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October 27, 2009

**Via Electronic Filing and Facsimile**

Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570-0001

**Re: Comau, Inc. -and- Automated Systems Workers Local 1123, a  
Division of Michigan Regional Council of Carpenters, United  
Brotherhood of Carpenters and Joiners of America -and-  
Willie Rushing, an individual  
Case No. 7-CA-52106 (Region 7)  
Reply To Counsel For The General Counsel's Opposition To  
Respondent Comau Inc.'s Motion For Partial Summary Judgment**

Dear Mr. Heltzer:

Attached is Respondent Comau Inc.'s Reply To Counsel For The General Counsel's Opposition To Respondent Comau Inc.'s Motion For Partial Summary Judgment and Certificate of Service which has been filed via electronic filing through NLRB.gov.

Very truly yours,



Thomas G. Kienbaum

TGK/jah  
Attachment  
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Office of the Executive Secretary  
National Labor Relations Board  
October 27, 2009  
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cc: Lester A. Heltzer (via electronic mail and facsimile)  
Stephen M. Glasser, Regional Director (Via Facsimile)  
Edward J. Pasternak, Counsel for Charging Party (Via Facsimile)  
Sarah Pring Karpinen, Counsel for the General Counsel (Via Facsimile)  
Willie Rushing (Via Federal Express)

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAU, INC.,

Respondent,

Case No. 7-CA-52106

-and-

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

Charging Party/Incumbent Union,

Case No. 7-RD-3644

-and-

WILLIE RUSHING, an individual,

Petitioner.

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**REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION  
TO RESPONDENT COMAU INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

1. Counsel for the General Counsel (“CGC”) makes only one legitimate point in her opposition: That the nature of the discussions between Comau and the Union during January and February 2009 (whether characterized as exploratory or negotiations) presents a question of fact. But it is not a material question of fact for this Motion, and the undisputed record as to the material facts warrants granting Partial Summary Judgment.

2. It is indisputable that on December 22, 2008 Respondent implemented its entire Last Best Offer (“LBO”). See Tab 1 to Comau’s Motion, Affidavit of Fred Begle, paragraphs 5-6. The “Notice of Imposition of Last Best Offer,” Exhibit 1 to Mr. Begle’s Affidavit, was sent to employees on December 3, 2008, and notified them and the Union of the components of the LBO, which were attached to that notice. The LBO, attached as Exhibit 2 to Mr. Begle’s Affidavit, covers hospitalization, medical, dental and vision care at Article 10, pages 21 through 28. Sub-section 10.09, and those that follow, specifically refer to the “Blue Cross medical coverage plans (effective March 1, 2009).” This is the part of the LBO described in paragraph 6 of Mr. Begle’s Affidavit. In short, the LBO’s terms concerning health care were explicitly and unquestionably effective March 1, 2009.

3. It is indisputable that the December 22, 2008 implementation was challenged by the Union in Case No. 7-CA-51886 (Tab 2 to Comau’s Motion) in which it complained that Comau was “unilaterally implementing changes in termination procedures, health benefits and other terms and conditions of employment prior to impasse and by failing to bargain in good faith” (emphasis added). As noted in

Comau's Motion, that Charge was filed on March 5, 2009, following the effective date of the health care changes implemented on December 22, 2008 via the LBO.

4. The Union's March 23, 2009 Amended Charge (Tab 3 to Comau's Motion) confirmed the Union's intent as to the December 22, 2008 implementation:

About December 22, 2008, the Employer unilaterally changed employees' terms and conditions of employment by implementing its "Last Best Offer," without having reached good faith impasse with the Charging Union, and without there being any exigent circumstances privileging the implementation.

5. Even before this amendment, the Regional Office investigator had made clear that she well understood what the Union was asserting in Case No. 7-CA-51886 (and its companion Case No. 7-CA-51906) by writing on March 16, 2009:

I have not yet obtained all of the Union's evidence in these matters, but I can tell you preliminarily that the first Charge encompasses the following contentions:

- Comau's December 2008 implementation of its offer was illegal, because the parties were not at bona fide impasse due to Comau's engagement in surface bargaining. . . .

(Tab 4 to Comau's Motion.)

6. Case No. 7-CA-51886 (and its companion case) were then dismissed by the Region (Tab 5 to Comau's Motion), and the General Counsel's Office of Appeals affirmed, with the following factual finding:

Regarding the Employer's December 22, 2008 implementation of terms and conditions of employment for unit employees represented by the Union, the evidence establishes that the parties were at a lawful impasse when the implementation occurred. Further, the Employer's conduct at, and away from, the bargaining table was not indicative of bad faith or an unlawful intent not to reach agreement.

(Tab 6 to Comau's Motion.)

7. The foregoing chronology makes puzzling, and very troubling, CGC's assertion in paragraph 2 of her Response, where she says:

Because the Respondent's health care proposal was not implemented on December 22, the Region did not reach the question of whether there was an impasse on the health care issue as of that date . . . .

8. Equally puzzling, and troubling, is the repetition of this false assertion in paragraph 11 of her Response, where she says:

As noted above, there has been no finding that the health care plan contained in Respondent's LBO was lawfully implemented on December 22. . . . There was no determination with regard to whether the parties were at impasse at that time on the subject of health care, and therefore the remedy requested in the Complaint is appropriate.

9. To repeat the obvious: The LBO expressly referenced the health care plan to be effective March 1, 2009 in its implementation notice; Charge No. 7-CA-51886 specifically challenged that implementation, referring explicitly to health benefits; and the Region's and General Counsel's disposition of that Charge specifically addressed that implementation, finding it to have been lawful.

10. Perhaps what CGC means to say is that "implementation" equals the "effective date" of health care coverage under those circumstances. If so, then this attempted intermingling of these independent terms is plainly wrong and cannot create a genuine issue of material fact. An example will demonstrate the fallacy of such an argument: Assume the December 22, 2008 LBO had included a \$500 bonus, payable March 1, 2009, i.e., three months after "implementation." Would CGC seriously argue

that “implementation” of the LBO would not occur until three months hence, when the payment becomes due? Obviously not.

11. To complete the analogy, assume that after the December 22, 2008 implementation of the March 1 bonus, the parties held further discussions (since the duty to bargain continues), including whether the bonus to be paid on March 1 should be larger than that promised and implemented. Assume further that the parties did not reach agreement as a result of these discussions, nor impasse, but that the Employer unilaterally decides not to honor its commitment to pay the March 1 bonus. Would CGC seriously contend under these circumstances that the Employer was privileged to make this unilateral change to the status quo that had been established by the December 22 implementation? Because it had not yet been implemented? Of course not.

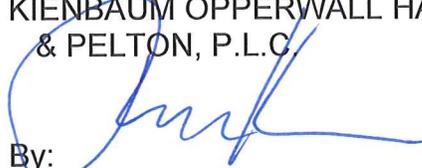
12. The point is that mere bargaining, assuming that is what occurred in January and February 2009, following a lawful impasse, does not change the status quo established by the earlier implementation of the LBO. That is basic legal doctrine, and CGC does not cite any law to say otherwise, nor does she cite any precedent to contest the basic proposition that implementation of the new health care plan occurred on December 22, 2008, not March 1, 2009.

13. It is ironic that the Region’s unsupported, erroneous, and counter-intuitive theory is in all likelihood impeding that which it purports to encourage: The Union has to date not submitted the LBO to its membership for a vote, nor has it requested to bargain, no doubt because it hopes to gain the unachievable remedy the CGC’s theory espouses. But that promise is illusory, and its advancement in this instance counters the public policy the Act is intended to further.

Comau's Motion for Partial Summary Judgment should be granted. Apart from her palpably erroneous assertions, CGC has put forward no reason for the Board to deny the Motion.

Respectfully submitted,

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

By: 

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Theodore R. Opperwall  
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Dated: October 27, 2009

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAU, INC.,

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Case No. 7-CA-52106

-and-

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

Charging Party/Incumbent Union,

Case No. 7-RD-3644

-and-

WILLIE RUSHING, an individual,

Petitioner.

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**PROOF OF SERVICE**

Pursuant to 28 U.S.C. §1746, I hereby certify under penalty of perjury that the following is true and correct: On October 27, 2009, I caused to be served via facsimile a copy of the following: **Reply To Counsel For The General Counsel's Opposition To Respondent Comau, Inc.'s Motion For Partial Summary Judgment** and this **Proof of Service** upon the Regional Director, Region Seven, counsel for the Charging Party Union, Counsel for the General Counsel and Willie Rushing, an individual, at the following addresses:

Stephen M. Glasser  
Regional Director, Region Seven  
National Labor Relations Board  
(313) 226-2090 (facsimile)

Edward J. Pasternak  
Counsel for Charging Party Union  
(248) 354-0393 (facsimile)

Sarah Pring Karpinen  
Counsel for the General Counsel  
(313) 226-2090 (facsimile)

and via Federal Express to:

Willie Rushing  
8953 Birwood Street  
Detroit, MI 48204



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Jill A. Hall