

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 BRIEF IN OPPOSITION TO COUNSEL FOR
THE GENERAL COUNSEL'S CROSS-EXCEPTION 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

Counsel for the General Counsel (hereafter "CGC") has filed a single cross-exception to one passage in the ALJ's Decision that she describes in these terms:

The ALJ's finding that Respondent's eleventh hour demand that the Union take over its responsibility to pay trailing costs did not create an impediment to bargaining in violation of Section 8(a)(5) of the Act. (ALJD, p. 18, lines 45-48.)

Thus, CGC's cross-exception is limited to this legal conclusion appearing at page 18, lines 45 through 48, of the ALJ's Decision:

[O]n or about March 20, 2009, the Respondent [did not violate] Section 8(a)(5) and (1) by introducing a new demand that the Union absorb the Respondent's liability to pay accrued health care insurance costs. That complaint allegation should be dismissed.¹

A party wishing to except to any finding of an ALJ must do so specifically, and any finding not thus identified in an exception will be conclusively deemed established by the Board. Section 102.46(b)(2) of the Board's Rules is clear: "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived." This Rule is strictly enforced.

In *White Electrical Construction Co.*, 345 NLRB 1095 (2005), the CGC also filed a limited exception, only to have the Board rule that he was foreclosed from raising an argument that depended on a factual finding to which he had not excepted. The ALJ in that case rejected the CGC's primary contention — that employees were discharged for protesting the discharge of a fellow employee — and found there was no evidence that the discharges were motivated by anti-union animus. *Id.* at 1096, fn. 5. When the

¹ CGC's exception truncates this conclusion by not quoting the first line, which states that "the General Counsel has failed to show [a violation of section 8(a)(1) and 8(a)(5)]."

Board reversed the ALJ's alternative rationale for finding that the discharges violated the Act, it refused to consider CGC's attempt to assert a violation under an alternative "*Wright Line*" theory. That theory could not succeed absent a finding of anti-union animus, and the Board found CGC "procedurally foreclosed from raising this issue" because he had not excepted to the ALJ's finding that the employer did not have such animus. *Id.* at 1096. See also *ACS, LLC*, 345 NLRB 1080 (2005) (because CGC did not except to ALJ's factual findings related to a legal conclusion that the employer had not unlawfully refused to arbitrate grievances, those factual findings were assumed in the Board's analysis, which affirmed the ALJ); *Gaetano & Associates Inc.*, 344 NLRB 531, 531 n. 6 (2005); and *Vallery Electric, Inc.*, 336 NLRB 1272, 1272 n. 1 (2001).

CGC's failure to take exception to the following explicit factual findings of the ALJ concedes that they are established:

1. "[T]he record does not establish that [Comau] introduced the new demand for the purpose of creating an impediment to agreement." (Decision, p. 18, ll. 3-5.)
2. "Even before [Comau] introduced the new demand, there were a number of issues about which the parties had been unable to reach agreement. The areas of disagreement included: Whether [Comau's] per-employee contribution would be the same regardless of the type of coverage the employee was enrolled for; the method by which [Comau's] payments to the MRCC plan would be adjusted to account for increases in health care insurance costs; and the duration of the contract." (*Id.*, p. 18, ll. 6-10.)
3. "[T]hese [unresolved issues] are significant differences and while none of them were insurmountable, the record does not show that resolution was

imminent when [Comau] made the new demand regarding trailing costs.”
(*Id.*, p. 18, ll. 10-12.)

4. “Thus, the suggestion [by CGC] that [Comau] introduced the trailing costs demand in order to avoid an agreement is not particularly compelling.”
(*Id.*, p. 18, ll. 13-14.)
5. “Moreover, Reuter and Bologna – members of the Union’s bargaining committee – both testified that in March 2009 [Comau] was pressing the Union to reach a contract. Indeed, [Comau] urged the Union to take a contract proposal to the membership and get it ratified, even if it was inconsistent with [Comau’s] Last Best Offer.” (*Id.*, p. 18, ll. 16-19.)
6. “[Comau] argued that it would be in the Union’s best interest to reach a new collective bargaining agreement because doing so would nullify the decertification petition that was circulating among employees.” (*Id.*, p. 18, ll. 19-22.)
7. “The fact that even the Union witnesses called by the General Counsel remembered that [Comau] was pressuring the Union to agree to a contract in March weighs heavily against accepting the General Counsel’s contention that [Comau] was attempting to avoid an agreement at that time.” (*Id.*, p. 18, ll. 22-25.)
8. “Moreover, the General Counsel produced no direct evidence, such as statements by [Comau’s] negotiators, showing that [Comau’s] strategy was to avoid an agreement, and certainly none showing that the Company inserted the trailing costs issue on March 20 to further such a strategy.”
(*Id.*, p. 18, ll. 25-28.)

9. “I conclude that in this case the evidence indicating that [Comau] was attempting to reach an agreement – including Union officials’ testimony that [Comau] was pressing for a contract, and the state of negotiations generally – outweighs the contrary inference arising from Comau’s failure to provide a reason for introducing the new demand.” (*Id.*, p. 18, ll. 38-42.)
10. See also, ALJ Decision, p. 11, ll. 20-25 (detailing Comau’s urgings that the Union reach agreement in the March 20, 2009 timeframe to blunt the decertification effort).

CGC’s Brief in Support of Cross-Exception argues in complete contradiction with these explicit findings of the ALJ, which she is precluded from challenging because she has not excepted to any of them. Consequently, Comau will comment only briefly on the procedurally impermissible points CGC has raised in her brief.

II. DISCUSSION

At pages 2-3 of her brief, CGC relies heavily on the ALJ’s finding that Comau had not consistently demanded that the Union pay the trailing costs to argue that Comau was not bargaining in compliance with Section 8(a)(5) (ALJ Decision, p. 18). That argument is foreclosed because the ALJ’s unchallenged findings above, particularly items 4 and 9, show that the ALJ found that the evidence that Comau genuinely wished to reach agreement was more compelling. *Compare White Electrical Construction, supra.*

Moreover, Comau did not argue it had expressly made such a demand, only that it had repeatedly stated prior to March 20, 2009 that it could not pay the trailing costs, as CGC eventually concedes at page 3 of her brief. And it was unnecessary for Comau to explain its March 20 position that the Union take responsibility for trailing costs

precisely because of these earlier statements -- which were unquestionably made -- that Comau could not assume those costs (see pp. 12-13 of Comau's principal brief and the finding in item 9 above).

CGC argues at pages 4–5 of her brief that the other outstanding bargaining issues that remained unresolved as of March 20, 2009 were insignificant. Again, CGC's argument is precluded by the ALJ's unexcepted-to findings, particularly items 2-3 above. There plainly was no "meeting of the minds" on any of these points of disagreement — and it is improper and speculative for CGC persistently to argue, using clever double-negatives to create a false impression, that there is "no evidence" these supposedly "minor issues" would have "prevented the parties from reaching [overall] agreement" (brief pp. 4-5). How does she know that? She obviously does not. The ALJ found to the contrary and CGC did not take exception.²

CGC's final argument (brief, pp. 6-8) asserts that Comau was motivated to avoid agreement by anti-union animus. This argument, too, is directly contradicted by the ALJ's unexcepted-to findings in items 4-8 above. Then, at page 7 of her brief, CGC argues (contrary to the ALJ's unchallenged finding in item 8 above) that evidence of anti-union animus was supplied by Mr. Reuter's testimony that Mr. Savi preferred that a particular facility be non-union because he would like to be able to staff it with the most

² CGC's brief makes the deceptive statement that, after the March 20, 2009 meeting ended, "and despite requests by the Union, the parties did not meet again to bargain" (p. 4; emphasis added). No record support is cited, and there is none. The truth is that, after March 20, the Union asked for a meeting which took place in June or July 2009, but it was not a bargaining session — it was instead a forum for MRCC President Fred Buckler (who was not involved in the bargaining) to harangue the Company's representatives about not having reached an agreement (TR 502-503). See Comau's Reply to CGC's Answering Brief to Comau's Exceptions, p. 9. CGC's effort to suggest to the Board that Comau rebuffed continuing efforts by the Union to bargain is improper advocacy. Instead, the Union decided to commit its fate to the Board's processes and never again asked to bargain.

skilled employees without regard to seniority. (TR 83-84, *cf.* TR 499.) This alleged statement by Mr. Savi was made in response to a question from Mr. Reuter at a meeting on November 16, 2009, the day before the ALJ hearing, and eight months after the March 20, 2009 meeting that is the focus of CGC's cross-exception. (TR 83-84.) It bears absolutely no connection to the course of events eight months earlier that led the ALJ to conclude that Comau was not attempting to introduce an obstacle to agreement. And Mr. Savi's alleged statement about preferring the best employees can hardly be characterized as demonstrating anti-union animus.³

As the ALJ found, any claim of anti-union animus would be inherently inconsistent with Comau's urgings (testified to by several Union and Company witnesses) that the Union execute an agreement to avoid the decertification effort that was then being rumored.

CGC's single exception is not only unfounded in the record, but is contradicted by the ALJ's explicit factual findings to which no exception has been taken.

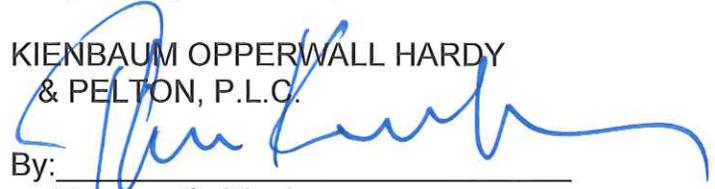
³ CGC's claim that Comau "flatly refused to produce [Mr. Savi] despite his availability," and that an adverse inference should be drawn due to Comau's "failure to comply with a subpoena" (brief, p. 7) is another example of improper advocacy. The Union withdrew its motion to enforce its subpoena for Mr. Savi at the end of the hearing (TR 620). CGC could have pursued enforcement of the subpoena on behalf of the Union, but elected not to do so. (TR 618-620.)

III. CONCLUSION

The ALJ's finding that Comau did not bargain in bad faith by making the March 20, 2009 inquiry as to how the Union intended to pay for trailing costs, and making clear to the Union that it would not pay them, is amply supported by the record. However, the Board can dispose of CGC's cross-exception expeditiously, for she has failed to except to any of the factual findings that form the predicate for that conclusion, making the conclusion unassailable. Consequently, CGC's cross-exception must fail.

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 Brief In Opposition To Counsel For The General Counsel's Cross-Exception 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