage in some respects. Id.

At a December 3, 2008 bargaining session, Comau 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. During this same timeframe, Comau sent a letter to bargaining unit employees to describe the key changes that would be imposed on December 22. In addition to notifying the unit about new rules regarding tardiness, seniority, overtime pay and other issues, Comau also notified employees that, effective March 1, 2009, it would no longer offer the existing health insurance plans, but would instead offer healthcare coverage though other, employee-paid premium-required, medical plans. *Comau*, supra at 4; see also. Jt. Exhs. 1, 2.

Notwithstanding Comau's declaration of impasse, Comau and the ASW continued to negotiate about health insurance. Specifically, from December 8, 2008 through March 20, 2009, the parties (using healthcare insurance subcommittees) met on approximately 10 occasions for negotiations regarding healthcare insurance. Each party's subcommittee had the authority to enter into tentative agreements regarding employee health insurance, subject to final approval by the union membership (as to the ASW) and by Comau's full negotiating committee and/or upper management. *Comau*, supra at 5. Among other proposals, the subcommittees discussed the ASW/MRCC's suggestion that Comau stop paying to finance its own self-insured health insurance plan and instead make contributions to help cover the cost of insuring unit employees under a health insurance plan provided through the MRCC.[12] Id. In particular, the parties discussed the amount that Comau would pay to the MRCC plan for the employees' health insurance on a weighted average per-employee basis. Id. Comau initially offered (on December 8, 2008) to pay a weighted average of $766 per employee/per month, and on December 18, 2008, increased its contribution offer to $820 per employee/per month. Id.

Any prior impasse regarding healthcare ceased to exist on January 7, 2009, when Comau made a written proposal that significantly increased the per-employee contribution that Comau was offering to make to provide coverage under the MRCC health insurance plan. *Comau*, supra at 9. Not only did Comau increase its contribution offer on January 7, 2009 (the weighted average is not known)—it again increased its contribution offer (in response to an ASW counteroffer) on February 5, 2009 (to a weighted average of $835 per employee per month).[13] Id. at 5 fn.13. Meanwhile, Comau continued to prepare for implementing its new health insurance plan (as outlined in the imposed last best offer) in January 2009, as it met with unit employees to discuss the plan and complete the paperwork needed to enroll employees in the plan. Id. at 4; Tr. 937, 941.

D. Early 2009—Employees Circulate a Decertification Petition and Comau Unilaterally Implements Its New Health Insurance Plan

In the weeks after Comau announced that it would be imposing its last best offer, employees began to voice their unhappiness with the ASW/MRCC. The prospect of paying significant health insurance premiums was a prominent concern, since the new premiums would be yet another deduction from employee paychecks. Tr. 186–187, 399–400, 772, 817, 833–834, 1151–1152; RE Exh. 13, pp. 542, 554–555, 561–562, 568, 576–577, 586, 595. However, other latent discontent with the ASW/MRCC also rose to the surface, as various employees believed (in different degrees) that the ASW/MRCC: was not effective in attempting to negotiate a new contract (Tr. 186–187, 1117–1118); charged unduly high dues that came with little or no resulting benefit to the bargaining unit (Tr. 400, 740, 773, 1110, 1157; RE Exh. 13, pp. 554–555, 571, 578, 613); failed to deliver on its promises to provide bargaining unit members with training and job placements (Tr. 825, 1050, 1110–1112, 1133, 1153, 1195–1196; RE Exh. 13, pp. 592–593, 604, 610–612); did not protect bargaining unit members from losing job openings at Comau to contractors or members of other unions (Tr. 776–778, 1203–1204; RE Exh. 13, pp. 529–530, 610–611); and improperly claimed the entire balance of

[12] The anticipated benefit of this proposed arrangement would be that unit employees would be spared the cost of paying for health insurance premiums, while Comau would realize a savings in cost since its contributions to the MRCC healthcare plan would be lower that the amount that Comau was paying to maintain its self-insured healthcare plan.

[13] Negotiations continued from this point until March 20, 2009. The ASW essentially agreed to the $835 per employee/per month contribution amount that Comau offered, but other issues remained unresolved. *Comau*, supra at 5–6, 9.

the ASW dues account (approximately $250,000) at the time of the March 2007 merger (Tr. 741–742, 1111).

In January 2009, the ASW/MRCC executive committee (minus Darrell Robertson and Pete Reuter) met to discuss how to respond to the concerns expressed by various members of the bargaining unit about the ASW/MRCC. Tr. 375, 774, 778–779. After some discussion, the executive committee researched the process for decertifying the ASW/MRCC (including consulting with an NLRB employee and obtaining materials from the NLRB website), and committee members Dave Baloga and Dan Malloy prepared a decertification petition. Tr. 376–377, 780–781, 1021–1022.

On February 18, 2009, employee Frederick Lutz signed a written request that the ASW executive committee initiate decertification proceedings from our ASW 1123/UBC/MRCC representation. RU Exh. 1; Tr. 726–727. Based on that request, the executive committee members began gathering employee signatures (including their own) on the decertification petition, and also on individual forms authorizing the CEA to serve as the bargaining unit's collective bargaining representative. Tr. 782, 787, 1023; RU Exhs. 3, 8. However, later in February 2009, the executive committee transferred the responsibility of circulating the petition to employee Willie Rushing, after being warned (by Pete Reuter) that any executive committee member who circulated the petition could (among other things) be sued or disciplined by the ASW/MRCC. Tr. 787–788, 790–791, 879–880, 940–941. Once Rushing received the petition and the accompanying authorization for representation forms, he turned the materials over to unit employees who passed the materials around in Comau's facilities to obtain additional signatures.[14] Tr. 880–881, 886. Bargaining unit employees who signed the decertification petition in February 2009 were aware that the new health insurance plan and premiums would take effect on March 1, 2009. RE Exh. 13, pp. 554–555, 557–558, 560, 574, 585.

On March 1, 2009, Comau unilaterally implemented the new health insurance plan contained in its imposed last best offer. *Comau*, supra at 9. As the Board has found, Comau's unilateral action was an unfair labor practice because the ASW/MRCC had not agreed to the health insurance plan, and because the previously declared impasse (declared by Comau in December 2008) was subsequently broken by (at the latest) January 2009 when Comau and the ASW/MRCC resumed negotiations about employee health insurance. Id.

In the nine days that followed Comau's unlawful unilateral action, thirty-four[15] additional employees signed and dated the decertification petition. RU Exh. 3. In addition, employee discontent with the ASW/MRCC intensified.[16] As Daniel Malloy testified, while members of the bargaining unit were upset in December 2008 when Comau imposed its last best offer, once the health care premium money came out of the checks in March 2009, the bargaining unit employees "wanted to fry us. They wanted to fry the committee, they wanted to fry Pete [Reuter] and Darrell [Robertson]. . . . because we were promised all along that . . . they would work to keep us from having to pay anything." Tr. 833.

Rushing returned the completed decertification petition and authorization for representation forms to Dan Malloy. Tr. 887. Initially, Malloy (with the agreement of others) decided to delay filing the petition in hopes that the ASW/MRCC would deliver on some new promises (by Reuter) to place employees who had been laid off from Comau in other jobs. Tr. 793–794, 888, 1025; RE Exh. 13, pp. 602–603. When those job placements did not materialize, Rushing retrieved the petition from Malloy and filed the decertification petition with the NLRB on or about April 14, 2009. Tr. 888.[17]

E. Employee Discontent Persists as Employees Await Action on Decertification Petition

In May 2009, Rushing met with MRCC director Doug Buckler to discuss the rationale for the decertification petition. Consistent with the concerns expressed by other employees, Rushing told Buckler (and also Reuter) that he was unhappy with:

[14] While the petition circulated, ASW/MRCC executive committee members who signed the petition subsequently redacted their names and signatures from the petition, citing ongoing concerns that the ASW would take action against them for participating in the decertification effort. Tr. 886–887, 1048, 1173, 1181.

[15] The decertification petition in the record has been redacted to eliminate the names and addresses of the employees who signed the document (thus leaving only the date of signature). Tr. 886–887. To the extent that ASW/MRCC executive committee members signed the petition, those signature lines were fully redacted (by members of the ASW/MRCC) to obscure the entries in full, including the date of signature. The count (34) of signatures entered on or after March 1, 2009, referenced herein does not include any of the fully redacted entries (whether made by the executive committee or otherwise) on the petition. The petition as a whole contains 105 signatures (again, excluding the 13 fully redacted entries), most of which were entered on February 19, 2009. RU Exh. 3. I note that although I am not including the 13 redacted petition entries in my calculations (since the redactions rendered the entries null and void), my analysis would remain the same even if the 13 redacted entries were counted.

[16] The Acting General Counsel presented the cover sheets of ASW/MRCC meeting minutes to demonstrate the change in ASW/MRCC meeting attendance in this time period (and to suggest that the decline in attendance was caused by the March 1 unfair labor practice). The cover sheets reflect the following attendance figures: January 7, 2009 (62 members attended); January 22, 2009 (69 members); February 4, 2009 (45 members); February 24, 2009 (50 members); March 4, 2009 (35 members); April 1, 2009 (29 members); May 6, 2009 (26 members); June 3, 2009 (32 members); July 1, 2009 (32 members); August 5, 2009 (29 members); September 2, 2009 (28 members); and November 3, 2009 (12 members). See GC Exhs. 9–13, 15–21. I have given limited weight to these meeting attendance figures because while the numbers do show a downward trend in 2009, the record does not include attendance figures from 2008. Without the comparison data from 2008, I cannot rely on the meeting attendance figures to conclude with any confidence that attendance declined because of (among other possibilities) Comau's unfair labor practice on March 1, routine fluctuations that occur every year, or because of a spike in attendance (and then a return to normal levels) after Comau imposed its last best offer in December 2008.

[17] The parties have stipulated that on December 22, 2009, there were 178 employees in the bargaining unit. There was no stipulation proposed or offered about the unit's membership on April 14, 2009. However, the evidence in the record indicates that the bargaining unit included between 234 and 237 employees as of April 14, 2009. RE Exh. 13, pp. 527, 600.

the MRCC's failure to provide training in skilled trades that it promised; the fact that the MRCC issued him a journeyman card that was limited to the ASW, and thus had little to no value in making him eligible for other jobs; the high cost of MRCC union dues; the transfer of the ASW dues account balance to the MRCC; and the quality of the MRCC health insurance that the ASW/MRCC proposed in negotiations (belatedly, in Rushing's view) as an alternative to Comau's health insurance plan. Tr. 914–921. Rushing also continued to monitor the status of the decertification petition periodically at the NLRB because he was getting pressure from bargaining unit employees, particularly when employees received another paycheck with ASW/MRCC union dues deducted. Tr. 891.

F. December 2009 Disaffection Petition

On November 19, 2009, Comau, the ASW and Rushing participated in a *Saint Gobain* hearing before Judge Bogas in Case 7–RD–3644 regarding decertification petition and pending charges. *See* RE Exh. 13; see also *Saint Gobain Abrasives*, 342 NLRB 434 (2004). The decertification petition ultimately stalled.

In late 2009, Rushing obtained the contact information for a consulting firm to seek assistance with the pending decertification petition. Tr. 894–895, 1026. Rushing passed the consultant's information on to Harry Yale.[18] Tr. 895. With the consultant's assistance, Yale prepared a disaffection petition (a/k/a "Dana" petition), as well as a revocation of dues-checkoff authorization form. Tr. 1027; RU Exhs. 6, 7. Each page of the disaffection petition contained the following language at the top of the page:

> We, the employees of Comau, Inc. in the bargaining unit of the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) declare by our signatures below that we no longer want to be represented by that Union, and we request that Comau, Inc. immediately stop recognizing that Union as our collective bargaining representative.
>
> We no longer want to be represented by the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) because of the excessive dues that Union charges us each month and because it has not come through on its promises to increase job opportunities for us—and not because Comau, Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan.
>
> We also declare by our signatures below that we want to be represented by the Comau Employees' Association, and we request that Comau, Inc. immediately begin recognizing the Comau Employees' Association as our collective bargaining representative.

RU Exh. 6.

On December 15, 2009, Yale placed copies of both the disaffection petition and revocation of dues-checkoff forms in binders, and placed the materials on his desk at Comau for employees to review and sign on their break time.[19] Tr. 897–898, 1029–1030. On his own time, Yale also took the binders to other Comau facilities in the area for members of the bargaining unit to review and sign the petition and dues-checkoff revocation form. Id. At each facility, employees generally passed the materials around for review, but occasionally did so during work time. Tr. 1065–1066, 1112, 1124, 1140. The petition generally was circulated without much discussion, other than describing the petition as a document about getting out of the union. Tr. 158, 1124, 1153–1154. Some employees testified that they did read the language at the top of the disaffection petition before they signed the document. Tr. 1116, 1133–1134, 1142, 1202–1203.

Employee Rich Mroz, however, had a somewhat different experience with the disaffection petition. As Mroz explained, initially one of his leaders (Nelson Burbo) at the Novi facility approached him and advised him about the disaffection petition that was circulating. Burbo then asked Mroz if he was happy with the ASW/MRCC, to which Mroz responded that although he was not happy with the Union, he thought it might be a bad time to get out of the Union in light of the ongoing dispute with Comau about health insurance benefits. Tr. 158–159. On another day, another leader (James Reno) invited Mroz (who was on his work time) to speak to Yale, who was visiting the facility. Mroz agreed to speak with Yale, and reiterated his concern that it might be a bad time for the disaffection petition. Yale did not disagree with that opinion, but asserted that the MRCC was not going to get anywhere with its efforts to recover the money that members of the bargaining unit spent to pay the new health insurance premiums. Tr. 160–161. Mroz also asked if his leaders signed the petition,[20] to which Yale replied that Mroz's leaders did sign the petition, as did a majority of employees in the unit. Tr. 162. Mroz agreed to sign the petition after confirming that his brother also signed the document, but noted that the information he received from Yale did influence his decision to sign. Tr. 162–163, 192.

On or about December 21, 2009, Yale received the completed disaffection petition and revocation of dues-checkoff authorization forms.[21] See RU Exh. 6 (final signatures dated

[18] Yale served as an ASW/MRCC executive committee member until July 2009, when he lost his bid for reelection to the committee.

[19] In this same time period, several employees objected to the fact that MRCC dues were deducted from their annual holiday check. By tradition, Comau closes its facilities for a period of time in December, and issues its employees a holiday check for a predetermined number of hours as a bonus payment. Tr. 898. Although MRCC dues were deducted from holiday checks in 2007 and 2008, several employees objected when MRCC dues were deducted from holiday checks in 2009, and expressed frustration that the April 2009 decertification petition remained unresolved. Tr. 899, 903, 1217–1219; GC Exh. 55.

[20] Mroz expressed concern about going against the opinion of his leaders about the petition, and thus running the risk of the leaders taking an adverse action against him as a result. Tr. 162–163, 165.

[21] Other than the acts of its alleged agents (Yale, Burbo and Reno) as described herein, there was limited evidence that Comau facilitated or participated in the circulation of the disaffection petition. Baloga testified that he saw two employees on layoff status approach the binder with the petition, but the record does not show that Comau gave those individuals access to the shop floor (as opposed to an employee using his or her own scan card to allow access, or a Comau clerical employee allowing access without management's knowledge). Tr. 286–288,

December 21, 2009). Yale notified Comau human resources director Fred Begle on December 21 or 22 that he planned to give him the documents, and actually delivered the materials to Begle on December 22, 2009. Tr. 1076, 1085, 1088; RE Exh. 1 at 12. Begle accepted the petition, and advised Yale that he (Begle) would verify the signatures on the petition.[22] Tr. 1032, 1085, 1088. Begle then compared the signatures on the disaffection petition with sample signatures obtained from individual employee files, and determined that 103 members of the bargaining unit (out of a total of 178 employees in the unit) signed the disaffection petition. Tr. 964–965, 1076–1078; RE Exh. 1 at 27.

On December 22, 2009, after verifying the signatures on the disaffection petition, Comau notified the bargaining unit that a majority of employees in the unit requested that Comau withdraw recognition from the ASW/MRCC Union and instead recognize the Comau Employees' Association (CEA) as the unit's exclusive collective-bargaining representative. Jt. Exh. 4; see also Jt. Exh. 5. Accordingly, effective December 22, 2009, Comau withdrew recognition from the ASW/MRCC, stopped withholding ASW/MRCC dues from the paychecks of unit employees, and immediately recognized the CEA as the unit's exclusive collective-bargaining representative. Id.

G. The CEA Becomes the Unit's Collective Bargaining Representative

In February 2010, the CEA elected the following individuals as its officers: Yale (president); Rushing (secretary); Jeffrey H. Brown (vice president); Fred Lutz (treasurer); Jim Morabito (committeeman); Chris Economides (committeeman); and Jim Kayko (committeeman). Tr. 729; 907–908; 981; 1038; 1174–1075. The CEA and Comau subsequently negotiated a new collective bargaining agreement that was then ratified by the CEA membership in April 2010. Tr. 217–218, 907–908, 1040; Jt. Exh. 3 (noting that the contract was effective from December 22, 2009 through April 13, 2013). The collective-bargaining agreement included the following union security clause:

> a) Seniority employees shall be required, as a condition of continued employment, to become dues paying members of the [CEA]. Dues will be collected by the Company the last week of each month by payroll deduction. Any uncollected dues for the current month will be reported to the CEA by the Company. The CEA will then specify which of those uncollected dues must be collected from the November vacation pay check each year or as soon as administratively possible. The Company will remit payment of collected dues to the CEA by wire transfer, to the CEA bank account, within seven (7) days or as soon as possible as it becomes administratively possible.
>
> b) In addition to the above, non-seniority employees with more than thirty (30) days service shall be required, as a condition of continued employment, to become dues paying members of the association.

Jt. Exh. 3 at 1–2.[23]

H. The CEA Asks Employees to Sign Dues-Checkoff Authorization Forms

In May 2010, CEA committeemen distributed union dues-checkoff authorization forms for employees to sign to authorize Comau to collect dues by automatic payroll deduction. Tr. 982–83; RE Exhs. 6, 9(a). Several employees signed the form without objection. Tr. 983. However, some employees (at least initially) declined to sign the form.[24] One such employee was Nizar "Bill" Akkari, a machinist who was working at the Novi facility. Tr. 215–216. In May 2010, Akkari was approached on two occasions by Jim Kayko, who asked Akkari if he was willing to sign the dues-checkoff authorization form. Akkari refused on both occasions. Tr. 220–221, 986–987. After the second refusal, Kayko advised Akkari that he would probably need to speak to Fred Begle about the issue. Tr. 221, 988. During Akkari's next shift at work, the night-shift supervisor (Matthew Parsons) notified Akkari that Begle was at the Novi facility and wished to speak with him. Tr. 222. Akkari accordingly met with Begle (and Parsons) in an available office, and Begle advised him that he would be terminated if he

628–629, 949. Similarly, while Baloga testified that Comau generally enforced rules for when materials can be circulated on the shop floor, there is no evidence that Comau officials knew the disaffection petition was being circulated before December 21, 2009, and decided not to enforce the rules for circulating such materials. Tr. 284–285, 353. I have considered an excerpt from Comau's position paper (read by the Acting General Counsel into the record as an admission by a party opponent) on the latter issue, and do not find a basis to conclude that Comau was aware that the disaffection petition was being circulated before the petition was nearly (if not fully) completed. *See* RU Exh. 6 (indicating that most employees signed the petition on or before December 18, 2009, shortly after the document began circulating).

[22] Begle asked Yale to keep the revocation of dues-checkoff authorization forms while the signatures on the petition were being authenticated. Yale delivered the revocation of dues-checkoff forms to Begle on January 11, 2010. Tr. 1032–1033.

[23] The 2005–2008 collective bargaining agreement between the ASW and Comau contained a similar provision. GC Exh. 32 at 2.

[24] In connection with this issue, the Acting General Counsel presented a chain of e-mails provided by ASW/MRCC President Darrell Robertson. See GC Exh. 6. Part of that exhibit includes an e–mail sent on May 14, 2010, by Comau administrative assistant Jill Opasik to various Comau personnel (including Fred Begle, Duane Jerore, and James Kayko). Opasik's e-mail listed employees who had not signed a dues-checkoff authorization form, and stated that the employees could be terminated if they did not sign the form by May 18, 2010. Id. at 2. Another portion of the e-mail chain suggests that Jerore forwarded Opasik's e-mail to five employees (Al Redd, Ronald Krieger, Gary Hilliker, James Wheeler, and Robert Fox). Id. at 1. However, in the text of Jerore's message, he referred the employees to a notice that was apparently attached to his e-mail, but was not entered into the trial record. Id.

I have given little weight to GC Exh. 6 for the following reasons: (a) no testimony was offered about Opasik's role with Comau or her authority to speak for Comau as an agent, and thus the content of her e-mail is hearsay; and b) the Acting General Counsel did not call any of the five employees who purportedly received Jerore's forwarded message to testify as witnesses during the trial, and thus the record contains no information (beyond the uncorroborated exhibit itself) about what information these employees ultimately received from Jerore.

did not sign the dues-checkoff authorization form.[25] Begle did not offer Akkari any option to pay union dues by any other means besides automatic payroll deduction. Tr. 223–224, 227. Akkari relented and signed the dues-checkoff authorization form.[26] Tr. 218–219; GC Exh. 37.

Employee Gasper Calandrino reported a similar experience at the Jefferson North Assembly Plant, one of Comau's field service locations.[27] Tr. 410. In May 2010, Site Supervisor Duane Jerore advised Calandrino that he should review a dues-checkoff authorization form, sign it, and return the form to him. Calandrino complied with Jerore's request, but since he did not want dues deducted from his paycheck (preferring instead to pay dues in person and receive a receipt), Calandrino wrote on the form "I do not authorize the company to payroll deduct." Tr. 413. Jerore agreed to turn the annotated form in to Fred Begle,[28] but advised Calandrino that "[y]ou could be disciplined or up to a discharge on something like that," and added that "chances are we'll probably get a phone call from Fred." Tr. 414.

The next day at work, Calandrino received a message that he needed to see Jerore in the office. Jerore told Calandrino that before he began his shift, they needed to call Begle about the dues-checkoff authorization form. Tr. 415. In the ensuing telephone conversation with Begle, Calandrino confirmed that he did not wish to authorize payroll deduction for dues, again noting his preference for having a receipt for individual payments. Begle responded by stating that payroll deduction is more convenient, and then asked Calandrino if he was aware of the consequences, which included being disciplined or terminated if his dues were late or went into arrears. Begle added that Calandrino had been a good employee and had been at Comau for a long time, and stated that he would hate to see disciplinary action or discharge happen if Calandrino did not keep up with his dues payments. Tr. 416–417. Feeling pressured, Calandrino signed a new dues-checkoff authorization form.[29] Tr. 417; GC Exh. 35.

Jeffrey T. Brown testified about his experience with the dues-checkoff authorization form at Comau's Southfield complex (specifically, at the Arlens facility, one of the three buildings at the complex). Tr. 490, 495–500. CEA treasurer Fred Lutz first approached Jeffrey T. Brown about signing a dues authorization form in February 2010, prompting Brown to advise Lutz that he did not want to, and would not, sign the form. Tr. 496. Lutz told Brown that he was going to provide Begle with a list of all employees who did not sign the dues-checkoff authorization form, and Brown responded that if Begle gave him a letter that his job was at risk if he did not sign, then Brown would sign the form. Id.

Lutz again approached Jeffrey T. Brown about the dues-checkoff authorization form in May 2010. Brown accepted the form, but did not sign it. Tr. 496; 734. Lutz checked back with Brown twice more about the form, and on the second visit, Brown asked about the possibility of paying dues in cash. Lutz responded that he (Lutz) would have to speak with Begle about that, and a few minutes later, returned to Brown and advised him that they both needed to speak with Begle in Begle's office (located in the Comau Center, another building at the Southfield complex). Tr. 497–498; 735. At the meeting with Begle, Begle asked Brown why he did not wish to sign the dues-checkoff authorization form, and Brown explained that he preferred to pay in cash since the Company was into his paycheck more than enough already. Tr. 498–499. Begle initially expressed some reservations about having CEA officials collect $20 in cash every month from various employees, but liked Brown's proposal that he pay a full year of dues in cash ($240). Lutz, however, asked Brown what would happen if he was laid off in six months. Unsure of the intent behind Lutz's question, Brown did not respond. Tr. 499. After some additional chitchat, Brown decided he was done with the conversation and handed over a signed dues-checkoff authorization form.[30] Tr. 499; GC Exh. 36.

[25] I have credited Akkari's account of this conversation. Begle was present in the courtroom during Akkari's testimony (as one of Comau's designated assistants), and did not dispute Akkari's account when he later testified as one of Comau's witnesses. Tr. 1084. I have considered the fact that Comau impeached Akkari's testimony on a narrow point, insofar as Akkari incorrectly asserted that he never before was required to sign a dues-checkoff authorization form (*compare* Tr. 231 *with* RE Exhs. 19–20), but that limited impeachment did not undermine the credibility of Akkari's overall testimony, which was corroborated by other witnesses and was not contradicted by Begle.

[26] Dave Baloga also testified that Kayko approached him about signing a dues-checkoff authorization form. According to Baloga, he reluctantly signed the form after being told that the contract prevented him from simply paying dues in cash at union meetings. Tr. 290; GC Exh. 38. Kayko, meanwhile, testified that Baloga simply signed the form when asked to do so, saying, I might as well. Tr. 989; see also Tr. 447 (Christopher Bloodworth testimony that in February 2010, Jeffrey H. Brown approached both him and Baloga about the dues-checkoff authorization form. Both Bloodworth and Baloga refused to sign the form at that time); Tr. 982–983 (describing Kayko's efforts to ensure that he asked employees about the dues-checkoff authorization form "in the right way"). The limited testimony offered about Baloga's exchange with Kayko was equally credible and plausible, and thus I have afforded the testimony equal weight.

[27] Periodically, Comau assigns employees to off-site locations to work on projects. The assignments are field service assignments. Tr. 411.

[28] It is not clear what happened to the form that Calandrino annotated. No annotated form was presented at trial or entered into the trial record.

[29] Calandrino's testimony was uncontradicted, even though Begle was present in the courtroom for his testimony and later testified for Comau. Tr. 1084.

[30] I have credited Brown's version of the conversation. Begle testified at trial, but did not challenge Brown's account of their conversation. Tr. 1084. Lutz also testified, but stated on direct that he did not remember the whole conversation with Begle. Tr. 737. However, Lutz answered, yes when asked to affirm the accuracy of closed/leading questions about the conversation with Begle during cross examination. Tr. 748. Lutz's demeanor and answers were tentative and uncertain, and generally indicated that Lutz was having trouble remembering the details of the interactions that he had with Brown and other employees in the relevant time period. Finally, Brown's credibility was bolstered by the corroborating testimony that employee Chris Bloodworth offered about his own interaction with Lutz. According to Bloodworth, Lutz approached him at the Arlens facility and stated that Begle wanted Lutz to bring Bloodworth over to talk about the dues-checkoff authorization form. Not wanting to cause any problems with his job status, Blood-

I. Comau and the CEA Attempt to Clarify Their Positions About Dues-Checkoff and Other Methods of Paying CEA Dues

On June 9, 2010, Comau (through Begle) posted a notice to the bargaining unit about the dues-checkoff authorization forms. The notice stated:

> The ASW has charged that our employees have been coerced into signing dues authorization forms. We have investigated this allegation and do not believe it to be factually accurate. Just to be sure that everyone understands their rights, however, we want to confirm the following:
>
> While the contract contains a requirement that employees become dues paying members, the contract does not require that dues be paid through a payroll deduction authorization, with dues to be withheld by the Company from your paycheck. It is up to you whether you wish to authorize payment of your dues in that manner.
>
> In the event anyone signed a dues deduction authorization form under the mistaken assumption that the Company required this, you should feel free to rescind the authorization and deal with the CEA directly. In that event, please so indicate to me in writing.

RE Exh. 9(b). Two employees subsequently rescinded their dues-checkoff authorization forms based on Comau's notice, and received refunds from Comau for any dues that were paid by undesired payroll deductions. Tr. 1083–1084.

Akkari admitted that he saw Comau's notice about the dues-checkoff authorization forms after it was posted, and he admitted that he did not request that Comau rescind the authorization form that he signed. Tr. 229; see also Tr. 501 (Jeffrey T. Brown also saw the letter). Akkari explained, however, that he did not take Comau up on its June 9, 2010 offer because he felt like Comau was playing games, and because he saw the CEA's letter of understanding posted on the Novi shop floor stating that the only acceptable method for paying dues (other than payroll deduction) was by certified cashier's check. GC Exh. 2; Tr. 230, 242–244; see also Tr. 502 (Jeffrey T. Brown saw the CEA's letter of understanding posted at the Arlens facility). CEA's letter of understanding stated:

> Subject: union dues by means other than direct deposit.
>
> 1.) Certified cashiers check, is the only acceptable method of payment. Made out to the Comau Employees Association.
>
> 2.) Payment must be received by the end of the 3rd week of every month (Friday is considered the last day of the work week).
>
> 3.) Payment must be hand delivered to the union president, vice-president or treasurer. (Mailing is not acceptable)
>
> President: Harry Yale
> Vice-President: Jeff H. Brown
> Treasurer: Fred Lutz
>
> 4.) Late payments will not be accepted as a general practice, and disciplinary action will be instituted, up to and including discharge. As per the union by-laws governing dues payments, and as stated in our labor agreement (Section # 3.2).
>
> 5.) If there is an acceptable reason for a late payment (field service, etc.) the $10.00 late fee will still be applied.
>
> 6.) If these terms are not acceptable, then direct deposit is the only other means of payment.

GC Exh. 2. Before the letter of understanding was posted, Yale sent it to Begle for review. GC Exh. 53 (e-mail sent on May 21, 2010).

On June 18, 2010, Harry Yale sent an e-mail to Jim Kayko (and cc'ed to Fred Begle) to instruct Kayko to deliver a copy of the letter of understanding to an employee (Ken Skrbalo) who rescinded his dues-checkoff authorization. GC Exh. 54. Per Yale's e-mail, if Skrbalo did not pay his dues by the following Friday, "we will start the proceedings as stated in the contract and by-laws." *Id.* Notwithstanding the terms stated in the letter of understanding, Yale ultimately permitted Skrbalo to pay his dues for the year by personal check.[31] Tr. 1059–1060.

J. The Board Rules That Comau Committed An Unfair Labor Practice by Unilaterally Implementing its Healthcare Plan on March 1, 2009

On November 5, 2010, the Board affirmed Judge Bogas' rulings, findings and conclusions in case number 7–CA–52106. *Comau*, 356 NLRB No. 21 (2010). In particular, the Board adopted Judge Bogas' finding that Comau violated Section 8(a)(5) and (1) by unilaterally implementing a new health insurance plan in the absence of an agreement or a bona fide impasse with the ASW/MRCC. Id. at 1 fn. 5.

Discussion and Analysis

A. Comau's Decision to Withdraw Recognition from the ASW and Recognize the CEA

1. Complaint allegations and asserted legal theories

The principal issues in this case turn on whether Comau ran afoul of the Act when (on December 22, 2009) it withdrew recognition of the ASW/MRCC as the bargaining unit's exclusive collective-bargaining representative, and recognized the CEA as the unit's new representative.

The complaint specifically alleges that Comau: failed to bargain collectively and in good faith with the ASW when it withdrew recognition from the ASW (in violation of Sec. 8(a)(5) and (1)); dominated, interfered with and rendered unlawful assistance to the CEA when, in the absence of the support of an uncoerced majority of employees, Comau recognized the CEA as the unit's exclusive bargaining representative, entered into a collective-bargaining agreement with the CEA that contained a union security clause, and deducted CEA union dues from employee wages pursuant to the union security clause (in violation

worth agreed to sign the form. Tr. 449. Lutz was not questioned about his interaction with Bloodworth.

[31] Yale asserted that the CEA never enforced the terms of its letter of understanding. Tr. 1059–1060. There is no evidence, however, that the CEA advised the bargaining unit as a whole of any decision not to enforce the letter of understanding.

of Sec. 8(a)(2) and (1)); and discriminated against employees regarding hiring and the terms and conditions of employment (and unlawfully encouraged membership in the CEA) by entering into a collective bargaining agreement with the CEA that contained a union security clause (in violation of Sec. 8(a)(3) and (1)). GC Exh. 1(v), pars. 24–26.

As for the CEA, the complaint alleges that at a time when the CEA did not represent an uncoerced majority of employees in the unit, the CEA: unlawfully obtained recognition from Comau as the unit's exclusive collective-bargaining representative (in violation of Sec. 8(b)(1)(A)); and attempted to cause Comau to discriminate against its employees via the CEA collective-bargaining agreement and union security clause (in violation of Sec. 8(b)(2) of the Act. GC Exh. 1(v), pars. 28–29.

At trial, the Acting General Counsel offered two legal theories to support the allegations in the complaint regarding Comau's decision to withdraw recognition from the ASW/MRCC. First, the Acting General Counsel asserted that the December 2009 disaffection petition that Comau used to conclude that the ASW did not represent a majority of employees in the unit was tainted by Comau's prior unfair labor practices (specifically, Comau's March 1, 2009 implementation of its new health insurance plan). Second (and in the alternative), the Acting General Counsel asserted that the disaffection petition was tainted because certain individuals (Harry Yale, James Reno, and Nelson Burbo) who circulated it did so with the apparent authority of Comau. As described below, I find that the Acting General Counsel has demonstrated by a preponderance of the evidence that the disaffection petition was tainted by a prior unfair labor practice.[32]

2. The December 2009 disaffection petition was tainted by Comau's March 1, 2009 unfair labor practice

A union is irrebuttably presumed to continue to enjoy the support of a majority of the unit employees while a collective bargaining agreement is in effect. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 176 (1996). After the contract expires, the union still is presumed to enjoy majority status, but the presumption is rebuttable. In such a situation, an employer may rebut the presumption and withdraw recognition if it can show that the union in fact no longer has the support of a majority of the unit employees. Id. at 176–177; *Champion Home Builders Co.*, 350 NLRB 788, 791 (2007); *see also Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001) (overruling precedent that also allowed an employer to withdraw recognition from a union based on a good-faith doubt about the union's continued majority status).[33]

However, 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. *Champion Home Builders*, 350 NLRB at 791. Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. *Lee Lumber*, 322 NLRB at 177. In determining whether a causal relationship exists between unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Champion Home Builders*, 350 NLRB at 791 (*citing Master Slack Corp.*, 271 NLRB 78, 84 (1984)).[34]

In this case, a few preliminary facts are clearly established. The Board has determined that Comau committed an unfair labor practice on March 1, 2009, when it violated Section 8(a)(5) and (1) by changing employees' healthcare benefits without the ASW/MRCC's consent and in the absence of a bona fide impasse. *Comau*, 356 NLRB No. 21, slip op. at 11 (2010). In addition, there is no dispute that the ASW/MRCC had actually lost majority support by December 22, 2009, as indicated by the fact that a majority of the employees in the bargaining unit (103 employees out of 178 in the unit at the time) signed a December 2009 disaffection petition stating that they no longer wished to be represented by the ASW/MRCC. *See* RU Exh. 6. Finally, it is undisputed that Comau recognized the CEA as the bargaining unit's exclusive collective bargain-

[32] Because I have found that the disaffection petition was tainted by the unfair labor practice that Comau committed on March 1, 2009, I need not rule on the Acting General Counsel's alternative theory that the petition was tainted because it was circulated by employees who were Comau's agents. However, I note that I have made findings of fact (including credibility findings) that are relevant to that theory, should further analysis be necessary.

[33] While Comau has argued that it was legally obligated to withdraw recognition from the ASW/MRCC when it received the December 2009 disaffection petition, the Board has clearly stated that an employer with objective evidence (such as a disaffection petition) that a union has lost majority support withdraws recognition at its peril. *Levitz Furniture Co. of the Pacific*, 333 NLRB at 725 (noting that an employer in that circumstance runs the risk of being found to have violated Sec. 8(a)(5) if it is later shown that the union had not lost majority support). The Board also explained that as an alternative to simply withdrawing recognition based on the objective evidence, an employer lawfully may file an RM petition for an election and continue to recognize the incumbent union while the election proceedings are ongoing. *Levitz*, supra at 724.

[34] The *Master Slack* test is an objective test aimed at evaluating whether a causal relationship exists between unremedied unfair labor practices and subsequent loss of union support. *See Saint Gobain Abrasives*, 342 NLRB at 434 fn. 2 (noting that it is not relevant to ask individual employees why they chose to reject the union); *AT Systems West*, 341 NLRB 57, 60 (2004) (subjective state of mind of the employees is not relevant). During trial, I permitted Comau and the CEA to present evidence about the objective circumstances that may have caused employee disaffection independent of the March 1, 2009 unfair labor practice. However, I did not permit the CEA to call (as it proposed) between 20 to 90 witnesses to testify about their subjective reasons for signing the December 2009 disaffection petition, because the witness' subjective reasons are not relevant to the inquiry, and the witnesses' expected testimony about the objective circumstances was cumulative.

ing representative on December 22, 2009, and subsequently entered into and adhered to a collective-bargaining agreement with the CEA that included a union security clause. See findings of fact (FOF), above, sec. II(G).

The question in dispute is whether there is a causal relationship between the March 1, 2009 unfair labor practice and the loss of majority support for the ASW/MRCC that was evident on December 22, 2009. To examine that issue, a review of the operative facts is warranted. Comau declared impasse in December 2008, and based on that impasse, imposed its last best offer (including the new health insurance plan, which would take effect on March 1, 2009) on December 22, 2008. See FOF, above, sec. II(C). The impasse regarding employee health insurance coverage was broken on January 7, 2009. Id. Comau, however, continued to prepare employees for the effective date of the health insurance plan set forth in Comau's imposed last best offer. Id. In February 2009, employees began circulating a petition to decertify the ASW/MRCC. See FOF, above, sec. II(D). While employees had a variety of reasons to be unhappy with the ASW/MRCC and therefore sign the petition,[35] the unilaterally imposed healthcare plan was prominent among those reasons. Of the 103 employees that ultimately signed the decertification petition, all did so on or after February 19, 2009 (i.e., within days of the March 1 effective date of the healthcare plan), and 34 did so on or after March 1, 2009. Id. Once the unilaterally imposed healthcare plan took effect, bargaining unit discontent with the ASW/MRCC reached a new high, and carried forward[36] to December 2009, when Harry Yale prepared and circulated the disaffection petition that Comau relied on when it withdrew recognition from the ASW/MRCC on December 22, 2009. FOF, above, sections II(E), (F).

Turning to the relevant factors, nine months passed between the March 1, 2009 unfair labor practice in this case and Comau's December 22, 2009 decision to withdraw recognition from the ASW/MRCC. That length of time does not, per se, preclude a finding of a causal relationship. See, e.g., *AT Systems West*, 341 NLRB 57 (2004) (unfair labor practice was within 9 months of the withdrawal of recognition that it caused); *Columbia Portland Cement v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992) (same, but with a passage of 1 year). More important, the facts of this case show that the March 1, 2009 unfair labor practice had a more immediate effect on the bargaining unit, as the bargaining unit unhappiness with the new health insurance premiums drove (at least in part) the contemporaneous decertification petition that employees signed in February and March 2009, and filed in April 2009. Thus, the December 2009 disaffection petition was essentially an effort to renew the Spring 2009 decertification movement that started just before the unilaterally imposed healthcare plan (unlawfully) took effect.

The evidentiary record and applicable case law also show that the nature of the unfair labor practice here included the possibility of a detrimental and lasting effect on employees, as well as a tendency to cause employee disaffection (factors 2 and 3). The fact that Comau imposed the new health care plan and its accompanying employee-paid premiums unilaterally is particularly significant. It is well established that when an employer makes unilateral changes to terms and conditions of employment, those changes harm the union's status as the bargaining representative because the employer's actions undermine the union in the eyes of the employees and give the impression that the union is powerless. *Priority One Services*, 331 NLRB 1527, 1527 (2000) (collecting cases); see also *Goya Foods,* 347 NLRB 1118, 1120–1121, 1123 (2006) (unilateral changes to working conditions are likely to have an impact on union support); *Penn Tank Lines*, 336 NLRB 1066, 1067–1068 (2001) (unilateral changes to terms and conditions of employment minimize the influence of organized bargaining and show employees that their union is irrelevant, thereby creating a clear possibility of a detrimental or long lasting effect on employee support for the union). The Board also has recognized that unilateral increases in employee health insurance premiums can undercut the union's ability to function as the employees' bargaining representative, because the unilateral changes substantially affect all unit employees and directly impact employee compensation, one of the fundamental subjects of bargaining. *Priority One Services*, supra (discussing the effect of a 9.5 percent increase in health insurance premiums). The unilateral change to employee health care at issue in this case was even more significant than the change discussed in *Priority One Services*, because instead of a percentage increase to premiums that employees were already paying (as in *Priority One*), Comau's unilaterally changed employee health insurance premiums from zero (since Comau paid all costs under the 2005–2008 contract) to hundreds of dollars per month in some cases.

Finally, the record shows that Comau's unilateral change to its employee health insurance plan had an adverse effect on employee morale, and on the ASW/MRCC's organizational activities and membership. The new health care plan played a significant role in motivating employees to sign the spring 2009 decertification petition[37]—indeed, all employees signed within

[35] Those reasons include employee impressions that the ASW/MRCC: was not effective in attempting to negotiate a new contract; charged unduly high dues that came with little or no resulting benefit to the bargaining unit; failed to deliver on its promises to provide bargaining unit members with training and job placements; did not protect bargaining unit members from losing job openings at Comau to contractors or members of other unions; and improperly claimed the entire balance of the ASW dues account (approximately $250,000) at the time of the March 2007 merger.

[36] Employee discontent about the health insurance plan was kept alive by a variety of factors, including: the ongoing, significant deductions from employee paychecks to pay the premiums required for the unilaterally imposed health insurance plan; meetings with the ASW/MRCC about the decertification petition that touched on health insurance (among other issues); and the November 19, 2009 *St. Gobain* hearing in Case 7–RD–3644 in which several employees testified (and were reminded of the fact) that the new health insurance (and its cost) was among their concerns when they signed the decertification petition.

[37] As part of their defense, the Respondents maintain that employee disaffection with the ASW/MRCC preceded the March 1, 2009 unfair labor practice. The record does show that before March 1, 2009, there was some employee discontent with the ASW/MRCC about issues such as high union dues, the ASW/MRCC's failure to provide training and job placements, and the ASW/MRCC's failure to protect bargaining unit members from losing Comau job opportunities to workers that did

days (on either side) of the effective date of the new health insurance plan, and 34 employees signed after March 1, 2009.[38] In addition, as witness Daniel Malloy explained, members of the bargaining unit were upset when Comau imposed its last best offer (in December 2008), but when the health insurance premiums began coming out of employee paychecks in March 2009, employees wanted to fry the ASW/MRCC leadership because it failed to deliver on its promise to protect employees from having to pay the premiums.[39] Those sentiments persisted for the rest of 2009, as employees pursued the decertification petition with the Board (particularly after receiving yet another paycheck with unwanted deductions), questioned the ASW/MRCC's efforts to address the issue of employee healthcare at meetings, and ultimately renewed the effort to get rid of the ASW/MRCC by circulating the December 2009 disaffection petition.[40]

Thus, all of the factors outlined in *Master Slack* demonstrate that Comau's unilateral implementation of its new employee health insurance plan on March 1, 2009, had a causal relationship to the loss of support for the ASW/MRCC and in turn, the December 2009 disaffection petition.[41] The disaffection peti-

not belong to the bargaining unit. Several of those sources of discontent, however, had been present since the ASW/MRCC merger in March 2007, but were tolerated to some degree with the hope that in the end, the merger would be beneficial. More important, even though there were other reasons for bargaining unit employees to be unhappy with the ASW/MRCC, the fact remains that Comau's unilateral imposition of the health insurance plan had a reasonable tendency to (and did, in fact) cause employee disaffection with the ASW/MRCC.

[38] The Respondents contend that the Acting General Counsel is limited to arguing events that occurred on or after March 1, 2009, the day that the health insurance plan took effect (and thus the date of the unfair labor practice). While it is true that March 1, 2009 unfair labor practice is the only one at issue, the facts about that unfair labor practice are not limited to March 1 and after, particularly on the issue of whether a causal relationship exists between the unfair labor practice and the loss of union support. Simply put, this is not a case where the unfair labor practice occurred on a specific date and took everyone by surprise. To the contrary, Comau announced the March 1, 2009 health insurance plan effective date in December 2008, and held meetings in January 2009 to prepare employees for the change. Thus, the new health insurance plan (which ultimately was found to be an unfair labor practice) was on the minds of employees at least by January 2009, after the impasse had been broken and before the decertification petition began circulating. To the extent that the Respondents suggest that they were not given an opportunity to litigate this issue (employee sentiment before March 1, 2009), I note that the record demonstrates that the contrary is true. The Respondents presented extensive testimony about factors that could have caused employee disaffection before March 1, 2009 (to support their defense that employee discontent preceded the unilateral change to the employee health insurance plan), and the parties offered exhibits (most without objection) relating to events that occurred before March 1, 2009. See, e.g., RE Exh. 13 (transcript of the November 19, 2009 *St. Gobain* hearing regarding the decertification petition circulated in February and March 2009).

That being stated, the fact remains that even if the causation analysis were limited to events that occurred on or after March 1, 2009, there is ample evidence that links the March 1, 2009 unfair labor practice with the loss of support for the ASW/MRCC leading up to the December 2009 disaffection petition. See discussion accompanying this footnote, supra.

[39] The Respondents suggest that employee discontent about the health insurance plan did not arise until March 6, 2009, the actual date that the first premiums were deducted from their paychecks. See RE Br. at 11. The purpose of that argument is to suggest that employees who signed the decertification petition between March 1 and March 5 (28 employees out of the 34 that signed the petition on or after March 1) were not aware of the March 1 unfair labor practice because the first health insurance premiums were not deducted from their paychecks until March 6. I do not find this argument to be persuasive. First, the Board has ruled that the unfair labor practice occurred on March 1, 2009, and that ruling is binding for purposes of my analysis. Second, as discussed above, the March 1, 2009 effective date of the health insurance plan was well publicized, and naturally was on the minds of employees for some time. Once March 1 arrived, the health insurance plan took effect, and there was no question that health insurance premiums would be deducted from employee paychecks. Just as a reasonable employee would be aware of a forthcoming reduction in wages, I find that a reasonable employee would have been aware of the forthcoming new healthcare premiums both when the decertification petition was circulated in late February 2009, and when the new health insurance plan took effect on March 1, 2009.

[40] I have considered the fact that that December 2009 disaffection petition included language at the top of each page stating that the employees who signed the petition were not motivated to do so by Comau's unilateral implementation of the health insurance plan. As a preliminary matter, the fact that the drafters of the petition thought such a disclaimer was necessary supports my finding that the health insurance plan and the accompanying premiums remained points of concern for bargaining unit employees. More important, the petition language cannot immunize the petition from the effects of the March 2009 unfair labor practice that the Board found in the earlier *Comau* case, 356 NLRB No. 21, slip op. at 12–13. As indicated above, see fn. 34, supra, the *Master Slack* causation test is an objective, not a subjective, test that evaluates (among other things) the tendency of the violation to cause employee disaffection, and whether the nature of the violation includes the possibility of a detrimental or lasting effect on employees. The subjective views of employees about a past unfair labor practice and its effects are not relevant to the *Master Slack* inquiry.

[41] The cases that Comau and the CEA cited in arguing that Comau's March 1, 2009 unfair labor practice did not cause the ASW/MRCC to lose support are distinguishable. See RE Brief at 34-35; RU Br. at 20–23. Specifically, the decisions that the Respondents cited (as examples of cases where the Board or the federal court of appeals held that prior unfair labor practices did not have a causal relationship to the loss of union support) are fact-driven decisions that bear little similarity to this case. See *Champion Home Builders*, 350 NLRB at 791–792 (no causal relationship found where all but one of the unfair labor practices occurred 5–6 months before the disaffection petition, and the record did not show that employees knew about the more recent violation; the nature of violations did not support a finding of taint because they were isolated and/or brief events; the record did not show that the violations had a tendency to cause employee disaffection towards the union; and the record did not show that the scheduling disputes had an adverse effect on employee morale, organizational activity or union membership); *Garden Ridge Management*, 347 NLRB 131, 134 (2006) (same, regarding the effect of a bargaining session scheduling dispute); *Master Slack*, 271 NLRB at 84–85 (same, where the unfair labor practices were committed 8–9 years before the withdrawal of recognition and backpay issues were still being litigated, and there was limited evidence that the backpay dispute had an adverse effect on employee morale, organizational activity or union membership); *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 764 (6th Cir. 2003) (same, regarding the effect of an employer's breach of its duty to collect union initiation fees and its unilateral decision to increase the wages of 6 employees in the 78-

tion therefore was tainted by the March 1, 2009 unfair labor practice, and it was unlawful for Comau to rely upon the December 2009 disaffection petition as its basis for withdrawing recognition from the ASW/MRCC.

Based on my finding that the December 2009 disaffection petition was tainted by the March 1, 2009 unfair labor practice, I find that Comau committed the following violations:

> By withdrawing recognition from the ASW/MRCC on December 22, 2009 and subsequently refusing to bargain with the ASW/MRCC, Comau violated Section 8(a)(5) and (1) of the Act. *AT Systems West*, 341 NLRB 57, 61 (2004).
>
> By extending recognition to the CEA and entering into a collective bargaining agreement with the CEA when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau interfered with the formation and administration of a labor organization in violation of Section 8(a)(2) and (1) of the Act. *AM Property Holdings Corp.*, 352 NLRB 279, 281 & n.10 (2008); *AT Systems West*, supra at 62.
>
> By giving effect to the union security clause in its collective bargaining agreement with the CEA at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau encouraged membership in a labor organization and discriminated against employees regarding hiring and the terms and conditions of employment, in violation of Section 8(a)(3) and (1) of the Act. *Caldor, Inc.*, 319 NLRB 728, 739 (1995).

I also find that the CEA committed the following violations in connection with Comau's withdrawal of recognition of the ASW/MRCC and recognition of the CEA:

> By accepting recognition from Comau and by entering into a collective-bargaining agreement with Comau when it did not have the uncoerced support of a majority of employees in the bargaining unit, the CEA violated Section 8(b)(1)(A) of the Act. *Ladies Garment Workers v. N.L.R.B.*, 366 U.S. 731, 732 (1961); *United Workers of America*, 352 NLRB 286, 286 (2008).
>
> By maintaining a union security clause in its collective bargaining agreement with Comau at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, the CEA caused and attempted to cause Comau to violate Section 8(a)(3) by encouraging membership in a labor organization and discriminating against employees regarding hiring and the terms and conditions of employment. Through these actions, the CEA violated Section 8(b)(2) of the Act. *Rockville Nursing Center*, 193 NLRB 959, 965 (1971).

employee bargaining unit); see also *Saint Gobain Abrasives*, 342 NLRB at 434 (cited by the CEA, and only standing for the proposition that a hearing is necessary to determine whether the employer's unilateral change to employee health insurance had a causal nexus to employee disaffection).

B. Comau's and the CEA's Conduct in Asking Employees to Sign Dues-Checkoff Authorization Forms

1. Complaint allegations

In addition to the larger issues (discussed above) related to Comau's decision to withdraw recognition from the ASW/MRCC and recognize the CEA as the exclusive collective-bargaining representative for the bargaining unit, the Acting General Counsel also alleged that both Comau and the CEA violated the Act when they asked employees to sign dues checkoff authorizations for paying CEA dues.

Specifically, the complaint alleged that in May 2010, Comau threatened employees at the Jefferson North, Novi and Southfield facilities with termination if they failed to authorize automatic dues deduction payments to the CEA (in violation of Sec. 8(a)(1) of the Act). GC Exh. 1(v), pars. 19, 27. The complaint also alleged that in May 2010, the CEA threatened employees at the Novi and Southfield facilities with loss of employment if they failed to authorize automatic dues deduction payments to the CEA (in violation of Sec. 8(b)(1)(A) of the Act). GC Exh. 1(v), pars. 23, 28.

2. Both Comau and the CEA violated the Act by conduct that reasonably could coerce employees to sign dues-checkoff authorization forms

There is no dispute that under a collective-bargaining agreement that contains a valid union-security clause, an employee may be required to pay union dues as a condition of employment, and may be discharged for failing to pay the required dues. *International Longshoreman's Association, Local 1575*, 322 NLRB 727, 729 (1996). However, a union may not compel union members to execute dues-checkoff authorizations as a condition of their employment; nor can a union threaten to cause employees to be discharged if they fail to execute dues-checkoff authorizations, because the execution of a dues-checkoff authorization is entirely voluntary. Id. at 729–730 (noting that a union's threat to cause discharge under these circumstances would violate Sec. 8(b)(1)(A)). More generally, a union violates Section 8(b)(1)(A) of the Act if it engages in conduct that may reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights. *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159 (1997).

Similarly, an employer may not lead employees to believe that the dues-checkoff authorization method for fulfilling their financial obligations to their union is compulsory. *Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997). An employer that directs employees to sign dues-checkoff forms authorizing deduction of dues under the threat of losing their employment has interfered with, restrained, and coerced employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1). Id. An employer also violates Section 8(a)(1) of the Act if the employer's conduct or statements have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Yoshi's Japanese Restaurant*, 330 NLRB 1339, 1339 fn. 3 (2000) (noting that the employer's subjective motivation for the statements is not relevant); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

a. Comau violations

In this case, the facts demonstrate that in May 2010, Comau management personnel spoke with three employees who initially declined to sign dues-checkoff authorization forms: Gaspar Calandrino (Jefferson North field service location) Nizar Akkari (Novi facility); and Jeffrey T. Brown (Southfield facility). Comau human resources director Fred Begle specifically warned Akkari that he could be terminated if he did not sign the form. Site supervisor Duane Jerore similarly warned Calandrino that he could be disciplined or discharged if he did not sign a dues-checkoff authorization form. See FOF, above, Sec. II(H). Those explicit (and uncontested) statements each violated Section 8(a)(1), as the threat of losing employment or being disciplined had a reasonable tendency to coerce Akkari and Calandrino in the exercise of their protected Section 7 rights to choose whether or not to sign the dues-checkoff authorization forms. *Rochester Mfg. Co.*, supra at 262.[42]

I also find that Begle's statements to Calandrino (in a followup conversation that Jerore joined), and Begle's statements to Jeffrey T. Brown violated Sec. 8(a)(1). In those exchanges, although Begle did not explicitly link the failure to sign the dues-checkoff authorization form with possible discipline or termination, Begle questioned the employees about their refusal to sign the form, questioned the reliability of paying by other means (such as cash), and (as to Calandrino) warned of consequences that could result if he chose another method of payment and fell behind with his dues. See FOF, above, Sec. II(H). Viewing those statements as a whole, along with the context of Begle taking the unusual step of having a shop floor employee brought to a private office to speak with him (in person as to Brown, and by phone as to Calandrino), I find that Begle's remarks to Calandrino and Jeffrey T. Brown had a reasonable tendency to coerce those employees in exercising their Section 7 rights.

b. CEA violations

The Acting General Counsel also presented evidence about the role that two CEA committeemen (James Kayko and Fred Lutz) played in asking employees to sign dues-checkoff authorization forms.

I recommend dismissing the allegations in paragraph 23(a) of the complaint because the evidence that the Acting General Counsel presented about James Kayko's conduct falls short of proving a violation of Section 8(b)(1)(A). Kayko did ask Akkari to sign a dues-checkoff authorization form, but he did not suggest that any adverse employment action would result when Akkari refused. Kayko did mention that Akkari might be contacted by Fred Begle about the matter, but he did not participate in any ensuing conversations between Akkari and Begle, or suggest that the possible contact with Begle would involve any adverse consequences. See FOF, above, section II(H). Viewing Kayko's conduct as a whole, I find that his actions or statements did not have a reasonable tendency to coerce Akkari to sign the dues-checkoff authorization form.

As for Kayko's interactions with Dave Baloga (also covered by Paragraph 23(a)), I find that both witnesses were equally credible in their respective accounts of Kayko's request that Baloga sign a dues-checkoff authorization form. Since the Acting General Counsel bears the burden of proving the allegations in its complaint by a preponderance of the evidence, the tie between Kayko's and Baloga's testimony leads me to find that the Acting General Counsel did not demonstrate that the CEA (through Kayko) violated the Act in its interactions with Baloga about the dues-checkoff authorization form. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

Lutz's interactions with Jeffrey T. Brown are different in character, and do establish that the CEA (through Lutz) violated Section 8(b)(1)(A). See GC Exh. 1(v), par. 23(b). Lutz's initial requests that Brown sign a dues-checkoff authorization form were merely requests that were not linked to any threat of adverse employment action. However, when Brown refused to sign the form, Lutz escorted Brown to Begle's office, and also participated in Begle's meeting with Brown. Lutz's presence at the meeting served as a CEA endorsement of Begle's remarks and of Begle's treatment of Brown's refusal to sign the dues-checkoff authorization form as a point of concern. Further, like Begle, Lutz questioned the reliability of paying dues by means other than dues-checkoff. Taking the totality of the circumstances into account, Lutz's conduct and statements to Jeffrey T. Brown had a reasonable tendency to coerce Brown to sign the dues-checkoff authorization form, and thus violated the Act.

3. Comau did not cure its violations of the act regarding dues-checkoff authorization forms

As part of its response to the allegations in the complaint regarding the dues-checkoff authorization forms, Comau contends that any violation that Begle committed was cured by the June 2010 memorandum that Comau posted in the workplace. RE Br. at 25 (citing RE Exh. 9(b)).[43] In so arguing, Comau invokes *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), which explains that an employer may relieve itself of liability for unlawful conduct in some circumstances by repudiating the conduct. Id. at 138. To be effective, the repudiation must be: timely; unambiguous; specific in nature to the coer-

[42] As noted in the statement of facts, I do not give weight to the content of GC Exhibit 6, a chain of e-mails apparently initiated by Jill Opasik regarding employees who had not yet signed a dues-checkoff authorization form. Among other things, the record does not establish Opasik's role as a Comau supervisor or agent, and also does not establish with sufficient reliability that her specific comments reached any bargaining unit employees. See fn. 24, supra. In light of those shortcomings, the exhibit does not demonstrate that Comau violated the Act.

[43] The CEA did not address the substantive issues concerning the dues-checkoff authorization forms in its posttrial brief. It did, however, deny the allegations in its answer to the complaint. The record does not show that the CEA repudiated (or attempted to repudiate) any violations associated with the dues-checkoff authorization forms. The CEA did issue a letter of understanding (that authorized payment by cashier's check under certain parameters), but the letter of understanding did not address or repudiate any previous violations of Sec. 7 rights.

cive conduct; adequately publicized to the employees involved; free from other proscribed illegal conduct, and accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future. Id.; see also *Cintas Corp.*, 353 NLRB 752, 753 fn. 8, 769 (2009). The employer also must not engage in proscribed conduct after the repudiation. Id.

Comau's effort at repudiation (sent by Begle) read as follows:

> The ASW has charged that our employees have been coerced into signing dues authorization forms. We have investigated this allegation and do not believe it to be factually accurate. Just to be sure that everyone understands their rights, however, we want to confirm the following:
>
> While the contract contains a requirement that employees become dues paying members, the contract does not require that dues be paid through a payroll deduction authorization, with dues to be withheld by the Company from your paycheck. It is up to you whether you wish to authorize payment of your dues in that manner.
>
> In the event anyone signed a dues deduction authorization form under the mistaken assumption that the Company required this, you should feel free to rescind the authorization and deal with the CEA directly. In that event, please so indicate to me in writing.

RE Exh. 9(b). The repudiation does not satisfy the standard set forth in *Passavant* because (among other things) it was not specific to the nature of the misconduct. The memo makes no reference to the threats of termination that Comau communicated to employees, nor does it address the other actions and statements that Comau took that had a reasonable tendency to coerce employees to sign the dues-checkoff authorization forms in the first instance. The attempted repudiation was therefore incomplete.[44] Accordingly, my finding that Comau violated Section 8(a)(1) of the Act remains unchanged.

CONCLUSIONS OF LAW

1. By withdrawing recognition from the ASW/MRCC on December 22, 2009, as the bargaining unit's exclusive collective-bargaining representative, Comau violated Section 8(a)(5) and (1) of the Act.

2. By extending recognition to the CEA as the bargaining unit's exclusive collective-bargaining representative on December 22, 2009, when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau violated Section 8(a)(2) and (1) of the Act.

3. By entering into a collective bargaining agreement with the CEA (effective December 22, 2009) when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau violated Section 8(a)(2) and (1) of the Act.

4. By giving effect to the union security clause in its collective bargaining agreement with the CEA (effective December 22, 2009) at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau encouraged membership in a labor organization and discriminated against employees regarding hiring and the terms and conditions of employment, in violation of Section 8(a)(3) and (1) of the Act.

5. By telling employees at the Novi and Jefferson North facilities in May 2010 that they could be disciplined or discharged if they did not sign dues-checkoff authorization forms, Comau interfered with, restrained or coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

6. By making statements to employees and engaging in conduct in May 2010 that had a reasonable tendency to coerce employees at the Southfield and Jefferson North facilities to sign dues-checkoff authorization forms, Comau interfered with, restrained or coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

7. By accepting recognition from Comau on December 22, 2009, as the bargaining unit's exclusive collective-bargaining representative when it did not have the uncoerced support of a majority of employees in the bargaining unit, the CEA violated Section 8(b)(1)(A) of the Act.

8. By entering into a collective-bargaining agreement effective December 22, 2009, with Comau when it did not have the uncoerced support of a majority of employees in the bargaining unit, the CEA violated Section 8(b)(1)(A) of the Act.

9. By maintaining a union security clause in its collective bargaining agreement with Comau (effective December 22, 2009) at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, the CEA caused and attempted to cause Comau to violate Section 8(a)(3) by encouraging membership in a labor organization and discriminating against employees regarding hiring and the terms and conditions of employment. Through these actions, the CEA violated Section 8(b)(2) of the Act.

10. By making statements to employees and engaging in conduct in May 2010 that had a reasonable tendency to coerce employees at Comau's Southfield complex to sign dues-checkoff authorization forms, the CEA restrained or coerced employees in the exercise of Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.

11. The unfair labor practices stated in conclusions 1–10 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and(7) of the Act.

12. I recommend dismissing the allegations stated in paragraph 23(a) of the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectu-

[44] Comau's memorandum was also ambiguous because it did not address restrictions that the CEA placed (with Comau's tacit consent) on other forms of payment. In a letter of understanding, the CEA advised the unit that any employee who elected not to use dues-checkoff was required to pay dues by hand delivering a certified cashiers check to Harry Yale, Fred Lutz, or Jeffrey H. Brown. Comau was aware of the restrictions that the CEA imposed (since Yale presented the letter of understanding to Begle for review), and essentially acquiesced to the restrictions by allowing them to persist even after Comau issued its June 2010 memo. See FOF, above, sec. II(I).

ate the policies of the Act. While most of the remedies that I will require will be set forth in the Order attached to my decision,[45] the Acting General Counsel's request for an affirmative bargaining order requires specific attention.

The Board consistently has held that an affirmative bargaining order is the traditional, appropriate remedy for a Section 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees. *Caterair International*, 322 NLRB 64, 68 (1996). Applying that principle, the Board recently ruled that an affirmative bargaining order was warranted as a remedy for an employer's unlawful withdrawal of recognition from a union. *Vincent/Metro Trucking*, 355 NLRB No. 50, slip op. at 1 (2010). In so ruling, the Board examined the facts of the case under District of Columbia Circuit precedent that states that an affirmative bargaining order must be justified by reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representative; and (3) whether alternative remedies are adequate to remedy the violations of the Act. Id. (citing *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000)).

Adhering to the Board's approach, I have analyzed the facts of this case under the three-factor balancing test outlined by the District of Columbia Circuit.

> (1) An affirmative bargaining order in this case will vindicate the Section 7 rights of the employees who supported the ASW/MRCC and were denied the benefits of that union's collective-bargaining by Comau's unlawful decision to withdraw recognition. To the extent that some employees may still oppose the ASW,[46] an affirmative bargaining order will not unduly prejudice their Section 7 rights because the affirmative bargaining order is temporary. In addition, it bears repeating that Comau committed an unfair labor practice that had a causal relationship to ASW/MRCC's loss of employee support, and thus to the December 2009 disaffection petition that served as the springboard for Comau to withdraw recognition.[47] Under those circumstances, it is only by restoring the status quo ante and requiring Comau to bargain with the ASW for a reasonable period of time that employees will be able to fairly decide for themselves whether they wish to continue to be represented by the ASW.
>
> (2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes Comau's incentive to delay bargaining in the hope of further discouraging support for the ASW. It also ensures that the ASW will not be pressured, by the possibility of another decertification or disaffection petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice and the issuance of a cease-and-desist order.
>
> (3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy Comau's and the CEA's violations, because it would permit a decertification petition to be filed before Comau had afforded the employees a reasonable time to regroup and bargain through the ASW in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the nature of Comau's unfair labor practice likely created a lasting negative impression of the ASW in the bargaining unit, and where Comau immediately recognized a replacement union (the CEA) that has been able to develop relationships with bargaining unit employees while the ASW litigated its charges. I find that those circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose ASW's continued union representation.

See *Vincent/Metro Trucking*, supra at 1–2 (citing similar issues that weighed in favor of an affirmative bargaining order); *Spectrum Health-Kent Community Campus*, 353 NLRB 996, 996–997 (2009) (same); *AT Systems West*, 341 NLRB at 63 (same). Based on my analysis under the three-factor balancing test applied by the Board, I find that an affirmative bargaining order with a temporary decertification bar for a reasonable period of time is necessary in this case to fully remedy Comau's unlawful withdrawal of recognition of the ASW.[48]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[49]

[45] To the extent that I will require Comau and the CEA to reimburse bargaining unit members for the CEA fees and dues that were collected unlawfully on or after December 22, 2009, that remedy is required because the CEA collective-bargaining agreement and union-security clause were unlawful. I will also require Comau and the CEA to reimburse bargaining unit members for daily compound interest on any such reimbursement amounts as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I will not require any reimbursement of CEA dues based on the violations associated with coercion in obtaining dues-checkoff authorization forms. *See Rochester Mfg.*, 323 NLRB at 263 (no reimbursement required if affected employees were subject to a lawful union-security clause obligating them to pay dues).

[46] After Comau withdrew recognition, the ASW changed its affiliation (in March 2010) from the MRCC to the CIC. Both entities are part of the United Brotherhood of Carpenters.

[47] The Board's decision concerning this unfair labor practice (the March 1, 2009 unilateral implementation of a new health care plan for employees) also contains an affirmative bargaining order. *Comau*, 356 NLRB No. 21, slip op. at 13.

[48] I have considered the fact that after Comau withdrew recognition from the ASW/MRCC, the ASW subsequently (in March 2010) changed its affiliation from the MRCC to the CIC (still within the United Brotherhood of Carpenters). The CEA suggests that the bargaining unit should not be forced to accept the ASW/CIC as its bargaining representative, since the unit did not vote to affiliate with the CIC. While the CEA's argument has some superficial appeal, I find that as an equitable matter, the ASW should not be penalized for continuing to conduct its operations while this litigation was pending. It should come as no surprise that the ASW made various decisions (including the decision to affiliate with the CIC) since December 22, 2009, the date that Comau withdrew recognition. To the extent that the bargaining unit may be unfamiliar with (or skeptical of) some of the changes that the ASW has made, it will be up to the ASW to persuade the unit (while the affirmative bargaining order is in effect, and beyond) that the changes are beneficial.

[49] 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

ORDER

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

1. Cease and desist from

(a) Withdrawing recognition from the ASW and refusing to meet and bargain in good faith with the ASW as the exclusive collective-bargaining representative for the following bargaining unit of Comau employees:

> All full-time and regular part-time production and maintenance employees, inspectors and field service employees, employed by Comau 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.

(b) Extending recognition to the CEA as the bargaining unit's exclusive collective-bargaining representative where the CEA does not represent an uncoerced majority of employees in the unit.

(c) Entering into and adhering to a collective bargaining agreement with the CEA when the CEA does not represent an uncoerced majority of employees in the bargaining unit, with the exception of any provisions in the current agreement that establish wages or benefits for bargaining unit employees.

(d) Giving effect to the union security clause in its collective bargaining agreement with the CEA where the CEA does not represent an uncoerced majority of employees in the bargaining unit, and thereby encouraging membership in the CEA and discriminating against employees regarding hiring and the terms and conditions of employment.

(e) Telling employees that they could be disciplined or discharged if they did not sign dues-checkoff authorization forms.

(f) Making statements or engaging in conduct that has a reasonable tendency to coerce employees to sign dues-checkoff authorization forms.

(g) 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) On request, bargain for a reasonable period of time with the ASW 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 Comau 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.

(b) Withdraw recognition from the Comau Employees Association as the representative of employees in the bargaining unit unless and until that labor organization has been certified by the Board as the exclusive collective-bargaining representative of those employees.

(c) Jointly and severally with the Comau Employees Association, reimburse with interest all present and former bargaining unit employees for all initiation fees, dues and other moneys paid by them or withheld from them on or after December 22, 2009, under the CEA's unlawful collective-bargaining agreement and union-security clause.

(d) Within 14 days after service by the Region, post at its facilities in Southfield, Michigan and in Novi, Michigan, copies of the attached notice marked "Appendix–Notice to Employees."[50] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Comau's authorized representative, shall be posted by Comau and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if Comau customarily communicates with its employees by such means.[51] 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, Comau has gone out of business or closed the facility involved in these proceedings, Comau shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Comau at any time since December 22, 2009.

(e) 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.

B. The Respondent Union, Comau Employees Association (CEA), Southfield, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from Comau as the bargaining unit's exclusive collective-bargaining representative and engaging in bargaining with Comau when it does not have the uncoerced support of a majority of employees in the bargaining unit.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[50] 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."

[51] The notice posting language provided herein (specifically regarding distributing notices electronically) is consistent with the Board's recent decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010).

(b) Entering into a collective-bargaining agreement with Comau, and enforcing its collective-bargaining agreement with Comau when it does not have the uncoerced support of a majority of employees in the bargaining unit.

(c) Maintaining a union security clause in its collective bargaining agreement with Comau at a time when the CEA does not represent an uncoerced majority of employees in the bargaining unit, thereby causing and attempting to cause Comau to violate Section 8(a)(3) by encouraging membership in a labor organization and discriminating against employees regarding hiring and the terms and conditions of employment.

(d) Making statements or engaging in conduct that has a reasonable tendency to coerce Comau employees to sign dues-checkoff authorization forms.

(e) In any like or related manner 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) Jointly and severally with Comau, Inc., reimburse with interest all present and former bargaining unit employees for all initiation fees, dues and other moneys paid by them or withheld from them on or after December 22, 2009, under the CEA's unlawful collective-bargaining agreement and union-security clause.

(b) Within 14 days after service by the Region, post at its union offices in Southfield, Michigan and Novi, Michigan, copies of the attached notice marked "Appendix–Notice to Members and Employees."[52] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the CEA's authorized representative, shall be posted by the CEA and maintained for 60 consecutive days in conspicuous places including all places where notices to members and Comau employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the CEA customarily communicates with its members by such means.[53] Reasonable steps shall be taken by the CEA 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, CEA has gone out of business or closed its offices involved in these proceedings, the CEA shall duplicate and mail, at its own expense, a copy of the notice to all individuals who were members of the CEA or Comau bargaining unit employees at any time since December 22, 2009.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Comau, if willing, at all places where notices to employees are customarily posted.

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

Dated, Washington, D.C. December 21, 2010

APPENDIX A

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 withdraw recognition from the ASW and refuse to meet and bargain in good faith with the ASW as the exclusive collective-bargaining representative for the following bargaining unit of Comau employees:

> All full-time and regular part-time production and maintenance employees, inspectors and field service employees, employed by Comau at and out of its facilities located at 20950, 21000, and 210175 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.

WE WILL NOT extend recognition to the CEA as the bargaining unit's exclusive collective-bargaining representative where the CEA does not represent an uncoerced majority of employees in the unit.

WE WILL NOT enter into or adhere to a collective bargaining agreement with the CEA when the CEA does not represent an uncoerced majority of employees in the bargaining unit, with the exception of any provisions in the current agreement that establish wages or benefits for bargaining unit employees.

WE WILL NOT give effect to the union security clause in the collective-bargaining agreement with the CEA where the CEA does not represent an uncoerced majority of employees in the bargaining unit, and thus encourage membership in the CEA and discriminate against employees regarding hiring and the terms and conditions of employment.

WE WILL NOT tell employees that they may be disciplined or discharged if they do not sign dues-checkoff authorization forms.

WE WILL NOT make statements or engage in conduct that has a reasonable tendency to coerce employees to sign dues-checkoff authorization forms.

[52] 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."

[53] The notice posting language provided herein (specifically regarding distributing notices electronically) is consistent with the Board's recent decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010).

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 withhold recognition from the CEA as your representative unless it has been certified by the Board as your exclusive collective-bargaining representative.

WE WILL, on request, bargain with the ASW for a reasonable period of time 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 Comau at and out of its facilities located at 20950, 21000, and 210175 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.

WE WILL reimburse bargaining unit employees for any initiation fees, dues and other moneys that were collected on or after December 22, 2009, under the CEA's unlawful collective-bargaining agreement and union-security clause.

COMAU, INC.

APPENDIX B

NOTICE TO MEMBERS AND 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 on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT accept recognition from Comau as the bargaining unit's exclusive collective-bargaining representative and engaging in bargaining with Comau when we do not have the uncoerced support of a majority of employees in the bargaining unit.

WE WILL NOT enter into a collective-bargaining agreement with Comau or enforce our collective-bargaining agreement with Comau when we do not have the uncoerced support of a majority of employees in the bargaining unit.

WE WILL NOT maintain a union security clause our collective bargaining agreement with Comau at a time when the CEA does not represent an uncoerced majority of employees in the bargaining unit, thereby causing and attempting to cause Comau to violate Section 8(a) (3) by encouraging membership in a labor organization and discriminating against employees regarding hiring and the terms and conditions of employment.

WE WILL NOT make statements or engage in conduct that has a reasonable tendency to coerce Comau employees to sign dues-checkoff authorization forms.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse bargaining unit employees for any initiation fees, dues and other moneys that were collected on or after December 22, 2009, under the CEA's unlawful collective-bargaining agreement and union-security clause.

COMAU EMPLOYEES ASSOCIATION