

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

COMAU, INC.,

Respondent Employer,

Case No. 07-CA-073073

-and-

WISNE AUTOMATION EMPLOYEES
ASSOCIATION,

Charging Party Union.

**RESPONDENT COMAU, INC.'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Comau, Inc. (hereafter sometimes "Comau," "Respondent," or "Employer") submits the following exceptions to the Recommended Findings of Fact and Conclusions of Law as set forth in Administrative Law Judge Mark Carissimi's December 26, 2012 Decision. Concurrently with these Exceptions, Comau is submitting a Brief that sets forth the record citations, factual grounds, and legal authorities supporting the Exceptions. Respondent takes exception to both (a) the ALJ's affirmatively making specific findings and/or conclusions that are not supported by the record evidence or governing legal precedent, and (b) the ALJ's failure to make specific findings and/or conclusions that are supported by the record and governing precedent.

Respondent excepts to:

1. The finding that "all of the individuals working at Warren at the time [of] the hearing were contractors." (Page 3, lines 22-23.)

2. The finding that during the period from 2009 through January 2011, when WAEA employees were temporarily assigned to Novi, "all of the provisions of the WAEA collective-bargaining agreement applied to the employees the WAEA represented while they were working at Novi." (Page 4, lines 28-30.)

3. The finding that, prior to January 2012, "there are other instances of the WAEA contract being applied to Wisne employees when they were working outside the Wisne facility." (Page 4, lines 31-32.)

4. The finding/implication with reference to LaForest's testimony that "when he worked at the Royal Oak facility during the period from January through May 2010,

he was able to use his personal days and vacation days as set forth in the WAEA contract." (Page 4, lines 41-43.)

5. The finding that, "while working at the Novi facility in May and June 2010 the WAEA employees were assigned overtime prior to contractors." (Page 4, lines 43-45.)

6. The finding/implication that Ciaramitaro "was never informed by anyone in management that the shop rules in the WAEA contract did not apply to him, "i.e., evidence drawn from a double negative or void of evidence. (Page 4, lines 43-46.)

7. The finding/implication intended with the reference to Vargo's testimony "that all the provisions of the WAEA contract, including the shop rules in article 26, applied to him when he worked at the Novi facility from October 2011 until January 2012, when the new rules were applied at the Novi facility," i.e., evidence again drawn from a void. (Page 4, lines 46-47; page 5, lines 1-2.)

8. The finding that Brooks, while assigned to Royal Oak in 2011, "used personal days under the WAEA contract." (Page 5, lines 11-12.)

9. The finding that it was "consistent with the WAEA contract" not to be given a drug test when returning to work at the Novi facility, when there is no evidence that this was different at Novi. (Page 5, lines 14-15.)

10. The finding/implication that when Brooks returned from a leave of absence he was not administered a drug test, as supposedly would have been required under the expired NIEA contract, as there is no evidence that that was the case. (Page 5, lines 14-19.)

11. The finding that employees of the home plant were given the priority for overtime, and then employees represented by other unions, and then contractors, without simultaneously recognizing that individuals assigned to a project were given priority first. (Page 5, lines 24-27.)

12. The finding that layoffs were conducted on the basis of classification, and then by seniority, based on home plant, next guest worker and then contractor status, without simultaneously recognizing that the project employees were working on would govern layoff in the first instance. (Page 5, lines 29-38.)

13. The finding that it was "the general practice" that proportionality of layoffs would occur between guest employees before laying off home plant employees. (Page 5, lines 38-42.)

14. The finding/conclusion that there is significance to the occurrence of a layoff in 2008 when WAEA represented employees were laid off prior to CEA-represented employees, as this occurrence actually demonstrates the lack of a practice rather than the existence of one. (Page 5, lines 44-47; page 6, lines 1-6.)

15. The finding that the email from Andriano "was the first notification the WAEA had received from the Respondent regarding the temporary closure of the Wisne facility," disregarding the impact of the frequent production notices WAEA leaders and employees had received. (Page 6, lines 22-24.)

16. The finding that "there were no other discussions regarding the effects of the closure at this meeting" of December 3, 2011, without also finding that the WAEA had ample opportunity to request further bargaining and did not do so, resulting in a waiver. (Page 6, lines 35-36.)

17. The finding that "credible, uncontroverted testimony" supported the conclusion that Andriano instructed LaForest and Ciaramitaro "not to talk about the contract" and tell their people not to talk about the contract, and that if "LaForest and Ciaramitaro did not speak to their members about this, he would shut their plant down permanently." (Page 7, lines 21-31.)

18. The finding that "LaForest and Ciaramitaro said they would speak to their members about not talking about the Novi contract negotiations." (Page 7, lines 31-32.)

19. The finding that the testimony of LaForest and Ciaramitaro was credible, mutually corroborative, and consistent with their demeanor when testifying on this point, despite the failure of both to identify this in their affidavits. (Page 7, footnote 8.)

20. The finding that Parsons stated during the meeting of January 2012 "that the attendance policies would be changed and that personal days and sick days were no longer valid as they were 'negotiated items,' and not a 'company benefit,'" and additionally, that "Parsons also stated the WAEA contract was void in Novi." (Page 8, lines 29-34.)

21. The finding that the meeting on January 17, 2012 was held "to discuss what employees had been told about the application of new rules at Novi." (Page 8, lines 35-37.)

22. The finding that Respondent's supervisors began to distribute the new Novi rules on January 23, 2012 and that these rules were not given to the WAEA employees "prior to their implementation." (Page 10, lines 4-7.)

23. The finding that the Novi rules made "a number of changes in terms and conditions of employment set forth in the WAEA collective bargaining agreement." (Page 10, line 26 through page 12, line 8.)

24. The finding that the "Novi rules eliminate the '50-hour rule' contained in art. 25, par. 8 of the WAEA collective bargaining agreement." (Page 10, lines 26-29.)

25. The finding that the "WAEA collective bargaining agreement further provides that there are other required numbers of hours an employee must work for weekly schedules under 55 hours." (Page 10, lines 30-32.)

26. The finding that the "Novi rules also eliminate the provision contained in art. 25, par. 8 of the WAEA contract which indicates that an employee will be subject to discipline if the employee fails to meet the minimum hours more than 1 week of the month." (Page 10, lines 32-34.)

27. The finding that the parties commonly referred to a provision related to hours as the "bad week" rule. (Page 10, lines 34-35.)

28. The finding that "personal time counts as time worked for calculating when an employee begins receiving overtime pay for the week." (Page 11, lines 1-2.)

29. The finding that the WAEA contract compares to the Novi rules as described. (Page 11, lines 4-9.)

30. The finding/implication that the WAEA contract provides that overtime is not mandatory under any circumstances. (Page 11, lines 15-16.)

31. The finding/suggestion/inference that the Novi rules mandated drug testing. (Page 11, lines 24-40.)

32. The finding/implication that the parties only negotiated on January 26 and February 7 concerning the grievance the WAEA had filed about not applying the WAEA agreement at Novi after the announcement of the Novi rules. (Page 12, lines 10-12.)

33. The finding that Respondent only responded to the WAEA grievance regarding closure of the Wisne facility on February 20, 2012, and only as stated in the written document. (Page 12, lines 36-40.)

34. The finding that the WAEA was not given a copy of the Royal Oak rules before they were distributed to employees. (Page 13, lines 39-40.)

35. The finding that these rules "altered provisions of the WAEA contract for WAEA-represented employees who were working at Royal Oak." (Page 13, line 41 through page 14, line 28.)

36. The finding that Corich only "later" told Ciaramitaro that if he needed to leave to perform union business during working time, he had to go through another supervisor and could not talk to Corich about it anymore. (Page 15, lines 4-6.)

37. The finding/conclusion that "Respondent had a duty to give notice and an opportunity to bargain to the WAEA regarding the effects of its decision to temporarily close the Wisne facility, including the transfer of employees who were working at that facility to its Royal Oak and Novi facilities" and that this failure violated Section 8(a)(5) and (1) of the Act, inasmuch as this confuses decision bargaining and effects bargaining and ignores the WAEA's waiver of its right to request further effects bargaining. (Page 15, lines 35-38.)

38. The finding/conclusion that the Board's decision in *General Die Casters, Inc.*, 359 NLRB No. 7 (2012), has application to the instant case. (Page 16, lines 6-13.)

39. The finding/conclusion that the case of *Naperville Jeep/Dodge*, 357 NLRB No. 183 (2012), has application to the facts of this case. (Page 16, lines 15-24.)

40. The finding that there was a change in the WAEA members' working conditions when they were assigned to different facilities, as well as the failure to find that any WAEA unit member was adversely impacted. (Page 16, lines 26-28.)

41. The finding that the changes in working conditions "were sufficiently material, substantial and significant so as to constitute a mandatory subject of bargaining." (Page 16, lines 28-30.)

42. The finding/conclusion that the 2009 temporary closure of the Wisne plant, and the bargained-for tri-lateral agreement between Comau, the NIEA, and the WAEA creating a special accommodation, supports the outcome reached by the ALJ in this regard, when it actually supports the opposite outcome. (Page 16, lines 30-39.)

43. The failure to find that the negotiated personal accommodation for LaForest and Ciaramitaro constituted effects bargaining and that the WAEA asked for no further effects bargaining, constituting a waiver. (Page 17, lines 1-4.)

44. The finding/conclusion that the "implementation of the closing and the transfer of employee[s] . . . greatly limited the Union's ability to engage in bargaining over the issues presented," inasmuch as the record is devoid of such evidence. (Page 17, lines 4-6.)

45. The finding that Respondent began to move equipment out of the Wisne facility on December 1, 2011. (Page 17, lines 8-9.)

46. The finding/conclusion that the WAEA was presented with a *fait accompli* on December 1, 2011, and that discussions between the parties that day and thereafter

did not fulfill the Respondent's effects bargaining obligation, evidencing a confusion between decision bargaining and effects bargaining. (Page 17, lines 10-18.)

47. The finding/conclusion that "Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice and an opportunity to bargain to the WAEA prior to temporarily closing the Wisne facility and transferring the employees who were working there." (Page 17, lines 16-18.)

48. The finding/conclusion that the Respondent argued only as is reflected by the ALJ (at page 18, lines 5-18) in response to Acting General Counsel's argument regarding the past practice alleged in the Complaint, when, in fact, Respondent's principal argument consisted of the undisputed fact that prior to the implementation of the new Novi rules there was no material distinction between the rules at the various facilities from which a past practice could be discerned. (Page 18, lines 5-18.)

49. The finding/conclusion that the management rights clause, rule 36, and other contract provisions did not give Respondent the right to insist that WAEA members abide by the Novi rules while temporarily assigned to the Novi facility. (Page 18, lines 20-24.)

50. The finding/conclusion that the legal standard applicable to these circumstances requires a "clear and unmistakable" waiver of a statutory right, and that this (incorrect) standard was not satisfied, given the various contract clauses that gave jurisdiction over employees assigned to the Novi plant to the NIEA, and the right to enforce rules of the locale, which has traditionally been the case; the correct standard of analysis is the "contract coverage" standard recognized in such cases as *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). (Page 18, lines 26-42.)

51. The finding/conclusion that the cited language is the only contract language Respondent relies and relied on. (Page 18, lines 44-46.)

52. The finding/conclusion that there is no evidence that the WAEA waived its right to bargain over the application of local rules. (Page 18, line 46 through page 19, line 19.)

53. The finding that it is undisputed that provisions of the WAEA contract regarding certain benefits were applied to WAEA represented employees working outside the Wisne facility, given that there was no material distinction in benefits or rules at the time between the various agreements and facilities. (Page 19, lines 13-16.)

54. The finding that "LaForest was able to use personal days and vacation days as provided in the WAEA contract while he was working at Royal Oak from January through May 2010," given that attendance rules (for the purpose of using these days) were uniform between the various facilities. (Page 19, lines 17-21.)

55. The finding that "Brooks was also able to use personal days under the WAEA contract while working at Royal Oak in November 2010," given that attendance rules (for the purpose of using these days) were uniform between the various facilities. (Page 19, lines 21-23.)

56. The finding/conclusion that failing to require a drug screen of Brooks when assigned to the Novi facility on January 13, 2012 after returning from medical leave, was consistent with the provisions of the WAEA contract, and that the "expired Novi contract [was] not applied to him, and the finding/conclusion that this single isolated circumstance, if it actually occurred, established or supported a past practice as alleged in the Complaint. (Page 19, lines 22-28.)

57. The finding/conclusion that there is significance to the fact that Brooks, LaForest and Ciaramitaro may not have been specifically informed, given the uniformity of attendance policies for the various facilities, that "the shop rules and attendance policies of the WAEA contract were not applicable to them while they were temporarily assigned to other Respondent facilities prior to January 2012." (Page 19, lines 28-31.)

58. The finding/conclusion that prior to January 2012 there existed a past practice with respect to overtime, i.e., that home plant employees would get the first option, guest employees would next be offered overtime, and contractors would be the last to be offered overtime, given that overtime was assigned in the first instance based on the work being performed by teams, and who was assigned to a team. (Page 19, lines 33-39.)

59. The finding/conclusion that prior to January 2012, a practice regarding layoffs existed, as described by the ALJ. (Page 19, line 40 through page 20, line 1.)

60. The finding/conclusion that the "only exception" to this asserted practice concerning layoffs "occurred in 2008" at the Novi plant "when, over the objection of the WAEA, the Respondent laid off WAEA represented employees before those represented by the CEA," inasmuch as this is a major example that establishes the absence of the alleged practice. (Page 20, lines 1-3.)

61. The finding/conclusion that a March 2009 agreement between Respondent, the WAEA, and the NIEA somehow evidences a past practice as asserted by the ALJ, when it in fact establishes the opposite because a special agreement outside the WAEA contract had to be negotiated. (Page 20, lines 5-9.)

62. The finding/conclusion that the Acting General Counsel has established a past practice of applying the WAEA contract, including the shop rules contained in art. 25 and the attendance policies, to employees represented by the WAEA when such employees were working at Respondent's facilities other than their home plant. (Page 20, lines 13-16.)

63. The finding/conclusion that "established policies regarding the assignment of overtime to WAEA represented employees and the layoff of such employees were applied when WAEA represented employees worked outside of their home plant." (Page 20, lines 16-19.)

64. The finding/conclusion that "it is undisputed that wages, benefits, classifications, and the union's security provision of the WAEA contract were applied to WAEA represented employees working outside of their home plant prior to January 2012," inasmuch as Respondent has vigorously disputed this. (Page 20, lines 21-23.)

65. The finding that "Respondent applied the separate 'Wisne Automation Seniority List' to Wisne employees when they worked outside of the Wisne facility." (Page 20, lines 23-25.)

66. The finding that the current contract "requires the Respondent to apply the separate seniority roster of the WAEA to employees it represents when they work outside of their home plant." (Page 20, lines 25-27.)

67. The finding/conclusion that the special 2009 agreement established a practice as asserted by the ALJ, when it in fact proved the opposite. (Page 20, lines 27-32.)

68. The finding that the employer permitted LaForest "to take personal days pursuant to the WAEA contract while he was employed at Royal Oak in 2010." (Page 20, lines 36-38.)

69. The finding that Brooks, on his return from medical leave, had the WAEA rules applied to him, and that a "provision [of the NIEA contract] was not applied to Brooks." (Page 20, lines 38-41.)

70. The finding/implication that it is significant that WAEA represented employees were not told that their shop rules "would not apply to them when they were working outside of their home plant," given that the shop rules at the time were uniform and there would be no reason for Respondent to so advise them. (Page 20, lines 41-44.)

71. The finding/conclusion that there is "an established practice regarding the assignment of overtime to WAEA employees and the layoff of such employees working outside of their home plant." (Page 21, lines 1-3.)

72. The statement that it was appropriate for the ALJ to "rely heavily" on a supposedly undisputed fact (which was very much disputed) "that the WAEA contract generally applied to employees while they were on temporary assignments," demonstrating a fallacy in the ALJ's reasoning. (Page 21, lines 5-8.)

73. The finding that it is significant that there is no evidence "of situations prior to January 2012, where different policies regarding shop rules or attendance were applied to WAEA represented employees while they were working at any other of Respondent's facilities," in light of the fact that shop rules were uniform at the time; the

ALJ ignores the 2008 layoffs at Novi to which the WAEA objected. (Page 21, lines 8-11.)

74. The statement by the ALJ that his (false) premise "detracts from the Respondent's argument that the shop rules and the attendance provisions of the WAEA contract did not apply to WAEA represented employees when they were working outside of the Wisne facility." (Page 21, lines 11-13.)

75. The finding that the "only example of the Respondent not applying the assignment of overtime and layoff policies" to WAEA represented employees working outside of their home plant occurred in the Novi facility in 2008. (Page 21, lines 13-21.)

76. The finding/conclusion that *BASF Wyandotte*, 278 NLRB 173 (1986), and *Raley's Inc.*, 348 NLRB 382 (2006), are inapplicable or distinguishable. (Page 21, lines 23-38.)

77. The improper use of a "past practice" concept to create contractual (or quasi-contractual) terms that do not exist and to impose those terms on Respondent, thereby exceeding the limited role of the NLRB in "contract coverage" situations. See, e.g., *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). (Pages 19-22, and throughout the decision.)

78. The complete failure to make the only relevant comparison for a genuine past practice analysis, i.e., a comparison between the WAEA contract and the other two Unions' contracts prior to January 2012. (Pages 19-22).

79. The statement that "it is undisputed that generally the employer applied the provisions of the WAEA contract to WAEA represented employees working outside of the Wisne facility," inasmuch as this was entirely disputed by Respondent, and this

statement by the ALJ demonstrates his lack of understanding of Respondent's position on the central issue of the case. (Page 21, lines 40-42.)

80. The finding that there are specific examples of the application of the shop rules and attendance policies contained in the WAEA contract, inasmuch as the shop rules and policies were uniform. (Page 21, lines 42-43.)

81. The finding/conclusion that Respondent applied consistent policies regarding the assignment of overtime and layoff of WAEA represented employees when working outside their own facility, and that this means that a past practice existed, inasmuch as the rules and policies were uniform. (Page 21, lines 42-45.)

82. The finding/conclusion that the "Novi and Royal Oak rules changed terms and conditions of employment which are mandatory subjects of bargaining." (Page 22, lines 5-7.)

83. The finding/conclusion that WAEA representatives were not given meaningful notice and opportunity to negotiate concerning the Novi rules. (Page 22, lines 7-10.)

84. The finding/conclusion that, under the circumstances, the WAEA was presented with a *fait accompli* concerning the application of the rules, given that there was ample opportunity to bargain concerning their application, and bargaining in fact occurred. (Page 22, lines 8-16.)

85. The finding/conclusion that the WAEA was presented with a *fait accompli* as to the Royal Oak rules so as to excuse the WAEA's failure to bargain about them. (Page 22, lines 17-29.)

86. The finding/conclusion that "the provisions of the Respondent's contract with the WAEA do not clearly and unmistakably give the Respondent the unilateral right to apply such policies to WAEA represented employees working at those facilities," inasmuch as this is not only unsupported by the record factually, but the "contract coverage" legal standard should have been utilized. (Page 22, lines 40-43.)

87. The finding/conclusion that "Respondent had an established policy of applying the provisions of the WAEA contract to employees represented by the WAEA working at the Novi and Royal Oak facilities." (Page 22, lines 44-45.)

88. The finding/conclusion that "Respondent also had an established policy of applying extra contractual practices to those employees regarding the manner in which overtime was assigned and the order in which they were laid off relative to employees of the home plant, employees represented by another visiting union, and contractors." (Page 22, line 45 through page 23, line 1.)

89. The finding/conclusion that Respondent was required to give notice to the WAEA and an opportunity to bargain before applying these rules to the WAEA employees, and that Respondent violated Section 8(a)(5) and (1) of the Act in this regard. (Page 23, lines 1-4.)

90. The finding/conclusion that Respondent violated Section 8(d) of the Act as described by the ALJ, inasmuch as no specific term in the WAEA contract was modified and Respondent had a sound arguable basis in the contract for acting. (Page 23, lines 6-24.)

91. The finding/conclusion that "Respondent applied the terms of the WAEA collective-bargaining agreement to WAEA represented employees when they were temporarily assigned to another of the Respondent's facilities." (Page 23, lines 39-41.)

92. The finding/conclusion that "the contract was applied to employees working outside of the Wisne plant by practice" and that the Respondent violated that practice by deviating from it and unilaterally implementing new terms and conditions. (Page 23, lines 43-47.)

93. The conclusion that Respondent should be required to "rescind the unlawful unilateral changes it instituted." (Page 24, lines 10-12.)

94. The finding/conclusion that Respondent violated Section 8(a)(1) of the Act by informing the WAEA "through Corich" that "their Union no longer existed." (Page 25, lines 15-24.)

95. The finding/conclusion that the statement attributed to Corich concerning the existence of the WAEA "was within the scope of Corich's authority," when in fact it was not, and Respondent had not admitted Corich was an agent for this statement as asserted by the ALJ. (Page 25, lines 15-33.)

96. The finding/conclusion that Respondent should be responsible for Corich's statement given the circumstances of this case, and in light of its isolated character. (Page 25, lines 25-43.)

97. The conclusion that Respondent violated Section 8(a)(1) due to alleged December 2011 statements by Durocher. (Page 26, lines 7-27.)

98. The conclusion that Durocher's statement that employees could take a layoff if they did not wish to accept the Novi rules violated Section 8(a)(1) and was not

protected by Section 8(c) of the Act, in light of that explicit option in the WAEA contract. (Page 26, line 29 through page 27, line 36.)

99. The conclusion that Respondent violated the Act by failing to bargain over the effects of the temporary closure of its Wisne Automation facility. (Page 28, lines 34-35.)

100. The conclusion that Respondent violated the Act by failing to bargain with the WAEA regarding the application of the Novi and Royal Oak rules to the WAEA represented employees temporarily working at those facilities. (Page 28, lines 38-40.)

101. The conclusion that Respondent unilaterally changed certain terms of the WAEA collective-bargaining agreement and thereby violated Section 8(a)(5) and (1) and Section 8(d) of the Act. (Page 28, lines 43-45.)

102. The conclusion that Respondent violated the Act by committing the enumerated violations. (Page 29, lines 1-13.)

103. The finding/conclusion that any of the elements of the proposed remedy, order, and notice are legally proper and should be adopted or enforced. (Page 29, line 22 through page 34.)

104. Respondent notes that the Board is not, at present, lawfully constituted, see *Noel Canning v. NLRB*, ___ F.3d ___ (2013), and therefore lacks authority to act in this case.

WHEREFORE, Respondent requests that its exceptions be granted and that the Complaint be dismissed.

Respectfully submitted,

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