



United States Government
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March 29, 2011

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

Re: Comau, Inc.
Cases 7-CA-52614 and 7-CA-52939
Comau Employees Association (CEA)
Case 7-CB-16912

Dear Sir:

Attached is an electronic copy of the Counsel for the Acting General Counsel's Reply Brief in Support of Cross Exceptions 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,

Darlene Haas Awada
Counsel for the Acting General Counsel

Attachments: Counsel for the Acting General Counsel's Reply Brief in Support of Cross Exceptions to the Decision of the Administrative Law Judge

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

COMAU, INC.

Respondent Employer

and

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

COMAU EMPLOYEES ASSOCIATION (CEA)

Party in Interest/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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF IN
SUPPORT OF CROSS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE¹**

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

Most of the regurgitated arguments raised in Respondents' Answering briefs were already addressed in Counsel for the Acting General Counsel's Brief in Support of Cross-Exceptions. Thus, Counsel for Acting General Counsel will limit their reply to

¹ Throughout this brief the following references will be used: "ALJ": Administrative Law Judge Geoffrey Carter. "ALJD": ALJ's decision. "Tr." (followed by page number): Transcript; "Comau Brief": Respondent Comau's Brief in Opposition to the Acting General Counsel's Cross Exceptions; "CEA Brief": Respondent CEA's Answering Brief in Opposition to the Acting General Counsel's Cross Exceptions.

responding to factual and legal inaccuracies raised in Respondents' Answering Briefs.

To begin, Respondents Comau and CEA again assert that the language of Section 2(2) precludes a finding that Yale, Burbo, and Reno were acting with Respondent Comau's apparent authority to circulate the disaffection petition it relied upon to withdraw recognition. Notably, neither Respondent cites any Board precedent in support of this fanciful argument. Indeed, as set forth in Counsel for the Acting Counsel's Brief in Support of Cross-Exceptions, the interpretation of Section 2(2) urged by Respondent Comau would permit employer supervisors and managers to serve as officers of labor organizations and stands afoul of the Act's long-standing prohibition against employer dominated unions. See, e.g., *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

Moreover, Respondents' interpretation of the statute—that one cannot simultaneously act as an agent of an employer and labor organization—is, in fact, inapplicable here since neither Respondent established that Yale, Burbo, or Reno were acting as agents of the nascent CEA when they circulated the disaffection petition in December 2009.² While Counsel for the Acting General Counsel set forth in their Brief in Support of Cross-Exceptions ample record evidence and ALJ Carter's factual findings establishing Yale, Burbo, and Reno's status as apparent agents of Respondent Comau in

² Respondent CEA misstates the burden of proof (CEA Brief, p. 1), asserting that Counsel for the Acting General Counsel has the burden to show that Yale, Burbo, and Reno were *not* acting for the CEA. It is well-established law that the burden of showing agency status is on the party asserting it. *In re Pan-Oston Co.*, 336 NLRB 305, 306 (2001). There is no burden on the Counsel for the Acting General Counsel to prove the absence of a fact.

circulating the disaffection petition, neither Respondent has established the status of Yale, Burbo, or Reno as agents of Respondent CEA for the same activity or during the same time period.

Indeed, the record is devoid of evidence that Yale, Burbo, or Reno had any actual or apparent authority to speak for Respondent CEA when they circulated the disaffection petition. In fact, the nascent CEA did not elect Yale as an officer until January or February 2010—well after Comau unlawfully withdrew recognition from the ASW (Tr. 1038), and there is no evidence that Burbo or Reno ever served as CEA officers.

Similarly misguided is Respondent CEA's argument (CEA Brief, p.3) that the “[Acting] General Counsel has not even attempted to explain why, if leaders are de facto employer agents, this Board should enter an affirmative bargaining order in favor of a union whose leadership includes employer agents.” Likewise, Respondent Comau erroneously argues that the Acting General Counsel “continues to insist” that the leaders have apparent authority that “seemingly has no limits.” In so asserting, both Respondents misconstrue the Acting General Counsel's argument. Counsel for the Acting General Counsel is not broadly arguing that all leaders are Respondent Comau's agents for all purposes, nor does the record address that issue. Rather, as set forth in Counsel for the Acting General Counsel's cross-exceptions, and as the record and ALJ Carter's factual findings amply support, three specific leaders—Yale, Burbo, and Reno—had the apparent authority from Respondent Comau to circulate the disaffection petition among

employees based on the totality of the circumstances.³ The petition was thus tainted, and Respondent Comau could not lawfully rely upon it to withdraw recognition from the ASW and grant recognition to Respondent CEA. See *SKC Electric*, 350 NLRB 857 (2007).

Respondent Comau's argument (Comau Brief, p. 6) that "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" is equally unavailing. Section 2(13) of the Act clearly states: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Accordingly, apparent authority can be found even if the employer gave no specific instructions to the agent. *Facchina Construction Co.*, 343 NLRB 886, 887 (2004); *Hausner Hard-Chrome of Ky., Inc.*, 326 NLRB 426, 428 (1998).

In conclusion, the ALJ made ample factual determinations to support a finding and legal conclusion that Yale, Reno, and Burbo were agents of Respondent Comau within the meaning of Section 2(13) of the Act. In addition, by virtue of Yale, Reno, and Burbo's agency status and the manner in which the petition was circulated, the disaffection petition was tainted and Respondent Comau's reliance upon it in withdrawing recognition from the ASW and recognizing Respondent CEA violated

³ Not, as Comau (Comau Brief, p. 2) and the CEA assert (CEA Brief, p. 4), based solely on the job functions of Yale, Burbo, and Reno.

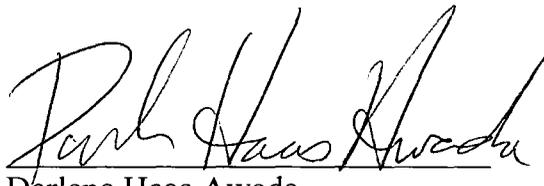
Section 8(a)(5) and (2) of the Act.

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

Respectfully submitted this 29th day of March, 2011.



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CERTIFICATE OF SERVICE

I certify that on the 29th day of March, 2011, I electronically served copies of Counsel for the Acting General Counsel's Reply Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge on the following parties of record:

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