

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/Union,

Case No. 7-RD-3644

-and-

WILLIE RUSHING, an individual,

Petitioner.

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

KIENBAUM OPPERWALL HARDY
& PELTON, P.L.C.
Thomas G. Kienbaum
Theodore R. Opperwall
Attorneys for Respondent
280 North Old Woodward Avenue
Suite 400
Birmingham, MI 48009
(248) 645-0000

Dated: July 14, 2010

Pursuant to Section 102.46 of the Board's Rules and Regulations, Comau, Inc. (hereafter sometimes "Comau," "Respondent," or "Employer") submits the following exceptions to the Recommended Findings of Fact and Conclusions of Law as set forth in Administrative Law Judge Paul Bogas' May 20, 2010 Decision. Concurrently with these Exceptions, Comau is submitting a Brief that sets forth the factual grounds and legal authorities supporting the Exceptions. The Respondent takes exception to the ALJ's findings and/or conclusions –

1. That the Respondent is "a division of the Fiat automotive company."
(Page 2, line 34 of the Decision.)

2. That "the parties suspended negotiations for much of the summer of 2008 while the Respondent attempted to reach a contract" with another union, as the hiatus was actually short. (Page 3, lines 21 and 22 of the Decision.)

3. That the "Respondent's primary condition [to switching to the Union-proposed MRCC health insurance plan] was that the switch had to adequately reduce the Company's health insurance costs as compared to its health costs under the prior contract." (Page 4, lines 32 through 35 of the Decision.)

4. That, during initial discussions concerning the Company's proposal on health care, "the premiums the Respondent was seeking from employees had been higher, but the amounts were reduced during negotiations in 2008." (Page 4, fn. 7, lines 41 through 42 of the Decision.)

5. That the Respondent's chief bargainer, then General Counsel Edward Plawecki, "told the Union that it was very feasible that the parties could reach

agreement on moving to the MRCC plan if the trailing costs were, in fact, less than \$500,000.” (Page 4, lines 13 through 15 of the Decision).

6. That “Respondent’s Blue Cross contact first estimated the total amount of trailing costs at \$183,000 and later adjusted its estimate upward to \$240,000 and then to \$440,000.” (Page 5, lines 18 and 19 of the Decision.)

7. That the changes announced on December 22, 2008, with respect to health care, merely referenced “health care coverage through other, premium-required, medical plans,” inasmuch as the detailed notice to employees and Union specified that the health care coverage would be the same Company-wide plan proposed by Comau throughout the bargaining process. (Page 5, lines 34 through 41 of the Decision.)

8. That it was uncontradicted, based on the testimony of “witnesses for the Respondent,” that the Union’s proposal’s trailing costs would also be incurred under the implemented health care plan, an incorrect inference inherent in the ALJ’s findings. (Page 5, fn. 9, lines 46 through 51 of the Decision.)

9. That the actions taken by Respondent to prepare for coverage under the implemented health care plan were merely those, both in timeframe and substance, as described in minimizing terms by the ALJ. (Page 6, lines 1 through 9 of the Decision.)

10. That “[n]one of the actions taken by the Respondent prior to March 1 constituted a ‘point of no return’ for switching employees to the Respondent’s new health care plan,” and that “Respondent’s labor relations director[] testified that at any point prior to March 1, the Respondent could have chosen to continue providing the unit employees’ old health care insurance, and cancel the plan to switch those employees to

the Company's premium-required insurance." (Page 6, lines 11 through 16 of the Decision.)

11. That "Union officials continued to hope that an agreement would be reached to provide insurance through the MRCC plan, without the employees ever being switched over to the Company's premium-required health care plan." (Page 6, lines 16 through 17 of the Decision.)

12. That on March 1, 2009, "the Respondent discontinued the Company's existing health care plan." (Page 6, lines 23 through 24 of the Decision.)

13. That "[b]eginning on December 8 and continuing through March 20, 2009, the parties met on approximately 10 occasions for negotiations regarding health care insurance." (Page 6, lines 31 through 32 of the Decision.)

14. That "[e]ach party's sub-committee had the authority to enter into tentative agreements regarding health care, but not into binding agreements." (Page 6, lines 37 through 39 and page 19, lines 5 through 6 of the Decision.)

15. That Respondent submitted written proposals intended to lead to tentative agreement. (Page 6, lines 43 through 47 of the Decision.)

16. That the discussions concerning the per employee cost of the MRCC plan constituted "proposals" as implied by the ALJ. (Page 7, lines 4 through 30 of the Decision.)

17. That "switching to the MRCC plan at [the \$835] contribution level would result in significant savings for the Respondent as compared to its costs under the old healthcare plan, even when one considered the Respondent's obligation to pay the trailing costs" from the original plan. (Page 7, lines 30 through 34 of the Decision.)

18. That “only a few” of Fred Begle’s edits to his bargaining notes were identified at trial, were not explained, or “tended to favor the Respondent’s litigation positions,” or that these notes dealt with any disputed matters at all that could have warranted the ALJ not crediting them. (Page 7, fn. 11, lines 36 through 43 of the Decision.)

19. That the only issues, in addition to trailing costs, that separated the parties on February 20, 2009 and thereafter, are those listed by the ALJ, or that they are even accurately described by the ALJ. (Page 8, lines 5 through 30 and page 9, lines 1 through 3 of the Decision.)

20. That the “record shows that the health care sub-committees of both parties negotiated with the understanding that the Respondent would be responsible for its own left-over bills from the prior insurance,” that it “was not until March 20 that the Respondent introduced a demand that the Union pay the Respondent’s trailing costs,” and that the Union’s witnesses “were very clear and certain . . . prior to Plawecki’s March 20 announcement, the Respondent had never suggested that the Union take over responsibility for paying the Respondent’s trailing costs.” (Page 9, lines 16 through 22, and page 17, lines 46 through 52 of the Decision.)

21. That Respondent’s witness, Fred Begle, was “vague and somewhat evasive” when testifying about the trailing costs issue, and that he testified that in fact “it was a shock to the Union” when told that it was their responsibility rather than that the Union representatives merely acted that way as they walked out of the March 20 meeting. (Page 9, lines 26 through 36 of the Decision.)

22. That “prior to March 20, the Respondent had not indicated that it expected the Union to pay the Company’s trailing costs, or that such a concession by the Respondent was a condition of reaching agreement,” and that this was an expense that would have to be outweighed “by the savings from switching from the old health care plan to the MRCC plan.” (Page 9, lines 36 through 42 of the Decision.)

23. That the documentary evidence supports the foregoing finding as asserted by the ALJ. (Page 9, lines 44 through 52, and page 10, lines 1 through 15 of the Decision.)

24. That it was the Respondent’s position that switching to the Union’s proposed MRCC plan would only have to provide the Company with “adequate savings as compared to the more expensive plan required by the last contract, but not as compared to the far-less-generous plan that the Respondent” had implemented in its Last Best Offer. (Page 10, lines 16 through 46, and page 11, lines 1 through 11 of the Decision.)

25. That the parties’ subjective expectations regarding the trailing costs during early 2009, as incorrectly determined by the ALJ, are even relevant to the outcome, inasmuch as it is undisputed that the parties never reached agreement due to the existence of many issues including trailing costs. (Pages 7-11 of the Decision.)

26. That the Respondent delayed or resisted getting back to the Union regarding its February 20 proposals until March 20, 2009, as implied by the ALJ. (Page 11, lines 15 through 16 of the Decision.)

27. That Board Agent Linda Hammell did not become an advocate for the Union or otherwise act inappropriately under the Board’s internal guidelines or under

external legal or constitutional principles. (Page 12, fn. 17, lines 45 through 51 of the Decision.)

28. That the ALJ properly analyzed Board and Court principles and precedents applicable to the Respondent's unilateral implementation of the Company-wide health care plan, inasmuch as his reliance on several Board decisions that are clearly distinguishable factually, or are off-target legally, suggest that his legal analysis was driven by a desired outcome rather than by a faithful application of Board precedent. (Pages 13 through 17 of the Decision.)

29. That "even if the parties were at impasse regarding health care benefits when the Respondent implemented various non-healthcare provisions of his last best offer on December 22, 2008, that impasse had been broken by March 1, 2009, when the Respondent implemented the terms relating to healthcare" (identified as the second of two arguments of the General Counsel), and that "there was no legally cognizable impasse on March 1, 2009, the date when the Respondent unilaterally implemented its health care plan." (Page 13, lines 26 through 38, and fn. 19, lines 49-51 of the Decision.)

30. That "[t]he record in this case reveals that, far from being at impasse, the parties were in the midst of productive discussions regarding a compromise at the time Respondent unilaterally implemented its health care plan on March 1, 2009." (Page 14, lines 9 through 10 of the Decision.)

31. That "[a]ny prior impasse regarding health care ceased to exist as of January 7, 2009, when the Respondent made a written proposal that significantly increased the per-employee contribution the Company was offering to make to provide

coverage under the MRCC health care plan.” (Page 14, lines 12 through 15 of the Decision.)

32. That following the February 20, 2009 meeting, “the parties [had come] the closest they had yet been to agreement on a compromise.” (Page 14, lines 19 through 20 of the Decision.)

33. That even assuming an impasse existed on December 22, 2008, it “had been broken as of the time the Respondent unilaterally implemented its own healthcare proposal on March 1, 2009,” and that the parties at this point were “positioned for further fruitful negotiations.” (Page 14, lines 24 through 29 of the Decision.)

34. That the claim that the sub-committee sessions “were something less than ‘negotiations’ . . . is dubious,” and that “[w]hatever one calls the subcommittee meetings in January and February 2008 [sic], it is clear that they created and advanced the possibility of future fruitful discussions.” (Page 14, fn. 20, lines 33 through 34, and 50 through 51 of the Decision.)

35. That the distinction between implementation of the health care plan, and its effective coverage date, is only “a matter of semantics” and fails “under the facts of this case and the applicable law.” (Page 15, lines 6 through 9 of the Decision.)

36. That it is appropriate to rely on a common dictionary to define a highly technical term of art in the labor relations field (“implementation”), as the ALJ has done. (Page 16, lines 11 through 15 of the Decision.)

37. That it “would seem fair to say that a change is generally not implemented until it has been put into effect” and the “[t]he Respondent provide[d] no contrary citation.” (Page 15, lines 12 through 15 of the Decision.)

38. That something is not implemented when it has not yet been given effect, and that “[a] change in terms of employment cannot reasonably be viewed as ‘implemented’ for unit employees at a time when that change is not being applied to a single one of those employees and the employer has not passed a ‘point of no return’ committing it to make the change at all.” (Page 15, lines 17 through 30 of the Decision.)

39. That Respondent had not “commit[ed] . . . to make the change at all” but had merely “announce[d]” an “intent” to implement the new plan in December of 2008, not actually implementing it at that time, and not doing so until March 1. (Page 15, lines 29 through 32 of the Decision.)

40. That the ALJ’s effort to distinguish the implementation of a future wage change from a future health care change, under the ALJ’s “point of no return” principle, can withstand rational or legal scrutiny. (Page 15, fn. 21, lines 46 through 51 of the Decision.)

41. That the ALJ has properly summarized or applied *PRC Recording Co.*, 280 NLRB 615 (1986). (Page 15, lines 37 through 44, and page 16, lines 1 through 2 of the Decision.)

42. That the ALJ has properly summarized or applied *Bryant & Stratton Bus.*, 327 NLRB 1135 (1999). (Page 16, lines 2 through 13 of the Decision.)

43. That the ALJ has properly summarized or applied the Board and Court decisions in the *McClatchy Newspapers* case. (Page 16, lines 15 through 25 of the Decision.)

44. That the decisions in *McClatchy Newspapers* stand for the proposition, as suggested by the ALJ, that implementation of an employer’s last best offer is legitimate

only as a method of breaking impasse, not also for obtaining the employer's desired outcome. (Page 16, lines 15 through 25 of the Decision.)

45. That the "separate but related case" doctrine, see *Cox Publishing of Ohio v. NLRB*, 402 F.3d 651, 668 (6th Cir. 2005), and other cited authorities, applies to this case in a manner that does not preclude re-litigation of the prior decision which covered all elements of Respondent's Last Best Offer implemented on December 22, 2008. (Page 16, lines 26 through 41 of the Decision.)

46. That the NLRB General Counsel's Office of Appeals did not decide, by affirming the dismissal of the Union's charge in Case No. 7-CA-51886, that the change in health care benefits was part of a proper post-impasse implementation on December 22, 2008, inasmuch as the Union's charge covered that subject and the General Counsel's determination was all-encompassing. (Page 17, lines 1 through 18 of the Decision.)

47. That Respondent "violated Section 8(a)(5) and (1) by changing employees' health care benefits without the Union's consent and in the absence of a bona fide impasse." (Page 17, lines 26 through 27 of the Decision.)

48. That Respondent's "March 20 demand regarding the trailing costs is fairly characterized as regressive," because the parties supposedly had an understanding reached during earlier discussions that "the Respondent would pay its own trailing costs," and that this supposedly "regressive demand" was first introduced on March 20. (Page 17, lines 45 through 52); and (Page 18, lines 1 through 5 of the Decision.)

49. That there is any record evidence suggesting that the Respondent “introduced the new [trailing costs] demand in an effort to avoid agreement,” as implied by the ALJ. (Page 18, lines 30 through 38 of the Decision.)

50. That the “Respondent violated Sections 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.” (Page 19, lines 24 through 26 of the Decision.)

51. That the Remedy and Order recommended by the ALJ is appropriate and legally warranted under the facts of this case and applicable legal principles. (Pages 19 through 21 of the Decision.)

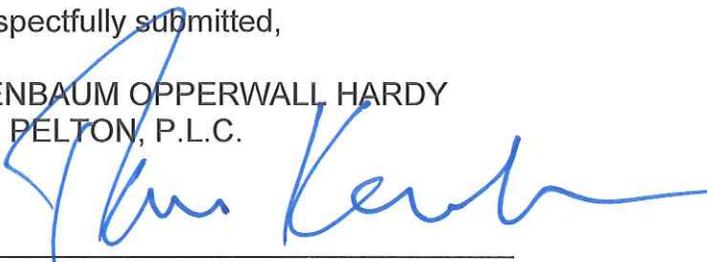
52. That, “[u]pon the Union’s request, the Respondent should be required to retroactively rescind the unilateral changes to the health care benefits of unit employees and make whole its employees for all monetary losses they have incurred as a result of the unlawful unilateral changes.” (Page 19, lines 33 through 38 of the Decision.)

53. That the foregoing make-whole remedy recommended by the ALJ, extending indefinitely into the future, can be considered appropriate or legally warranted when it is clear from the record that an impasse regarding health care existed as of March 20, 2009 and has continued to the present date. (Pages 19 through 21 of the Decision.)

54. That the Respondent should cease and desist from the actions specified at page 20, lines 10 through 16 of the Decision, and take the affirmative actions (including posting a notice) identified at page 20, lines 21 through 46 and page 21, lines 1 through 21 of the Decision.

Respectfully submitted,

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

By: 

Thomas G. Kienbaum
Theodore R. Opperwall
Attorneys for Respondent
280 North Old Woodward Avenue
Suite 400
Birmingham, MI 48009
(248) 645-0000

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