UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAU, INC.,

Respondent Employer,

-and- Cases 7-CA-52614 and 7-CA-52939

AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with CARPENTERS INDUSTRIAL COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA,

Charging Party,

-and-

COMAU EMPLOYEES ASSOCIATION (CEA),

Party in Interest.

COMAU EMPLOYEES ASSOCIATION (CEA),

Respondent Union,

-and- Case 7-CB-16912

AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with CARPENTERS INDUSTRIAL COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA,

Charging Party.
_____/

RESPONDENT COMAU, INC.'S BRIEF IN OPPOSITION TO THE GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

DISCUSSION 2

A. Comau's Leaders Do Not Have "Apparent Authority." 2

B. Mr. Mroz's Testimony Proves Nothing. 4

C. Section 2(2) Precludes An Agency Relationship. 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Davlan Engineering, 283 NLRB 803, 804 (1987) 5

Dentech Corp., 294 NLRB 924 (1989) 3

NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938) 6

Service Employees Int'l Union, 322 NLRB 402 (1966) 5

Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988) 5

SKC Electric, 350 NLRB 857 (2007) 2

INTRODUCTION

The cross-exceptions filed by the General Counsel principally concern the alleged existence of agency and the supposed "apparent authority" of three Leaders. The General Counsel excepts to ALJ Carter's decision not to make findings of fact and conclusions of law on this subject. The General Counsel maintains that Leaders Harry Yale, James Reno, and Nelson Burbo should have been found to be agents of Comau whose actions in circulating the December 2009 disaffection petition (in the case of Mr. Yale) and casually introducing one employee to Mr. Yale (in the case of Mr. Reno and Mr. Burbo) tainted the petition. Comau has previously explained its contrary position — i.e., that the ALJ should have found the three Leaders were not Comau's agents (see pages 43-46 of its February 15, 2011 Brief in Support of Exceptions). Comau therefore limits its response to the following comments regarding the extreme position taken by the General Counsel.

The General Counsel's argument faces three insurmountable obstacles. First, as the General Counsel implicitly concedes, there is no evidence that the three Leaders did anything to affect employees' free choice to begin with. Second, the General Counsel's extreme position on when "apparent authority" may be found cannot be supported. Finally, the General Counsel has not explained how the three Leaders can be deemed agents of the "employer" at all, given the statutory definition of that term in Section 2(2). If they did anything to improperly influence employees — which they did not — it would have been as agents of the CEA, not agents of Comau.

DISCUSSION

A. Comau's Leaders Do Not Have "Apparent Authority."

The General Counsel continues to insist that the role Comau's Leaders play in facilitating other hourly employees' completion of manufacturing tasks and in coordinating the timely completion of projects (a role that requires them to communicate frequently with management) clothes leaders with "apparent authority" that seemingly has no limits. According to the General Counsel, the "reasonable employee" is likely to conclude that, anytime a Leader says or does anything related to a matter covered by Section 7, he is acting on behalf of management.

The General Counsel quotes a parade of statements found in cases that are readily distinguishable from this one, placing particular reliance on *SKC Electric*, 350 NLRB 857 (2007), a case that could hardly be more different. In *SKC Electric,* the Board found that a decertification petition was tainted because it was circulated by an employee (who was not a Union official) who oversaw subordinate employees' work on a number of the employer's construction jobs, driving a company truck from project to project. He directly collected employee signatures on the petition during his oversight visits to project sites. Given this roving agent's obvious importance and authority to give on-site directions, a reasonable employee perhaps could have reasonably concluded that he was acting on behalf of the employer when he collected the signatures.

But not so here. The evidence here establishes that, while Leaders communicate production schedules and priorities to team members and sometimes give technical advice, all decisions on scheduling work and overtime, assigning employees, and the like, are made by management. As for Mr. Yale's role in obtaining signatures on the disaffection petition, his testimony is undisputed: he did no more than leave the binder containing the petition on his desk

at various times and transport it to a couple of other locations on his own time. (Tr. 1029-1030.) The employees at those locations passed it around among themselves, as did employees at the Arlens Center where Mr. Yale was based. (*Id.*, 1066). Perhaps most importantly, given the lengthy and well known history at Comau of Leaders playing key roles in the Union, including serving as its principal officers, it would be completely unreasonable for employees on the shop floor to believe that Leaders were actually voicing management's position whenever they addressed Union-related issues.

Similarly, the strikingly different facts in *Dentech Corp.*, 294 NLRB 924 (1989), illustrate why "apparent authority" on behalf of the employer could be found there but not here. The employer in *Dentech* allowed an employee with only one year of tenure to post a notice and call an employee meeting (a first in company history). The employee led two meetings at which he solicited employees to oppose a union organizing campaign and warned them the business would move if they did not. Supervisors made no effort to send employees back to work when the meetings extended from break time into work time. In contrast, here there is no evidence that management provided a platform or even tolerance to circulators of the disaffection petition.

The General Counsel intimates that such evidence can be found in testimony that on one occasion two laid-off employees were seen near the looseleaf binder containing the disaffection petition, and that the petition sometimes circulated during working time on the shop floor. (Brief, p. 7.) It does not follow from this that a reasonable employee would believe that Comau supported the petition. Such an employee would have no reason to conclude that the laid off employees were admitted onsite by management rather than by other employees. And there was no testimony, not even from Mr. Mroz, that Comau supervisors or managers saw the disaffection

petition being circulated. The ALJ understandably, and correctly, rejected this contention by the General Counsel. (ALJ Decision, p. 11, n. 21.)

In sum, a reasonable Comau employee would have no basis to believe that Mr. Yale (or Mr. Burbo or Mr. Reno, who did essentially nothing) had been given any authority by management with respect to the disaffection petition. Almost all of the unit employees had many years of seniority, and they would have been familiar with the longstanding active and independent role of Leaders in Union affairs. The General Counsel's cross-exceptions argue for applying agency principles the Board has articulated in very different factual settings. Those principles cannot be stretched to govern every case where an employer has designated certain employees as Leaders.

B. Mr. Mroz's Testimony Proves Nothing.

To support the argument that a reasonable employee could have been influenced by the Leaders' support for the disaffection petition, the General Counsel turns to the testimony of Richard Mroz – the only employee who described any contact at all with Leaders in connection with deciding whether or not to sign the petition. (GC Brief, p. 6.) As Comau explained in its principal Brief (at pp. 21-22, 46), when Mr. Mroz's testimony is read as a whole, it is apparent that his decision to sign the disaffection petition was not coerced and that the decisive factor for him was that his brother signed it. Furthermore, although Mr. Mroz testified that he inquired whether <u>his</u> Leaders had signed and he thought that "they do have a lot of influence," it was actually "the information that I got from Mr. Yale [that] did influence me that maybe I ought to sign this thing." (Tr. 163.) Mr. Mroz knew Mr. Yale only as "a regular worker," not as a Leader, and Mr. Yale even agreed with Mr. Mroz that "it might be a little [bit of a] bad time" to decertify the Union. (Tr. 160.)

C. Section 2(2) Precludes An Agency Relationship.

Finally, the General Counsel disputes Respondents' argument that, in any event, Mr. Yale and the two other Leaders cannot be deemed agents of Comau for purposes of supporting the disaffection petition at the same time they were acting openly as agents of the CEA to obtain signatures. The disaffection petition included a request that Comau recognize the CEA in addition to the request that it withdraw recognition from the ASW-Millwrights. *Service Employees Int'l Union*, 322 NLRB 402 (1966), the sole case the General Counsel cites for the proposition that "the Board has found individuals to be simultaneously agents of both an employer and a labor organization," is plainly distinguishable.

In the *SEIU* case, the Respondent Union had recruited a supervisor named Arrospide to solicit signatures on authorization cards from his subordinate employees. Arrospide oversaw janitorial crews in 11 buildings, traveling from one building to another to ensure that the crews performed their work properly, and he exercised significant influence over hiring and firing decisions and discipline. The ALJ found that Arrospide was not only a statutory supervisor and agent of the employer, but also a "special agent" of the Union for the limited purpose of card solicitation. *See, e.g., Davlan Engineering,* 283 NLRB 803, 804 (1987); *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988). The Union was found to have committed an 8(b)(1)(A) violation because it had induced someone whom the employees viewed as the employer's agent to obtain signatures for the Union; moreover, the Union's "special agent" threatened employees with job loss and other reprisals if they did not sign the cards.

The fact pattern here is the reverse of that in *SEIU*. The statutory definition of a "labor organization" in Section 2(5) does not preclude designating someone who is in the first instance

a known supervisor or agent of an employer as a "special agent" of a Union for solicitation purposes. In contrast, the definition of "employer" in Section 2(2) does preclude treating "anyone acting in the capacity of officer or agent" of a labor organization as an extension of the "employer" when assessing whether there has been a violation of Section 8(a). To the extent that Mr. Yale (or Mr. Burbo or Mr. Reno) was involved in circulating the disaffection petition (which also requested recognition of the CEA in place of the ASW-Millwrights), he was plainly a known "agent" of the CEA for that purpose. He could not at the same time be an agent of the "employer" for purposes of finding a Section 8(a)(1) violation.[1]

The General Counsel's footnoted suggestion (p. 10, fn 6) that Comau's reading of Section 2(2) would permit supervisors and managers to serve as officers of labor organizations is a red herring. No one disputes that since its inception the NLRA has prohibited employer domination of unions. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), did not address the meaning of Section 2(2) — which in any event was amended in 1947. Rather, it concerned the scope of the Board's power to order an employer to withdraw recognition from an employee association that it effectively controlled.

Finally, there is no evidence whatsoever in the record that Comau made Mr. Yale its agent for the purpose of obtaining signatures on the disaffection petition. To the contrary, the record evidence establishes without any dispute that the disaffection petition was entirely the idea of Mr. Yale and his hourly coworkers who wanted to be rid of the ASW-Millwrights.

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[1] Judge Duggan agreed in denying 10(j) relief that in light of the Section 2(2) definition of "employer," the Leaders could not be agents of the employer. Exhibit A to Comau's Brief in Support of Exceptions, p. 20.

CONCLUSION

The cross-exceptions filed by the General Counsel are without factual or legal support and should be denied.

Respectfully submitted,

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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 March 15, 2011, I caused to be served via electronic mail a copy of **RESPONDENT COMAU, INC.'S REPLY BRIEF IN OPPOSITION TO THE GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** upon:

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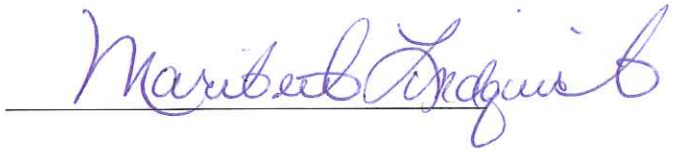
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