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August 25, 2010

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St., NW
Washington, DC 20005-3419

Re: Comau, Inc.
Case 7-CA-52106

Dear Sir:

Attached is an electronic copy of the Counsel for the General Counsel's Reply Brief in Support of Cross Exception to the Decision of the Administrative Law Judge in the above case. As indicated on the last page of the document, copies have been electronically served on all parties of record.

Very truly yours,

Sarah Pring Karpinen
Counsel for the General Counsel

Attachments: Counsel for the General Counsel's Reply Brief in Support of Cross Exception and Certificate of Service

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

COMAU, INC.,

Respondent

and

CASE 7-CA-52106

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

Charging Party/ Incumbent Union

and

CASE 7-RD-3644

WILLIE RUSHING, An Individual

Petitioner

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN REPLY TO
RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL
COUNSEL'S CROSS EXCEPTION TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE¹**

Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Reply Brief.

¹ References to the Administrative Law Judge's Decision are indicated by ALJD; to the transcript - Tr.

In its answering brief, Respondent asserts that Counsel for the General Counsel is precluded from challenging the ALJ's finding that Respondent did not introduce a regressive demand as an impediment to bargaining because cross-exceptions were not filed over a number of factual findings which Respondent asserts were essential to the ALJ's legal conclusion. Counsel for the General Counsel did not except to the factual findings of the ALJ because the ALJ found that the last-minute demand was regressive and that Respondent offered no explanation for making the regressive demand. Counsel for the General Counsel excepts to the ALJ's conclusion that Respondent's regressive conduct in making the demand did not amount to bad faith bargaining.

Section 102.46(b)(1) of the Board's Rules and Regulations requires that each exception filed to the decision of an Administrative Law Judge "(i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception." In this matter, Counsel for the General Counsel excepts to the ALJ's conclusion that Respondent did not bargain in bad faith by introducing an eleventh hour demand for the Union to pay trailing costs associated with switching over to the MRCC plan. In accordance with Section 102.46(b)(1) of the Board's Rules, the cross-exception and brief in support of the cross-

exception specifically cited the legal conclusion the cross-exception was based upon, identified the portion of the decision to which the objection was made, designated by citation the portions of the record relied upon, and stated the grounds for the cross-exception in a concise manner.

In support of its claim that Counsel for the General Counsel is foreclosed from making arguments in support of the cross-exception, Respondent cites *White Electrical Construction Co.*, 345 NLRB 1095 (2005). Respondent asserts that the Board in that case ruled that Counsel for the General Counsel “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.” In fact, the Counsel for the General Counsel in *White Electrical* made an argument in his answering brief that a group of employees were discharged for their union activity. The Board held that he was foreclosed from making that argument because he had not filed an exception to the ALJ’s finding that the employer was not motivated by union animus when it discharged the employees. *White Electrical* has since been cited by the Board for its holding that a party is prohibited from asserting an exception in its answering brief. *Kamal Corp.*, 354 NLRB No. 16, fn. 6 (2009); *Woodbury Partners, LLC*, 352 NLRB 1072, 1075, fn 12 (2008); *The Bohemian Club*, 351 NLRB 1065, 1067, fn. 6 (2007).

In addition, the facts of *White Electrical* are distinguishable from this one. In that case, the Board found that the General Counsel was foreclosed from making a *Wright*

Line argument in his answering brief because he had not excepted to the ALJ's finding that the employer was not motivated by union animus in making its decision to terminate a group of employees. A finding of animus is a necessary element to finding that an employee was discharged for his or her union activity. Here, the ALJ found that Respondent's demand that the Union pay trailing costs was regressive and that it did not offer an explanation for introducing such a regressive demand so late in its negotiations with the Union. Both of those facts are sufficient to support a finding that the demand was introduced for the purpose of avoiding agreement. See *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001).

As noted in Counsel for the General Counsel's Brief in Support of Cross-Exception, the ALJ's conclusion that the trailing cost demand was not introduced as an impediment to agreement is not supported by the record. The Union agreed to Respondent's proposed healthcare contribution amount on February 20. ALJD, p. 7. The parties did not meet again until March 20, when Respondent abruptly introduced a demand that the Union take the responsibility for paying the leftover healthcare bills from its old plan as a precondition to switching to the MRCC plan. ALJD, p. 18. The ALJ found that the demand was regressive, and that Respondent offered no explanation for why it chose to introduce the new demand when it did. *Id.* However, he ruled that other evidence outweighed the inference of bad faith bargaining arising from Respondent's unexplained regressive demand. *Id.* It is that conclusion that Counsel for the General

Counsel excepts to in this matter.

Counsel for the General Counsel respectfully asks that the Board grant its Cross-Exception and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 25th day of August, 2010.



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CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2010, I electronically served copies of the Counsel for the General Counsel's Reply Brief in Support of Cross Exception to the Decision of the Administrative Law Judge in Comau, Inc., Case 7-CA-52106, on the following parties of record:

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