

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAU, INC.,

Employer,

-and-

AUTOMATED SYSTEMS WORKERS LOCAL 1123,  
a Division of MICHIGAN REGIONAL COUNCIL OF  
CARPENTERS, UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,

Case No. 7-RD-3644

Union,

-and-

WILLIE RUSHING, an individual,

Petitioner,

-and-

COMAU EMPLOYEES ASSOCIATION,

Intervenor.

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**COMAU, INC.'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S  
DECISION AND ORDER DISMISSING PETITION**

KIENBAUM OPPERWALL HARDY  
& PELTON, P.L.C.

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Dated: December 28, 2010

The Regional Director's December 14, 2010 Decision and Order dismissing the decertification petition in this matter (for convenience, a copy of the Decision is attached at Tab A) turns the Board's concept of "temporal proximity" on its head by reversing a "cause and effect" timeline and creating a "continuum" theory based on an "anticipated" unfair labor practice that had not happened (and in theory might never have happened). The Regional Director's approach to deciding a *Master Slack* or *Saint Gobain* issue<sup>1</sup> is unprecedented in the Board's caselaw and ungrounded in basic logic. Accordingly, Comau requests review of the Decision pursuant to Section 102.67(c)(1) and (2) of the Board's Rules and Regulations for these reasons:

- The Decision raises substantial questions of law and policy affecting a class of *Master Slack* and *Saint Gobain* cases for which there is no Board precedent addressing this timing issue; and to the extent there is Board precedent generally governing this class of cases, the Decision is a radical departure.
- The Decision's analysis of the core "causation" issue is clearly erroneous in light of the undisputed timeline of critical events, and it prejudicially affects the rights of the parties to this proceeding.

Comau is also attaching to and incorporating in this Request for Review a copy of its Brief to the Regional Director Concerning Decertification Petition Pursuant To *St. Gobain* (see Tab B), which summarizes the factual record and legal framework for this case.

The question addressed by the Regional Director, and now presented to the Board on review, is whether a single unfair labor practice found to have occurred on March 1, 2009 "caused" the employee disaffection that resulted in the filing of the instant decertification petition so as to warrant its dismissal. It is undisputed that Comau

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<sup>1</sup> See *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004).

acted lawfully when it took the following steps in anticipation of a March 1, 2009 effective date for applying the Company-wide health care plan to bargaining unit employees:

- Comau announced on December 3, 2008 that, following an impasse in bargaining, it was implementing its entire Last Best Offer (LBO) on December 22, 2008 following an agreed notice period.
- The LBO included, as a key provision, putting the unit employees on the Company-wide health care plan effective March 1, 2009, a delay that would allow for an orderly administrative transition.
- During January 2009, the Company (with the Union's participation) conducted educational rollout and enrollment meetings with employees to inform them of the upcoming health care plan changes and permit them to make coverage elections for themselves and their families.
- During February 2009, the Company carried out all of the administrative transition steps (paperwork, payroll, computerized data entry, etc.) and coordinated with Blue Cross Blue Shield to ensure a smooth and accurate changeover of health care benefits on and after March 1, 2009.

All of these steps, taken over a 60-day period following the date of the LBO's implementation, were undisputedly lawful. Although the Union filed charges asserting otherwise, the Regional Director dismissed all charges relating to events that occurred in December 2008, and that dismissal was affirmed by General Counsel's Office of Appeals. See ALJ Paul Bogas' Decision, *Comau, Inc.*, 356 NLRB No. 21 (November 5, 2010), Slip Opinion at 8. Furthermore, ALJ Bogas dismissed the Union's charges relating to events that occurred in January and February 2009, *id.* at 11-12, and the General Counsel did not take exception to the dismissals. Thus, the sole event found by ALJ Bogas (with the Board's affirmance) to constitute an unfair labor practice was

the Company's act of allowing the earlier-announced health care plan change to become effective on March 1, 2009 as scheduled in the LBO.<sup>2</sup>

It is likewise undisputed that the disaffection with the Union that led to the decertification petition began in late 2008, blossomed in January 2009, and had achieved full fruition by the end of February 2009 when over 30% of the unit described in the petition had signed it. All of this happened before the March 1 effective date of the health care plan – also the date of the sole unfair labor practice. That more employees than necessary signed the petition after March 1, and that the petition's filing date was delayed to April 14 (due to more unfulfilled promises by the Union), are both facts that are completely irrelevant to the timeline illuminating the "causation" of the employees' disaffection with the Union in the first place.

To be sure, because the health care issue was such an important one for the Company, the Union, and the unit employees, the anticipated change in plan coverage (which would require cost-sharing by the unit employees for the first time) was a factor among several that contributed to employee disaffection with the Union and the decision by over 30% of the unit employees to sign the decertification petition in February 2009. But it is undisputed that, when they signed in February 2009, nothing unlawful had occurred that could or would have motivated them to sign. What they were unhappily "anticipating" was totally lawful.

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<sup>2</sup> Comau has filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the Board's adoption of ALJ Bogas' conclusion that Comau committed an unfair labor practice on March 1, 2009 by allowing the health care plan change to take effect on that date as previously announced and scheduled in the LBO. For purposes of this Request for Review only, Comau will assume (while preserving all arguments to the contrary) that this single act on March 1, 2009 was an unfair labor practice, inasmuch as the Regional Director was bound by the Board's November 5, 2010 decision to that effect.

Yet the Regional Director's Decision re-orders the employees' motivation, and temporally reverses the actual "cause and effect" sequence, by creating a hitherto nonexistent "anticipation" and "continuum" theory to support dismissing the petition:

Although the Employer's unlawful conduct occurred on March 1, employees were on notice as of December 3 that the Employer would no longer offer the existing health insurance plan as of March 1, but would instead offer lesser healthcare coverage requiring payroll deductions for employee premium contributions. In January 2009, employees attended meetings, during which they learned of the specific amount of the premium contributions and completed paperwork to ensure coverage under the new plan.

\* \* \*

It is obvious that **learning** that they would no longer be receiving Employer-funded healthcare and would be required to pay significant premiums for lesser coverage, constituting virtual wage cuts, would have a detrimental effect on the employees and might cause them to support the decertification effort. Employees' anticipation of the devastating impact of the financial burden of the unlawfully implemented healthcare plan cannot be separated from the real-time impact of the change to the healthcare plan when it came to fruition on March 1.

I find that the employees' expression of dissatisfaction followed close on the heels of, and was contemporaneous with, the Employer's announcement of the pending implementation of its premium-based healthcare plan, and is inextricably intertwined with the March 1 unlawful implementation of that very plan. The Employer's actions are on a continuum which forecloses separating out its lawful conduct, the December 3 announcement and December 22 implementation of its last best offer, from the subsequent unlawful conduct [on March 1]. . . . (Decision at 7, boldface in original, underscoring added.)

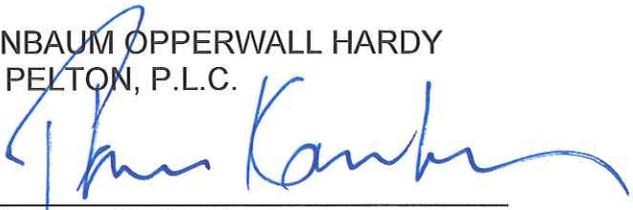
This analysis of an undisputed sequence of events is intellectually incoherent. *Master Slack* and *Saint Gobain* require that the unlawful conduct "precede" the disaffection that leads to the "ensuing" decertification effort and that there be "temporal

proximity.” The Regional Director’s result-oriented reasoning has reversed the time continuum. That not only defies common sense (and laws of nature), but there is no known Board precedent for this type of time-shifting analysis. Not one of the half dozen cases cited by the Regional Director in his Decision supports such an analysis. In every one of the cited cases, the usual and rational time sequence was present, allowing a true “cause and effect” determination between prior unlawful conduct and subsequent disaffection.

The Regional Director’s Decision is fatally defective. The decertification petition was motivated by lawful conduct and it was supported by an adequate showing of interest prior to any allegedly unlawful conduct occurring. The Regional Director’s Decision to dismiss the petition not only raises substantial questions of law and policy, and it not only violates all existing precedent in the *Master Slack* and *Saint Gobain* class of cases, but it is simply wrong – in a way that substantially and prejudicially affects the rights of the parties to this proceeding. The Board should grant review, reverse the Decision of the Regional Director, and direct an election.

Respectfully submitted,

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& PELTON, P.L.C.

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Dated: December 28, 2010  
149665

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAU, INC.,

Employer,

-and-

AUTOMATED SYSTEMS WORKERS LOCAL 1123,  
a Division of MICHIGAN REGIONAL COUNCIL OF  
CARPENTERS, UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,

Case No. 7-RD-3644

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WILLIE RUSHING, an individual,

Petitioner,

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COMAU EMPLOYEES ASSOCIATION,

Intervenor.

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**PROOF OF SERVICE**

I hereby certify that on December 28, 2010, I caused to be served via **electronic mail** a copy of the following: **Comau, Inc.'s Request for Review of Regional Director's Decision and Order Dismissing Petition** and this **Proof of Service** upon all counsel in the above-captioned matter:

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Kristine Grand

**TAB A**

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

**COMAU, INC.**

**Employer**

**and**

**Case 7-RD-3644**

**WILLIE RUSHING, An Individual**

**Petitioner**

**and**

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

**Union**

**and**

**COMAU EMPLOYEES ASSOCIATION (CEA)**

**Intervenor**

**APPEARANCES:**

Thomas J. Kienbaum, of Birmingham, Michigan, for the Employer.

Edward J. Pasternak, of Southfield, Michigan, for the Union.

Willie Rushing, of Detroit, Michigan, Pro se.

**DECISION AND ORDER**

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer<sup>1</sup> of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

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<sup>1</sup> An administrative law judge was the hearing officer as noted hereinafter.

Upon the entire record in this proceeding<sup>2</sup>, the undersigned finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
2. The labor organizations involved claim to represent certain employees of the Employer.
3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

### **Procedural history and overview**

On April 14, 2009, the Petitioner filed the instant petition seeking to decertify the Union as the exclusive collective bargaining representative of certain of the Employer's employees.

On August 28, 2009, the undersigned issued an Order Consolidating Cases, Complaint and Notice of Hearing in Cases 7-CA-52106 and 7-RD-3644 for a hearing before an administrative law judge. The complaint alleged that the Employer violated Section 8(a)(5) and (1) of the Act by, inter alia, implementing Article 10 of a document entitled Imposed Last Best Offer, and thereby changing the employees' hospitalization, medical, dental, and vision care benefits without obtaining the Union's consent and without first bargaining with the Union to a good-faith impasse. The Notice of Hearing directed a hearing on the issue of any causal connection between the Employer's alleged unfair labor practices and the decertification petition. Following the hearing, the cases were severed and the instant case was remanded to the undersigned for appropriate disposition in accordance with *St. Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), and pursuant to Section 102.64 through 102.67 of the Board's Rules and Regulations.

On May 20, 2010, the administrative law judge issued his decision in Case 7-CA-52106, and on November 5, 2010, the Board issued its decision and order, *Comau, Inc.*, 356 NLRB No. 21. Affirming the administrative law judge, the Board found that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new health insurance plan in the absence of an agreement or a bona fide impasse.

Applying the causation test factors set forth in *Master Slack*, 271 NLRB 78, 84 (1984), I find that there is a close temporal proximity between the Employer's unlawful

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<sup>2</sup> The Employer, Union, and Intervenor filed briefs, which were carefully considered.

conduct and the filing of the petition: the Employer's unilateral implementation of changes to employees' healthcare benefits are the type of unlawful acts which have a detrimental and long lasting effect on employee support for the Union, had a tendency to cause employee disaffection from the Union, and had an effect on employee morale and caused the employees' disaffection from the Union. Under these circumstances, I conclude that a causal relationship exists between the Employer's unilateral changes and employee disaffection, and that the petition should be dismissed.

## **Background**

The Employer, a division of the Fiat automobile company, builds assembly lines and specialty tools for the automobile industry. Since at least 2001, the Automated Systems Workers (ASW) has represented a bargaining unit of all full-time and regular part-time production and maintenance employees, inspectors, and field service employees, employed by the Employer 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.<sup>3</sup> In about March 2007, the ASW affiliated with the Michigan Regional Council of Carpenters (MRCC), United Brotherhood of Carpenters and Joiners of America, becoming ASW Local 1123, a division of the MRCC (the Union herein). At this time, the unit employees' union dues deductions increased, with a portion of these dues going to the ASW and the remainder going to the MRCC.

The most recent collective bargaining agreement between the Union and the Employer was effective by its terms from March 7, 2005, until March 2, 2008. Prior to the expiration date, the parties entered into an agreement that extended the effective period of the contract indefinitely, and gave either party the right to cancel the extension with 14 days notice. The parties commenced negotiations for a successor contract in January 2008, meeting more than 20 times in 2008, and continued to negotiate through March 20, 2009.

## **The Employer's Unfair Labor Practices found in Case 7-CA-52106**

Early in the 2008-2009 negotiations with the Union, the Employer stated that the new contract would have to be concessionary and that it would not provide the employees

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<sup>3</sup> The bargaining unit was established by 1961. Although it is unclear whether the ASW was the bargaining representative prior to 1981, it appears that before either ASW or the Union represented the unit employees, they were represented by an independent employee organization known as the Pico Employees Association (PEA).

with anything that increased Employer costs unless the employees provided the Employer savings in return. Among the major concessions sought by the Employer were reductions in the employees' healthcare benefits (including hospitalization, medical treatment, dental care, and vision care benefits). Under the extant collective bargaining agreement, unit employees were not required to pay any premiums for their Employer-provided healthcare coverage. Although the Employer used a "self-insured" health plan, the coverage was provided through Blue Cross/Blue Shield (Blue Cross). The Employer proposed that it would remain self-insured and continue to provide medical insurance through Blue Cross, but the unit employees would be required to pay health insurance premiums and their actual coverage would be reduced in some respects. The amount of the employee premium contributions under the Employer's December 3, 2008, last best offer would be significant, ranging between \$57.28 to \$453.05 per month, depending on the level of benefits chosen, the type of coverage (individual, two-person, or family), and the extent of 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.

The healthcare insurance became a sticking point between the parties and at the December 3, 2008, bargaining session, the Employer 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 contract extension ceased to apply. The Employer informed the Union that despite its above actions, it was prepared to continue negotiations in order to reach a successor contract. Also on December 3, the Employer, in writing, and thereafter in meetings held from January 23 to 31, 2009, notified employees that, effective March 1, 2009, it would no longer offer the existing healthcare plan, but would instead offer healthcare coverage through another plan, requiring employee contributions towards the premium.<sup>4</sup> The Union also held meetings with employees after the Employer's December 3 announcement regarding the implementation of the last best offer to discuss the new healthcare plan. In this regard, the Union assisted the Employer as well as employees in readying the paperwork necessary for employees to receive benefits under the new healthcare plan.

The parties met on approximately 10 occasions for negotiations regarding health insurance between December 8, 2008, and continuing through March 20, 2009. On March 1, having not reached any agreement with the Union regarding healthcare, the Employer discontinued the existing healthcare plan, and switched unit employees to a new healthcare plan, including payroll deduction for the employees' share of the premium.

Under the above facts, the administrative law judge found that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new health

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<sup>4</sup> The imposed last best offer contained a notation that the new medical plan would be effective on March 1, 2009.

insurance plan in the absence of an agreement or a bona fide impasse. As noted, the Board affirmed this finding.

### **The Decertification Petition**

According to Petitioner Willie Rushing, he began talking with another employee about decertification in fall 2008 because they were not happy with events occurring following the 2007 merger of the ASW and MRCC, including increased union dues and the Union's failure to follow through on promises to assist laid-off employees in securing other employment. Although the record is unclear as to a specific date, a "standing committee" comprised of unit employees was thereafter formed to solicit signatures for and file the petition. Harry Yale, a unit employee and member of the standing committee, as well as a member of the Union's bargaining committee, testified that as a result of talking to an information officer at the NLRB Regional Office, the Comau Employees Association (CEA) was formed around this time to ensure that employees would not be left without union representation following a decertification election. The standing committee did not begin soliciting signatures for the decertification petition until February 19, 2009.

Employees Felix Nash, Thomas Kalenick, Joseph Yoerg, Randall Nance, William Filbey, and Lacey Mathis each testified that he signed the decertification petition because he was unhappy with the Employer's imposed contract as stated in its December 3 last best offer, primarily including prospective deductions for premiums for the new healthcare plan.<sup>5</sup> As stated above, the Employer notified employees on December 3, 2008, as well as in meetings held thereafter in January 2009 that, effective March 1, 2009, it would no longer offer the existing health insurance plan, but would instead offer healthcare coverage through a plan requiring premium contributions from employees. The Union also held meetings with employees after December 3 to discuss the terms of the Employer's new healthcare plan, including the amount of prospective deductions from employees' paychecks for their premium contributions. Union vice-president Daniel Malloy testified that about January 2009, employees were advised of the specific amount of their premium contribution and started completing the paperwork necessary to receive coverage under the new plan. Employees also began complaining to the Union about healthcare costs being incurred for the first time ever. Malloy testified that after the first premium deduction in March, employee discontent reached a crescendo and he was "hit" with numerous angry phone calls from employees complaining about healthcare costs. Union recording secretary David Baloga also testified that the

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<sup>5</sup> Nash, Kalenick, and Filbey also each testified that he signed the petition, in part, because he was unhappy about paying increased union dues. Unit employees had been paying increased union dues since March 2007, resulting from the merger of the ASW and MRCC.

employees' decertification efforts were the result of the Employer's decision to change its healthcare plan.<sup>6</sup>

A total of 105 signatures was gathered to support the decertification petition: 71 signatures were collected from February 19 to February 27, and the remaining 34 signatures were collected from March 2 to March 10. The Petitioner filed the petition on April 14. The record is not clear with regard to the number of employees in the bargaining unit at the time the decertification petition was filed. On the petition, the number is listed as 204; a witness testified that there were approximately 237 employees in the unit.

### **Analysis**

The Board will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the petition itself. The Board considers conduct to be inconsistent with the petition if it taints the showing of interest, precludes a question concerning representation, or taints an incumbent union's subsequent loss of majority support. To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection from an incumbent union, the Board has identified the following relevant factors: (1) the length of time between the unfair labor practices and the filing of the petition; (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 employee morale, organizational activities, and membership in the union. *Overnite Transportation Co.*, 333 NLRB 1392, 1392-1393 (2001), citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

As to the first factor, the length of time between the unfair labor practices and the filing of the petition, the Board has found a close temporal proximity where an employer's unfair labor practices occurred prior to or simultaneously with the circulation of the petition. See *The Hearst Corp.*, 281 NLRB 764, 764 (1986). See also *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001) (Board found a close temporal proximity where a disaffection petition was presented to an employer in the midst of the employer's ongoing bad faith bargaining).

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<sup>6</sup> In its brief, the Employer argues that the testimony of Baloga, as well as Malloy, should not be relied on as it was provided during the unfair labor practice portion of the hearing. The Intervenor also argues, in its brief, that the record in the instant matter consists only of the transcript beginning with page 521 and that the remainder of the transcript and exhibits are part of 7-CA-52106, and are not part of the instant record. However, as noted by the administrative law judge, some of the witness testimony pertinent to the instant case was provided during the course of the unfair labor practice case, and the undersigned is entitled to review the entire record of transcripts and exhibits in making a decision in the instant matter.

In the instant matter, the Employer discontinued the existing healthcare plan on March 1, 2009, and unilaterally implemented changes by switching unit employees to the new healthcare plan requiring them to make premium contributions, which they had never made before. Although the Employer's unlawful conduct occurred on March 1, employees were on notice as of December 3 that the Employer would no longer offer the existing health insurance plan as of March 1, but would instead offer lesser healthcare coverage requiring payroll deductions for employee premium contributions. In January 2009, employees attended meetings, during which they learned of the specific amount of their premium contributions and completed paperwork to ensure coverage under the new plan.

Employee signatures expressing disaffection and supporting the petition were collected within the two weeks before and the two weeks following the March 1 implementation date. The decertification petition itself was filed April 14, almost 6 weeks after the Employer unlawfully unilaterally implemented the new health care plan requiring employee premium contributions and about 24 days after the Employer and the Union ceased negotiations.

It is obvious that **learning** that they would no longer be receiving Employer-funded healthcare and would be required to pay significant premiums for lesser coverage, constituting virtual wage cuts, would have a detrimental effect on the employees and might cause them to support the decertification effort. Employees' anticipation of the devastating impact of the financial burden of the unlawfully implemented healthcare plan cannot be separated from the real-time impact of the change to the healthcare plan when it came to fruition on March 1.

I find that the employees' expression of dissatisfaction followed close on the heels of, and was contemporaneous with, the Employer's announcement of the pending implementation of its premium-based healthcare plan, and is inextricably intertwined with the March 1 unlawful implementation of that very plan. The Employer's actions are on a continuum which forecloses separating out its lawful conduct, the December 3 announcement and December 22 implementation of its last best offer, from the subsequent unlawful conduct implementing the previously announced changes to the health insurance coverage at a time when the parties had broken the impasse with respect to health insurance. On March 1 the Employer was no longer privileged to unilaterally implement the new healthcare plan. This detrimental action would suggest to the employees that the Union was ineffective as their representative, and would likely cause employee disaffection from the Union.

Contrary to the Employer's assertion, in its brief, that the record leaves no doubt that the petition was not initiated as a result of anything occurring on March 1, 2009, I find that the record leaves no doubt that the petition was initiated as a result of anything other than what occurred on March 1. Moreover, the Employer and Intervenor

acknowledge in their briefs that employee disaffection toward the Union may well have resulted from the Employer's December 2008 announcement that the healthcare plan would be changing on March 1, 2009, and from additional information that employees obtained during the enrollment process in January 2009. The Employer's unlawful conduct and the collection of signatures and filing of the decertification petition indicate a strong nexus to the employee disaffection expressed in the petition. Moreover, the petition was not filed until April 14, after the implementation of the new healthcare plan. Therefore, I conclude that there is a close temporal proximity between the Employer's unlawful conduct and the circulation and filing of the petition.

As to the second factor, the nature of an employer's unlawful acts, including the possibility of their detrimental or lasting effect on employees, the Board has found that unilateral changes like those here graphically portray to employees that the employer is in a position to confer or withdraw economic benefits without regard to the presence of the union. Such a failure by an employer "to accord to the Union its rightful role to negotiate such programs for the employees necessarily tend[s] to undermine the Union's authority among the employees...with erosion of majority status the probable result." *Guerdon Industries, Inc.*, 218 NLRB 658, 661 (1975). Thus, the Board has held that unilateral changes to wages and benefits are of "such a character as to either affect the Union's status, cause employee disaffection or improperly affect the bargaining relationship itself." *Id.* at 661. The possibility of a detrimental or long lasting effect on employee support of the union is clear where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages and benefits. *M & M Automotive, Group, Inc.*, 342 NLRB 1244, 1247 (2004); *Penn Tank Lines*, 336 NLRB 1066, 1067 (2001).

In the instant case, the Employer notified employees as of December 3 that it would no longer offer the existing health insurance plans, and thereafter on March 1 it unilaterally implemented a new health insurance plan requiring, for the first time, employee premium contributions, doing so in the absence of an agreement or a bona fide impasse. The Employer's unilateral implementation involved rising healthcare costs and payroll deductions to cover employee premium contributions, the important bread-and-butter issues which typically motivate employees to seek and obtain union representation. See, *M & M Automotive, Group, Inc.*, *supra* at 1247. The nature of the Employer's unlawful conduct was of a type to invite employee unrest and disaffection from a union, particularly given that the changes affected all employees, and sent a message to employees that the Union was irrelevant in preserving their healthcare benefits. *Id.* Compare, e.g., *Lexus of Concord, Inc.*, 343 NLRB 851 (2004) (single employee transfer did not have detrimental or long lasting effect on employees); *Champion Home Builders Co.*, 350 NLRB 788 (2007) (nature of the violations did not support a finding of taint because employer's confiscation of union materials from an employee workstation and a supervisor's threat to an employee were isolated events involving one employee each). I conclude that the Employer's changes to health benefits, including the requirement of

employee premium payments without the Union's consent and in the absence of a bona fide impasse are the type of unlawful acts which have a detrimental and long lasting effect on employee support for the Union.

As to the third factor, any possible tendency to cause employee disaffection from the union, the Employer's unilateral implementation of changes to employees' healthcare benefits to require employee premium payments, which in effect constituted a wage reduction, clearly had a tendency to cause employee disaffection. The Board has held that finding an employer's unfair labor practices caused employee disaffection "is not predicated on a finding of actual coercive effect, but rather on the tendency of such conduct to interfere with the free exercise of employee rights under the Act." *Hearst Corp.*, supra at 765. Further, the Board has held that the unilateral implementation of significant changes in terms and conditions of employment during negotiations has the tendency to undermine employees' confidence in the effectiveness of their selected collective-bargaining representative. *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 302 (1999).

As to the fourth factor, the effect of the unlawful conduct on employee morale and membership in the union, there is direct evidence which establishes that the Employer's unfair labor practices caused the employees' disaffection from the Union. Employee testimony demonstrates that employees were well aware of the parties' contractual dispute regarding healthcare and considered it to be significant. Employees testified that they signed the decertification petition because they were not happy with the Employer's imposed contract, primarily including wage deductions for healthcare premiums for the new healthcare plan. There can be no question that the Employer's unlawful conduct contributed to the employees' disaffection.

### **Conclusion**

Based on the foregoing and the record as a whole, I find that all four of the causation test factors set forth in *Master Slack* have been met: (1) there is a close temporal proximity between the Employer's unlawful conduct and the filing of the petition, (2) the Employer's unilateral implementation of changes to employees' terms and conditions of employment were the type of unlawful acts which have a detrimental and long lasting effect on employee support for the Union, (3) the Employer's unilateral changes to employees' benefits had a tendency to cause employee disaffection from the Union, and (4) the Employer's unlawful conduct had a detrimental effect on employee morale and membership in the Union. Under these circumstances, the weight of the evidence supports, and I conclude, that a causal relationship exists between the

employer's unlawful unilateral changes and employee disaffection, and will dismiss the petition.

**ORDER**

**IT IS ORDERED** that the petition is dismissed.

Dated at Detroit, Michigan, this 14th day of December 2010.

(SEAL)

*/s/ Stephen M. Glasser*

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Stephen M. Glasser, Regional Director  
National Labor Relations Board, Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **December 28, 2010**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlrb.gov**,<sup>7</sup> but may **not** be filed by facsimile.

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<sup>7</sup> Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.

**TAB B**

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

COMAU, INC.,

Employer,

-and-

AUTOMATED SYSTEMS WORKERS LOCAL 1123,  
a Division of MICHIGAN REGIONAL COUNCIL OF  
CARPENTERS, UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,

Case No. 7-RD-3644

Union,

-and-

WILLIE RUSHING, an individual,

Petitioner,

-and-

COMAU EMPLOYEES ASSOCIATION,

Intervenor.

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**COMAU, INC.'S BRIEF TO THE REGIONAL DIRECTOR CONCERNING  
DECERTIFICATION PETITION PURSUANT TO *ST. GOBAIN***

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& PELTON, P.L.C.  
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Dated: November 24, 2010

## A. PROCEDURAL BACKGROUND

On April 14, 2009, Petitioner Willie Rushing filed a Petition (NLRB Case No. 7-RD-3644) seeking to have an election to decertify the incumbent Union, Automated Systems Workers Local 1123, a Division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America ("ASW-MRCC"). At the same time he also submitted to the Regional Office a separately prepared petition seeking recognition on behalf of the Comau Employees Association ("CEA"), which led to the CEA being treated as an Intervenor in the NLRB case. The Regional Office initially processed the two petitions toward an election that would allow the bargaining unit employees (stated on the NLRB Petition as numbering 204 at that time) to choose between the incumbent ASW-MRCC, the independent CEA, and "no union."

However, knowing that a decertification effort had been underway since early in 2009, the ASW-MRCC filed charges (NLRB Case Nos. 7-CA-51886 and 7-CA-51906) on March 4, 2009, asserting that Comau had engaged in bad faith bargaining in violation of Section 8(a)(5), including by announcing in December 2008 that it was implementing a new health care plan that would be effective March 1, 2009. While those charges were under investigation, Mr. Rushing filed the instant Petition on April 14, 2009. At the conclusion of the investigation, the Regional Director dismissed the ASW-MRCC's charges for lack of merit on May 29, 2009. The ASW-MRCC appealed the dismissal to General Counsel's Office of Appeals, and the General Counsel denied the appeal on August 31, 2009.<sup>1</sup>

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<sup>1</sup> This procedural history is described in ALJ Paul Bogas' Decision, 356 NLRB No. 21 (November 5, 2010), Slip Opinion at p. 8.

With the decertification effort proceeding toward an election, the ASW-MRCC filed another charge on May 19, 2009 (NLRB Case No. 7-CA-52106) asserting additional bad faith bargaining claims under Section 8(a)(5). While this new charge was being investigated by the Regional Office, Mr. Rushing's Petition was held in abeyance (i.e., "blocked") pending a determination as to merit. On July 28, 2009, the ASW-MRCC amended the charge (in Case No. 7-CA-52106) to assert additional bad faith bargaining claims, dealing specifically with the health care plan that had been announced in December 2008 and had taken effect on March 1, 2009, nearly five months earlier. On August 28, 2009, based on the amended charge, the Regional Director issued a Complaint against Comau alleging the following violations of Section 8(a)(5):

1. Making unilateral changes to the health care benefits provided to bargaining unit employees without the Union's consent and without bargaining to a good faith impasse;
2. Failing to cloak its representatives with the authority to make proposals or enter into binding agreements;
3. Submitting written proposals to the Union without attempting to gain authority to do so; and
4. Introducing a new demand that the Union absorb [Comau's] liability for previously accrued health insurance "trailing costs."<sup>2</sup>

Along with the Complaint, the Regional Director issued a Notice that Mr. Rushing's Petition (in NLRB Case No. 7-RD-3644) would be the subject of a *St. Gobain* hearing, at the same time and place as the unfair labor practice hearing, and that the ALJ would act as a hearing officer for that purpose. See *St. Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). The Regional Director's Notice stated that, because

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<sup>2</sup> This background is summarized in ALJ Bogas' Decision, *supra*, 356 NLRB No. 21, Slip Opinion at p. 2.

“substantial and material issues of fact exist,” a special hearing would be held in the representation case to determine “whether the unfair labor practices alleged in Case No. 7-CA-52106 bear a causal relationship to the employee disaffection reflected in the filing of the decertification petition.”<sup>3</sup>

The unfair labor practice hearing in Case No. 7-CA-52106 took place on November 17, 18, and 19, 2009 before ALJ Bogas. As reflected in the transcript of the November 19 session, beginning at page 521, the proofs closed on the unfair labor practice case, and the proofs commenced on the *St. Gobain* hearing for the representation case. The proofs then closed for the *St. Gobain* hearing at page 616 of the transcript. During the *St. Gobain* hearing, just one exhibit was offered into evidence, and was marked as Judge’s Exhibit 1 — consisting of twelve redacted pages of a specially drafted petition form entitled “Signature Petition For Decertification.” Above the signature lines on each page appears this paragraph:

We, the undersigned employees of Comau, Inc. no longer consider the ASW Local 1123 (local union of the MRCC) as representing the majority of the employees in this union and do hereby petition the National Labor Relations Board (NLRB) to conduct a decertification election to determine whether the employees of said bargaining unit desire continued representation or whether the employees desire “NO REPRESENTATION.”

The earliest signature date on the twelve pages of the petition form was February 19, 2009, putting aside when the 14 blacked-out signatures were dated. From a timing perspective, the signatures that were not blacked out can be categorized as follows:

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<sup>3</sup> See ALJ Bogas’ Decision, *supra*, Slip Opinion at p. 2.

- February 19, 2009 — 64
- February 20 - February 28, 2009 — 6
- March 1 - March 10, 2009 — 34

There can be no question that even the 70 signatures by employees, as of March 1, 2009, are over the 30% required by the NLRB to support a decertification petition in the 204-person unit. So there is no question that the showing of interest was adequate as of February 28, 2009.

At the conclusion of the *St. Gobain* hearing, ALJ Bogas severed the representation case from the unfair labor practice case, and returned the representation case to the Regional Director for subsequent briefing and his issuance of findings of fact and conclusions of law regarding whether the unfair labor practices alleged in the Complaint “bear a causal relationship to the employee disaffection reflected in the filing of the decertification petition and thus warrant dismissal of the petition.” (Transcript, p. 621.) The Regional Director subsequently advised the parties that briefing on the *St. Gobain* question would await a final decision by the Board concerning the merits of the four unfair labor practices alleged in the Complaint.

On May 20, 2010, ALJ Bogas issued his Decision, in which he rejected three of the four above-listed unfair labor practice allegations, finding merit to only the first (which dealt with the health care plan change effective March 1, 2009). He stated in Conclusion of Law No. 3:

The Respondent violated Section 8(a)(5) and (1) on March 1, 2009, by changing employees’ health care benefits without the Union’s consent and in the absence of a *bona fide* impasse. (ALJ Bogas’ Decision, 356 NLRB No. 21, Slip Opinion at p. 12.)

Significantly, ALJ Bogas rejected the Complaint allegations (listed above as Nos. 2 and 3) that involved bargaining conduct over health care during January and February 2009, preceding the March 1, 2009 effective date of the new health care plan. (*Id.*, p. 12.)<sup>4</sup>

On November 5, 2010, the Board issued its Decision, 356 NLRB No. 21, in which it affirmed ALJ Bogas' Conclusion of Law No. 3, quoted in full above, that Comau violated the Act "on March 1, 2009, by changing employees' health care benefits" in the absence of agreement or impasse. (*Id.*, p. 1, fn. 5). The Board also expressly adopted ALJ Bogas' rejection of the bad faith bargaining allegations relating to events during the January–February 2009 time period. (*Id.*)

Thus, from a procedural and substantive perspective, the question before the Regional Director under *St. Gobain* is whether a single event that occurred on March 1, 2009 — Comau's act of passively allowing a new health care plan that had been lawfully announced in December 2008, and had been lawfully readied for administrative transition during January and February 2009, to take effect on March 1, 2009 — caused the disaffection that led to the decertification effort. There is no finding (and there could be none at this late date) that Comau did anything in

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<sup>4</sup> Counsel for the General Counsel did not take exception to those findings and conclusions, though she did take exception to ALJ Bogas' rejection of the fourth-listed allegation relating to regressive bargaining over "trailing costs" on March 20, 2009 (*id.*, p. 12). The Board found it unnecessary to pass on that issue because it would not affect the remedy (see Board Decision, 356 NLRB No. 21, p. 1, fn. 5). That subject also has no bearing on the instant case because the complained-of conduct for that allegation took place on March 20, 2009, three weeks after the crucial time period for the *St. Gobain* analysis (pre-March 1, 2009).

December 2008 or in January–February 2009 that was unlawful in any respect — hence the sole focal point for the Regional Director’s *St. Gobain* analysis is March 1, 2009.<sup>5</sup>

Although the *St. Gobain* case itself did not involve the highly refined timing issue that controls the instant case, it did involve that employer’s change from one form of health care coverage to another, and the Board explicitly noted the importance of “how many employees expressed dissatisfaction with the Union prior to the change.” 342 NLRB at 434. The Board held in *St. Gobain* that where, as here, “the alleged unfair labor practice is a single unilateral change on the single subject [of health care coverage] and . . . there are significant factual issues as to the impact of that change,” there must be a factual basis before concluding that the unfair labor practice caused the petition to be generated. (*Id.*) The Board cautioned that, when determining whether an unfair labor practice caused the decertification effort, “[i]t is not appropriate to speculate.” (*Id.*) The Regional Director’s “causation” analysis must therefore be firmly grounded in record evidence establishing the timing and the reasons for employee disaffection toward the incumbent Union.

Here, as the record evidence plainly shows, the decertification Petition had been generated and supported by more than enough signatures (over 30%) before March 1, 2009, i.e., before the only alleged unfair labor practice had occurred. Consequently, the Petition could not have been “caused” by any unlawful act, and an election should be scheduled. Comau submits that Mr. Rushing’s Petition should be

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<sup>5</sup> ALJ Bogas’ finding that an impasse no longer existed after the parties bargained on January 7, 2009 is irrelevant, because that is not a finding of a violation. Nor is it relevant that ALJ Bogas did not find it necessary to determine whether an impasse existed as to health care in December 2008, as that is not a finding of a violation either. The only violation alleged by the General Counsel and found by ALJ Bogas and the Board occurred on March 1, 2009.

processed, and a three-choice election held as soon as possible. As the record of the *St. Gobain* hearing establishes, that is unquestionably what the unit employees have desired for a long time, wholly independently from the change in health care coverage effective March 1, 2009.<sup>6</sup>

## B. SUMMARY OF THE RECORD EVIDENCE

Mr. Rushing, who filed the decertification Petition on April 14, 2009, testified that it had actually been ready for filing a month and a half earlier. He held off filing it because Harry Yale, who had been instrumental in obtaining employee signatures, asked him to do so inasmuch as the ASW-MRCC had promised the availability of jobs — one of the original commitments made by the MRCC at the time of the affiliation in 2007 — and he wanted to see whether they would “come through.” (Transcript, pp. 602-603.) There can accordingly be no doubt from the record that the Petition was not generated due to anything occurring on March 1, 2009 — it had undisputedly been created no later than February 19 when the first (unredacted) employee signatures were affixed (we do not know from this record when the 14 blacked-out signatures were affixed). A total of 31% of the unit (64 of 204) signed on February 19 alone, and 34% by February 28.

During the *St. Gobain* hearing, the ASW-MRCC proceeded first and called seven witnesses: Phillip Scavone, Felix Nash, Thomas Kalenick, Joseph Yoerg, Randall

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<sup>6</sup> While the employees arguably mooted the NLRB Petition by submitting a disaffection petition to Comau in December 2009, which then led to Comau’s recognition of the CEA, the parties appear to be headed for years of litigation over what happened at that later time. Comau submits that an election could democratically resolve all currently pending disputes, and thus avoid significant ongoing cost and upheaval for the parties, the NLRB, and the affected employees.

Nance, William Filbey, and Lacey Mathis. Petitioner Willie Rushing then called two witnesses, Claude Fredette and Harry Yale, in addition to testifying himself.<sup>7</sup>

Mr. Scavone, the ASW-MRCC's first witness, stated that he signed the Petition because he was dissatisfied with the ASW-MRCC due to its failure to represent the employees in connection with a subcontracting issue that had arisen. (*Id.*, p. 530.) He stated:

I wanted the Union to come in real strong and say, "Hey, these people are in the shop doing our people's work; let's talk about it." And that's what I was looking for.

Like several dozen of his co-workers, he signed the Petition on February 19, 2009. (*Id.*, p. 534.) At the same time he (and others) also signed a separate form requesting representation by the CEA. (*Id.*, pp. 534-535.) The Petition thus did not seek to decertify an incumbent union in order to obtain a union-free environment. Rather, it was an effort to return to the *status quo ante* (before the MRCC had arrived) by essentially reestablishing the independent self-governed union that had represented the employees at an earlier time, known originally as the PEA (or Pico Employees Association) (see below). The announced health care change, Mr. Scavone testified, had nothing "whatsoever to do with signing the Petition." (*Id.*, p. 531.)

Thomas Kalenick was next called by the ASW-MRCC. He testified that he signed the Petition in January or February of 2009. (*Id.*, p. 554.) While he had an issue

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<sup>7</sup> Comau has confined its summary of the evidence to the record made during the *St. Gobain* portion of the hearing. (Transcript, pp. 526-616.) The ASW's Brief (pp. 6-8) goes beyond that record in some respects, most notably by relying on the testimony of Dan Molloy and David Baloga during the unfair labor practice portion of the hearing. If this testimony is considered, the Regional Director should also consider Mr. Molloy's testimony that he "heard from both sides" on the health care issue, including 15 to 20 members who said they preferred the Company's new health care plan to the ASW-MRCC alternative, and that opinion on the point was "evenly divided." (Transcript, p. 516.) See also, testimony of David Baloga. (Transcript, p. 272; same.)

with union dues and insurance premiums that he assumed might be coming out of his paycheck after he signed the Petition (*id.*, pp. 554-556), he made clear that he was dissatisfied with the ASW-MRCC regardless of the health care issue (*id.*, p. 556):

Q. . . . No. You mentioned that you didn't like the Union. What is it you don't like about it?

A. I was told I had to sign the piece of paper or else I would lose my job in 2007.

Q. Is it fair to say that you wouldn't have wanted to join this MRCC anyway?

A. No, because I knew more union dues and other stuff was going to be taken out of my check.

Q. Are you happy with them now?

A. No.

Mr. Kalenick confirmed that he would have signed the Petition even if the health insurance issue had not been in the picture — i.e., he did so solely because of his dissatisfaction with the ASW-MRCC and its dues structure. (*id.*, p. 557.)

The ASW-MRCC next called Joseph Yoerg. He testified that he had not intended that the Petition actually be filed, but instead he wanted it to act as a wake-up call for (or to “light a match under”) Darnell Robertson and Pete Reuter, the MRCC’s full-time officials who had previously been Comau employees in the bargaining unit. He too signed the Petition on February 19, 2009. (*id.*, p. 563.) He had never decided which health care plan he would have preferred — the Company’s or the MRCC’s — as he simply wanted to reduce the cash taken out of his paycheck. (*id.*, p. 565.)

Randall Nance was the ASW-MRCC’s next witness. He was the only testifying witness who signed the Petition after March 1, 2009 (he signed it on March 2). (*id.*, p. 571.) His main complaint about the health care coverage involved expensive adult

riders (for which he pays \$680 a month) (*id.*, p. 568), but he acknowledged that the alternative plan proposed by the Union had an adult rider charge as well. (*id.*, p. 569.) He confirmed that nothing that happened between the December 2008 announcement of the new health care plan, and when he signed the Petition on March 2, 2009, contributed to his signing the Petition. (*id.*, p. 572.) In other words, the new plan taking effect on March 1, 2009 was not a significant or triggering event for him. To the extent a concern over the health care plan contributed to his signing the Petition, that was present in December 2008, long before March 1, 2009. (*id.*) After all, the added costs to employees of the new plan were known to them as early as December 2008, and certainly after they attended the enrollment and administrative transition meetings for the new plan in January 2009.

The ASW-MRCC then called William Filbey, who testified that he signed the Petition on February 18 or 19, 2009. (*id.*, p. 574.) He too had a problem with the college student rider of the new plan, testifying that he was “at wits end with MRCC,” partly because of the health care premiums, but also because of the large union dues he was paying (“it was the money issue generally”). (*id.*, pp. 576-578). He confirmed as well that nothing happened between the announcement of the new health care plan in December 2008, and February 2009 when he signed the Petition, that would have contributed to his decision to sign. (*id.*, p. 579.) Mr. Filbey elaborated on the oppressive MRCC dues structure. He had not had a problem with the dues prior to the time the MRCC came into the picture in 2007, when the predecessor independent union (the PEA) had represented the employees. The PEA charged \$20 per month, whereas under the MRCC he was paying between \$24 and \$50 per week. (*id.*, pp. 582-583.)

Lacey Mathis was the ASW-MRCC's last witness. He too signed the Petition on February 19, 2009. (*Id.*, p. 588.) He was concerned that the employees might have no representation (*id.*, p. 589), but he would have been fine with any representation at a lesser dues cost. (*Id.*, p. 590.) He confirmed, as had the other witnesses, that nothing occurred between the December 2008 announcement, and when he signed the Petition in February 2009, so as to motivate him to sign. (*Id.*, p. 590.)

In short, the ASW-MRCC's own witnesses made clear that their motivations for signing were already established, and (with one exception) they had already signed the Petition prior to March 1 when the only alleged violation occurred. The remaining witnesses continued that theme.

After the ASW-MRCC rested, Petitioner Willie Rushing called Claude Fredette. Mr. Fredette testified that the new health care coverage had nothing to do with his decision to sign the Petition. (*Id.*, p. 596.) He then gave his reason for signing:

It seems that there's been a lot of promises made that never come to fruition. There's been, you know, a lot of, you know, they tell us they're going to give us training. They tell us they're going to get us jobs. You know, but still our people are laid off, you know. You get a lot of – I know that there was a Turbine; that we were supposed to get jobs at Turbine. They were talking about Hollywood coming to Detroit; we're going to get in on that. I mean, I just never seen any of it, you know, so. (*Id.*, pp. 592-593.)

Harry Yale was the Petitioner's next witness. He confirmed that a request for representation by the CEA was signed by the employees at the same time as the decertification Petition, and that this was intended to revert back to the equivalent of representation by the independent PEA for many years. (*Id.*, p. 601.) While he did not sign the Petition himself, Mr. Yale testified that he decided not to do so only because he was part of the Union's leadership at the time, and he felt that it was his responsibility to

hold off. (*Id.*, pp. 600-604.) He nevertheless fully supported the Petition (and had been active in obtaining employee signatures) for the following reason:

- A. Because all of the promises that were made before we joined the MRCC, which Mr. Rushing has a list of, and it's multiple items, none of them have ever come true. None of them have been taken care of. I mean we promised these people that when they got laid off that they would get jobs through the MRCC. Then as soon as these people got laid off they said, "Well, economic times," none of that was ever mentioned to get us to join that Union. They, I want to use profanity here, but I'm not going to.
  
- Q. Did the imposition of the new healthcare plan have anything to do with what you just represented would be your reason for having signed the petition were you not a member of the bargaining committee? That's a little awkward, but I hope you understand it.
  
- A. None whatsoever. I was doing it because of broken promises. The insurance means nothing to me that they offer because it does not have dental at the time, and actually I never got to read the policy because I was on the bargaining committee, and I got presented that document 15 minutes before I walked into a meeting with the company, "Here, take a look at it." They finally produced a copy to look at. Before that it was just like a spreadsheet saying, "Well, it could be this, this, this, and this, but nothing was ever in an actual policy. (*Id.*, pp. 604-605.)

Mr. Yale testified that he actually preferred the Comau health care plan to what the Union had proposed as an alternative, because it provided better coverage for him. (*Id.*, p. 605.)

Petitioner Willie Rushing, called by himself to testify, was the last witness during the *St. Gobain* hearing. He explained that discussions concerning decertification of the ASW-MRCC started in late 2008, when the IBEW had demonstrated an interest in becoming involved. (*Id.*, pp. 609-610.) Mr. Rushing further testified that he had lost

confidence in the MRCC after the 2007 affiliation because of the exorbitant dues structure which, instead of the \$20 per month previously charged by the independent union, could be well over \$2,000 per year for him (*id.*, pp. 611-613), and also because of the MRCC's broken promises (*id.*, pp. 613-614):

Q. Now, my sense is that you had expected the *quid pro quo* for these high dues –

A. Absolutely.

Q. -- to be the jobs that maybe a trade union –

A. Absolutely.

Q. -- like the [MRCC] could provide?

A. Yes.

Q. And once you found out that that didn't appear to be the case, you were left with nothing but extraordinarily high dues?

A. That's very true.

Mr. Rushing confirmed that it was his and the other signing employees' intention to have the CEA become the representative of the employees, returning to the *status quo* that had existed prior to the ASW's affiliation with the MRCC. (*Id.*, p. 614.)

The foregoing summarizes the record evidence that may properly be considered by the Regional Director in addressing the "causation" issue under *St. Gobain*. All of the dispositive events and signatures had occurred before the single alleged violation on March 1, 2009.

### C. LEGAL DISCUSSION

The Board's *St. Gobain* decision directs that, in evaluating the "specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating loss of support," the legal standard established in *Master Slack*, 271 NLRB 78 (1984),

should be applied. See *St. Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004). Note the Board's use of the term "ensuing events."

*Master Slack* identified the following factors for determining whether the Union's burden to demonstrate "causation" is satisfied:

1. The length of time between the unfair labor practices and the filing of the petition;
2. The nature of the alleged act;
3. Any possible tendency to cause employee disaffection; and
4. The effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. 271 NLRB at 78.

It is clear from both *St. Gobain* and *Master Slack* that the Union has not and cannot meet its burden in this case. After all, the March 1, 2009 commencement date of the new health care plan's coverage could scarcely be said to have "caused" the decertification effort and the Petition that had occurred earlier. While additional names were added to Mr. Rushing's Petition after March 1, this cannot change the analysis. The Petition was adequately supported and ready for filing before March 1 – there is no contrary evidence in the record. The actual filing was delayed until April 14 only because the Union had made a last-ditch effort to alter employee sentiment by promising jobs, which did not materialize. So Mr. Rushing went ahead at that later date and filed the Petition with the Regional Office.

It is also independently obvious from the four *Master Slack* factors that the Union's burden of proving "causation" cannot be met in this case. First, the length of time between the unfair labor practices and the filing of the Petition here is irrelevant because the Petition was created and sufficiently signed before the alleged single-event

unfair labor practice occurred.<sup>8</sup> Second, the nature of the alleged unlawful act — i.e., the March 1 commencement of the new health care plan's coverage — could scarcely have had an impact on the signers of the Petition because it had not yet occurred when they signed. Nor did the March 1 event cause "employee disaffection," given that a high level of disaffection already existed when the Petition was signed earlier. While some employee disaffection toward the Union may well have resulted from Comau's December 2008 announcement that the health care plan would be changing on March 1, 2009, and from additional knowledge employees obtained through the enrollment process in January 2009, that announcement and that additional information were undisputedly proper and legal and thus could not "cause" or otherwise "taint" the Petition. And nothing even remotely violative of the Act occurred between the lawful December 2008 announcement and March 1, 2009. Lastly, it cannot be said that the March 1, 2009 event had any effect on employee morale, organizational activities, or membership in the Union. The single alleged unlawful act occurred well after widespread employee dissatisfaction with the Union had already developed fully and had led many employees (more than 30%) to sign a Petition to decertify the Union.

This is not the more typical case where an alleged violation by an employer leads to a petition seeking to unseat a union, thereby creating a union-free environment. No, here the source of the employees' dissatisfaction was the ASW-MRCC's broken promises and exorbitant dues structure, as well as the employees' wish to return to the *status quo* before the affiliation with the MRCC — i.e., the independent self-governed

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<sup>8</sup> Comau is aware of no Board precedent that has found "causation" based on such a chronology.

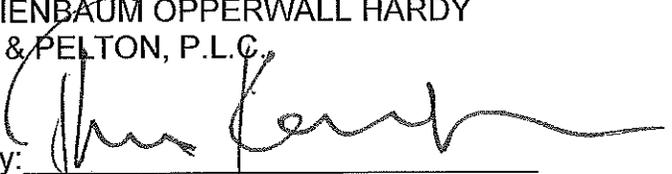
CEA, the successor to the PEA, which had satisfactorily represented the unit employees for many years.

#### D. CONCLUSION

The record evidence does not establish “causation” as required by *St. Gobain*. In fact, it disproves “causation” based on the simple fact of timing — without even addressing the other independent “causes.” What is more, the ASW’s Brief corroborates this point by focusing essentially on pre-March 1 events. Therefore, no reason exists for dismissing the Petition or for not promptly directing an election. Public policy favors that result as well.<sup>9</sup>

Respectfully submitted,

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Dated: November 24, 2010

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<sup>9</sup> Comau notes that it has been informed by the ASW that, subsequent to the *St. Gobain* hearing, the ASW ended its affiliation with the MRCC and began an affiliation with an entity called the “Carpenters Industrial Council.” This is, of course, not the labor organization the Comau employees voted to affiliate with in 2007.