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

COMAU, INC.

Respondent

and **Case 07-CA-073073**

WISNE AUTOMATION EMPLOYEES ASSOCIATION

Charging Union

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

Darlene Haas Awada, Esq.
Patricia A. Fedewa, Esq.
Counsel for the Acting General Counsel
National Labor Relations Board, Seventh Region
477 Michigan Avenue, Room 300
Detroit, Michigan 48226
Telephone (313) 226-3212
(313) 226-3236

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Counsel for the Acting General Counsel (herein also referred to as "the Acting GC"), pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge.[1]

I. The ALJ's factual errors, omissions, and ambiguities (Exceptions 1 through 6)

The Acting GC excepts to some of the ALJ's factual findings which were contrary to the record or stated in an ambiguous manner. To begin, the ALJ's findings of fact regarding the structure of Respondent's facilities and the employees represented by its three unions are ambiguously stated. (ALJD p.2, lines 43-44; p. 3 lines 13-17, 19-23) In this respect, the ALJ finds that the WAEA[2] represents employees "who generally work at the Wisne (Comau Automation) facility," and the "production and maintenance employees at [Respondent's] Novi facility are represented by the [NIEA]." (ALJD p.2, lines 43-44; p. 3 lines 13-15) He also fails to specify which facilities serve as "home plants" for the WAEA and the NIEA. The resulting ambiguity gives the apparently inadvertent impression that the WAEA and the NIEA represent *all* production and maintenance employees at their identified home plant facilities, which is unsupported by the record and is not the position of any party.

[1] Throughout this brief ,"Tr." refers to the transcript of the administrative hearing; "JX," "GCX," and "RX" refer to joint exhibits, the Acting General Counsel's exhibits, and Respondent's exhibits, respectively. "ALJ" refers to Administrative Law Judge Mark Carissimi. "ALJD refers to the ALJ's decision, dated December 26, 2012.

[2] Throughout this brief, the unions representing employees of Respondent will be referred to as follows: "WAEA" refers to the Charging Union, the Wisne Automation Employees Association; "NIEA" refers to the Novi Industries Employees Association; and "CEA" refers to the Comau Employees Association.

In addition, the ALJ failed to find that, although employees represented by the WAEA, the NIEA, and the CEA worked at the Royal Oak and Warren facilities, those facilities were not home plants to any union. (ALJD p. 3, lines 19-23) The ALJ also erred in finding that all of the individuals working at Respondent's Warren facility were contractors.[3] (ALJD p. 3, line 23).

The undisputed record evidence establishes that the WAEA represents employees working at and out of the Comau Automation facility. The NIEA represents some employees working at the Novi facilities, but does not represent employees represented by the WAEA or the CEA working at Novi. Two facilities—Royal Oak and Warren—do not serve as "home plants" for employees, and have no "home plant union" recognized at those facilities. However, employees represented by the WAEA, the NIEA, and the CEA work at those facilities on a temporary basis. (Tr. 76-78, 240-241, 268; GCX 41) With regard to the ALJ's finding that all of the individuals working at the Warren facility were contractors, the record establishes only that the "vast majority" of employees at Warren were contractors. (Tr. 244) Accordingly, the Acting GC seeks for these factual ambiguities, omissions, and errors to be clarified.

[3] Respondent also excepts to the finding that all of the individuals working at the Warren facility were contractors. (Respondent's Exceptions, dated February 22, 2013, Exception 1).

II. Exceptions regarding the "contract coverage" doctrine (Exceptions 7 through 9)

The Acting GC agrees with the ALJ's findings, analysis, and conclusions that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the WAEA over the effects of the closing of Comau Automation in December 2011, and violated Section 8(a)(5) and (1), and Section 8(d) of the Act by unilaterally implementing the Novi Rules and Royal Oak Rules upon WAEA-represented employees without bargaining with the WAEA. The ALJ correctly found (ALJD p. 18, lines 20-24) that the management rights clause and Article 25, Rule 36 contained in the parties' collective bargaining agreement did not privilege its right to unilaterally implement the Novi Rules and the Royal Oak rules upon WAEA-represented employees at the Novi and Royal Oak facilities. (ALJD p. 18, lines 20-24, p. 23, lines 1-4) The Acting GC also agrees with the ALJ's analysis and conclusions finding that a waiver of a statutory right must be clear and unmistakable under ***Metropolitan Edison Co. v. NLRB***, 460 U.S. 693 (1983), reaffirmed by the Board in ***Provena St. Joseph Medical Center***, 350 NLRB 808 (2007) (ALJD p. 18, lines 26-29), and that the WAEA did not waive its right to bargain over the implementation of the Novi and Royal Oak Rules. (ALJD p. 18, lines 39-47; p. 19, lines 1-8).

However, the Acting GC excepts to the failure of the ALJ to find and make conclusions of law that the "contract coverage" doctrine adopted by the D.C. Circuit, the Seventh Circuit, and the First Circuit does not apply in this context. The Acting GC also excepts to the ALJ's failure to find and conclude that, even if the "contract

coverage" doctrine was applied, Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union over the effects of the closing of Comau Automation, and violated Section 8(a)(5) and (1) and Section 8(d) of the Act over the implementation of the Novi Rules and the Royal Oak Rules upon the WAEA-represented employees working at the Novi and Royal Oak facilities.

A. The rationale for applying the "contract coverage" doctrine does not exist under this contract

The D.C. Circuit, the Seventh Circuit, and the First Circuit have rejected the Board's "clear and unmistakable waiver" analysis in determining whether an employer is privileged to implement changes to mandatory subjects of bargaining during the term of the contract. In adopting the "contract coverage or "covered by" doctrine, these Courts of Appeals express that their guiding rationale is that arbitrators, under the grievance arbitration procedure, and the courts, through lawsuits brought under Section 301 of the Labor Management Relations Act, are the principal sources of contract interpretation. See, e.g,, ***Litton Financial Printing Division v. NLRB,*** 501 U.S. 190, 202 (1991). However, and significantly, the agreement between Respondent and the WAEA at issue here does not contain an arbitration provision. (ALJD p. 10, n.19; JX 6) Thus, while the D.C. Circuit has stated that, once a subject is "covered by" a contract, parties should resolve all questions regarding interpretation of the collective bargaining provision at issue through the grievance arbitration procedure, ***United Mine Workers of America, Dist. 31 v. NLRB***, 879 F.2d 939, 944 (D.C. Cir. 1989), the WAEA and Respondent do not have that contractual mechanism in place. Moreover,

under the NLRA, arbitration is a matter of consent, and the Supreme Court has held that it will not be imposed upon parties beyond the scope of their agreement. ***Litton Financial Printing***, 501 U.S. at 201.

The Supreme Court has held, under these circumstances, where a collective bargaining agreement does not contain an arbitration provision and a union has alleged a unilateral change in violation of Section 8(a)(5) of the Act, that it is within the Board's jurisdiction to construe a collective bargaining agreement to determine whether an unfair labor practice occurred. ***C & C Plywood Corp.***, 385 U.S. 421, 428 (1967).

Thus, although courts adopting the "contract coverage" doctrine have rationalized that "the Board has only limited authority to interpret labor contracts and should not act as an arbitrator in contract interpretation disputes," ***Bath Marine Draftsmen's Ass'n v. NLRB***, 475 F.3d 14, 25 (2007), the cases considered by these courts have not opined on what recourse is available to a party when the contract provision will not be heard by an arbitrator due to the absence of a negotiated arbitration clause. As noted, the Courts of Appeals which have adopted the "contract coverage" doctrine point to the courts as the other principal source of contract interpretation. However, the Supreme Court has found that where, as here, in the absence of an arbitration clause, Congress could not have intended to require a union to institute a Section 301 lawsuit to determine the applicability of an employer's contractual defense to implementing an alleged unilateral change, then, if successful, to go back to the NLRB to institute an unfair labor practice proceeding. The Supreme

Court rejected such an inefficient requirement as contrary to legislative intent, finding that, in the labor field, "time is crucially important in obtaining relief." ***C & C Plywood***, 385 U.S. at 429-430. In addition, the Supreme Court noted the difficulty a union might face in establishing the amount of injury caused by a respondent's action in a Section 301 lawsuit, as the injury to the union's status as bargaining representative resulting from an Employer's unilateral change to a contract provision would be difficult to translate into a monetary amount. ***Id.*** at 429, n.15.

Accordingly, applying the "contract coverage" doctrine in this situation, where the parties could not obtain an interpretation of any arguably applicable contractual language through an arbitrator or the courts, is uniquely inequitable and not in the interest of judicial economy.

B. The ALJ's failure to find and conclude that, even if the "contract coverage" doctrine was applied, Respondent violated Section 8(a)(5) and (1), and Section 8(d) of the Act

"Contract coverage" analysis is premised on Section 8(d)'s provision that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period." Thus, the once the parties have exercised their right to bargain about a particular subject by negotiating the provision into the contract, the parties' rights are fixed, and further bargaining is not required as to that subject." ***Local Union No. 47, IBEW***, 927 F.2d 635, 640 (D.C. Cir. 1991) (internal citations omitted). Under "contract coverage" analysis, once a matter is "covered by" the labor agreement, "the

union has exercised its bargaining right and the question of waiver is irrelevant." ***Department of Navy v. FLRA***, 962 F.2d 48,57 (D.C. Cir. 1992).

1. Respondent's failure to bargain over the effects of the December 2011 closing of Comau Automation under the "contract coverage" doctrine

Article 4.18 of the WAEA's collective bargaining agreement states:

It is the agreement of the Company and the Union that should the Company make a business decision to close a plant or to consolidate plants, **the Company will bargain with the Union regarding the effects** of the business decision. (Emphasis added)

Article 4.18 explicitly requires the Company to bargain with the Union regarding the effects of a closing. There is no ambiguity in the language. Although Respondent, in its Exceptions Brief, attempts to make a distinction between a temporary and permanent closing, the record fails to establish that there was any indication of the duration of the closing when it occurred, and the contract provision itself does not differentiate between a temporary and permanent closing. Moreover, a temporary closing is within the "clear compass" of Article 4.18, which explicitly requires Respondent to bargain over effects of a decision to close. ***NLRB v. U.S. Postal Service***, 8 F.3d 832, 838 (D.C. Cir. 1993). Thus, even applying the "contract coverage" doctrine, Respondent failed to bargain with the WAEA over the effects of the closing in violation of Section 8(a)(5) and (1).

2. Respondent's failure to bargain with the WAEA over the implementation of the Novi and Royal Oak Rules upon WAEA-represented employees under the "contract coverage" doctrine

Similarly, even if the "contract coverage" doctrine were applied, Respondent violated Section 8(a)(5) and (1) and Section 8(d) by unilaterally implement the Novi

Rules and the Royal Oak Rules upon the WAEA-represented employees. Under Article 25 "Shop Rules," Article 25.01 states:

> It is mutually agreed between the Company and the Shop that to further increase efficiency and to eliminate discrimination in the disciplining of employees, the following rules and regulations shall apply to all employees. **It is further understood that additional rules may be added or the present rules changed by mutual agreement.** (Emphasis added). (JX 6, Article 25.01)

This specific requirement that changes or additions to the rules must be agreed upon by both parties establishes that the WAEA had bargained precisely to prohibit Respondent from making unilateral changes to the rules applicable to WAEA-represented employees. Although Respondent argues that the management rights clause (JX 6, Article 11) allows it to make changes to the rules, it is black letter law in contract interpretation that "a specific provision controls over one of more general application." ***Gozlon-Peretz v. United States***, 498 U.S. 395, 407 (1991). Likewise, Article 25, Rule 36, also misguidedly relied upon by Respondent, which provides for discipline for "violations of Company policies or Procedures or other rules not specifically stated," does not include rules not yet in existence, and is similarly too general to supersede the explicit requirement in Article 25.01 for changes to rules to be by mutual agreement. Thus, even under the "contract coverage" doctrine, Respondent's implementation of the Novi Rules and the Royal Oak Rules for WAEA-represented employees violates Section 8(a)(5) and (1), and 8(d) of the Act.

III. Exceptions regarding the Unit Description (Exceptions 10 through 13)

The ALJ erred by failing to alter the Unit Description to describe the reality that

the WAEA represents employees working "at and out of" the Comau Automation facility. (ALJD p. 23, lines 41-43, p. 24, lines 15-19)

It is well settled that the Board has the authority to clarify bargaining units which have never been certified and which were established solely by agreement of the parties. ***Brotherhood of Locomotive Firemen and Enginemen***, 145 NLRB 1521, 1523-24 (1964).[4] Moreover, the Board's authority to change contractual unit descriptions to reflect reality is also long-recognized. See, e.g., ***Peerless Publications, Inc.***, 190 NLRB 658, 660 (1971) (the Board clarified unit mid-contract to exclude independent contractors from the unit); ***Cencom of Missouri***, 282 NLRB 253, 253 (1986) (the Board modified the unit description to reflect new job titles).

Indeed, the fact that a collective-bargaining agreement happens to describe the contours of the bargaining unit does not displace the Board's obligation to ensure that, unless an employer makes a significant change to that unit, the employees' right to continue to bargain through their chosen representative remains honored. *See* ***Comar, Inc.***, 339 NLRB 903, 904, 905, 914 (2003) (requiring employer to continue to bargain with representative of relocated employees and describing the unit in terms of workers at previously located facility); see also ***Leach Corp.***, 312 NLRB 990, 990 (1993) (requiring employer to continue to bargain with representative of employees who were relocated to different facility from their historical facility). Accord ***ADT Security Services, Inc.***, 355 NLRB No. 223 (2010).

[4] There is no record evidence that the WAEA unit was ever certified by the Board.

The record establishes that the WAEA-represented employees maintain their distinct identity as a bargaining unit, regardless of the Respondent facility at which they work. The three unions present at Comau are independent of each other and are not affiliated with each other in any manner. (Tr. 79, 145) Each union negotiates its own collective bargaining agreement with Respondent. (JX 1, 2, 5, 6) Employees represented by the WAEA are on their own seniority list, updated by Respondent each month, which organizes WAEA seniority based on classification, regardless of where the employees are working. (Tr. 79-80, 168, 148, 268; GCX 24) It is undisputed that the wages, benefits, classifications, and separate seniority of the WAEA-represented employees remain constant no matter to what Respondent facility they are temporarily transferred, that the WAEA CBA union security clause continues to apply, and that Respondent continues to process grievances filed by the WAEA on behalf of WAEA-represented employees working at Respondent facilities other than their home plant Comau Automation.

The ALJ's finding that the WAEA contract applies to WAEA-represented employees when they work at Respondent facilities other than Comau Automation support the Board altering the unit description to reflect reality. The ALJ's deferral of this alteration to bargaining is misplaced. (ALJD p. 24, 15-18) To begin, a unit description provision setting forth the scope of the unit is a permissive subject of bargaining. ***Antelope Valley Press***, 311 NLRB 459, 460 (1993); ***Taylor Warehouse Corp. v. NLRB***, 98 F.3d 892, 902 (6th Cir. 1996); ***McDonnell Douglas Corp. v. NLRB***, 59 F.3d 230, 232 (D.C. Cir. 1995). Because the scope of the bargaining unit is

a permissive subject of bargaining, the parties may bargain about that subject only by mutual consent. However, because such bargaining is permissive only, neither party may bargain to impasse or condition bargaining over mandatory bargaining issues on such a subject. ***Taylor Warehouse Corp.*****,** 98 F.3d at 902. Accordingly, the WAEA would only be able to negotiate an accurate unit description with Respondent if Respondent agrees to bargain over the issue.

In addition, if other unions are interested in representing the bargaining unit, it is a disservice to all parties for the unit description to describe inaccurately the bargaining unit. The resulting confusion is axiomatic from the ALJ's own attempt to describe the different units without using the modifier "working at and out of" the bargaining units' home plant facilities. As excepted to by the Acting GC (Exceptions 1 and 2), the ALJ's description that the WAEA represents production and maintenance employees at the Comau Automation facility gives the erroneous impression that all employees working at that facility are represented by the WAEA when the record establishes that employees are at times transferred to other facilities of Respondent, so employees represented by the NIEA or the CEA could be working at Comau Automation. Similarly, WAEA-represented employees could, at any given time, be temporarily working at Respondent's other facilities and still remain within the WAEA bargaining unit. (ALJD p. 4, lines 1-3). Under these circumstances, contrary to the ALJ's findings and conclusions, it is appropriate to modify the unit description to accurately describe the WAEA-represented bargaining unit.

IV. The ALJ's failure to include in the remedy Notice postings at all of Respondent's facilities (Exception 14)

The ALJ's recommended order and remedy includes Notice postings at the Comau Automation, Novi, and Royal Oak facilities. (ALJD p. 30, lines 10-18, p. 32, lines 1-14). However, because of the nature of Respondent's work, it is likely that affected employees may be working at other facilities of Respondent, or be on field service at a customer's facility. (ALJD p. 4, lines 1-5; Tr. 79, 145; JX 5, Article 4.04(c); JX 6, Articles 4.04(c) and 5.01) Accordingly, Respondent's posting at the Comau Automation, Novi, and Royal Oak facilities will not reach all the employees affected by Respondent's unfair labor practices. Therefore, the Acting GC requests that the Notices be posted at all of Respondent's facilities and be mailed to any employees on field service.

The Board has held that postings at multiple employer facilities are appropriate in order to notify affected employees of the outcome of the proceedings, the remedy, and to notify employees of their rights under the Act. Thus, in ***Technology Service Solutions***, 334 NLRB 116, 118 (2001), the Board ordered *inter alia* Notice postings at all of an employer's facilities in the region because the employees affected by the unfair labor practices did not report to the facility at which the employer initially posted the Notice. The Board held that posting the Notice at the initial facility would not suffice to inform the affected employees that Respondent had committed an unfair labor practice and the measures that it would take to remedy the violation. See also ***Best Roofing Co., Inc.,*** 298 NLRB 754, 758 (1990). Accordingly, the Acting GC

seeks for the Order remedying Respondent unfair labor practices to include Notices posted at all of Respondent's facilities and mailed to any employees on field service.

V. Conclusion

Counsel for the Acting General Counsel respectfully requests that the Board grant the requested Cross-Exceptions and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 22nd day of March, 2013.

/s/Darlene Haas Awada
Darlene Haas Awada
Counsel for the Acting General Counsel
NLRB, Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, Michigan 48226
(313) 226-3212
Darlene.HaasAwada@nlrb.gov

/s/Patricia A. Fedewa
Patricia A. Fedewa
Counsel for the Acting General Counsel
NLRB, Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, Michigan 48226
(313) 226-3236
Patricia.Fedewa@nlrb.gov