

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'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'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

I. INTRODUCTION

Respondent Comau pointed out in its principal brief (at p. 30, fn. 15) that the ALJ had made a gratuitous and unfair statement that he did not credit Comau's bargaining minutes "regarding any disputed matter" because their author, Mr. Begle, had edited them. The ALJ's statement was gratuitous because Comau did not rely on those minutes to establish any contested material fact. Moreover, there was no material dispute regarding the parties' bargaining history. In short, the edits simply did not matter.

Counsel for the General Counsel ("CGC") attempts to take the ALJ's gratuitous comment about Mr. Begle's bargaining minutes a giant step further, arguing that the ALJ therefore must have refused to credit all of Comau's evidence on "several key issues." (CGC brief, p. 2.) This argument is without foundation. Not only did the ALJ expressly limit the extent to which he disregarded the minutes to "disputed matters" (there were none), but CGC's treatment of the so-called "key issues" in her brief gives an unfair presentation of the uncontroverted record.¹

The first "key issue" to which CGC points is "whether [Comau] had demanded prior to March 20, 2009, that the Union pay the trailing costs associated with changing health care plans." (CGC brief, p. 2; emphasis added.) CGC then twists this into the suggestion that on March 20, 2009, Comau suddenly raised trailing costs for the first time. (*Id.*)

The ALJ did not, however, find that trailing costs were not the subject of discussions before March 20, 2009. After all, his analysis of the record leading to his

¹ During the hearing before the ALJ (TR 476-477), CGC pointed out Mr. Begle's edits. None were material.

finding that Comau had not demand prior to March 20 that the Union pay trailing costs shows that there were repeated discussions of this topic. (ALJ Decision, pp. 9, 17.) In fact, Comau did not argue that it made a specific demand to that effect before March 20, 2009, as CGC grudgingly acknowledges in her separate Brief in Support of Cross-Exception (at p. 3). Thus, the question of whether there had been a specific demand was not a disputed issue to be resolved.

By the same token, it was undisputed that Comau had stated repeatedly over the course of several months that it could not assume these costs. (TR 326-327, 350, 400-401, 404, 420-421.) ASW's principal witness, Peter Reuter, admitted it was "highly possible" that Comau had said so. (TR 102.) Mr. Reuter also acknowledged (reading from his Affidavit) that trailing costs "had turned out to be the big issue separating us" in 2008 and 2009. (TR 141.) CGC's claim that this uncontroverted background involved a "key [disputed] issue" as to which Comau should not be believed is an attempt to pretend that this case turns upon credibility resolutions. It does not. The material facts are undisputed.

CGC's second would-be "key issue," i.e., "whether [Comau] had consistently taken the position in negotiations that any health care plan it agreed upon with the Union would have to represent a savings over the implemented health care plan" (CGC brief, p. 2), is presented even more disingenuously. CGC understandably has not commented on the fact that her own witnesses, whose testimony was wrongly relied on by the ALJ, actually did not support the ALJ's conclusion that the previous health care plan (not the implemented plan) was Comau's cost benchmark. (Comau's principal brief, p. 42.) And the supposed admission of Comau's chief bargainer, Ed Plawecki, that he merely wanted a cost neutral health care plan (ALJ Decision, p. 10; CGC brief,

pp. 13, 15) is a blatant misrepresentation: Mr. Plawecki was testifying about the overall cost of the new contract — not its health care component. (TR 359.)

It is one thing to say that a party's evidence should not be believed. It is a completely different thing to recast the record into supposed "facts" that are without support in the record, and then to assert that those unsupported "facts" should be accepted wholesale because the other party cannot be believed. In doing so, CGC has, in pursuit of an outcome, overstepped the bounds of proper advocacy.

CGC's attempt to erect these distortions on the flimsy foundation of the ALJ's gratuitous comment about Mr. Begle's bargaining notes is misguided. There should be no question that an honest reading of the record shows: (1) Comau had repeatedly raised trailing costs as an obstacle associated with the ASW's proposals for a Union-administered insured health care plan; and (2) Comau's post-impasse bargaining objective with respect to health care was to improve on, or at least maintain, the cost basis of the health care plan it had implemented on December 22, 2008.

II. ARGUMENT

A. **The New Health Care Plan Was Implemented On December 22, 2008, And The ALJ Could Not Contradict The GC's Decision That This Was Lawful.**

CGC acknowledges that, as held in *Dayton Newspapers v. NLRB*, 402 F.3d 651, 668 (6th Cir. 2005), the Board cannot bypass "the General Counsel's decision not to issue a complaint" (brief, p. 6). CGC insists, however, that the instant Complaint is "based on this charge and this investigation" — circular and tautological reasoning at best (*id.*, emphasis added).

Perhaps recognizing this fallacy, CGC hastens to add that "the Office of Appeals did not specify in its dismissal of the prior related charges [exactly] which terms and

conditions of employment were implemented” (*id.*, p. 7, emphasis in original). This fallback argument implicitly concedes that, if the Office of Appeals had addressed the Regional Director’s refusal to issue complaint on the announced implementation of the health care plan, then the ALJ and the Board would have to abide by that determination.

But to argue that the December 22, 2008 implementation of the health care plan was not brought before the General Counsel’s Office of Appeals and addressed in its August 31, 2009 letter affirming the dismissal is to be blind to what actually happened:

- The new health care plan was the “term and condition” implemented on December 22, 2008 that was of the greatest significance to the parties in terms of their overall bargaining and impasse, and about which the Union filed its initial charge (Case No. 7-CA-51886).
- Both Comau and the Union believed that the health care plan had been implemented on December 22, 2008. The Company plainly announced that it was imposing its “Last Best Offer effective at 12:02 a.m. on December 22, 2008,” and Article 10 of that Last Best Offer described, in full detail, the terms of the new health care plan “effective March 1, 2009.” (RX 8, pp. 21-28.)
- The Union’s charge in Case No. 7-CA-51886, filed on March 5, 2009 — immediately following the March 1, 2009 effective date of the new plan — complained that Comau had “unilaterally implemented . . . health benefits” (GCX 1, (a).) It was this initial Section 8(a)(5) charge that was dismissed after full investigation. And that dismissal was affirmed by the Office of Appeals.
- The Union’s chief witness, Mr. Reuter, gave a 59-page Affidavit (as well as a supplement) during the investigation of this initial charge (Case No. 7-CA-

51886), and therein referred repeatedly to the December 22, 2008 “implementation” of the health care plan that had merely become “effective” on March 1, 2009. (TR 113-114, 118-122.)

- Charge No. 7-CA-52106, filed by the Union on May 19, 2009 (which led to the instant Complaint), made no mention of the health care plan. It did not assert that there had been an “implementation” of a new plan on March 1, 2009.
- On May 29, 2009, Regional Director Glasser wrote to the Union in reference to Case No. 7-CA-51886 that he had “carefully investigated and considered [its] charges alleging violation under Section 8 of [the Act]” and was dismissing them. (GCX 1(b).) This dismissal was appealed and was upheld on the basis that the General Counsel’s Office of Appeals had found that “the Employer’s December 22, 2008 implementation of terms and conditions of employment” occurred after a “lawful impasse.” (GCX 1(f).)
- Region Seven Board Agent Linda Hammell confirmed in August 6, 2009 correspondence that she was the architect of “a legal theory not clearly raised by the original charge in 7-CA-52106,” which she characterized as “an idea” that was “entirely hers, not the Union’s.” (RX 15-3.) Her newly crafted theory was that the new health care plan was not really “implemented” until March 1, 2009. If this was the new theory, then inevitably the old theory was that implementation occurred on December 22, 2008. Recognizing that the old theory was precluded by the dismissal of the prior case, Agent Hammell creatively thought up a new theory concerning implementation.
- The late amendment to the instant charge (Case No. 7-CA-52106) and the resulting Complaint is an attempt to circumvent the established rule that “the

ALJ cannot contradict the General Counsel's findings that some complained-of activity did not constitute an unfair labor practice," even when such findings occur in a separate but related case. *Dayton Newspapers, supra*, 402 F.3d at 665 (emphasis added).

The plain wording of the dismissed charge (Case No. 7-CA-51886), the Union's acknowledged position that the complained-of "implementation" on December 22, 2008 included the health care plan, and Ms. Hammell's later acknowledgement that she had herself concocted a new theory to get around the dismissal, all mandate that the dismissal of the charge and the General Counsel's affirmance of that dismissal constitute a finding that falls squarely within the holding in *Dayton Newspapers*.²

B. At All Relevant Times, Trailing Costs Precluded Reaching Agreement On The ASW's Proposed Health Care Alternative.

Whether or not discussions following the December 22, 2008 implementation were productive depends on how trailing costs are viewed.

As discussed above, it cannot be disputed that trailing costs were an issue and a major discussion point well before March 20, 2009. Both Mr. Plawecki and Mr. Begle testified without contradiction that even in 2008 the Company had stated it could not afford to pay the trailing costs. (TR 326-328, 401, 420-421.) The Union's primary witness, Mr. Reuter, testified that it was "highly possible" that management had said this was an additional cost the Company could not assume. (TR 102.) He also

² Should the Board have any question about what the Regional Office and the General Counsel viewed Case No. 7-CA-51886 as encompassing, Comau suggests that the Board consult the Region's transmittal memo to the Office of Appeals. Comau's attempt to obtain this memo through a September 21, 2009 pre-trial FOIA request was rebuffed. See correspondence attached at Tab A. While the General Counsel refused to disclose that memo, which presumably would have shed light on this point and confirmed Comau's position, the Board is able to consult this evidence from the Agency's files.

acknowledged that, long before Blue Cross's trailing cost estimates were first received in February – March 2009, the Company "was raising trailing costs as an impediment." (TR 134-135.) And the Company's position on trailing costs "had turned out to be the big issue separating us," Mr. Reuter told the Board Agent during the investigation of the Union's first charge (Case No. 7-CA-51886), filed shortly after the March 1, 2009 effective date of the new plan. (TR 141-142.)

On March 20, 2009, when Comau asked the Union how it would handle the trailing costs under its proposal, the Union's witnesses made clear that the Union would never agree to pay them. (TR 201, 230-231.) The only meeting scheduled after the March 20, 2009 meeting, held in about July 2009, was not a negotiation session at all, but instead a forum for MRCC President Doug Buckler, who had not been at the bargaining table, to berate the Company about the failure to reach agreement. (TR 502-503.) The Union has never requested further bargaining.³

The ALJ found that Comau's March 20, 2009 statement that the Union would have to pay the trailing costs was not unlawful, even if it was the Company's first explicit "demand" to that effect. At the same time, to conclude that impasse had been broken before March 20, the ALJ had to find that trailing costs had been a non-issue at earlier stages. He purported to accomplish this by reasoning that in early 2009 Comau was comparing the cost figures for the Union's proposed alternative plan against the cost of the previous 2005-2008 contract's plan -- not the cost of the plan implemented on December 22, 2008. (ALJ Decision, p. 10.) Without that faulty premise, it would have been impossible for the ALJ to deny that trailing costs were a "single critical issue" that

³ In another example of questionable advocacy, CGC distorts the record to suggest that the Union has sought further bargaining, which is simply not true (brief, p. 18).

was a constant impediment to agreement, with impasse never being broken. See, e.g., *CalMat Co.*, 331 NLRB 1084, 1097 (2000) (“A single issue (such as the critical pension negotiations before us here) may be of such overriding importance that it justifies an overall finding of impasse on all of the bargaining issues”).

CGC tellingly fails to comment on Comau’s demonstration that the ALJ was mistaken about the record evidence when he cited Union witnesses as supposedly testifying that Comau was interested only in holding health care costs to their level under the previous 2005-2008 contract. (Comau’s principal brief, p. 42.) They had not. And CGC’s suggestion that Mr. Plawecki’s testimony confirmed such a position is simply false. (CGC brief, pp. 13, 15.) Mr. Plawecki was speaking of Comau’s initial approach to the cost of the overall contract, at the outset of bargaining, not to its health care component in isolation. (TR 359.) There is absolutely no evidence in the record supporting CGC’s claim as to Comau’s intent, whereas Comau’s witnesses repeatedly and consistently testified to the contrary. (Comau’s principal brief, pp. 39-43.) In fact, Union witness Darrell Robertson, President of ASW Local 1123, admitted that the Company was using the imposed offer as a base line, not the previous contract’s plan, when presenting cost figures on charts such as GCX 17. (TR 284, 285-287.)

It is a travesty that Comau, in addition to being confronted with a charge and theory concocted by a Board Agent as a “second bite at the apple” following a dismissal and affirmance, must now counter CGC’s numerous overzealous mischaracterizations of the evidence that build on an unfair and gratuitous criticism of Mr. Begle’s bargaining minutes by the ALJ. Comau’s concern that its due process rights have been and continue to be violated is understandable and well founded.

C. If The ALJ's Conclusion That There Was A Violation Of Section 8(a)(5) Were To Be Sustained, His Recommended Remedy Must Be Severely Limited.

CGC's response to the argument and case law cited at pp. 46-48 of Comau's principal brief — which would limit any remedy to Unit members' actual out-of-pocket losses during a 20-day period — rests on her single, and non-meritorious, cross-exception to the ALJ's conclusion that Comau's March 20, 2009 position on trailing costs was lawful. (CGC brief, p. 18.) CGC does not dispute the principles and case law cited by Comau and presents no contrary authority.

Comau is addressing CGC's lone and insufficient exception in a separately filed brief. But it warrants repeating here that the Union has not bargained with Comau since it walked out on March 20, 2009. While CGC characterizes the email in GCX 39 as a request for bargaining, the short meeting that resulted in June or July 2009 was not bargaining. Instead, Mr. Buckler, President of the Michigan Regional Council of Carpenters, used the occasion to harangue Comau management, expressing his dissatisfaction that no agreement had been reached, and making several threats to disrupt Comau's business. (TR 502-503.) It is undisputed that the Union has made no other effort since March 20, 2009 to resume bargaining. Without question, this establishes that the parties were at impasse as of March 20, 2009, and still are. And following Mr. Buckler's harangue, the impasse no doubt deepened into an "impossibility of fruitful discussions."⁴

⁴ The Union may have adopted the attitude that it could accomplish no more through bargaining, and therefore chose to rely on the Board to provide an escape from the corner it placed itself in. It is not the case, however, that a party can ignore its continuing bargaining right or obligation, and merely sit back and wait for the Board's process to run its course.

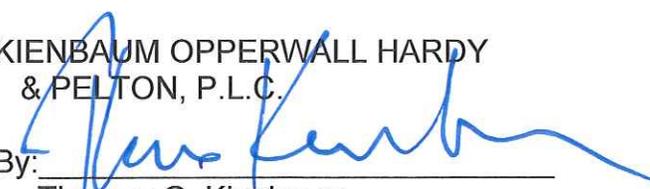
CGC's final point on this issue raises an irrelevancy -- that the March 1, 2009 effective date of the new health care plan implemented by Comau on December 22, 2008 could have been "aborted" because it was never "past the point of no return." (brief, p. 19.) Nothing is ever past that point. The implementation, like anything else, could have been undone — illustrating the impropriety of the test utilized by the ALJ and now defended by CGC. But that is not the issue. CGC's ineffectual response to Comau's argument that, if there is to be a remedy, it must be limited in these circumstances to 20 days, can properly be seen as conceding it.

III. CONCLUSION

It is for good reason that Comau believes its due process rights have been violated by actions of Region Seven and CGC. A Board Agent created an alternate theory on which this entire case is built, after the Region properly, and with the General Counsel's later affirmance, dismissed an earlier charge challenging the lawfulness of the December 22, 2008 implementation. The record is now being unfairly mischaracterized to support this concocted theory. The Board should uphold Comau's exceptions to the ALJ's faulty findings and recommendations and dismiss this case.

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

Dated: August 12, 2010

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.

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 August 12, 2010, I caused to be served via electronic mail a copy of **Respondent's Reply To Counsel For The General Counsel's Answering Brief To Respondent's Exceptions To The Administrative Law Judge's Decision** upon:

Sarah Pring Karpinen
Counsel for the General Counsel
National Labor Relations Board – Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226-2569
Sarah.Karpinen@nrlrb.gov

Edward J. Pasternak
2000 Town Center, #2370
Southfield, MI 48075
ejp@novaratesija.com

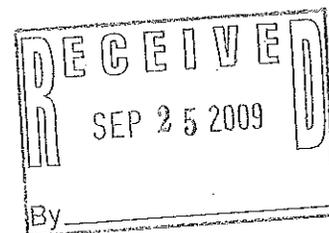
Willie Rushing
8953 Birwood Street
Detroit, MI 48204
wrushing259757@comcast.net


Jill A. Hall

TAB A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

FREEDOM OF INFORMATION OFFICE
Washington, D.C. 20570



DATE: September 22, 2009

Thomas G. Kienbaum
Kienbaum Opperwall Hardy
& Pelton, P.L.C.
280 North Old Woodward Avenue
Suite 400
Birmingham, MI 48009

Re: FOIA ID/LR-2009-0673

Dear Mr. Kienbaum:

This is in response to your telefax, dated September 21, 2009 and received in this Office on September 22, 2009, in which you request, pursuant to the Freedom of Information Act: (1) all correspondence and materials submitted by the Charging Party in connection with its appeal in **Comau, Inc.**, Case Nos. 7-CA-51886 and 7-CA-51906 and (2) the transmittal memo sent by the Regional Office to the Office of Appeals when forwarding the case file.

As to the first part of your request, the requested documents are enclosed. Deletions have been made in these documents pursuant to the policies embodied in Exemptions 6 and 7(C) of the FOIA, since disclosure of those portions could constitute an unwarranted invasion of privacy.

The second portion of your request is denied. The transmittal memo from the Regional Office to the Office of Appeals is privileged from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552 (b)(5), since it is an intra-agency memorandum that would not be available by law to a party in litigation with this Agency. Exemption 5 has been construed to exempt those documents normally privileged in the civil discovery context. **NLRB v. Sears, Roebuck & Co.**, 421 U.S. 132, 149 (1975).

This memo is protected by the deliberative process privilege incorporated in Exemption 5 because it reflects the internal deliberations of the Agency. See **NLRB v. Sears, Roebuck & Co.**, 421 U.S. 132, 159-62 (1975); **Strang v. Collyer**, 710 F.Supp. 9, 12 (D.D.C. 1989) (upholding Exemption 5 deliberative process claim for notes taken at meetings, as well as memos to the Board that reflected the agency's decision-making process). The deliberative process privilege incorporated in Exemption 5 is designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policymaking stage, and to prevent a premature disclosure of policy that could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda so

that communications between those involved in the process might be uninhibited. See **NLRB v. Sears, Roebuck & Co.**, 421 U.S. at 150-151,152.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." **NLRB Rules and Regulations**, Section 102.117(d)(1)(v). Consistent with this fee category, you "will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." **NLRB Rules and Regulations**, Section 102.117(d)(2)(ii)(A). Charges for all categories of requesters are: \$3.10 per quarter-hour or portion thereof of clerical time; \$9.25 per quarter-hour or portion thereof of professional time; and 12¢ per page of photoduplication. **NLRB Rules and Regulations**, Section 102.117(d)(2)(i).

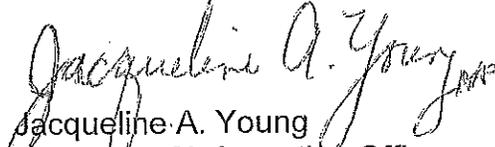
I have enclosed an invoice which sets forth the charges applicable to your request. One-half hour of professional time was expended in searching for and reviewing for release the requested material and 5 pages were photoduplicated. Accordingly, please remit \$19.10.

To pay this amount by check or money order (do not send cash) please submit your payment along with the invoice to the NLRB's Finance Branch at the address reflected at the top of the invoice. Please make the check or money order payable to the National Labor Relations Board and **note on your payment the invoice number to insure that your payment will be properly credited.** You may also submit your payment by credit or debit card over the internet by following the instructions I have enclosed.

The undersigned is responsible for the above determination. You may obtain a review thereof under the provisions of the NLRB's Rules and Regulations, Section 102.117(c)(2)(v), by filing an appeal with the General Counsel, Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, within 28 calendar days of the date of this letter. Thus, the appeal must be received by the close of business at 5:00 p.m. (ET) on October 20, 2009. Any appeal should contain a complete statement of the reasons upon which it is based. Questions concerning an appeal of this determination should be directed

to the Office of Appeals. For questions concerning this letter, please call Diane Bridge, FOIA Supervisor, at (202) 273-3851.

Sincerely,


Jacqueline A. Young
Freedom of Information Officer

LGK/kmb
kienbaum.lgk.doc

**KLENBAUM OPPERWALL
HARDY & PELTON, P.L.C.**
ATTORNEYS AND COUNSELORS

Julia Turner Baumhart
Jay C. Boger
Robert Bruce Brown
William B. Forrest III
Elizabeth Hardy
Thomas G. Kienbaum
Sonja Lengnick
Shannon V. Loverich
Noel D. Massie
Theodore R. Opperwall
Eric J. Pelton
Jennifer A. Zinn

280 North Old Woodward Avenue
Suite 400
Birmingham, Michigan 48009
Phone (248) 645-0000
Fax (248) 645-1385

211 West Fort Street, Suite 500
Detroit, Michigan 48226
Phone (313) 961-3926
Fax (313) 961-3945

Patricia J. Boyle
Christina D. Hill Johnstone
Victor G. Marrocco
Of Counsel

September 17, 2009

Jacqueline Young
FOIA Office
National Labor Relations Board
1099 14th St. NW – Suite 10100
Washington, DC 20570

VIA FACSIMILE
202-273-4275

RE: Comau, Inc., Respondent
Charges No. 7-CA-51866 and No. 7-CA-15906

Dear Ms. Young:

This letter is a request made under the Freedom of Information Act, 5 U.S.C. §552. Please send copies of the following documents with respect to each of the above listed Charges filed against Comau Inc., which were dismissed by the Regional Director:

1. All correspondence or other materials submitted by the Charging Party to the Office of Appeals in the Office of the General Counsel in connection with the Charging Party's appeal from the Regional Director's determination not to issue a complaint on the charge;
2. The Transmittal Memo sent by the Regional Office to the General Counsel's Office of Appeals when forwarding the case file on the charge, as described in Section 10122.9 of the Board's Unfair Labor Practices Casehandling Manual.

September 21, 2009
Page 2

We agree to pay all necessary costs associated with this request. Please contact me at the above address or phone number if you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Thomas G. Kienbaum / nom". The signature is written in a cursive style with a large initial 'T' and 'K'.

Thomas G. Kienbaum

TGK/kam
134914